

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 October 2004

CASE NO. 2004-STA-26

In the Matter of:

JAMES M. MINNE and
ROBERT W. PRIVOTT
Complainants

v.

STAR AIR, INC.
Respondent

APPEARANCES:

Bruce B. Elfvin, Esq
For the Complainants

Christopher J. Freeman, Esq.
For the Respondent

Before: DANIEL L. LELAND
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Section 405 of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C. § 31105, and its implementing regulations, 29 CFR Part 1978. James M. Minne and Robert W. Privott filed complaints with the Occupational Safety and Health Administration (OSHA) on July 8, 2003. Following an investigation OSHA dismissed both complaints. Complainants filed timely requests for a hearing and the case was referred to the Office of Administrative Law Judges. A hearing was held before the undersigned in Akron, Ohio on July 14 and 15, 2004. Complainants' exhibits (CX) 1-60 and Respondent's exhibit (RX) 1 were admitted into evidence. Both parties filed post-hearing briefs.

STIPULATIONS

1. Star Air, Inc. is a company operating commercial motor vehicles, located in North Canton, Ohio.
2. The commercial motor vehicles owned by Star Air, Inc. carry ammunition to gun shows.
3. The gun shows to which Star Air, Inc. travels are located in Ohio and various other states.

4. Star Air, Inc. employs commission sales representatives to drive commercial motor vehicles loaded with ammunition to gun shows and sell ammunition at gun shows.
5. James Minne was employed by Star Air, Inc. as a commission sales representative.
6. Robert Privott was employed by Star Air, Inc. as a commission sales representative.
7. Neither Robert Privott nor James Minne has ever had a Class A Commercial Driver's License (CDL).
8. Robert Privott was on Star Air, Inc.'s schedule to work as a commission sales representative at a gun show on January 11, 2003 in Richmond, VA.
9. On January 10, 2003 Privott was issued a Uniform Warning Citation by the West Virginia Department of Transportation.
10. After the citation was issued, Robert Privott called Robert Custer to inform him that he was issued a citation.
11. Robert Privott informed Robert Custer that the West Virginia Department of Transportation would not allow Robert Privott to leave with Star Air, Inc.'s trailer.
12. Robert Privott returned to Star Air, Inc. without Star Air, Inc.'s trailer.
13. James Minne was on Star Air, Inc.'s schedule to work as a commission sales representative at a gun show on January 11, 2003 in Belleville, Illinois.
14. On January 10, 2003, James Minne left Star Air, Inc. for Belleville, Illinois driving Star Air, Inc.'s truck with an attached trailer.
15. Daniel Boomhower was accompanying James Minne to the Belleville show to serve as his helper.
16. Daniel Boomhower was in the truck en route to Belleville, Illinois with James Minne.
17. While in route to Belleville, Illinois, James Minne received a call from Robert Privott, describing the violations that he was cited for by the West Virginia Department of Transportation.
18. James Minne called Robert Custer to discuss the situation with Robert Privott, and the legality of the truck that he was driving.
19. James Minne and Daniel Boomhower did not proceed to the Belleville show, they instead returned to Star Air, Inc.
20. Robert Privott was scheduled to work the Indy gun show on January 18, 2003.
21. A truck was rented by Star Air, Inc. for use by Robert Privott, so that Privott could drive said truck to the Indy gun show.
22. Robert Privott did not attend the Indy gun show.
23. Between January 2002 and March of 2003, neither James Minne nor Robert Privott worked as a commission sales representative for Star Air, Inc. at any show in the state of Ohio.
24. Between 01/01/2002 and 03/01/2003 Robert Custer and Guy Levan sold ammunition at 10 out of 12 of the Medina, Ohio gun shows.

25. Other than load sheet inventories, Star Air, Inc. has never provided drivers with shipping papers.
26. All vehicles in Star Air, Inc.'s fleet are registered in Ohio.
27. Star Air had a welding company modify some Star Air, Inc. trailers, adding a sheet of metal "diamond plate" to the floor and gate.
28. The addition of "diamond plate" sheet metal to the floor and gate of some Star Air, Inc. trailers added weight to those trailers.
29. Star Air, Inc. had some trucks in its fleet modified to include a fifth wheel.

ISSUE

Did the Respondent subject the complainants to adverse employment actions due to their protected activity?

SUMMARY OF THE EVIDENCE

Respondent sells ammunition to gun shows located in Ohio and other states. (TR 188-189, Stipulation 3). It owns commercial motor vehicles which are used to transport the ammunition to the gun shows. (Stipulation 2). Complainants were employed by Respondent as commissioned sales representatives to drive motor vehicles transporting the ammunition to the gun shows and to sell the ammunition at the gun shows. (Stipulations 4-6). Neither complainant has a Class A Commercial Driver's License (CDL). (Stipulation 7).

On January 10, 2003, complainant Privott left Respondent's headquarters in north Canton, OH driving a tractor and attached trailer carrying ammunition to a gun show in Richmond, VA. (Stipulation 8). At a weigh station in Parkersburg, WV, complainant was stopped by an employee of the West Virginia Department of Transportation and given a warning citation because: 1. he was hauling a trailer with a load in excess of 10,000 pounds without a Class A CDL; 2. the trailer was 12, 800 pounds overweight; 3. the truck did not display the name of the company, its home base, or its DOT number; and 4. Privott was not carrying a log book. (TR 121-125). See CX 58. The West Virginia DOT official impounded the truck and trailer. (TR 127). Privott then called complainant Minne, who was driving one of Respondent's motor vehicles to a gun show in Belleville, IL, and informed him that his motor vehicle was also not in compliance with motor vehicle regulations. (TR 62, 129). He also called Respondent's headquarters and told Robert Custer, the president and owner of Star Air, about the incident in West Virginia. (TR 131). He expressed his concerns to Custer about the safety and compliance problems with the motor vehicle he was driving. (TR 131). Privott returned to Respondent's headquarters without the trailer. (Stipulation 12). Out of concern with whether the vehicle he was driving was in compliance, Minne turned around and drove his vehicle back to Star Air. (TR 63).

Privott was scheduled to attend a gun show in Indianapolis, IN the following weekend, but he told Custer that he did not want to drive a motor vehicle to the show if it was not in compliance. (TR 132). Privott testified that Custer told him that if he would not drive to the

Indianapolis show he would find someone who would, and that it was too expensive to bring his vehicles into compliance with DOT regulations. (TR 132-133, 135). Custer denied making either of these statements. (TR 391, 401).

The week after Privott was stopped by the West Virginia DOT, Carmen Neidert, who was then Custer's secretary, took steps to bring Respondent's motor vehicles into compliance. (TR 343). She arranged to have the correct weight stickers placed on the trucks and for the F 250 truck to be reregistered to increase its gross vehicle weight to 26,000 pounds. (TR 343, 351). She spoke to Privott about obtaining a Class A CDL. (TR 136, 349). She researched the requirement for when the trucks require hazardous material placarding. (TR 356). Ms. Neidert called the Ohio Highway Patrol to inquire about adhering to the motor vehicle regulations. (TR 374). She arranged for Star Air to rent a Ryder truck for Privott to take to the Indianapolis show which she believed to be in compliance with the applicable regulations. (TR 364).

Privott expressed doubt about whether the Ryder truck was in compliance because it did not have the name of the company or its base of operation on the side. (TR 138-139, 162). He was scheduled to arrive at Respondent's headquarters at 4 a.m. on Friday, January 17, 2003 to pick up the truck for the Indianapolis show but he never showed up. (TR 139, 392-394). Privott stated that he refused to drive to the Indianapolis show and other shows in the next few weeks because he believed that the trucks were not in compliance. (TR 145, 166-167). Custer never told Privott that he was fired or that he could not drive for Star Air. (TR 174).

After his aborted trip to the Belleville show, Minne refused to drive Respondent's vehicles unless they were brought into compliance. (TR 66). He discussed with Ms. Neidert methods for bringing the trucks into compliance, and she told him of her efforts to change the registered weights on the vehicles and other attempts to bring the trucks into compliance. (TR 70). Minne was placed on the schedule to go to a gun show in Medina, OH the week after the Belleville show but he did not show up for the trip. (TR 322-323). On January 31, 2003, Minne called Star Air and spoke to Ms. Neidert about her efforts to bring the vehicles into compliance. (TR 72-73). In February 2003, Minne discovered that his company credit card had been deactivated. (TR 74). He spoke to Custer and asked if he had been fired and Custer said no. (TR 75). Minne reiterated his refusal to drive the trucks unless they were brought into compliance. *Id.* Minne testified that he was never fired by Star Air but he refuses to drive for Respondent because of his belief that the trucks are still not in compliance. (TR 94-95). Privott's and Minne's names were not removed from the scheduling board; they simply failed to show up for the gun shows. (TR 308-309, 411-412). Their names were eventually taken off Respondent's payroll in February 2003. (TR 327).

CONCLUSIONS OF LAW

Section 31105 states that:

A person may not discharge an employee, or discipline or discriminate against any employee regarding pay, terms, or privileges of employment, because-

- (B) the employee refuses to operate a vehicle because-
 - (i)...the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;

To prevail in a whistleblower complaint under the STAA, the complainant must establish that his employer took adverse employment action against him because he engaged in protected activity. Under the traditional burden shifting analysis, the complainant must initially prove a *prima facie* case by showing: 1) that he engaged in protected activity; 2) that his employer was aware of his protected activity; 3) that he suffered an adverse employment action; and 4) the existence of a causal link or nexus raising an inference that he was retaliated against because of his protected activity. If the complainant makes out a *prima facie* case, the burden shifts to the employer to articulate a legitimate business reason for taking the adverse employment action, and the complainant must then prove that the articulated reason is a pretext and that the employer discriminated against him because of his protected activity. *Shannon v. Consol. Freightways*, ARB No. 98-051, ALJ No 1996-STA-15 (ARB April 15, 1998). However, if a case has been fully tried on the merits, it is not particularly useful to analyze whether the complainant has established a *prima facie* case. Rather the relevant inquiry is whether the complainant established by a preponderance of the evidence that he was discharged or disciplined for his safety complaints. *Pike v. Public Storage Companies, Inc.*, ARB No 99-072, ALJ No 1998-STA-35 (ARB Aug. 10, 1999).

Privott was understandably concerned when he was cited for four motor vehicle violations in West Virginia. It is evident that Respondent operated in a shoddy manner and was either unaware of or chose to ignore the applicable motor vehicle regulations governing its trucks. Despite Respondent's good faith efforts, following the incident in West Virginia, to bring its vehicles into compliance, Privott and Minne were justified in believing that the vehicles were not yet in full compliance with the regulations. Although they may have been mistaken in that belief, their refusal to drive the vehicles to the gun shows, based on their perception that the vehicles were not in compliance, constitutes protected activity. *See Yellow Freight System, Inc. v. Martin*, 954 F. 2d 353, 356-357 (6th Cir. 1992).

However, the evidence fails to establish that either Privott or Minne suffered any adverse employment action as a result of their protected activity. Complainants' own testimony, as well as the testimony of Respondent's employees, clearly shows that they were not fired or disciplined because of their refusal to drive the trucks to the gun shows. There is no support for the contention that their names were removed from the gun show schedule in retaliation for their refusal to drive. Privott and Minne voluntarily decided not to return to their jobs at Star Air because they believed that the trucks that they were assigned to drive were not in compliance with the applicable regulations; they were not removed from the schedule by Respondent. Although Complainants' concern for adhering to the law is commendable, their refusal to drive was based more on their perception than reality as Respondent was making good faith, although belated, efforts to bring its transportation of ammunition to the gun shows into compliance with the regulations. As the evidence does not show that Complainants were fired, disciplined, or suffered any other adverse employment action because of their protected activity, they are not entitled to relief under the STAA.

RECOMMENDED ORDER

IT IS ORDERED THAT the complaints of James M. Minne and Robert W. Privott under the Surface Transportation Assistance Act are DISMISSED.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).