U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ANGELO SCOTT,

COMPLAINANT,

v.

E.O. HABHEGGER COMPANY,

RESPONDENT.

ARB CASE NO. 2023-0027

ALJ CASE NO. 2019-STA-00048
ALJ THERESA C. TIMLIN

DATE: March 14, 2024

Appearances:

For the Complainant:
Angelo Scott; *Pro Se*; Philadelphia, Pennsylvania

For the Respondent:
Alberto M. Longo, Esq. and Randall C. Schauer, Esq.; *Fox Rothschild, LLP*; Exton, Pennsylvania

Before HARTHILL, Chief Administrative Appeals Judge, WARREN and THOMPSON, Administrative Appeals Judges

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises from a complaint filed by Angelo Scott (Complainant) against his employer, E.O. Habhegger Company (Respondent), alleging retaliation in violation of the whistleblower protections of the Surface Transportation Assistance Act of 1982 (STAA) and its implementing regulations.[1] After a hearing on the merits, the Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) finding that Respondent violated the whistleblower protections of the STAA. For the following reasons, we affirm the ALJ's D. & O.

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[1] 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978 (2023).

BACKGROUND

Respondent provides and services gas pump equipment for service stations.[2] During the relevant timeframe, Respondent owned one truck weighing 26,000 pounds, and several box vans weighing under 10,000 pounds, which Respondent used to ship equipment.[3] Among other products, Respondent supplied Class 2 fire extinguishers to its service station customers.[4] Respondent received fire extinguishers from a distributor in large boxes, each box containing four fire extinguishers.[5] The boxes had green hazardous material warning labels affixed to them.[6] Respondent's practice was to cover the green hazardous material labels and ship individual fire extinguishers to customers through the United Parcel Service (UPS).[7]

In April of 2017, Respondent hired Complainant as a full-time warehouse assistant.[8] His duties included picking and packing orders and either giving them to UPS or loading them onto Respondent's trucks for delivery.[9] He also loaded equipment, including gas pump dispensers and hoses, onto Respondent's 26,000-pound truck and unloaded empty skids.[10]

At one point during Complainant's employment, David Ramani (Ramani), Respondent's shipping manager, attached a handmade sign to a computer monitor directing employees to cover green hazardous material labels when shipping fire extinguishers to its customers.[11] The sign stated: "COVER THE GREEN LABEL! OR . . . RE-BOX IT!!"[12] Ramani testified that UPS directed him to cover the labels when shipping them, otherwise, UPS would hold the shipment to inquire as to its

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2 D. & O. at 5. Respondent's business is located in Lansdowne, Pennsylvania and sells most of its equipment within the Philadelphia area. It ships products to U.S. locations within driving distance of its business, such as Virginia, Maryland, and Delaware. *Id.* at 5-6.

3 *Id.*

4 *Id.* at 5.

5 *Id.*

6 *Id.* at 6.

7 *Id.* at 5-6.

8 *Id.* at 5.

9 *Id.*

10 *Id.* at 5, 10. Complainant also received boxes of fire extinguishers and stocked individual fire extinguishers in the warehouse. *Id.* at 5.

11 *Id.* at 6.

12 *Id.* at 12.

contents, which caused unnecessary delays.[13] Ramani explained that the sign did not direct employees to ship anything in an illegal or prohibited manner because the hazardous label was only required when shipping fire extinguishers by air.[14] Respondent did not ship any products, including fire extinguishers, by air.[15]

On June 5, 2017, Complainant refused to ship a case of fire extinguishers via UPS because Chris Graziola (Graziola), a warehouse assistant and driver, told him that the package was not legal.[16] On the same day, Complainant voiced his concerns to Jody Porter (Porter), Respondent's vice-president of sales, regarding Respondent's practice of covering the green hazardous label when shipping fire extinguishers.[17]

On June 10, 2017, Complainant emailed Porter and Matt Jordan (Jordan), Respondent's shipping manager, about several employment-related concerns.[18] In the email, Complainant also referred to the Respondent's practice of shipping fire extinguishers: "Dave Ramani, was mad at me because I didn't cover a UPS package with a dark tape, so you couldn't see the hazardous material symbol on it. He was mad that I would even question his integrity. He said the procedure was the only way UPS would take it."[19]

On June 12, 2017, Porter met with Complainant.[20] Porter testified that he met with Complainant to try to help him and that during the meeting Complainant only talked about how difficult it was to work with his co-workers.[21] Porter testified that he asked Complainant why he was so agitated, and Complainant responded

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13 D. & O. at 6. During the January 6, 2020 hearing, Ramani explained "we've shipped [fire extinguishers on] multiple occasions, and once in a while I'll get a call from the UPS center wanting to know what it was to make sure they could pass it on to our customer . . . In order to not have the package held up, I took it upon myself to do that so that wouldn't happen." *Id.*

14 *Id.* at 6.

15 *Id.* at 5.

16 *Id.* at 6. The package was going to Pine Run Construction in Doylestown, Pennsylvania. *Id.* The ALJ determined that the distance between Pine Run Construction and Respondent, which is just over 36 miles, "confirm[s] the finding that Respondent would not ship the fire extinguishers by air." *Id.* at 6 n.6.

17 *Id.* at 6.

18 *Id.* at 6-7.

19 *Id.* at 7.

20 *Id.*

21 *Id.* at 8.

that other employees were unprofessional and picking on him.[22] Porter stated: "[W]e discussed it for a awhile and came upon a mutual agreement that we should part ways. There was no firing done. It was if you're not happy, leave."[23]

Complainant, however, explained his understanding of the meeting with Porter somewhat differently.[24] In a June 12, 2017 email to Ken Hagman (Hagman), Respondent's former partner, Complainant stated that Porter informed him that "'it was better that we parted ways.' I said what do I do now? I have no job."[25] He also testified: "I definitely didn't quit because I didn't have no job lined up."[26] Complainant further stated that Porter told him that he was not happy and that it was better if they parted ways.[27] He testified: "So right then and there I knew I was getting fired."[28]

After the June 12, 2017 meeting, Complainant went home and never returned to the company.[29] Although Complainant and Respondent disagree on how the June 12, 2017 meeting transpired, it is undisputed that Complainant's employment relationship with Respondent ended on the morning of June 12, 2017.[30]

In his June 12, 2017 email to Hagman, Complainant also stated that he complained to Porter in their meeting about Respondent's practice of covering the hazardous material label on fire extinguishers.[31] Complainant indicated that he "discussed with [Porter] about certain procedures that constituted a D.O.T. violation. Specifically, I was instructed to cover up a green hazardous material label; (Green 2.2), on a UPS box."[32] Complainant attached photos of Ramani's sign to his email.[33]

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22 *Id.* at 7-8.

23 D. & O. at 8; Tr. at 110-11.

24 D. & O. at 8.

25 *Id.* During the relevant timeframe, Hagman was also a partner, but he died in January of 2020. *Id.* at 3.

26 Tr. at 54.

27 *Id.* at 55.

28 *Id.*

29 *Id.* at 56.

30 D. & O. at 7-8.

31 *Id.* at 8-9.

32 *Id.*

33 *Id.*

In a contemporaneous June 12, 2017 email to Complainant, Porter set out his perception of the meeting.[34] Porter explained that they had a conversation about Complainant's unhappiness at his job and that Complainant "did not feel as if [he] would fit into this structure. We agreed that we should go our separate ways."[35]

On June 13, 2017, Porter wrote a letter to Complainant to "summarize our meeting and your decision to resign from E.O. Habhegger Co."[36] Porter reported that Complainant described several incidents and disagreements that he had with employees.[37] Porter indicated that he told Complainant that he could change the business issues, but he could not change Complainant's feelings.[38] Porter noted that "at this point, you decided to leave our employ."[39]

On June 14, 2017, Complainant sent additional letters and emails to Hagman, Porter, and Jordan raising his complaint about the sign instructing employees to cover the hazardous material label, objecting to his termination from employment, and voicing his rights under whistleblower protection laws.[40]

PROCEDURAL BACKGROUND

On June 14, 2017, Complainant filed a complaint with OSHA alleging that Respondent fired him on June 12, 2017, in retaliation for reporting safety concerns and refusing to perform unsafe tasks.[41] On June 14, 2019, OSHA issued its findings and dismissed the June 14, 2017 complaint.[42]

On June 27, 2019, Complainant timely requested a hearing before an ALJ.[43] The ALJ conducted a hearing on January 6, 2020.[44] At the conclusion of

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34 *Id.* at 8.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 8-9. In an email to Hagman, Porter, and Jordan, Complainant stated: "I have whistle blower protection folks," and set forth protections under the STAA whistleblower protection statute (49 U.S.C. § 31105). RX L.

41 *Id.* at 1.

42 *Id.*

43 *Id.*

44 *Id.*

Complainant's presentation, Respondent moved to dismiss the claim.[45] The ALJ stayed the hearing and subsequently issued an Order Denying Employer's Motion to Dismiss on October 16, 2020.[46] On December 16, 2020, the ALJ held the conclusion of the hearing.[47]

On April 11, 2022, the ALJ issued a D. & O. finding that Complainant established his claim of retaliation in violation of the whistleblower protections of the STAA.[48] The ALJ concluded: (1) Respondent was an employer under the STAA; (2) Complainant was an employee under the STAA; (3) Complainant engaged in STAA-protected activity on or before June 12, 2017; (4) Respondent terminated Complainant's employment on June 12, 2017 in retaliation for Complainant's protected activity; and (5) Respondent did not establish that it would have terminated Complainant's employment absent his protected activity.[49]

On April 22, 2022, Complainant and Respondent each filed a petition for review of the ALJ's D. & O. before the Administrative Review Board (ARB or the Board).[50] The Board accepted and consolidated the parties' appeals for the purposes of rendering a decision.[51] On December 22, 2022, the Board issued an Order Dismissing Petitions for Review Without Prejudice and remanded the case for the ALJ to issue a final ruling on all of Respondent's obligations as to damages.[52]

On March 24, 2023, the ALJ issued a Decision and Order on Damages.[53] The ALJ found Complainant was entitled to back pay (and interest) for the period of

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45 *Id.* at 1-2; Respondent moved to dismiss the claim on the basis that Complainant had not established the necessary elements of entitlement for relief under the STAA (specifically, that Complainant had not established he was a covered employee and Respondent was an employer under the STAA). Tr. at 78-80.

46 D. & O. at 2; *Scott v. E.O. Habhegger Co.*, ALJ No. 2019-STA-00048 (ALJ Oct. 16, 2020) (Order Denying Employer's Motion to Dismiss and Scheduling Conclusion of Hearing).

47 D. & O. at 2.

48 *Id.* at 22.

49 *Id.* at 10, 15, 17, 19, and 20.

50 *Scott v. E.O. Habhegger Co.*, ARB Nos. 2022-0036, -0037, ALJ No. 2019-STA-00048, slip op. at 2 (ARB Dec. 5, 2022).

51 *Id.*

52 *Id.* at 2-3.

53 *Scott v. E.O. Habhegger Co.*, ALJ No. 2019-STA-00048 (ALJ Mar. 24, 2023) (Decision and Order on Damages).

unemployment between his termination and the beginning of his employment at P.T.R. Baler (approximately four months), totaling $12,238.44.[54]

On April 7, 2023, Respondent timely petitioned the Board for review of the ALJ's April 11, 2022 D. & O.[55] Both parties filed briefs with the Board.[56]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA.[57] The Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence in the record considered as a whole.[58] Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[59]

DISCUSSION

The STAA's whistleblower protection provision provides that a person may not discharge, discipline or discriminate against an employee regarding the pay, terms, or privileges of employment because the employee has engaged in statutorily

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54 *Id.* at 11.

55 Respondent's appeal is limited solely to the April 11, 2022 D. & O., and not the ALJ's March 24, 2023 Decision and Order on Damages. Pet. for Review at 2, n.1.

56 We note that Complainant's Response Brief does not address points of argument in Respondent's brief in support of its appeal, and that Complainant does appear to assert that he should be awarded damages that are not at issue in this appeal. Complainant did not file a separate petition for review in this matter and again, this appeal is limited to the ALJ's April 11, 2022 D. & O. and not the ALJ's March 24, 2023 D. & O. on Damages.

57 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

58 29 C.F.R. § 1978.110(b); *Furlong-Newberry v. Exotic Metals Forming Co., LLC*, ARB No. 2022-0017, ALJ No. 2019-TSC-00001, slip op. at 16 (ARB Nov. 9, 2022) (citations omitted); *see also Luckie v. United Parcel Serv., Inc.*, ARB Nos. 2005-0026, -0054, ALJ No. 2003-STA-00039, slip op. at 6 (ARB June 29, 2007) (citations omitted), *aff'd sub. nom*, *Luckie v. Admin. Rev. Bd., U.S. Dep't of Lab.*, 321 F. App'x 889 (11th Cir. 2009), *reh'g denied*, 348 F. App'x 557 (11th Cir. 2009).

59 *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938); *accord Furlong-Newberry,* ARB No. 2022-0017, slip op. at 16 (citation omitted); *Luckie*, ARB Nos. 2005-0026, -0054, slip op. at 6 (citations omitted).

protected activity.[60] Complaints under the STAA are governed by the legal burdens of proof set forth in the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century (AIR21).[61] To prevail on a STAA complaint, an employee must prove by a preponderance of the evidence that: (1) they engaged in protected activity; (2) the employer took adverse employment action against them; and (3) the protected activity was a contributing factor to the adverse employment action.[62] If the employee meets his burden of proof, the employer may avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable action in absence of the protected activity.[63]

1. Complainant Is a Covered Employee Under the STAA

Under the STAA, an "employee" is defined as:

> "a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, *a freight handler*, or an individual not an employer, who (1) directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor vehicle carrier; and (2) is not an employee of the United States Government, a State, or a political subdivision of a State."[64]

On appeal, Respondent first argues that Complainant is not covered by the STAA because he was not a driver, mechanic, or freight handler under 49 U.S.C. § 31105(j).[65]

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60 49 U.S.C. § 31105(a)(1); *see also* 29 C.F.R. § 1978.102(a) ("No person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in [protected activity].") (emphasis added).

61 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121(b).

62 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a)-(b); *Johnson v. Norfleet Transp.,* ARB No. 2020-0037, ALJ No. 2019-STA-00022, slip op. at 5-6 (ARB Jan. 29, 2021) (citation omitted).

63 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. 1978.109(b); *Blackie v. Smith Transp., Inc.,* ARB No. 2011-0054, ALJ No. 2009-STA-00043, slip op. at 8 (ARB Nov. 29, 2012) (citation omitted).

64 49 U.S.C. § 31105(j) (emphasis added); 49 U.S.C. § 31101(2) (emphasis added); *see also* 29 C.F.R. § 1978.101(h).

65 Respondent's Opening Brief (Resp. Br.) at 11.

In finding that Complainant was a covered employer under the STAA, the ALJ properly determined that Complainant's job duties as a warehouse assistant included freight handling.[66] The ALJ relied on testimony from both Complainant and Hagman that Complainant worked in the warehouse and was responsible for loading and unloading cargo from Respondent's truck and vehicles, which are duties performed by a freight handler. Complainant described part of his duties as loading equipment (such as gas pump dispensers and hoses) onto Respondent's commercial motor vehicle and unloading empty skids.[67] Hagman also testified that Complainant put equipment away in the warehouse, helped customers load their vehicles, and loaded Respondent's vehicles.[68] The Board finds that substantial evidence supports the ALJ's determination that Complainant's position included freight handling duties and, therefore, is specifically covered under the STAA's statutory definition of "employee."[69]

Respondent also argues that Complainant's duties as a warehouse assistant had no impact on motor vehicle safety.[70] As Complainant is a freight handler, which is specifically included in the statutory definition of an "employee" in 49 U.S.C. § 31105(j), it is not necessary to discuss whether he is also an individual, not an employer, who "directly affects motor vehicle safety in the course of his employment."[71]

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[66] D. & O. at 10; *see also Caimano v. Brink's, Inc.*, ALJ No. 1995-STA-00004, slip op. at 3-4 (Sec'y Jan. 26, 1996), *rev'd on other grounds sub. nom, Brink's, Inc. v. Herman*, 148 F.3d 175 (2d Cir. 1998) (finding that the complainant-employee's duties as a messenger were "analogous to that of a freight handler, which is specifically included within the statutory definition," as his duties included the loading and unloading of cargo); *cf. Luckie,* 321 F. App'x at 891-92 (holding that the ARB committed no error in finding that complainant-employee's duties as a security manager included only the "occasional touching of packages—unrelated to uploading, unloading, or the sorting of packages," which failed to qualify him as a freight handler under the STAA).

[67] D. & O. at 10. The ALJ found that Respondent owns and operates a 26,000-pound truck, which meets the statutory definition of a commercial motor vehicle under 49 U.S.C. § 31101(1)(A). *Id.*

[68] D. & O. at 10.

[69] *See* 49 U.S.C. § 31105(j); 49 U.S.C. § 31101(2); 29 C.F.R. § 1978.101(h); *see also Caimano,* ALJ No. 1995-STA-00004, slip op. at 3-4.

[70] Resp. Br. at 12.

[71] 49 U.S.C. § 31105(j); *see also Williams v. Capitol Ent. Servs.,* ARB No. 2005-0137, ALJ No. 2005-STA-00027, slip op. at 4 (ARB Dec. 31, 2007) (concluding that the complainant-employee's job position of "Director of Maintenance" included responsibilities serving as a mechanic, which was a covered employee under the STAA).

2. Complainant Engaged in Protected Activity Under the STAA

The STAA protects employees who have filed a complaint or begun a proceeding "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order."[72] Under the complaint clause, the complainant does not need to "prove an actual violation of a motor vehicle safety regulation, standard, or order, but must have had a reasonable belief regarding the existence of an actual or potential violation."[73] Thus, the complainant must demonstrate both a subjective and objectively reasonable belief of an actual or potential violation.[74]

The ALJ found that Complainant engaged in protected activity under the STAA on two occasions: (1) on June 5 when he refused to ship fire extinguishers via UPS due to Respondent's practice of covering the hazardous material label; and (2) on June 10 when he emailed Respondent's management about the sign instructing employees to cover the hazardous material sign.[75] Respondent argues that Complainant's belief that covering the hazardous label violated a commercial motor vehicle safety rule or security regulation was not subjectively held or objectively reasonable.[76]

Respondent argues that Complainant did not have a subjective good faith belief that Respondent was violating a safety regulation because he only made general allegations about the working environment, and because Complainant should have known that covering the hazardous labels when shipping fire extinguishers via ground transportation was not a violation of a motor vehicle safety regulation.[77] The Board finds these arguments unpersuasive.

A complainant demonstrates a subjective belief by proving that he actually believed, in good faith, that the conduct complained of constituted a violation of

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[72] 49 U.S.C. § 31105(a)(1)(A)(i).

[73] *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 2010-0036, ALJ No. 2009-STA-00061, slip op. at 6 (ARB Nov. 16, 2011) (citing *Fabre v. Werner Enters.*, Inc., ARB No. 2009-0026, ALJ No. 2008-STA-00010, slip op. at 5 (ARB Dec. 22, 2009)); *see also Yellow Freight Sys., Inc. v. Martin,* 954 F.2d 353, 357 (6th Cir. 1992) ("protection is not dependent upon whether [an employee] was *actually* successful in proving a violation of a federal safety provision").

[74] *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 2011-0019, ALJ No. 2010-STA-00022, slip op. at 7 (ARB Nov. 28, 2012).

[75] D. & O. at 12-15.

[76] Resp. Br. at 15-20.

[77] *Id.* at 19-20.

law.[78] Here, the evidence of record demonstrates that Complainant specifically objected to Respondent's practice of covering the green hazardous material sign when shipping fire extinguishers on at least two occasions—first, on June 5, 2017, when he refused to ship fire extinguishers through UPS because another employee told him that it was illegal; and again, on June 10, 2017, when he emailed Respondent's management and explained that Ramani was mad at him for not covering a UPS package "so you couldn't see the hazardous material symbol on it."[79] Complainant specifically refused to ship fire extinguishers because of Respondent's practice of covering the hazardous label. This evidence supports the ALJ's finding that Complainant actually believed that the practice of covering the hazardous label violated a commercial motor vehicle safety rule or regulation. Furthermore, there is nothing in the evidence of record to suggest that Complainant had actual knowledge of the specific DOT regulation that required a hazardous material sign only when shipping fire extinguishers by air, or that Respondent informed Complainant that fire extinguishers were not considered hazardous equipment if transported by ground.[80] Accordingly, substantial evidence in the record supports the ALJ finding that Complainant had an actual, good faith belief that covering the hazardous material label on the fire extinguishers violated a commercial motor vehicle safety or security regulation.

Respondent also argues that Complainant's belief regarding the hazardous material sign when shipping fire extinguishers was not objectively reasonable because his complaint did not relate to an actual motor vehicle safety regulation.[81] Here, the ALJ acknowledged that Respondent's practice of covering the hazardous material label when shipping fire extinguishers to its customers was not an actual violation of motor vehicle safety.[82] Under Board precedent, however, Complainant does not have to establish an actual violation of a motor vehicle safety regulation as long as he can show that he reasonably believed that he was complaining about a

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[78] *Dick v. Tango Transp.,* ARB No. 2014-0054, ALJ No. 2013-STA-00060, slip op. at 7 (ARB Aug. 30, 2016); *Melendez v. Exxon Chems.,* ARB No. 1996-0051, ALJ No. 1993-ERA-00006, slip op. at 27-28 (ARB July 14, 2000).

[79] D. & O. at 15 (citing RX E).

[80] The ALJ expressly noted that the handmade sign instructing Respondent's employees to cover the green hazardous material label when shipping fire extinguishers did not explain that this practice was not illegal. D. & O. at 15; CX 4; Tr. 43-44.

[81] Resp. Br. at 16.

[82] D. & O. at 12-13. DOT regulations at 49 U.S.C. § 173.309 explain that fire extinguishers "are excepted" from "labeling (except for when offered for transportation by aircraft)." The ALJ found that Respondent did not ship fire extinguishers (or any other goods) by air and the substantial evidence of record supports this finding. *Id.* at 13-14.

safety hazard.[83] Objective reasonableness is evaluated based upon the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the complainant.[84] Here, the ALJ properly noted that another employee, Graziola, also believed that Respondent's practice of shipping unlabeled fire extinguishers through the mail was illegal.[85] The ALJ also properly considered the fact that because the fire extinguishers arrived at Respondent's warehouse facility with hazardous labels on them, a reasonable person would believe that a hazardous label was required for shipping fire extinguishers.[86]

For the reasons stated above, the Board concludes that substantial evidence supports the ALJ's determination that Complainant engaged in protected activity on June 5 and 10, 2017, because he actually believed that covering the hazardous material label on fire extinguishers before shipping them violated a commercial motor vehicle safety law, and that his belief was objectively reasonable.

3. Complainant Experienced an Adverse Employment Action When His Employment with Respondent Ended on June 12, 2017

Under the STAA, any discharge, including the termination of employment by an employer, constitutes an adverse action.[87] The Board has found that "except where an employee has actually resigned, an employer who decides to interpret an employee's actions as a quit [sic] or resignation has in fact decided to discharge that employee."[88]

The ALJ found that Complainant suffered an adverse personnel action on June 12, 2017, when Porter terminated his employment.[89] Respondent argues that the ALJ ignored testimony that supports that Complainant was "not discharged"

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83 *See Newell v. Airgas, Inc.,* ARB No. 2016-0007, ALJ No. 2015-STA-00006, slip op. at 10-11 (ARB Jan. 10, 2018).

84 *Bailey v. Koch Foods, LLC,* ARB No. 2010-0001, ALJ No. 2008-STA-00061, slip op. at 9 (ARB Sept. 30, 2011) (citing *Sylvester v. Parexel Int'l, LLC,* ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 14 (ARB May 25, 2011)); *Prioleau v. Sikorsky Aircraft Corp.,* ARB No. 2010-0060, ALJ No. 2010-SOX-00003, slip op. at 8 (ARB Nov. 9, 2011) (citation omitted).

85 D. & O. at 14.

86 *Id.*

87 *Klosterman v. E.J. Davies, Inc.*, ARB No. 2008-0035, ALJ No. 2007-STA-00019, slip op. at 6 (ARB Sept. 30, 2010) (citing *Minne v. Star Air, Inc.*, ARB No. 2005-0005, ALJ No. 2004-STA-00026, slip op at 13-15 (ARB Oct. 31, 2007)).

88 *Id.*

89 D. & O. at 16-17.

from employment.[90] Respondent's argument, however, is not legally sound. As noted above, when determining whether an employee was discharged by an employer, the standard is whether an employee has actually resigned, not whether an employee was "not discharged" from employment.[91]

Here, contrary to Respondent's assertion, substantial evidence in the record supports the ALJ's finding that Complainant did not explicitly quit or resign from his employment. The ALJ properly relied on Porter's hearing testimony where he indicated that he and Complainant "came upon a mutual agreement to part ways."[92] He also considered Complainant's June 12, 2017 email to Hagman where he described that Complainant's employment "came to an abrupt end . . . . I said what do I do now? . . . I have no job."[93] The ALJ's finding that Respondent discharged Complainant from his employment, an adverse action under the STAA, is supported by substantial evidence in the record.

4. Complainant's Protected Activity Was a Contributing Factor in His June 12, 2017 Termination From Employment

To prevail on a claim under the STAA, an employee must also prove that they engaged in protected activity that was a contributing factor in their discharge.[94] A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[95]

The ALJ found that Complainant's protected activity was the proximate cause of Respondent's decision to take adverse employment action.[96] Respondent argues that Complainant failed to show by a preponderance of the evidence that he

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90 Resp. Br. at 21.

91 *See Simpson v. Equity Transp. Co., Inc.,* ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 7 (ARB May 13, 2020) (affirming ALJ's finding that the complainant-employee did not actually quit or resign when none of his actions indicated an intent to quit his employment and that the respondent-employer "chose to interpret this action as resignation").

92 D. & O. at 16.

93 *Id.*

94 49 U.S.C. §§ 42121(b)(2)(B)(iii); *see also Formella v. U.S. Dep't of Lab.,* 628 F.3d 381, 389 (7th Cir. 2010); *Araujo v. N.J. Transit Rail Operations, Inc.,* 708 F.3d 152, 157 (3d Cir. 2013).

95 *Palmer v. Canadian Nat'l Ry., IL Cent. R.R. Co.,* ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 53 (ARB Sept. 30, 2016) (reissued with full dissent, Jan. 4, 2017).

96 D. & O. at 19.

was wrongfully terminated from employment because of his protected activity.[97] The Board finds this argument unconvincing.

In determining that Complainant was discharged from employment based, in part, on the refusal to cover the hazardous material labels when shipping fire extinguishers, the ALJ considered several facts, including: Respondent was aware of Complainant's protected activity prior to the June 12, 2017 meeting; Complainant mentioned his concern again during the June 12, 2017 meeting; and Complainant was discharged from employment only one week after his June 5, 2017 refusal to ship fire extinguishers.[98] The Board finds that substantial evidence supports the ALJ's finding of a "sufficient nexus" between Complainant's protected activity and Respondent's decision to terminate Complainant's employment and that protected activity did contribute to the adverse action.[99]

5. Respondent Failed to Prove That It Would Have Terminated Complainant's Employment Absent Protected Activity

After a complainant has met their burden of establishing that protected activity was a "contributing factor" in the adverse personnel action, an employer may avoid liability if it demonstrates by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity.[100] "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'"[101] Here, the ALJ properly determined that, although Porter discussed other workplace issues with Complainant during the June 12, 2017 meeting, Respondent has not provided

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97 Resp. Br. at 23.

98 D. & O. at 18-19.

99 *Id.* at 19.

100 49 U.S.C. § 42121(b)(2)(B)(iv); *Beatty v. Inman Trucking Mgmt., Inc.,* ARB No. 2013-0039, ALJ Nos. 2008-STA-00020, -00021, slip op. at 9 (ARB May 13, 2014) (citation omitted).

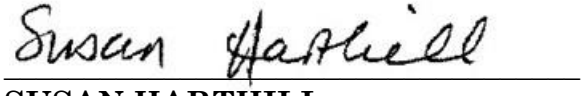
101 *Williams v. Domino's Pizza,* ARB No. 2009-0092, ALJ No. 2008-STA-00052, slip op. at 6 (ARB Jan. 31, 2011) (quoting *Brune v. Horizon Air Indus., Inc.,* ARB No. 2004-0037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006).

evidence which unambiguously shows that it would have terminated Complainant's employment for one of these other reasons in the absence of protected activity.[102]

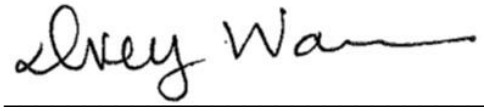
CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's Decision and Order.

SO ORDERED.



SUSAN HARTHILL
Chief Administrative Appeals Judge



IVEY S. WARREN
Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

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[102] D. & O. at 20. In its petition before the Board, Respondent argues that the ALJ erred in determining that the Respondent failed to prove by clear and convincing evidence that the Respondent would have terminated Complainant's employment in the absence of Complainant's alleged protected activity. Petition for Review at 5. Since it did not address this affirmative defense in its brief, Respondent has forfeited or waived its position on appeal. *Shah v. Albert Fried & Co.,* ARB No. 2020-0063, ALJ No. 2019-SOX-00015, slip op. at 7 (ARB Aug. 22, 2022); *Pajany v. Capgemini, Inc.,* ARB No. 2019-0071, ALJ No. 2019-LCA-00015, slip op. at 3 (ARB Jan. 25, 2021); *Hasan v. Sargent & Lundy,* ARB No. 2005-0099, ALJ No. 2002-ERA-00032, slip op. at 8-9, 9 n.39 (ARB Aug. 31, 2007) (quoting *Cruz v. Am. Airlines, Inc.,* 356 F.3d 320, 333-34 (D.C. Cir. 2004) (citations omitted)) ("Although we may discern a hint of such an argument after a close reading of plaintiff's reply brief (albeit not a hint supported by both citations to authority and argument, as is required by Federal Rule[s] of Appellate Procedure 28(a)(9)), plaintiff was required to present, argue, and support this claim in his opening brief for us to consider it. We are not 'self-directed boards of legal inquiry and research, but essentially . . . arbiters of legal questions presented and argued by the parties.'").