U.S. Department of Labor

Office of Administrative Law Judges
William S. Moorhead Federal Office Building
1000 Liberty Avenue, Suite 1800
Pittsburgh, PA 15222

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 29 December 2010

CASE NO.: 2010-STA-67

In the Matter of:

JOZEF WYSOCKI,
Complainant

v.

BRAVE LINES, INC.,
Respondent

Before: RICHARD A. MORGAN,
Administrative Law Judge

DECISION AND ORDER

I. Procedural History

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 [hereinafter "the Act" or "STAA"], 49 U.S.C. § 31105 (formerly 49 U.S.C. app. § 2305), and the applicable regulations at 29 C.F.R. Part 1978.[1] The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

Background

Mr. Jozef Wysocki filed a complaint against Brave Lines, Inc., with the Occupational Safety and Health Agency ("OSHA") of the Department of Labor, on January 7, 2010. On or about May 25, 2010, the Area Director, OSHA, issued "Secretary's Findings" holding "there is no reasonable cause to believe that respondent violated" the Act. The complainant timely requested a hearing before an administrative law judge.

[1] On August 3, 2007, various amendments to the STAA were signed into law, which were included in the Implementing Regulations of the 9/11 Commission Act of 2007. *See* Pub. L. No. 110-53, § 1536, 121 Stat. 266, 464-467. The STAA amendments generally strengthen protections for employees who complain of potential dangers and "problems, deficiencies, or vulnerabilities" regarding motor carrier equipment. The new subsection 49 U.S.C. §31105(b)(3)(C), provides for punitive damages up to $250,000 where previously only compensatory damages were allowed.

A hearing was conducted by the Honorable Richard A. Morgan, Administrative Law Judge, U.S. Department of Labor, on October 14, 2010, in Chicago, Illinois. The dispute concerned allegations, under the Act, by the complainant that the respondent had unlawfully discharged him in reprisal for making protected-activity complaints. Neither party was represented by counsel.

The STAA provides for employee protection from discrimination because the employee has engaged in protected activity while employed. It prohibits discharge, discipline, or discrimination against employees for refusal to operate a motor vehicle, with a gross weight over 10,000 pounds, in violation of Federal rules or regulations because of apprehension of serious injury to or unsafe conditions or health matters.

II. THE LAW

A complainant may recover under the Act under three circumstances:

First, by demonstrating that he was subject to an adverse employment action because he has filed a complaint alleging violations of safety regulations. 49 U.S.C. § 31105 (a)(1)(A). This provision of the Act provides specifically and in pertinent part:

> (a) Prohibitions. -- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
>
> > (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . .

The U.S. Department of Labor ("DOL") interprets this provision to include internal complaints from an employee to an employer. DOL's interpretation that the statute includes internal complaints has been found "eminently reasonable." *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998)(case below 95-STA-34). The Circuit Court of Appeals has stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. Id.

Second, by demonstrating that he was subject to an adverse employment action for refusing to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. § 31105(a)(1)(B)(i).

In such a case, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 1994-STA-55 (Sec'y Aug. 4, 1995). However, protection is not dependent

upon actually proving a violation. *Yellow Freight System v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).

Third, by showing that he was subject to an adverse employment action for refusing to operate a motor vehicle "because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." 49 U.S.C.§ 31105(a)(1)(B)(ii). To qualify for protection under this provision, a complainant must also "have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C. § 31105(a)(2).

For the Administrative Law Judge to find a violation, the complainant must demonstrate, by a preponderance of the evidence, that the protected activity was a contributing factor in the alleged adverse action. If the complainant makes such a showing the respondent must demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity or the perception thereof. The ALJ may employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in STAA cases.[2] The Title VII burden shifting pretext framework is warranted where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence. The ALJ may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action.[3] Thereafter, and only if the complainant has proven discrimination by a preponderance of evidence and not merely established a prima facie case, does the employer face a burden of proof.

III. ISSUES

I. Whether, under 49 U.S.C. § 31105(a)(1), the respondent discharged, disciplined or otherwise discriminated against an employee, to wit the complainant, on or about January 7, 2010**,** regarding pay, terms or privileges of employment, because:

(A) He made or filed complaints (with his supervisors or others) related to violation(s) of commercial motor vehicle safety regulation(s), standard(s), or order(s), namely concerning the condition of his assigned truck and

(1) Were these complaints "related to" to violation(s) of commercial motor vehicle safety regulation(s), standard(s), or orders?

OR

(B) He refused to operate a vehicle, because,

[2] *Peck v. Safe Air Int'l, Inc.,* ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 7-10 citing *Kester v. Carolina Power & Light Co.,* ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 and nn.12-19 (ARB Sept. 30, 2003).

[3] *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

(i) Its operation, would have violated a regulation, standard, or order of the United States related to commercial motor vehicle safety or health?

OR

(ii**)** He refused to operate a vehicle because he had a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition, that is it would be "a road safety hazard"? *Robinson v. Duff Truck Line, Inc.*, 86-STA-3 (Sec'y Mar. 6, 1987), *aff'd Duff Truck Line, Inc. v. Brock*, 48 F.2d 189 (6th Cir. 1988)(per curiam) (unpublished decision available at 1988 U.S.App. 9164).

Under § 31105(a)(1)(B)(ii), an employee's apprehension of serious injury is reasonable only if a reasonable person in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, under B(ii), the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. *See Calhoun v. UPS*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB Sept. 14, 2007).

II. If the respondent so violated 49 U.S.C. § 31105(A)(1)(a) or § 31105(a)(1)(B) what relief is appropriate?

IV. COMPLAINANT'S BURDEN OF PROOF UNDER THE STAA

The four key elements of the case are that:

(1) the employee engaged in protected activity;

(2) the employer knew of the protected activity;

(3) the employee was subjected to adverse action (a tangible job consequence- *Calhoun v. UPS*, ARB 00-026 (2002) STAA**)**; and,

(4) the protected activity was the likely reason for the adverse action.

Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y December 15, 1992).

With only one exception, the burden always remains with the claimant to establish, by a preponderance of the evidence, the elements of his case: (1) protected activity; (2) a causal nexus between the protected activity and the adverse action; and (3) in response to employer's evidence of an allegedly legitimate reason for its action, evidence of pretext.

The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the employer's proffered reason is not legitimate, and that the discharge (or other adverse personnel action) was motivated at least in part by retaliation for protected activity, then the employer must establish by a preponderance of the evidence that it would have discharged (or taken other adverse personnel action against) the complainant independently of his protected activity. *Faust v. Chemical Leaman Tank Lines*, Inc., 93-STA-15

(Sec'y October 2, 1996); *Moravec v. HC & M Transportation*, 90-STA-44 (Sec'y, January 6, 1992), slip op. at 12, N. 7.

Internal complaints made to supervisors concerning vehicle defects or safety may be protected activities. The form of the complaint is not critical and even an informal complaint to a supervisor may be sufficient to establish protected activity.

The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. *Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. §§* 1221(e)(1).

A "preponderance of the evidence" is "the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Black's Law Dictionary.*

V. STIPULATIONS

-The respondent is a motor carrier engaged in commercial motor vehicle operations which maintains a place of business in Lake Bluff, Illinois.

-Dariusz Filimon is the President of the respondent.

-The respondent's employees operate commercial motor vehicles, in the regular course of business, over interstate highways and connecting routes, principally to transport freight.

-The respondent contracted with the complainant, i.e., he was hired**,** o/a December 3, 2009, as an independent contractor- truck driver**.**

-The complainant was to be paid on a mileage basis, i.e., $0.36 per mile.

-The complainant worked as a driver of a commercial motor vehicle with a gross weight in excess of 10,000 pounds used on the highways to transport cargo.

- The complainant holds a class B Commercial Driver's License ("CDL").

-The complainant was assigned a run to the Postscript Warehouse, Norwich, Connecticut.

-His assigned truck, a 2005 Freightliner #796, broke down twice, first due to a bad clutch and the second time, a flat tire.

-The truck was repaired by Hilario Truck Center, LLC, Danbury (Newtown), Ct.

-The complainant remained with the truck for several days between o/a December 31, 2009 through on or about January 7, 2010.

-The complainant arrived at his assigned Connecticut destination on or about January 7, 2010.

-The complainant's employment with respondent ended, on or about January 7, 2010**.**

-While the complainant was not initially paid for this trip to Connecticut or for his return trip to Chicago, the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Ill., entered a civil judgment in his favor against Brave Lines, Inc., for $2238.57 as reimbursement for his costs and expenses**.**

-On or about January 7, 2010, the complaint filed a complaint with the Department of Labor, OSHA, under the provisions of the STAA.

-On or about May 25, 2010, the Area Director, OSHA, issued "Secretary's Findings" holding "there is no reasonable cause to believe that respondent violated" the Act.

(Transcript ("TR") pages 21-39).

VI. INITIAL FINDINGS

I find that:

The respondent is and was a "person," as defined in the STAA, 49 U.S.C. § 31101(3), and is a motor carrier engaged in commercial motor vehicle operations.

The complainant worked for the respondent as a driver of a commercial motor vehicle with a gross weight in excess of 10,000 pounds used on the highways to transport cargo.

The complaint was timely filed, i.e., within 180 days of the alleged adverse action.

The complainant timely filed objections to the Secretary's on or about June 9, 2010.

The complainant did not, on or before filing his complaint, commence or cause to be commenced, a proceeding under the STAA, had not and was not about to testify in a proceeding under the STAA, had not or was not about to participate in any proceeding under the STAA.

The Office of Administrative Law Judges, U.S. Department of labor properly exercises in personam and subject matter jurisdiction to hear this matter.

VII. FACTS

The complainant was hired by Brave Lines, Inc. (hereinafter "Brave Lines"), on or about December 3, 2009, as a commercial truck driver to principally to haul freight. (RX 1). The respondent is a small trucking firm with eighteen drivers headquartered in Lake Bluff, Illinois. Dariusz Filimon, who represented the company at the hearing, is its President and Mark Kiela, its Chief Executive Officer. The complainant was terminated on or about January 7, 2010. The company offered no benefits. (TR 152). Mr. Wysocki has been a truck driver for twenty-some years. (TR 180).

During the brief term of his employment, the company assigned him three trips often with multiple segments, the last of which ended with his termination. (TR 113). Mr. Wysocki claimed he had performed nine company trips. There were problems during and after all of the trips, according to both Mr. Wysocki and Mr. Filimon. (TR 132). Generally, Mr. Wysocki would talk to the company about the condition of their trucks before and during trips. (TR 144). If on his pre-trip inspection, he complained about the brakes, he would be asked if he could adjust them; if he could not they would send the vehicle to a shop, like Reliable, for repairs. (TR 144-146). Mr. Filimon testified keeping the trucks in repair was necessary to avoid violations and to keep customers. (TR 146).

On his first trip with tractor #796, to Bethlehem, PA, and back through Moorestown, NJ, the complainant was issued a traffic ticket, dated 12/9/09, for two defective trailer tires. (CX 1 and 2; TR 56, 65, 114). He informed the company by faxing in the citation and the company spent $1400 replacing eight trailer tires with Pomp Tires. (CX 3; TR 59-64, 114-115). The complainant did not refuse to drive the truck and did, in fact, embark on his trip.

The complainant's second trip was to Moorestown, NJ, then to pick-up a trailer and drop it at Roadrunner, in Boling Brook, Illinois. (TR 53, 115). Mr. Wysocki testified he complained to Mr. Filimon that taking this trip would exceed driving hours. Despite purportedly trying to decline the trip, Mr. Wysocki claimed Mr. Filimon "forced" him to do so and he did. (TR 68). He testified he complained (to Roadrunner) his truck (#796) had a tire "not qualified to be on the road." (TR 53-54).

Mr. Wysocki testified he had another trip to Roadrunner. (TR 73). They asked him to remove the trailer he had arrived with and hook-up another fully loaded trailer. (TR 74-75).

The respondent received complaints about his behavior from Roadrunner's dispatcher, Tracey Kubik, about his profanity, "abusive" "confrontational" and "threatening" behavior, on 12/22/09. (TR 116, 120-121; RX 3). Tracey Kubik asked that Mr. Wysocki not be sent to their company again. Mr. Filimon testified he counseled Mr. Wysocki about his behavior, advising him not to be abusive; an assertion Mr. Wysocki denies. (TR 121-122).

His third trip, over the Christmas holidays, was to American Logistics Group ("ALG") Direct and Boston. (TR 77, 123). The complainant testified that he informed Mr. Filimon that his assigned truck, number 796, a Freightliner, needed repairs and that the trailer was "no good." (TR 84-86). Mr. Filimon instructed him to take the vehicle to a repair shop for repairs, which he did. (TR 87). Mr. Wysocki claimed he waited 15-hours at the shop for the repairs to be completed. (TR 85). Mr. Filimon testified that was unlikely. Then he claimed Mr. Filimon wanted him to take the trip. He testified that he protested to Mr. Filimon he would not violate hours-of-service regulations, but claims the latter instructed him to either take the trip or lose his job; so he did. (TR 87-88). Mr. Filimon testified, "that's not true." (TR 148). Although Mr. Wysocki testified that he believed the repairs had been done, he was later ticketed because the registration, insurance and annual inspection sticker were out-of-date. (TR 89, 91 and 95).

Mr. Filimon testified that the company had trouble communicating with Mr. Wysocki and it seemed he had gotten lost in a snow storm. (TR 125-126). He claims he asked the police to find him and they did find him stuck. In any case, the truck's clutch broke and he later experienced a flat tire on the trailer. (TR 79). He informed Mr. Filimon. Mr. Wysocki claimed that, on or about January 6, 2010, he called Mr. Filimon about the flat and told him the truck was not safe to drive, but the latter told him to keep going to a service facility which he tried. (TR 101). He claims he was pulled over by firemen who ordered him to have the tire repaired, which he did. (CX 5; TR 97-98, 101). Mr. Filimon had Hilario's Truck Center, Danbury, CT, come to the truck and tow the truck to its facility for repair. (CX 4; TR 80, 100, 126). Mr. Filimon testified the complainant did not make his deliveries to any destination. (TR 130). Mr. Wysocki testified that he and Messrs. Filimon and Kiela argued over whether or not the damages to the truck were his fault.[4] (TR 83). Mr. Filimon, noting the company paid over $2978 for repairs and $318 to replace tires, testified the complainant was "abusing our equipment." (TR 130-1).

There is little dispute concerning Mr. Wysocki's ignominious termination. (TR 95-96). After Mr. Filimon learned Mr. Wysocki had not arrived at his scheduled destination on time and had the truck repaired, he and Mr. Kiela decided to fire him. They had planned to discuss his performance and customer relations upon his return to Chicago, but he did not show up. (TR 162). They believed that somehow Mr. Wysocki's manner of driving had damaged their truck and they were fed-up with customer complaints about him. (TR 131, 149). They feared losing their complaining customers' business and good will. For example, Mr. Kobs, owner of Reliable Mobile Service, the respondent's repair shop, wrote that Mr. Wysocki came to his office, on December 10, 2009, yelling, swearing, and threatening both his staff and him.[5] (RX 7). Roadrunner's Tony Reyes, wrote, because of an emails sent to him by his staff about Mr. Wysocki yelling, ranting, name-calling, and being abusive, they would no longer allow him on their property and would call the police if he tried. (TR 116-118; RX 2). Roadrunner's Mr.

[4] Disturbingly, Mr. Wysocki testified that Mr. Kiela called his home threatening to "put you in a wheelchair." (TR 104). Mr. Wysocki testified he reported it to the police. (TR 168). He also testified that, "I got a grudge over these people, you know, so I'm ready to die, you see. Not much left, you know."(TR 111). Mr. Filimon complained about Mr. Wysocki making abusive calls to his home. (TR 135). He added he had to contact the local police about Mr. Wysocki. (TR 141, 168). However, Mr. Filimon denied any police investigation of the respondent to threats against Mr. Wysocki. (TR 167). Mr. Wysocki continues to fear the respondent. (TR 183).

[5] Whether or not these written communications were hearsay or true, in and of themselves, the fact remains that they formed the bases of Mr. Filimon's belief and concern.

Tobin's email iterated that the trailer Mr. Wysocki complained about (#662513) was merely dirty, but otherwise okay. (RX 2). ALG's Operations Officer wrote that, on 12/22/09, he came across Mr. Wysocki who was "irate and out of control" and threatened to use force against a female worker if she did not load his trailer fast. (RX 2). He even called back well after the freight was delivered threatening the dispatchers. (RX 2).

Mr. Filimon testified that Mr. Wysocki was "a danger person to people . . . persons driving the vehicle on a highway . . . [H]is behavior to police officers. . . the way he is talking to our customers. . . [S]o we - - to stop doing, stopping what's happening…" (TR 143). "He was discharged because of his behavior, making trouble on our equipment. . ." unlike their other drivers. (TR 149).

Mr. Filimon testified they asked the local police to assist them with the termination and retrieval of company property; which the police did. Mr. Filimon claims he was informed that Mr. Wysocki was "belligerent" with the police. (RX 5). Mr. Wysocki testified that the police "threw him out of the truck;" he was greatly offended. Mr. Stubbs, General Manager, PS Warehouse, wrote about the events, the police involvement and Mr. Wysocki's name-calling. (TR 134; RX 5). The respondent sent a substitute driver, Mr. Leszek Goralcyck, to the destination to retrieve their vehicle and give Mr. Wysocki a ride back to Illinois. (TR 128, 132). However, Mr. Goralcyck refused to have the complainant ride with him because he felt the latter was abusive and a threat. (TR 129; RX 4). He wrote that Mr. Wysocki was "very angry and used vulgar language towards me (him)" during their brief encounter. (RX 4). Mr. Wysocki denied making threats about Brave Lines, but admitted they argued. (TR 176-178).

Mr. Wysocki had a difficult time getting back to Illinois at his own expense. (TR 102-103). Eventually, he sued Brave Lines for $10,000 for his expenses and received a judgment for $2300 from the court; which he claims was insufficient to cover all his damages. Brave Lines paid the judgment. (TR 104-106, 135-7; RX 6).

While Mr. Filimon claims he "counseled" Mr. Wysocki regarding the customer complaints, Mr. Wysocki testified that never occurred. (TR 108). Moreover, Mr. Wysocki claims he had no problems with the customers and that, at least one seemed supportive. Mr. Wysocki submitted a safety certificate he received on March 30, 2001. (CX 6; TR 98).

The complainant made efforts to find comparable employment after his discharge. (TR 42-44). The complainant briefly worked for the following employers: Speedy Transport for about one week in January 2010; Rick Transportation for about a week; a company in Elk Grove for a week, and, Good Logistics for about one month. (TR 51). He testified he left them because of their failure to pay him. (TR 59). At the time of the hearing, the complainant was employed by AWJ Transport and had been since October 18, 2010. (TR 41-42). Mr. Wysocki testified, " I am not anxious to come back to these people because they're not going to take me for any reason, okay." (TR 181).

VIII. DISCUSSION OF FACTS AND LAW[6]

Much of the rambling testimony was acrimonious, in good part unintelligible and irrelevant. In light of the parties' acrimony toward one-another, poor command of the language, behavior and demeanor at the hearing, largely divergent versions of what occurred during Mr. Wysocki's brief employment and the latter's claims concerning his subsequent jobs, I find neither witness very credible on disputed issues.[7]

However, I do find that Mr. Wysocki complained about his vehicle's defects and that his assigned truck and various trailers were not in good condition on the various occasions discussed, i.e. mostly bad tires. I also find that Brave Lines had many, if not most, of the defects promptly repaired at various times. I have no doubt that Mr. Filimon believed that Mr. Wysocki's manner of driving was damaging his trucks. But, I do not find his suspicion established in fact. Based upon the evidence submitted, it is established that Brave Lines' tractor (#796) and trailers were far from being in good condition. The evidence establishes that tires were constantly being replaced during the complainant's brief tenure. The clutch went out on #796. Mr. Wysocki was stopped more than once by the authorities for vehicle violations.

I find that while Mr. Wysocki complained about the condition of his vehicle and trailers and otherwise protested, he never actually did not take a driving assignment. Each time he complained about his tractor or trailer's condition, Mr. Filimon would have him take them to a repair facility. I find it more likely than not that when Mr. Wysocki called in about the bad clutch and tire on or about January 6, 2009, he was asked to keep going to a service facility. That effort was unsuccessful; he was pulled over and the truck was eventually towed to Hilario's for repair. While it is possible he complained about "hours-of-service" as he claimed, Mr. Filimon contested that and I do not find that established. The case law is ambiguous concerning a complainant driving or driving under "protest" after having initially refusing to do so.[8] *Palmer v. Western Truck Manpower,* 85-STA-6 (Sec'y Jan. 16, 1987)(Secretary held that driver's initial refusal was not made less of a protected activity because he ultimately did drive for fear of being fired). Moreover, the defects were promptly corrected in most instances. Thus, while Mr. Wysocki may have established a "refusal", it is unnecessary given his many established

---

[6] If it is not obvious, I have considered all the facts set forth in this Decision and Order in reaching my decision regardless of the section in which they are set forth.

[7] I had a U.S. Marshall act as bailiff due to my concerns about the parties' behavior toward one-another. This need was born out by their testimony regarding threats and their demeanor. When I allowed the parties to question one-another, their tone and demeanor immediately became somewhat menacing. I had to caution them to stay apart during lunch.

[8] In order to receive protection under either 31105(a)(1)(B)(i) or (ii), Complainant must actually refuse to drive the vehicle. A complainant cannot seek protection for driving under protest. *Calhoun v. United States Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB Sept. 14, 2007); *Williams v. CMS Transportation Services, Inc*., 1994-STA-5 (Sec'y Oct.25, 1995). In *Zurenda v. J&K Plumbing & Heating Co. Inc.*, 97-STA-16 (ARB June 12, 1998), the ALJ erred in concluding that certain incidents where Complainant alleged that he had complained about the condition of the trucks he was to drive on those dates was a "work refusal" analyzed pursuant to section 31105(a)(1)(B). The ARB concluded that because Complainant did actually drive those trucks, the complaint was more properly analyzed under the "complaint" provision of section 31105(a)(1)(A). *But see*, *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB Sept. 14, 2007).

complaints. Thus, I find "protected activity" is established. The complainant's termination is not disputed.

I also find that given their suspicions about the damage to their vehicle, the many customer complaints, their observations of his misbehavior and their inability to communicate with Mr. Wysocki, that Mr. Filimon's stated bases for the termination are established and are legitimate. They would have terminated Mr. Wysocki irrespective of any of his complaints about safety or vehicle condition. They believed that somehow Mr. Wysocki's manner of driving had damaged their truck and were essentially fed-up with customer complaints about him. (TR 131, 149). They feared losing their complaining customers' business and good will. "He was discharged because of his behavior, making trouble on our equipment. . ." unlike their other drivers. (TR 149). *See Formella v. Schnidt Cartage, Inc.*, ARB No. 08-050, ALJ No. 2006-STA-35 (ARB Mar. 19, 2009), where the Plaintiff engaged in protected activity under the STAA when he told company officials that he could not drive the assigned truck, because he had an objectively reasonable apprehension that unmatched tire treads could cause him to lose control of the truck. However, the ARB found that substantial evidence supported the ALJ's finding that the Complainant was provocative, intemperate, volatile, and antagonistic, and that he had been fired for this behavior rather than the protected activity. Here, the fact that Brave Lines asked the local authorities to assist in the termination further corroborates their concern about Mr. Wysocki's unacceptable behavior as the basis for termination. *Pollock v. Continental Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-1 (ARB Apr. 7, 2010)(Employer must prove by a preponderance of the evidence that it "would have" terminated the employee, even if the employee had not engaged in protected activity). I note, under *Ridgley v. Dannemiller*, ARB 05-063 (May 24, 2007), the dual motive analysis is unnecessary if protected activity plays no role in the adverse action. Even assuming Mr. Wysocki's complaints played some role in Brave Line's motivation, the respondent has established it would have discharged him for his behavior.

While Mr. Wysocki testified that he had never been counseled and that the allegations by the customers about his behavior were untrue, the facts are otherwise. It is not established that he was terminated because of protected activities, but rather because of his employer's belief in complaints of his very acerbic, confrontational, and threatening conduct.

CONCLUSIONS

The complainant had engaged in protected activities by complaining to the respondent about defects in his assigned vehicles. In all but one instance, these defects were promptly repaired before he was required to travel. The complainant never actually declined to drive, but may have driven under protest. He was terminated after a very brief period of employment. His protected activities were not a factor in his termination. The employer had been made aware of numerous customer complaints about his misbehavior and feared losing customers as well as having gotten a complaint from his coworker. The employer also believed that the complainant had abused their equipment. It is established that Mr. Wysocki was terminated for legitimate, non-pretextual, nondiscriminatory, reasons, independent of any protected activity.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the record, the complaint is DENIED.

A

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. 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). 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 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. § 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(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. §§ 1978.110(a) and (b).