U.S. Department of Labor

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Issue Date: 12 August 2013

Case No.: 2010-STA-00024

ARB Case No.: 11-050

In the Matter of

RICHARD E. TABLAS
Complainant

v.

DUNKIN DONUTS MID-ATLANTIC
Respondent

DECISION AND ORDER ON REMAND

This proceeding involves a complaint filed under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the Act), as amended, 49 U.S.C. § 31105 (formerly 49 U.S.C. § 2305), and its implementing regulations, 29 C.F.R. part 1978.[1] The Act protects employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules from retaliatory acts of discharge, discipline or discrimination.

Procedural History

On December 18, 2007, the Complainant was terminated from his employment with his employer, the Respondent.

On January 18, 2008, the Complainant filed a Complaint with OSHA officials, alleging that the Respondent violated the Act by terminating his employment on December 18, 2007. See 29 C.F.R. § 1978.102; see also Complainant's Pre-Hearing Statement at 2. On January 27, 2010, the OSHA Regional Administrator, acting on behalf of the Secretary of Labor, issued preliminary findings against the Complainant. The Complainant timely requested a formal hearing, which was held before me on June 9, 2010, in Cherry Hill, New Jersey.

[1] Unless otherwise noted, all references are to Title 29, Code of Federal Regulations (C.F.R.).

The testimony at the hearing focused on an incident that occurred on December 13-14, 2007, shortly before the Complainant's employment was terminated.[2] This incident involved a dispatch from the Respondent's depot in Westhampton, New Jersey, to Lancaster, Pennsylvania, and then to the Respondent's facility in Bellingham, Massachusetts. The Complainant was not driving his usual vehicle. He completed the initial portion of his run and picked up his load in Lancaster. He testified that he returned to the depot in Westhampton about midnight, because he had forgotten his EZ Pass; on his entry into the depot, the air lines on his tractor came undone and would not stay put. This constituted a safety hazard. The Complainant reported the problem to the dispatcher, and also told her he was concerned about forecasts of inclement weather in New England. The dispatcher stated she would call for a repair of the vehicle, and indicated to the Complainant he was to complete the run. The Complainant left the depot and went home, but returned in the morning.

By Decision and Order (D&O) dated April 28, 2011, I dismissed the Complainant's Complaint. I found that the Complainant's refusal to drive on December 13-14, 2007 did not constitute protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii). D&O at 26.

The Complainant timely appealed to the Administrative Review Board (Board). By Decision and Order (Board D&O) dated April 25, 2013, the Board reversed my decision and remanded the matter for further proceedings. By Order dated May 12, 2013, I informed the parties that I had received the record from the Board, and invited the parties to submit supplemental briefs, addressing the issues the Board had identified for my consideration on remand.

The parties requested a telephonic conference to discuss re-opening the record, which was held on June 10, 2013.[3] I granted the parties' request to re-open the record to receive updated evidence on damages; set a tentative date for a hearing session on August 29, 2013; and informed the parties I had not yet determined whether to grant the Respondent's request to re-open the record for additional evidence on the merits. Order of June 12, 2013 (memorializing conference) at 1-2. I directed the parties to address in their briefs the appropriateness of re-opening the record for testimony on the merits. Id. at 1-2.

The parties timely submitted briefs, which addressed not only the issue of re-opening the record but also asserted the parties' positions on the ultimate issues to be determined on remand.

Re-Opening the Record on Remand

As noted above, the Respondent has requested that the record be re-opened on remand, to permit additional evidence and testimony on the merits. In its post-remand brief, the Respondent asserted that a claim under 49 U.S.C. § 31105(a)(2), requiring a complainant to request that the employer correct a hazardous condition before a complaint could be considered under § 31105(a)(1)(B)(ii), had been waived, and so it did not present evidence on this point.

[2] This summary is extracted from the summary of testimonial evidence in my initial Decision. See D&O at 5-15.

[3] This conference was memorialized in an Order dated June 12, 2013.

Additionally, the Respondent asserted that it had additional evidence regarding the Complainant's statements on the date in question, and the Respondent's ability to provide substitute equipment on request. Respondent's post-remand brief at 2-3. The Complainant noted that the Board did not order the record to be re-opened; he also asserted that the Respondent has had ample opportunity to submit evidence at the initial hearing and should not have a "second bite at the apple" at this time. Complainant's post-remand brief at 6-7.

As has been noted, the Board did not direct me to re-open the record on remand. Board D&O at 9-10. The Board has held that an administrative law judge may re-open a record, where a party establishes there is new and material evidence that was not readily available prior to the closing of the record. Woods v. Boeing-South Carolina, ARB No. 11-067, ALJ No. 2011-AIR-009 (ARB Dec. 10, 2012), slip op. at 4. The Board's holding mirrors the applicable procedural regulation, which enunciates the general rule that, after the record has been closed, no additional evidence is to be accepted, except where there is new and material evidence that was not readily available prior to the closing of the record. 29 C.F.R. § 18.54(c).

The Board held that the Complainant's protected activity fell under 49 U.S.C. § 31105(a)(1)(B)(i), and so it was not necessary to establish that the Complainant had requested the hazardous condition with the air lines be resolved and was refused relief. Board D&O at 8. I find, therefore, it is not necessary to re-open the record to deal with this issue, as the Respondent asserts. As well, I find that, contrary to the Respondent's assertions, the Respondent had ample opportunity to develop evidence on the Complainant's actions regarding the faulty air lines at the hearing. In fact, the Complainant was cross-examined on that very point. Hearing Transcript (T.) at 150-51; 156-58. Moreover, at the hearing, the Respondent submitted testimony from multiple witnesses about what the Respondent's employees did, after the Complainant informed them about the air lines, as well as testimony about the company's policies for dealing with faulty equipment. T. at 29-34 (Ms. Smith); T. at 228-29 (Mr. Krzywizki); T. at 250-52 (Mr. McCorry). In addition, although the Respondent's post-hearing brief focused on the Complainant's assertion that he was unable to drive due to forecasts of inclement weather, the Respondent also addressed the Complainant's complaint about the air lines. Respondent's post-hearing brief at 9-10.

Accordingly, I find that, because the issue was adequately raised and addressed by the parties at the hearing, re-opening the record is neither necessary nor appropriate. Therefore, I will proceed based on the record before me, as well as the parties' arguments in their post-remand briefs.

Board's Instructions on Remand

The Complainant was terminated from his employment with the Respondent on December 18, 2007. This was shortly after the incident on December 13-14, 2007, when the Complainant failed to complete an assigned run. D&O at 4; see also T. at 7 (stipulations). The Complainant asserted that his refusal to drive on this occasion, based on an apprehension of dangerous driving conditions as well as concerns about the condition of his assigned truck, constituted protected activity under the Act. D&O at 2; see also Complainant's post-hearing brief at 18-23.

On remand, the Board reversed my determination that that the Complainant's complaint about faulty air lines on his vehicle did not constitute protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii), and held that I erred when I did not determine that the Complainant's action constituted protected activity under 49 U.S.C. § 31105(a)(1)(B)(i). Board D&O at 8. The Board then held that, under the extensive facts I had found, it also was error for me to conclude that the Complainant's reporting of the air lines problem did not contribute to his termination from employment. Id. Accordingly, the Board remanded the matter to me to consider whether the Respondent can show, by clear and convincing evidence, that it would have taken the same action against the Complainant notwithstanding his protected activity. Id. at 9. The Board specifically remarked: "In making this determination, the record evidence in this case appears to show no basis for termination other than [the Complainant's] refusal to drive the truck the night of December 13, 2007, which we have determined violated the Act since the refusal was protected activity under [49 U.S.C.] section 31105(a)(1)(B)(i). Nonetheless, we remand to the ALJ to make that determination in the first instance." Id.

Applicable Law

As the Board has held, the Complainant's refusal to drive a vehicle that had defective air lines constituted protected activity under the Act. Board D&O at 8.

The Act protects employees from termination or other adverse action when the employee's protected activity was a factor in the adverse action. 49 U.S.C. § 31105(b)(2)(B); see also 29 C.F.R. §§ 1978.104(e), 1978.109(a). When a complainant has engaged in protected activity, the employer avoids liability only if it establishes, by clear and convincing evidence, that it would have taken the same adverse action, notwithstanding the employee's protected activity. Blackie v. Smith Transp. Inc., ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 8 (ARB Nov. 29, 2012). 49 U.S.C. § 31105(b)(1)(B)(iv); see also 29 C.F.R. § 1979.109(b). Under the clear and convincing evidence standard, a respondent's action must be "highly probable or reasonably certain." Blackie, slip op. at 8; see also Warren v. Custom Organics, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 6-7 (ARB Feb. 29, 2012).[4]

Discussion

I have reviewed the record in this matter, including the transcript of the hearing and all exhibits. I adopt the summary of evidence set out in my initial D&O. D&O at 4-15. I also have considered the parties' arguments, as set out in their post-remand briefs.

On review of the entire record on remand, I again find there are very few contested facts. D&O at 15. Though my initial Decision did not specifically make any findings as to credibility, I found that the witness testimony was remarkably consistent, and that all witnesses appeared to be "sincere and forthcoming" in their testimony. Id.

[4] As the Board has noted, the "clear and convincing evidence" standard was instituted on August 3, 2007, when the Act was amended. Warren, slip op. at 6. The Complainant's termination occurred in December 2007, which was after the Act's amendment.

Mr. Krzywizki, the deciding official, stated that the Complainant was terminated from his employment based on this incident. D&O at 27; see also T. at 223-26. On review, and considering the Board's instructions on remand, I find that Mr. Krzywizki also testified that, prior to making the decision to terminate the Complainant's employment, he and other management officials "went over everything" relating to the Complainant. T. at 224. Mr. Krzywizki also agreed that the termination document, which he prepared, reflected "most of the reasons" the Complainant was fired. T. at 226.

Relating to the Complainant's protected activity (reporting the problem with the tractor's air lines), I find the following facts, and note that all are consistent with my prior Decision:

1. The Complainant reported the problem with the air lines to the dispatcher, Ms. Smith. T. at 30; 105-07; see also CX 3. At the same time, he also expressed to her his concern about the weather. T. at 28-29, 106-07.

2. Ms. Smith acknowledged the problem with the air lines to the Complainant, and called the repair service for a repair.[5] T. at 31-32; see also T. at 107. She rebuffed his suggestion that the weather was too chancy for him to make his run, and told him that other drivers in the area had not reported any problems. T. at 28, 107-08.

3. It is not clear, from the record, whether Ms. Smith explicitly told the Complainant to wait for the repair. See D&O at 18. However, the Complainant acknowledged that Ms. Smith told him she would call in the problem for immediate servicing. T. at 107.

4. The Complainant told Ms. Smith he recommended he wait until morning to complete the run, after the vehicle had been repaired and the weather had cleared. T. at 107; see also T. at 29, CX 5.

5. The Complainant admitted that he unilaterally made the decision to leave the depot and return home, rather than complete the run. T. at 107-08. He said he was worried about the forecast weather conditions and the mechanical problem. T. at 109.

6. Though the Complainant testified about the air line problem at the hearing, the focus of his testimony was that he repeatedly expressed his concern to the Respondent's dispatchers about the weather forecast for bad conditions, even before the air line problem arose. T. at 81-90.

7. Mr. Krzywizki, who made the decision to terminate the Complainant's employment, was aware that the Complainant had raised a concern about the defective air lines on December 13-14, 2007. T. at 224; see also CX 10.

[5] Complainant's testimony indicates that Ms. Smith initially asked the Complainant to take the vehicle to the Penske repair shop, which was nearby; however, he persuaded her to call for repair personnel to come to the depot. T. at 107.

8. Mr. Krzywizki cited Section A-28, paragraph 1 of the Employee Handbook as justification for the Complainant's termination of employment. T. at 226-27.

9. Mr. Krzywizki also testified that the Complainant was terminated from his employment because he brought his load back to the depot and left it without waiting to see if there were any problems with his equipment to prevent completing his assignment. He also remarked that the Complainant had no justification for returning to the depot.[6] T. at 229.

As noted above, the Board remarked that it appears from the record that the only basis for the Respondent's termination of the Complainant's employment was the incident of December 13-14, 2007. Board D&O at 9. However, the Board authorized me to make findings on this issue. In my initial Decision, I found that the Complainant's termination was based "chiefly, if not solely" because he refused to complete the run on that date. D&O at 27. On remand, I again find that the Complainant's refusal to complete the run was the principal factor in his termination from employment, but was not the sole factor.

As to other factors that played a part in the Respondent's termination of the Complainant's employment, I find the following:

1. Upon being assigned the run, the Complainant immediately began to express concerns about road conditions, based on forecasts of inclement weather. T. at 82-83, 178-79, 207-08.

2. The Complainant stated he returned to the depot to get his EZ-Pass, which he had inadvertently left in his regularly assigned vehicle. T. at 95-96. His return to the depot required a short diversion from the usual route. T. at 97.

3. The Respondent has a procedure whereby a driver who does not have an EZ-Pass is able to complete his run without undue difficulty. T. at 199-200.

4. The Complainant received a written warning for refusing a load on November 6, 2007. RX 10; see also D&O at 17 n. 11.

5. This warning was characterized as a "1st written warning" and informed the Complainant that "any further occurrences may result in further disciplinary action." RX 10.

6. The Complainant acknowledged at the hearing that the warning was justified. T. at 115-16.

7. The Respondent's termination letter notice to the Complainant stated: "This is the second time we had a refusal of an assignment." CX 10.

8. The Respondent's Employee Handbook sets out a "Progressive Discipline Procedure" listing disciplinary actions ranging from "verbal warning with in-house documentation"

[6] As to this latter statement, I presume that Mr. Krzywizki was referring to the Complainant's asserted rationale that he returned to the depot to get his EZ-Pass.

to "termination [of employment]." The Handbook also states that the action taken "will be determined by the nature of the offense and the employee's previous history of disciplinary action, if any." RX 1 at 6-7 (paragraph A16).

9. As to the incident in November 2007, Mr. Krzywizki stated that the incident was reviewed when it happened, and the Complainant was not fired at that time because he was given the benefit of the doubt; accordingly, the Complainant was given a warning. T. at 231.

10. Paragraph A28 of the Respondent's Employee Handbook lists the offenses that "will result in immediate discharge." RX 1 at 12.

11. These offenses include, at subparagraph 1: "Refusal of a run and/or any job assigned [to the driver] by an authorized individual." Id.

Regarding the Respondent's termination of the Complainant, notwithstanding his protected activity, I find the following facts:

1. Because Ms. Smith told the Complainant that a request to repair the problem was called in, the Complainant was aware that the potential safety problem with the air lines would be fixed, before he would be required to resume his run. See T. at 107.

2. Based on the Complainant's admission that he made the decision on his own to go home, the Complainant intentionally failed to comply with Ms. Smith's instructions. See T. at 108.

3. In November 2007, a month prior to the incident, the Complainant received a written warning for refusing to make a run, as directed. RX 10. The warning letter informed the Complainant that any future incidents may result in disciplinary action. Id.

4. The Respondent's termination letter referred to the November 2007 incident. CX 10.

5. Respondent's written policies, as set out in its Employee Handbook, refer to a progressive discipline policy, but also indicate that the use of progressive discipline is discretionary and that refusing to take a run or performed an assigned job may result in termination of employment. RX 1 at 6-7, 12-13 (Paras. A16, A28).

6. The Respondent's termination letter specifically stated that the reason for termination was that the Complainant failed to follow instructions regarding repair of the vehicle and committed "job abandonment" by going home. CX 10.

7. The Respondent's termination letter contained at least two statements that are at odds with the Respondent's official's testimony at the hearing: first, the letter indicated the Complainant attempted to call in sick before starting the run. There is evidence of record that the Complainant stated he was not feeling well before he initially reported for the run, but the Complainant ultimately did show up. CX 5. Second, the letter stated that no

defect had been found in the air lines, as the Complainant had reported. CX 10. The evidence of record indicates the vehicle's air lines were repaired, but not until December 19, 2007, after the date of the letter.[7] T. at 54-56; see also CX 4. I note that Mr. Krzywizki did not testify regarding either of these inaccuracies. Based on Mr. Krzywizki's testimony at the hearing, I find that the most important factor, in his judgment, was the Complainant's unilateral decision to leave the depot and go home.[8]

As the Board indicated, the Act applies when a complainant's protected activity is a contributing factor in the Respondent's adverse action. Board D&O at 5 n. 1. The record in this matter establishes that the Complainant failed to complete his assigned run for multiple reasons, and that the Complainant's apprehension about the weather forecast was a major factor in the Complainant's decision not to complete the run. On careful consideration of the evidence of record, as well as the Board's Decision, I find that the two circumstances (apprehension about the assigned run and concern about the air lines) were inextricably intertwined in both the Complainant's and Respondent's actions.[9]

Mr. Krzywizki confirmed that he had seen CX 5-8 when he made the decision to terminate the Complainant's employment. T. at 223. He stated he took these statements into consideration when he made the decision. T. at 232.These items were created on December 13-14, 2007, and they reflect the Complainant's statements about his reluctance to make the run, even before the run began.[10] In his testimony, Mr. Krzywizki also commented that the Complainant had no reason to bring his load back to the yard. T. at 229. It is not clear to what extent Mr. Krzywizki's conclusion on this issue influenced his decision. [11]

In sum, I find that, regarding the Complainant's protected activity (complaining about the air lines), the Respondent would have terminated the Complainant's employment in any event, because the Complainant did not wait at the depot for repairs to his vehicle to be made, as he should have done. Rather, the Complainant took it upon himself to decide not to complete the

[7] As I noted in my initial Decision, there is no explanation for why the vehicle was not repaired until December 19. D&O at 18 n. 15.

[8] I also find that, because the Complainant was aware that the problem with the air lines had been called in for repair, it was not necessary for him to go home to avoid driving an unsafe vehicle.

[9] As set forth in my initial Decision, the Complainant's refusal to complete the run based on an apprehension of future weather conditions was not protected activity. D&O at 23-26.

[10] Ms. Howard's and Mr. Peters' statements (CX 6, 7) are not dated, but they testified they wrote up the statements "the next morning." T. at 180, 203.

[11] I find that this comment does not relate to the Complainant's complaint about the air lines directly, but rather relates to the Complainant's decision to bring the vehicle back so that he could pick up his EZ-Pass. Indeed, the testimony of the Respondent's officials (principally Ms. Howard and Mr. Peters), as well as CX 5-8, suggest the Complainant may have returned to the depot not only to pick up his EZ-Pass, but also to attempt to persuade management to allow him to wait out the weather and complete the run later.

run, and left the facility. Respondent's termination notice articulated that the reason the Complainant was terminated was based on his failure to wait on the repair to his vehicle. [12]

Moreover, I find that the Respondent also considered the Complainant's actions regarding his concern about the weather: specifically, that the Complainant expressed apprehension before starting out on the run, and then came back to the depot during the run, for a reason that Mr. Krzywizki believed was unjustified. Additionally, consistent with its published progressive discipline policy, the Respondent considered the Complainant's prior history of failing to take a run as instructed.

Because I find that the Respondent would have terminated the Complainant's employment in any event, due to the factors set out in the paragraph above, I also conclude that the Respondent has established, by clear and convincing evidence, that it would have taken the same action against the Complainant, notwithstanding his protected activity.

Accordingly, on remand I again find that the Respondent is not liable, and I dismiss the Complainant's complaint.

Because the Complainant's complaint is dismissed, there is no need to receive testimony as to damages. Accordingly, the hearing session, tentatively scheduled for August 29, 2013, is CANCELLED.

Digitally signed by Adele Odegard
DN: CN=Adele Odegard,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

[12] I note the termination letter indicates the Complainant failed to take the vehicle to the Penske repair facility. The Complainant testified that initially he was instructed to do that, but later was told that the repair personnel would be called to the depot. I find that any error in the termination letter regarding not taking the vehicle to the repair facility is not material.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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 for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(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.

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. §§ 1978.109(e) and 1978.110(b). 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. § 1978.110(b).