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Office of Administrative Law Judges
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Issue Date: 08 August 2018

CASE NO.: 2015-STA-6

In the Matter of:

RICKEY C. NEWELL,
Pro-se Complainant

v.

AIRGAS, INC.,
Respondent

APPEARANCES:

THOMAS B. HUGGETT, Esq.,
for Respondent

DECISION AND ORDER ON REMAND

This proceeding arises under the employee protective provisions of the Surface Transportation Assistance Act (the Act),[1] and the regulations promulgated thereunder.[2] The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

Background

Complainant filed his initial complaint with the Occupational Safety and Health Administration (OSHA) on 4 Jun 14. OSHA dismissed the complaint on 18 Sep 14. Complainant objected and requested a de novo hearing before the Office of Administrative Law Judges. On 7 Apr 15, I held a hearing at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs. Complainant alleged that he had been fired for (1) complaining about (a) the failure to use complete grid log reporting documents; (b) the failure to clock in/out on callouts and exceeding 14 hours; (c) violating the 34-hour rule and (2) refusing to drive in violation of the hours of service rule.

[1] 49 U.S.C. § 31105 et seq.
[2] 29 C.F.R. Part 1978.

On 2 Oct 15, I issued a decision and order dismissing the complaint. I found that it was more likely than not that Complainant engaged in protected activity by (1) objecting to the failure to complete required grid logs on various occasions up until August 2013; (2) raising the illegality of logging out before working over 12 hours while he was in Shreveport; (3) objecting to the practice of exceeding 14 hours and clocking out with false information in West Monroe; (4) complaining about a 34-hour rule violation in July 2013; and (5) refusing to drive in violation of the hours of service limits on 18 Mar 14 and 25 Mar 14. However, I found Complainant did not establish two allegations of specific alleged activity on 25 Oct 13 and 21 Mar 14. I also found Complainant failed to show that it was more likely than not that any of those protected activities, either individually or in the aggregate, contributed to Respondent's decision to fire him.

Complainant appealed my decision to the Administrative Review Board, which vacated the dismissal and remanded the case.[3] In a post-remand conference call, Complainant indicated that he expected an entirely new hearing. Respondent countered that, given the scope of the remand, there was no need for any additional evidence. I instructed Complainant to file a Motion to Reopen the Record, which Respondent subsequently opposed and I denied.

The Board's decision begins with its own extensive exposition of the facts.[4] It then found material "legal and factual missteps"[5] in my decision and vacated my findings against Complainant as to the allegations of protected activity on 25 Oct 13 and 21 Mar 14. It also noted the failure to consider Complainant's statements on 28 Mar 14 as protected activity. Finally, it vacated my finding that Complainant failed to establish that his protected activity contributed to Respondent's decision to fire him.

Review/Reconsideration on Remand

PROTECTED ACTIVITY

25 Oct 13 and 21 Mar 14

Initial Findings

My original decision found that:

> While working in both Shreveport and West Monroe, Complainant engaged in protected activity by objecting when his supervisors suggested that if he worked 12 hours, he should log out. If Respondent needed him to keep working, he should do that but not clock back in, and be paid later. Complainant

[3] ARB Case No. 007 (January 10, 2018).
[4] The exposition included at least one central fact that I specifically found did not happen. See n.5.
[5] Legal missteps imply a misapplication of law or regulation, whether substantive, evidentiary, or procedural. Legal missteps would include failing to use the correct legal standards and elements for a claim or defense, applying the wrong burdens of proof, or considering or weighing evidence in a way contrary to established law. It is not clear what a "factual misstep" involves. If it involves a finding of contested fact that the Board determines to be unsupported by the evidence and beyond what a reasonable fact finder could conclude; e.g., that witness X was not aware of fact Y; that factual misstep would be addressed with a Board order finding, as matter of law, that witness X was aware of fact Y.

> conceded that he was never actually asked to do that in Shreveport. However, Complainant alleged instances (25 Oct 13 and 21 Mar 14) in West Monroe when he was asked to work off the clock and be paid later to avoid going over hours.
>
> On 25 Oct 13, after Complainant returned from his normal route for the day, he saw a note from his boss, J.T. Ary, asking him to take another load. Taking the load would violate the rules, but at the time, Ary did not understand that, because he thought only driving time counted toward the 12 hour limit. Complainant called Ary about the note, but never mentioned hours of service. Complainant discussed the matter only with Ary, dispatcher J.J. Dahlum, and sales manager Joe Walker. Neither Ary nor Dahlum understood Complainant was objecting to taking the trip at all, much less because of hours.
>
> On 21 Mar 14, after having completed his normal route and leaving work, Complainant got a call for an urgent delivery. Complainant told the customer he probably could not make the delivery, but then drove back to work, because he expected Ary to tell him to do it. Complainant called Ary on the way back and told him it was an opportunity get a customer back, so he would take care of it. Complainant said he was going to clock back in, but never actually mentioned anything about hours of service, although he expressed hesitation about having to drive at night on unfamiliar roads. Complainant made the delivery, clocked in and out correctly, and went over the limit for hours of service. Still unfamiliar with the rules, Ary did not apprehend the implications of Complainant's extra trip in terms of hours of service or believe Complainant was objecting to the trip.

Based on those facts, I found that while Complainant had engaged in protected activity on other divers occasions by objecting to any suggestion that he would drive in excess of the limits by going off the clock, he did not engage in protected activity on 25 Oct 13 or 21 Mar 14.

Board Vacation of Findings

The Board ruled that my "curious" findings "too narrowly defined protected activity with regard to Newell's complaints about driving on October 25, 2013, and March 21, 2014, to require express mention of hours of service violation, particularly when considered within the context of his prior repeated complaints about hours of service violations." The Board further pointed out that although a complainant must demonstrate he had a reasonable belief that the conduct violated pertinent law or regulations, he need not "have necessarily conveyed a notion to have reasonably believed it to his supervisors." It concluded that I erred by requiring Complainant to articulate a specific hours of service violation to Ary and finding the evidence insufficient to establish that he communicated any objection about hours of service violations.

The Board then directed me to reconsider whether Complainant's

> "complaints about driving excessive hours on October 25, 2013, and/or March 21-22, 2014,[6] constituted protected activity notwithstanding that he did not expressly mention that the additional driving would be an hours of service violation and within the context of his repeated past hours of service complaints and his reasonable belief that Airgas expected him to make call-out deliveries and would possibly fire him if he refused."

Discussion and Findings

Much of the law cited by the Board relates to the requirement that Complainant need only have a reasonable belief about a violation. However, I found that Complainant's beliefs about and allegations of actual and potential violations were not only reasonable, but in at least some cases, true. The impediment to finding protected activity as to 25 Oct 13 and 21 Mar 14 was the nature of his communications to Ary.

25 Oct 13

Complainant testified that:

> Even though he never mentioned hours of service, he was sure he complained to Ary before he left and complained to Dahlum when calling to get the address. He also complained to Joe when he left a message to find out the address and Joe called back later.

Ary testified that:

> Complainant called and said he didn't know where the delivery location was. He assumed Complainant had decided to go and told Complainant to get with Mr. Barmore or Mr. Walker for the address. Complainant never said anything about hours of service being an issue and since he did not know the rules, he had no reason to think it was. Even though the delivery was made on Friday evening he filled out paperwork indicating Saturday. That's how he'd seen it done before, to make sure that the driver was paid a minimum of four hours pay.

[6] The Board's order on remand directs me to consider Complainant's complaints about "driving excessive hours" on 25 Oct 13, and/or 21 Mar 14, but I found that Complainant did not complain about "driving excessive hours" on either occasion. I noted that Complainant testified that he never mentioned hours of service and his actions were consistent with his testimony that he knew he was going to be told to go, so he just went ahead. I credited evidence that neither Ary nor Dahlum heard or saw anything that indicated any reluctance on Complainant's part to go, except for concerns about directions and available canisters. Indeed, Complainant testified that on the second occasion, he never mentioned working beyond 14 hours in a day, because Ary knew Complainant had been there earlier that day. Thus, I found Complainant did not mention how long he had worked, most likely because he reasonably (and likely correctly believed) that Ary already knew how many hours he had worked. Complainant likely also reasonably (albeit incorrectly) assumed that Ary realized what that meant in terms of a violation of the rules of hours of service. Nonetheless, I found that Complainant did not complain about "driving excessive hours" on either occasion. Although the Board directed me to consider the fact that he did, it entered no ruling that the record establishes, as a matter of law, that he did so. See n.5.

Dahlum testified that

> He recalls Complainant getting a note to go to Winfield N&R on a late night thing. He does not recall Complainant not wanting to go and JT telling him he had to. He recalls Complainant getting the address off of the internet.

I found it more likely than not that:

> Complainant understood taking the load would violate the rules, but decided to take it anyway, because he assumed Ary would want him to. He called Ary and complained about not having an address. He never mentioned violating hours of service. Because of Ary's misunderstanding of the rules, he did not apprehend that Complainant would be in violation if he took the load.

21 Mar 14

Complainant testified that:

> He got a call for a delivery while he was out with his wife for dinner. He hoped Ary would not make him take the load, but went to the branch anyway, because he expected Ary to tell him to do it. When he got to the branch, he called Ary and said they had gotten a call from a former customer wanting a whole bunch of nitrogen. He told Ary it was too late to make the delivery now and they didn't have what the customer wanted anyway. When Ary told him to take what they did have, he mentioned saving some for their regular customers and Ary said to do that. He told Ary he was going to clock back in and Ary said ok. He never actually mentioned the phrase hours of service or working beyond 14 hours in a day.

Ary testified that:

> Complainant called and told him a prior customer needed gas and he was on his way to the store to take care of it. Complainant called again when he got to the branch and they talked about needing to keep some gas in stock for their regular customers. Complainant said he wasn't real comfortable driving at night on unfamiliar roads, but they had no discussion of hours of service or being over 14 hours in a day. He didn't realize it was an issue, because he still had the understanding that it was only the actual drive time that counted.
>
> On Monday, 24 Mar 14, he contacted Susan Durbin to ask how to fill out the grid log for Complainant's trip, since it was past midnight. She told him to put everything on hold and he then was questioned by Respondent's area vice-president about his knowledge of the 14 hour rule. When he explained what he thought the rule was, he was told not to roll any trucks. After a call with the safety director he was told he was wrong and had to be trained by Ms. Durbin. He ultimately was given a written warning for not knowing the rules.

I found more likely than not that:

> Complainant understood taking the load would violate the rules, but decided to take it anyway, because he assumed Ary would want him to. He called Ary and mentioned being uncomfortable with driving at night[7] on unfamiliar roads. Complainant never mentioned hours of service or going over 14 hours. Because of his misunderstanding of the rules, Ary did not apprehend that Complainant would be in violation and had him take the load.

Given my findings, both alleged protected activities involve the same relevant facts.

- Complainant was asked to take loads that he correctly believed would result in violations of the hours of service rules.
- Complainant elected to take the loads anyway, because, based on his experience with his supervisor, he expected to be told to do so.
- Complainant voiced concerns about other aspects of taking the loads and (on the March load) told his supervisor he was going to clock back in.
- Complainant never raised any objections related to hours of service, but assumed his supervisor would understand there would be violations.
- Complainant's supervisor misunderstood the rules for hours of service and did not realize the loads would result in violations.

A central fact underlying my findings in this case is that Ary did not know the rules and did not understand that Complainant was violating the rules by taking the loads.[8] Moreover, he had no reason to infer from anything Complainant said that Complainant was raising a violation of the hours of service. As a consequence, Complainant, notwithstanding his reasonable and correct beliefs about violating hours of service, never communicated any concerns about hours violations to Ary.

The Board noted that although Complainant must show that his belief about a possible violation was reasonable, he does not necessarily have to show that he conveyed "a notion to Ary that he reasonably believed it." It similarly instructed that a complainant "is not required to show that he communicated his reasonable belief to his managers to prove that his conduct was protected."

[7] Consistent with Complainant's testimony that he objected that it was "too late."

[8] In addressing this issue, the Board noted that the original decision observed that "it seemed unlikely that Ary would be unaware of basic hours of service rules." Indeed, two of the factors the Board directs me to consider in reviewing my findings (*infra*) assume at least in part that Ary knew the rules. However, my observation about Ary was one of general circumstance. I went on to specifically find Ary's testimony credible in that regard and noted that Respondent's subsequent suspension of Ary for lack of rules knowledge was further corroboration that he had no basis from which to infer that any reluctance that Complainant did demonstrate had anything to do with hours of service violations. Moreover, Complainant testified that when he told Ary he was going to clock back in, Ary said that would be ok. That is persuasive circumstantial evidence that Ary did not know the rules. Otherwise, Ary would have known that by clocking back on, Complainant would be documenting a violation. (That is exactly what happened, leading to Ary's discipline and Complainant's termination.) Thus, I found that Ary did not know the rules. Although the Board directed me to consider the fact that he did, it entered no ruling that the record establishes, as a matter of law that he did. See n5.

Nonetheless, I do not understand the Board to have ruled that a reasonable belief that a violation has occurred or may occur is sufficient to constitute protected activity in the absence of any actions or statements by the complainant that would tend to communicate some concern about, identification of, or objection to the violation to a respondent.[9] Based on the facts I found and taking into consideration Complainant's course of conduct in objecting to hours violations to various supervisors and managers, I still concluded that Complainant did nothing (even given his history) on those two occasions to give Ary any reason to think there might be a problem with hours of service.

Moreover, even if I were to reverse my factual finding and take into consideration Complainant's argument and the Board's assumption that Ary knew the trips would be a violation, the additional circumstantial evidence would not tilt the probative scales in Complainant's favor. The finding of no protected activity would remain the same as to those two occasions, because Complainant simply did not do anything to give Ary the impression he was objecting to taking the trip.

28 Mar 14

The Board also found I erred by requiring Complainant "to articulate a specific hours of service violation … to the managers on the conference call on March 28." It noted I failed to consider whether Complainant's statements during the conference call on 28 Mar 14 constituted protected activity in light of the circumstantial evidence of record, when considered as a whole. Complainant did not raise the conference call on 28 Mar 14 as a specific protected activity.[10] As I did not consider whether that conversation constituted a protected activity in any context, I did not require Complainant to articulate a specific hours of service violation.

Complainant testified that:

> On Friday, 28 Mar 14, he was asked why he made the delivery when he was out of hours. He responded that he was doing exactly what he had been made to do by bosses from Mike Pate on, since the first day he started.

Susan Durbin testified that:

> She never heard any complaint from Complainant himself about hours of service issues or heard anyone report that Complainant had concerns about hours of service issues.

[9] Consider as an example a complainant who clearly and correctly understands that accepting an assignment will violate hours of service, but either simply accepts the assignment or refuses the assignment, but instead of mentioning the hours of service, expresses a reluctance to accept the assignment because he is unsure of the directions or the delivery address.

[10] Perhaps in part because he argued that the phone call was a prearranged charade and that the decision to terminate him had already been made, thus rendering any of his statements during the call, even if protected activity, moot in terms of their role in that termination.

Consequently, and in response to the Board's directive on remand, I find that when Complainant was asked on 28 Mar 14 why he took the load on 21 Mar 14 when he was out of hours, he explained that he had been regularly told by his supervisors to drive in violation of hours. Although he did not say anything about having objected to those supervisors, by reporting that he had been ordered on previous occasions to violate hours of service, he engaged in protected activity on 28 Mar 14.

In summary, I found for Complainant on every alleged protective activity with the exception of 25 Oct 13 and 21 Mar 14. However, the Board also directed reconsideration of the evidence of protected activities throughout his employment with Airgas in light of five specific factors:

> (1) Complainant's extensive testimony about his trucking experience and his knowledge of the hours of service regulations, including the requirements for grid and exempt logs, the 34-hour rule, and mandated rest periods;
> (2) Complainant's history of complaining about hours of service violations while working for Respondent and his credible testimony that he just went ahead and violated the rules because he knew he was going to be told to do so;
> (3) Respondent expected its drivers to respond to emergency call-outs as needed and have excess hours compensated as bereavement pay; [11]
> (4) Ary was aware that Complainant would clock in again on Friday and exceed his hours limit because Complainant told Ary he would do that, and Ary saw the resultant grid log on Monday;[12] and
> (5) Ary called Durbin on Monday morning specifically to find out how to submit Newell's grid log for the call-out on 21-22 Mar 14 despite having addressed Newell's almost identical hours of service violation on 25 Oct 13, by clocking the hours on a different day to disguise the violation.[13]

None of these five factors on reassessment change my findings as to Complainant's failure to prove protected activities on 25 Oct 13 and 21 Mar 14. Factor (1) relates to the reasonableness of his belief as to the potential violation, and I found that his belief was not only reasonable, but correct. Factor (2) correctly considers his history of objecting and that he "just went ahead and violated the rules because he knew he was going to be told to do so." However, that is consistent with my finding that he did not say anything, because he did not think it would do any good. Factor (3) is an overstatement of my findings and in any event not directly relevant as to what Complainant said or what Ary knew. Factor (4) assumes that Ary was aware that Complainant would exceed his hours limit. However, I specifically found that Ary did not understand what the hour limit was. Thus, Factor (4) does not apply.[14] Similarly, Factor (5) assumes Ary disguised a

[11] There is some evidence of using bereavement pay to avoid paying hours in violation of rules of service and I found protected activity where Complainant objected to it. However, that protected activity was before the "new edict" in August 2013. Thus, the blanket statement in (3) describing an ongoing course of conduct by Respondent does not reflect any of my findings.

[12] I made no finding that Complainant ever told Ary he was going to exceed his hours. Complainant testified that he did not make any such statement to Ary. My finding is that although Complainant told Ary he was going to clock back in, Ary never realized there was an hours of service violation until Durbin explained the correct rule to him.

[13] I made no finding that Ary was attempting to "disguise" a violation. My explicit finding is that Ary did not understand that there was a violation to "disguise."

[14] In the absence of a finding by the Board as a matter of law that Ary knew the rules.

violation. That assumption requires Ary to have understood the rules, which again is contrary to my specific factual finding. Consequently, Factor (5) does not apply.[15]

Consequently, on remand, I find the same protected activity as I found in my initial decision, now with the addition of the conference call on 28 Mar 14. However, even if I had also found protected activity on both 25 Oct 13 and 21 Mar 14, I would still deny the claim, since Complainant failed to show any protected activity contributed to his termination.

PROTECTED ACTIVITY CONTRIBUTION TO TERMINATION

Initial Findings

My original decision noted that Complainant needed only to show that his protected activity contributed to his termination and that an implicit part of contribution is that the person or persons making the decision to terminate either knew of the protected activity or relied on advice or recommendations from someone who did. I then found that:

> When Ary asked Durbin about how to handle logging the 21-22 Mar 14 hours, she realized Ary did not know the rules, told him to shut down operations until further notice, and called Vice-president Mike Thomas. Thomas told her to wait while he got with safety director Ryan Bobsein and Ary. Thomas then called back to tell her to make sure Ary understood DOT rules and regulations.
>
> Complainant was then asked to join a conference call on 28 Mar 14. Complainant was asked why he broke the rules and answered that he was simply doing what his bosses had been telling him to do from the day he started with Mike Pate. Thomas said he didn't doubt that about Pate, whom he had fired a while back. Complainant did not say anything about having voiced complaints or objections over the years. After Complainant left the call, Bobsein, Director of Human Resources Mike Gibbs, Tom Sprunger, and Thomas discussed the matter and decided to terminate Complainant because of the hours of service violation on 21-22 Mar 14. They were not aware of Complainant having made any objections about violations.

Having found that that the managers who decided to fire Complainant did not know about any of Complainant's protected activities, I concluded that they played no role in his termination.

Board Vacation of Findings

The Board first revisited Complainant's statement and Thomas's response during the 28 Mar 14 conference call. It expressed concern that I had disregarded the call and/or required Complainant to communicate his reasonable belief. It further explained that to correctly weigh evidence, a fact finder must not simply examine each piece of evidence independently, but must consider it with all the other evidence to determine if they support or detract from the premise that the protected activity contributed to the adverse action. The Board noted that under certain

[15] In the absence of a finding by the Board as a matter of law that Ary knew the rules.

circumstances, events that are "inextricably intertwined" may substantiate a finding of causation and cautioned that since fragmenting circumstantial evidence can distort the greater context, ALJs must look at all of the circumstantial evidence as a whole.

The Board then opined that "the key to considering the circumstantial evidence as a whole to determine whether Airgas managers were aware or should have been aware of Newell's protected activities is Thomas's response to Newell's explanation on the March 28 conference call." It then again cited Complainant's history of objections squelched by threats of adverse action.

The Board noted that although Respondent claims it fired Complainant because of the violation of the hours of service rules on 21 Mar 14, Complainant alleges he complained about the impropriety of that very incident[16] and would have been fired had he refused to make the delivery. The Board found that allegation to be credible, based on Complainant's repeated complaints about hours of service violations and ruled that if the 25 Oct 13 and 21 Mar 14 communications are protected activity, they become "inextricably intertwined" with the termination and I should consider whether that connection was a contributing factor in his discharge.

The Board cited as a second reason for the remand my excessive focus on the decision-makers' ***supposed*** lack of knowledge[17] and Ary's ***seeming*** lack of understanding of the basic hours of service rules,[18] instead of determining the "cumulative effect of the circumstantial evidence." It then emphasized that the protected activity need only tend to affect in any way the outcome of the personnel decision and may be a minimal co-factor with lawful factors or even only a necessary link in a chain of events leading to adverse action. It also cautioned that knowledge of the protected activity need not be specific or involve an express violation and is not a separate element, but part of the causation analysis.

The Board directed me to reconsider whether Complainant's protected activity contributed in any way to his firing, giving consideration to his repeated complaints about hours of service violations, the managers' responses to his submission of a proper grid log documenting the 21-22 Mar 14 violation, and the fact that Ary and managers Durbin, Thomas, and Bobstein knew of that hours of service violation the preceding weekend. It also directed me to make specific credibility findings regarding the testimony of Ary and managers Durbin and Thomas that they had no knowledge of Complainant's complaints about hours' regulations. The Board closed by ordering that, in the event I find protected activity on 25 Oct 13 or and/or 21-22 Mar 14, I reconsider the evidence of contributory factor as a whole and collectively weigh all of

[16] I found Complainant did not complain about the impropriety of that very incident as it related to any hours of service violation. Had Complainant done so, he may well have discovered that Ary did not know the rules and ended up not taking the load and committing the violation for which he was ultimately fired. While the Board expressed concern that such an observation "blames" Complainant, it is simply a statement of a fact and a rational extrapolation therefrom, explaining why he did not engage in the protected activity he alleges.

[17] (emphasis added). Notwithstanding the Board's characterization that the decision makers knew only what they heard on the conference call as "supposed," I found it as a fact. See n.5.

[18] (emphasis added). Notwithstanding the Board's characterization that Ary did not know the rules as "seeming," I found it as a fact. See n.5.

Complainant's evidence against all of Respondent's countervailing evidence to determine whether the protected activity contributed to the discharge.

DISCUSSION AND FINDINGS ON REMAND

Findings of Fact

Much of the specific direction in the Board's order of remand deals not with the substantive law to be applied to the facts that I find, but rather how I should weigh the evidence in finding those facts. Specifically the Board instructed me to

- Avoid considering evidence in fragments, but instead look at all of the circumstantial evidence as a whole.
- Remember that circumstantial evidence includes "a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices."
- Consider "internal inconsistencies, inherent improbabilities, important discrepancies, impeachment, or witness self-interest," giving them "the weight which in reason and in the light of judicial experience they deserve."
- Issue my order based "on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."
- Remember that I have a duty under applicable regulations to make my decision based on the record as a whole.

None of that very general guidance is particularly more applicable to this case than any other. It appears that the Board disagrees with some of my findings and is concerned that the disagreement is a consequence of my failure to follow those broad principles. However, I did apply those principles when I weighed the evidence and entered my findings of fact. Consequently, and notwithstanding the Board's apparent contrary view of the evidence, my findings of essential facts remain:

- On divers occasions during his employment with Respondent, Complainant
    - was correctly concerned about being assigned to take loads in violation of the rules related to hours of service.
    - voiced objections about those violations to his supervisors.
    - was told on occasion that if he did not take the loads, he would be fired.
- On 25 Oct 13 and 21 Mar 14
    - Complainant's supervisor was JT Ary.
    - Ary had no formal management training in hours of service.
    - Complainant was asked to take loads that he correctly believed would violate hours of service.
    - Ary did not know the rules concerning hours of service and did not understand that the loads would be in violation of those rules.

    - Complainant discussed the loads with Ary, but never mentioned anything about excessive hours, going over time, or violating hours of service rules, because he expected to be ordered to take the load anyway.
    - Ary had no reason to understand Complainant was concerned that the loads would violate the rules.
    - Complainant took the loads and violated the rules.
- On 24 Mar 14
    - Ary called Durbin to ask how to record Complainant's hours, because they extended from Friday into Saturday morning.
    - Durbin understood that the trip Complainant had taken was an obvious violation of the hours of service rule.
    - Durbin told Ary to shut down truck operations, called vice president Thomas, and explained the violation of rules situation to him.
    - Thomas told Durbin to wait while he consulted with safety director Bobsein and Ary.
- Durbin conducted hours of service training for Ary and Respondent's safety staff reviewed the paperwork related to the 21-22 Mar 14 trip.
- On 28 Mar 14
    - Complainant participated in a conference call with Thomas, account manager Joe Walker, both members of Respondent's safety department, and Human Resources director Tom Sprunger.
        - The 21-22 Mar 14 violation of hours of service was discussed.
        - Complainant was asked why he took the load and answered that he was simply doing what he had been told to do by his bosses, since starting out with Mike Pate.
        - Thomas said he was not surprised to hear that about Pate, who he had fired.
        - Complainant did not tell Thomas that Ary coerced him into taking the load by threatening him or raise having objected to his former supervisors when they asked him to break the rules
    - Thomas, Bobsein, and Sprunger discussed the case and decided to fire Complainant for violating the hours of service.
        - They understood Complainant had, on multiple occasions while employed by Respondent, been directed by various supervisors to violate hours of service, but did not understand that he had objected to his supervisors about being told to do so.
        - They understood the last of those occasions was on 21 Mar 14 when
            - Supervisor Ary sent Complainant on a trip not knowing the rules of service or apprehending that taking the load would result in a violation.
            - Complainant did know the rules, but did not mention the violation or any problem related to hours of service to Ary.

None of those findings involve a mixed question of law and fact or an application of the substantive law. The Board's direction that I reconsider some of those findings and reweigh the evidence in light of its guidance on how to properly consider evidence suggests that it would not make the same findings. The following findings appear to be the most troublesome to the Board:

- On 25 Oct 13 and/or 21 Mar 14, when Complainant discussed the loads with Ary, he never mentioned anything about excessive hours, going over time, or violating hours of service rules.
- On 25 Oct 13 and/or 21 Mar 14, Ary did not know the rules concerning hours of service and did not understand that the loads would be in violation of those rules.
- Thomas, Bobsein, and Sprunger did not know that Complainant had objected to his supervisors about being told to violate the rules.

Indeed, the Board directed me to make specific credibility findings regarding the testimony of Ary and managers Durbin and Thomas that they had no knowledge of Complainant's complaints about hours of service regulations. In that regard, I note that I had the opportunity to personally observe Ary and Durbin testify. I found Durbin to be the most credible witness in the case. Her testimony was internally consistent and straightforward. Her description of the telephone conference call was consistent with Complainant's testimony about the same thing. The same is true of Ary's testimony. It was consistent with the testimony of Complainant, Durbin, and Dahlum. I credited the testimony of both Ary and Durbin as consistent with Complainant's testimony that he found no reason to try to object, since he knew he would be forced to take the load anyway.

I am uncertain as to the Board's direction to specifically make credibility findings as to Thomas, since the record contains no live testimony, deposition testimony, or even affidavit or unsworn written statement from him. It may be that the Board simply seeks a response to its skepticism that Thomas was not aware of Complainant's previous objections. While it is possible that he was, based on my consideration of the entire record and the testimony I found most credible, I found it was more likely that Thomas was not aware of the previous objections.

CONCLUSIONS OF LAW

Turning to questions of mixed law and fact, the Board revisited one of its instructions on how to find facts and cautioned that in determining whether protected activity contributed to adverse action, I must not simply consider each piece of evidence independently, but must consider it in context with all of the other evidence. It also instructed that events that are "inextricably intertwined" may substantiate a finding of causation. It specifically noted that if the 25 Oct 13 and 21 Mar 14 communications were protected activity, they become "inextricably intertwined" with the termination.

The Board then restated the substantive law, clarifying that protected activity may be a minimal co-factor, as long as it tends to affect in any way the outcome of the personnel decision, even as only a necessary link in a chain of events leading to adverse action. The Board specifically faulted the original decision for not determining the "cumulative effect of the circumstantial evidence," but giving too much weight to my findings that the decision-makers knew nothing of

Complainant's history and that Ary did not know the rules. However, it also specifically identified as the key circumstantial evidence showing that Airgas managers knew or *should have known* of Complainant's whistleblowing history the fact that Thomas was not at all surprised to hear Complainant say that driving in violation of the rules is what he had been told to do by Pate.

The inclusion of the phrase "or should have known" is significant. In other parts of its order of remand, the Board conceded that while knowledge is not a separate element, it is part of the causation analysis, even though it need not be specific or involve an express violation. The Board also observed that "knowledge of protected activity is not a separate element, but instead forms part of the causation analysis" and "is a necessary part of the single question of causation and similarly requires that the evidence be considered as a whole." While it noted that "a respondent's knowledge of the protected activity need not be specific, and a complainant need not prove that a respondent knew that the complaint involved an express violation," it also instructed that " . . . proof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone, but may also be established by evidence demonstrating that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity."

If the phrase "should have known" was intended to mean that Complainant need not show actual knowledge of protected activity by anyone involved directly or indirectly in the termination decision, the Board's decision would involve a significant expansionary interpretation of the statutory language beyond current case law. It would mean that ALJs would be required as part of the "should have known analysis" to determine the reasonable span of control and knowledge for a manager. Broadly applied, it could also imply a "unitary Respondent" approach wherein knowledge would be imputed from one level of management to another. I find no clear indication in the Board's decision that it intended to engage in such an expansion. Consequently, I interpret the phrase as simply stating that, as a matter of circumstantial evidence, the fact that managers should have known something may tend to show that they did know it.[19]

To clarify, based on my interpretation of the law, I required Complainant to show that his protected activity more likely than not contributed in some way, even as a minor co-factor with other legitimate factors, in Respondent's decision to terminate him. As part of the circumstantial evidence I weighed in determining whether Complainant carried that burden of proof, I considered whether the evidence established that any of the individuals involved in the decision to terminate Complainant, or any individuals upon whose opinion or advice they relied, were aware of any protected activity on his part.

[19] The same issues are attendant to the Board's language that causation may exist even if the protected activity is only a necessary link in a chain of events leading to the adverse action. Such an interpretation would go even further than applying a "should have known" standard. It would entirely abrogate any requirement of knowledge and replace a cause-in-law analysis with a cause-in-fact analysis, which would be fundamentally inconsistent with the anti-retaliatory purpose of the statue. In the absence of a clear directive from the Board that it intends to depart from established case law and abandon any knowledge requirement, I decline to apply a factual chain of events standard to the contribution analysis.

In response to the Board's specific directions on remand, I do note that in my original decision I did not specifically consider Complainant's statements during the conference call of 28 Mar 14 as protected activity. In response to the Board's specific direction to consider that question, I found that when Complainant told Thomas he had been driving in violation at the direction of his supervisors, starting with Pate, he had engaged in protected activity.[20] On the other hand, notwithstanding having not specifically identified it as protected activity, I still considered the same conduct in reaching my original decision.

Indeed, I considered what Complainant said on the conference call, along with his history of objecting to hours of service violations, and all of the events surrounding the 21-22 Mar 14 violation. Considering the evidence of contributory factor as a whole and collectively weighing all of Complainant's evidence against all of Respondent's countervailing evidence, I find that none of Complainant's protected activity contributed to his termination.[21]

Even if I had determined that what happened on 25 Oct 13 or 21-22 Mar 14 constituted protected activity, my decision would remain unchanged, because it never came to the attention of the people who fired him. In both alternative analyses of causation, I considered Complainant's entire course of conduct and what role it played in the decision to terminate him. Thus, I did consider the extent to which his prior complaints were inextricably intertwined with the protected activity of which Thomas was aware and contributed to the decision to fire him.[22]

Complainant's fundamental position from the very beginning of this case has been that Respondent fired him for doing something he had been ordered to do in the past over his objections. My findings of fact are entirely consistent with that position. Particularly given his status as a pro se litigant, Complainant's frustration at having his complaint dismissed is understandable.

[20] It is important to note that the statement came in response to a direct question from Thomas and did not include any discussion of how often Complainant had tried to object to being told to work over hours. While it does not impact the legal characterization of Complainant's statement to Thomas as protected activity, it is relevant to the causation analysis, as it would indicate that Complainant had simply acquiesced. Such acquiescence does not invalidate the protected activity. However, in this case it meant that the only protected activity of which the decision makers were aware was that Complainant reported, when specifically asked, that he had been regularly driving in violation because his managers told him to. Obviously, the protected activity on 28 Mar 14 has a very close temporal nexus to the adverse action and allows an inference of causation. However I find the weight of the evidence as a whole establishes that it is more likely than not that Complainant was fired for knowingly violating the rule regarding hours of service, not for telling Thomas that he did it or that previous managers had required him to do so. Thomas clearly already knew about the 21 Mar 14 violation and was not surprised to hear about the previous managers, having fired one of them.

[21] My original decision specifically addressed many of the factors suggested by the Board as possible circumstantial evidence of contribution, including temporal nexus, pretext, animus, and attitudes toward compliance.

[22] To conclude otherwise, I would have to impute knowledge to Thomas. See infra.

However, Complainant's argument notwithstanding, he knowingly violated rules ultimately designed to protect the public safety on 21 Mar 14 and was fired for doing so. He was not fired for objecting to do it, refusing to do it, or even disclosing that it had happened.[23] Nonetheless, a strong equitable argument can be made that, particularly as a unitary entity, Respondent does not have clean hands and must accept much of the responsibility for Complainant's violation of the rules. Consequently, it would not be irrational to conclude that Respondent may have acted harshly and even unfairly in firing Complainant.[24] Nonetheless, however compelling, equitable considerations do not override the facts and controlling law.[25] Complainant was a whistleblower on multiple occasions while working for Respondent, but he was ultimately fired not for blowing a whistle, but for violating the rules himself.

ORDER

The complaint is dismissed.

ORDERED this 8th day of August 2018 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

[23] Thomas already knew about the 21 Mar 14 violation and was apparently not surprised to hear about the history with other managers. I considered the possibility that Respondent purposely had an organizational structure that allowed lower level managers to order violations and insulate higher level managers with termination authority from any knowledge of protected activity, but given Ary's ignorance of the rules and Respondent's reaction to it, the evidence did not show that to be the case.

[24] It may seem particularly unfair that Respondent only warned Ary. On the other hand, Respondent may have concluded that it had not properly trained Ary, whereas Complainant clearly knew the rules. In any event, an apparent absence of wisdom or equity in personnel management decisions are relevant in the causation analysis only as possible circumstantial evidence of factors such as pretext or animus and I did consider them in that regard.

[25] The Board closed its order on remand by noting it may set aside a decision if "we 'cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes.'" *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 7 (ARB Sept. 24, 2009) (quoting *Universal Camera*, 340 U.S. at 477-478). That citation omits the subsequent history of the case, wherein the Eleventh Circuit held "Although the ARB acknowledged that it was bound by the substantial evidence standard, the ARB showed little deference to the ALJ's findings with which it disagreed, and it disregarded the ALJ's conclusions supported by substantial evidence in the record." *Stone & Webster Constr., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1133 (11th Cir. 2012). Finding the Board refused to accept ALJ findings based on substantial evidence, the Circuit vacated and remanded the case. (The Board in turn remanded the case to the ALJ (ARB Case No. 11-029-A January 31, 2013), who again dismissed the case (ALJ 13 June, 2013). The Board again vacated the ALJ findings (ARB Case No. 13-074, April 25, 2014) and remanded the case to the ALJ, who again dismissed the complaint (ALJ 9 July 2104). The Board finally affirmed that dismissal (ARB Case No. 14-79 December 15, 2014.)).

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An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

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Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).