U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 November 2019

Case No: 2018-STA-00012

In the Matter of:

WILLIAM E. BUSSE, JR.,
Complainant

v.

HAGENY TIMBER AND LAND
d/b/a M&R TRUCKING,
Respondent.

Appearances:

For the Complainant:
William E. Busse, Jr., *pro se*; Birchwood, Wisconsin

For the Respondent:
Stephen L. Weld, Esq.; *Weld Riley S.C.;* Eau Claire, Wisconsin

DECISION AND ORDER DENYING THE COMPLAINT

PROCEDURAL BACKGROUND

On or about May 2015, William E. Busse, Jr. ("Complainant") filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") alleging that Hageny Timber & Land ("Hageny Timber" or "Respondent") violated the employee protection provisions of the Surface Transportation Assistance Act ("STAA" or "the Act") when it terminated his employment on January 19, 2015 in retaliation for reporting safety concerns about one of the company's trucks. 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978. After investigating, OSHA's Regional Supervisory Investigator dismissed the complaint on October 30, 2017, finding no violation of the Act. Complainant filed objections to the findings and requested a hearing before the Office of Administrative Law Judges ("OALJ"). The matter was then assigned to Administrative Law Judge William Barto and scheduled for hearing.

On September 6, 2018, counsel for Respondent filed *Respondent's Motion to Dismiss or, in the Alternative, Motion Requesting Hearing Be Postponed*. Judge Barto granted the alternative requested relief and issued *Order Cancelling Hearing and Granting Continuance* on September 17, 2018. The case was reassigned to me after Judge Barto's departure from the OALJ upon his selection as the Chief Judge of the Department of Labor's Administrative Review Board. On June 21, 2019, Respondent filed *Notice of Motion and Motion for Dismissal*, which I denied by written order on June 28, 2019.

I then presided over a formal hearing on July 9, 2019 in St. Paul Minnesota.[1] Complainant offered five exhibits. Over objection, I admitted Complainant's Exhibits 1-4 (Tr. at 10-16); Complainant's Exhibit 5 was not admitted into evidence (Tr. at 91-93). Respondent offered and I admitted Respondent's Exhibits 1-4, without objection (Tr. at 16). Additionally, I admitted Joint Exhibits 1-5 (Tr. at 8). Four witnesses, including the Complainant, testified (Tr. at 21-97). At the close of the hearing, I informed the parties that I would take the matter under advisement and issue my decision in due course (Tr. at 97). I have based my decision on all of the evidence admitted, relevant controlling statutory and regulatory authorities, and the arguments of the parties.[2] As explained in greater detail below, I find Complainant has not proven that any activity he engaged in that is protected under the "file a complaint" provisions of the STAA was a factor in the decision to fire him, and deny his complaint.

ISSUES TO BE DECIDED

1. Did Complainant engage in protected activity on January 15 and 19, 2015 when he identified things that needed to be done on a company truck before it would be safe to drive and brought it to the repair shop for service?

2. If so, whether Complainant's protected activity contributed to the Respondent's decision to fire him?

3. If so, can the Respondent show by clear and convincing evidence that it would have fired Complainant in the absence of the protected activity?

4. If not, what relief, if any, is Complainant entitled to receive?

[1] The following abbreviations are used in this decision: "Tr." for the hearing transcript; "CX" for a Complainant's Exhibit; "RX" for a Respondent's Exhibit; and "JX" for a Joint Exhibit.

[2] In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13, slip op. at 2 n. 3 (ARB Mar. 11, 2019) (per curiam), the Administrative Review Board ("ARB") noted that an administrative law judge ("ALJ") need not include a summary of the record in the Decision and Order, as it is assumed that the ALJ reviewed and considered the entire record in making his or her decision. The ARB stated that what is more helpful for its review of whether the ALJ's findings of fact are supported by substantial evidence of record is a tightly-focused set of findings of fact. Accordingly, in this Decision and Order I focus specifically on findings of fact pertinent to the issues in dispute. I have, however, reviewed and considered the *entire* record.

LEGAL FRAMEWORK AND BURDENS OF PROOF

While Complainant never explicitly identifies the specific paragraph Respondent allegedly violated, the employee protection provisions of the STAA prohibit an employer from discharging an employee when: the employee files a complaint about a violation of a commercial motor vehicle safety regulation, standard, or order; the employee refuses to operate a vehicle because such operation violates a regulation related to commercial motor vehicle safety; or the employee has a reasonable apprehension of serious injury to himself or the public because of the vehicle's hazardous safety condition.[3] 49 U.S.C. §§ 31105(a)(1)(A); 31105(a)(1)(B)(i)-(ii).

The current version of the STAA provides that whistleblower complaints shall be governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b)(2)(B)(i). 49 U.S.C. § 31105(b)(1). Under the AIR 21 standard, complainants must initially prove by a preponderance of the evidence that a protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. A "contributing factor" is "*any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[4] If a complainant makes this showing, an employer can avoid liability by demonstrating with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior. 49 U.S.C. § 42121(b)(2)(B)(ii).

Thus, in order to prevail in this case, Complainant must prove: (i) that he engaged in protected activity; (ii) that his employer, Hageny Timber, took an adverse employment action against him; and (iii) that the protected activity was a contributing factor in Hageny Timber's decision to take the adverse employment action. If Complainant satisfies this initial burden by a preponderance of the evidence, Hageny Timber may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action even if Complainant had not engaged in the protected activity.

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[3] The ARB has held that an actual violation need not have occurred; an objectively and subjectively reasonable belief of facts that would constitute a violation is sufficient. *See Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 9-10 (ARB Sept. 30, 2011) (stating that "the protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined."). Although the Eleventh Circuit disagreed in *Koch Foods, Inc. v. Secretary, U.S. Dept. of Labor*, 712 F.3d 476 (11th Cir. 2013), the law of the case varies according to the U.S. Circuit Court that will have jurisdiction. The operative facts in this case occurred in Wisconsin, and it appears the Seventh Circuit has yet to weigh in on this specific issue. Therefore, the standard articulated by the ARB in *Bailey* is controlling.

[4] *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11 (Jan. 6, 2017) (internal citations omitted).

ESSENTIAL FINDINGS OF FACT

Hageny Timber buys and harvests timber in different Northwest Wisconsin counties and also buys timber from private parties, landowners and farmers across the United States; it is owned by Michael J. Hageny. (Tr. at 73-74).

William Busse began working as a driver for Hageny Timber in September 2014. (Tr. at 30). He primarily drove Truck 18, which is a lowboy truck. Busse occasionally worked with other equipment, as he was, and still is, a highly skilled driver and such drivers are always in demand. (Tr. at 29).

Complainant and Respondent are covered by the STAA.

From September 2014 to January 2015, the usual procedure to get repairs completed on company trucks was to call Meyer repair shop and schedule an appointment; drivers did not have to get prior approval from Respondent before getting repairs. (Tr. at 30-32). There was never a time that Respondent did not authorize repair work on any company vehicle, and Respondent never required a driver to operate a company vehicle before necessary repairs were completed. (Tr. at 33, 75).

Thomas Stricklen was promoted to a part-time supervisory position at Hageny Timber on January 15, 2015, which meant that he would also be assigned to drive Truck 18 part-time. (Tr. at 41, 76-77). This change necessitated Busse being reassigned to Truck 12, a logging truck, which was then being driven by Mike Shay. (Tr. at 45-47).

On January 16, 2015, Stricklen met with Busse at Respondent's office in Trego, Wisconsin and told him that he would now be driving Truck 12 instead of Truck 18.[5] Busse was visibly angry with the transfer because he thought he would now be making less money. Busse told Stricklen that he would look for ways to make up for the money he lost, or words to that effect. (Tr. 49, 55; JX 3). Busse did not indicate to Stricklen how he would do this and Stricklen did not then believe Busse intended anything illegal by this remark, but was simply blowing off steam.

About a half hour later, Stricklen, Busse, and Shay did a walk-around of Truck 12; Busse smelled gear lube and Shay pointed out certain things that needed to be fixed, including an expired vehicle inspection, oil change, greasing the chassis, and replacing hoses. (Tr. at 25; JX 3). The repairs involved general maintenance; none constituted an immediate safety issue and the truck was still operable. (Tr. at 51-52, 57). Stricklen authorized Busse to make the repairs. Busse did not tell Stricklen that he believed driving Truck 12 before the repairs were complete would be hazardous to himself or others and did not refuse to drive Truck 12 until the repairs were made. Busse had never complained before that one of Hageny's trucks he was assigned to drive was unsafe. (Tr. at 63, 84).

[5] While Complainant testified that he met with Stricklen and Shay on January 15, 2015, he also mentioned that he met with them on a Friday; January 15 is a Thursday. Based on his later testimony stating that he met with Stricklen on Friday (Tr. at 24) and based on Stricklen's testimony (Tr. at 53), I determine that Complainant meant Friday, January 16, 2015.

Stricklen decided that Shay would drive Truck 12 on Saturday on regular company business and Busse would pick up the truck the following Monday morning and drive it to Meyer repair shop. (Tr. at 52). However, Busse went to Shay's house on Saturday, January 17, 2015, and took the truck without Shay's knowledge or permission and then drove it to Meyer for service around 1 p.m. on Monday, January 19, 2015. (Tr. at 53, JX 3). Busse texted Stricklen what was being done on the vehicle, which included an oil and filter change, resealing the transmission shift tower, dome lights, and repairs to the power divider input yoke and steering shaft. Stricklen thought Busse was being nitpicky with the list and trying to run up the bill. (Tr. at 25, 53-54, 56-57, 63; RX-2).

Whatever issues Busse had with Truck 12 were not enough to stop him from driving it away from Shay's residence on Saturday and driving it to the repair shop the following Monday. (Tr. at 29).

Busse never refused to drive Truck 12; he wanted the repairs to Truck 12 completed so that he could continue on with his normal route, which Stricklen had authorized during the walk-around on January 16, 2015. (Tr. at 29). Neither Stricklen nor anyone at Hageny Timber told Busse to drive or otherwise operate any truck that Busse believed was unsafe.

After the meeting with Stricklen and Shay on Friday, January 16, Busse called Kevin Tripp, a Hageny subcontractor, to complain that he would not be making the same amount of money driving Truck 12 because he would now be paid by the percentage of what the truck grossed instead of by the hour and said, "Well, if I'm going to make less money than what I was making, I'm going to have to steal a load of firewood to make up the difference," or words to that effect. Tripp, who had originally recommended Busse as a driver to Mike Hageny, called Stricklen and shared this information with him sometime over the weekend, but was not involved in the decision to fire Complainant (Tr. at 55, 69, 76; JX 3, 4). Because of the threat to steal lumber to make up for anticipated lost wages, Stricklen decided to fire Busse sometime after Busse arrived at Meyer repair shop on January 19, 2015 and called Hageny to inform him of the decision, who concurred. (Tr. at 57, 80).

Around 3:30 p.m. on January 19, 2015, while Busse was still at Meyer waiting for the repairs to Truck 12 to be completed, Stricklen tried to call Busse but did not get an answer. So, Stricklen texted Busse that he was fired. Stricklen did not give a reason.

Mike Hageny called Busse on April 7, 2015, telling him Stricklen said he was fired for threatening to steal lumber. (Tr. at 27).

Busse filed his complaint with OSHA on or about May 2015. (Tr. at 26). Busse now alleges "I was terminated at the garage for that truck being in the garage." (Tr. at 28).

CONCLUSIONS OF LAW

Unfavorable Personnel Action

Under the STAA, any discharge by an employer constitutes an adverse action and a discharge is any termination of employment by an employer.[6] I find that Complainant's discharge on January 19, 2015 constitutes an adverse action under the Act.

Protected Activity

The "refusal to drive" and "file a complaint" clauses of the STAA are potentially applicable under the facts of this case. 49 U.S.C. §§ 31105(a)(1)(A); 31105(a)(1)(B)(i)-(ii).

Refusal to Drive

Protected activity does include refusing to operate a vehicle. *Id.* at § 31105(a)(1)(B)(i)-(ii). However, in this case, Complainant never actually refused to operate any of the Respondent's trucks. When questioned about whether he had refused to operate any of the Respondent's vehicles, including Truck 12 on the day of his termination, Complainant responded "No, sir….I took that vehicle to the shop to get it up to snuff so it could get put to work. Mr. Hageny only wanted somebody professional in that truck hauling wood, and I was trying to do that." (Tr. at 29). Accordingly, because Busse actually drove the vehicle on Saturday, January 17 and Monday, January 19, 2015, there can be no protected activity under the STAA's refusal to operate clause. *Calhoun v. United Parcel Service*, 576 F.3d 201, 209 (4th Cir. 2009). That leaves whether Busse informing Stricklen about Truck 12's alleged deficiencies on January 16 and 19, 2015 is a protected activity under STAA's file a complaint clause.

File a Complaint

Safety complaints under § 31105(a)(1)(A) may be made to management or a supervisor and may be "oral, informal, or unofficial." *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-041, slip op. at 4 (ARB Mar. 27, 2012). For a court to consider a complaint protected activity, a complainant needs to demonstrate that he reasonably believed that there was a safety violation. *Id.*; *see also Gaines v. KFive Constr. Corp.*, 742 F.3d 256, 267-68 (7th Cir. 2014); *Guay v. Burford's Tree Surgeon's, Inc.*, ARB No. 06-131, ALJ No. 2005-STA-45, slip op. at 6-8 (ARB June 30, 2008). The standard for determining whether a complainant's belief is reasonable is both objective and subjective. For the subjective component, the complainant must show that he actually believed a violation occurred and for the objective component, complainant must show that a reasonable employee in the same circumstances would think that a violation occurred. *Garrett v. Bigfoot Energy Services*, ARB No. 16-057, ALJ No. 2015-STA-47, slip op. at 7 (ARB May 14, 2018). The complaint need only "relate" to a

[6] *Minne v. Star Air, Inc.* ARB No. 05-005, ALJ No. 2004-STA-26, slip op. at 13-15 (Oct. 31, 2007); *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19, slip op at 10 (ARB Sept. 30, 2010).

violation of a commercial motor vehicle safety standard and "[u]ncorrected vehicle defects, such as faulty brakes, violate safety regulations and reporting a defective vehicle falls squarely within the definition of protected activity under STAA." *Maddin v. Transam Trucking, Inc*., ARB No. 13-031, ALJ No. 2010-STA-20, slip op. at 6-7 (ARB Nov. 24, 2014). In other words, protection under the complaint clause is not dependent on actually proving a violation of a federal safety provision. *See Yellow Freight System, Inc., v. Martin,* 954 F.2d 353, 357 (6th Cir. 1992). Rather, it is sufficient to show reasonable belief in a safety hazards.

There is no dispute that Busse identified deficiencies and defects in Truck 12 to his supervisor, Stricklen, during the pre-transfer walk around on January 16, 2015 and then again to Stricklen by text while at the repair shop on January 19, 2015.

Some of the alleged truck violations were "an invalid sticker, a steering bearing sector…the drive shaft, the shifting tower, the lower fluids…and there were air leaks and stuff," and that the "invalid sticker" and "a steering bearing sector that the federal law says you cannot drive with a worn, welded, or missing steering component." (Tr. at 25). On this point, I find Stricklen's testimony regarding Respondent's long standing commitment towards vehicle safety compelling and that Respondent never denied any driver's requests for repairs to any of its trucks. However, even if the deficiencies to Truck 12 did not constitute actual regulatory violations or have any apparent effect on the vehicle's operability or road safety, that is not the standard and simply reporting a defective vehicle under these facts is a protected activity.

Accordingly, I find Busse has established that he engaged in protected activity under the STAA's "file a complaint" clause when he informed Stricklen of various repairs that needed to be done to Truck 12.

Contributing Factor Causation

However, even if Complainant's actions constitute protected activity under the Act, he must still establish by a preponderance of the evidence that the protected activity was a contributing factor to his discharge. It is here that Complainant falls short.

A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008). The trier of fact considers all relevant evidence in determining whether there was a causal relationship between a complainant's protected activity and the adverse employment action alleged. *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, slip op. at 21 (ARB Jan. 6, 2017), *aff'd Powers v. U.S. Dep't of Labor*, 723 Fed. Appx. 522 (9th Cir. 2018) (unpub.); *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13, slip op. at 8 n. 37 (ARB Mar. 11, 2019) (per curiam) (emphasizing that the *Powers* decision allows the trier of fact to consider all relevant evidence at the contributory factor causation stage).

The parties have dramatically different views of what motivated Respondent to fire Complainant, largely focusing on whether Respondent's articulated reason for discharging

Complainant – that he threatened to steal customers' lumber to make up for perceived lost wages – was the real reason for the discharge. Complainant argues that he was discharged because he had raised safety concerns about the new truck he was assigned to drive and that he never was actually going to steal lumber.

Temporal proximity

Evidence of proximity in time between protected activity and the adverse employment action can raise an inference of causation. Temporal proximity is not a dispositive factor, but just one piece of evidence for the trier of fact to weigh. *See Spelson v. United Express Systems*, ARB No. 09-063, ALJ No. 2008-STA-39, slip op. at 3 n.3 (ARB Feb. 23, 2011). Even with evidence of temporal proximity, the complainant still has the burden of establishing the causation element by a preponderance of the evidence. *Id*. An inference of causation may be broken by an intervening event or by lack of knowledge of the protected activity by the decision-maker. *See Dho-Thomas v. Pacer Energy Marketing*, ARB No. 13-051, ALJ Nos. 2012-STA-46, 2012-TSC-1, slip op. at 5, n. 12 (ARB May 27, 2015); *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-37, slip op. at 6 (ARB Oct. 17, 2012); *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. at 12 (ARB June 17, 2019) (per curiam) (causal inference based on temporal proximity diminished by intervening events showing a reasonable concern by employer that complainant was charging official time while engaged in personal activities).

In the instant case, there is no dispute that Busse notified his supervisor of various deficiencies to and necessary repairs for Truck 12 on January 16, 2015, and again around 1 p.m. on January 19, 2015. Complainant was fired at about 3:30 p.m. on January 19, 2015. Thus, I find that there was temporal proximity between the timing of Complainant's repair concerns and his discharge.

Intervening event and other factors

Although I find that there was temporal proximity between Busse's repair concerns and his discharge, other factors undercut the weight to be given to this temporal proximity.

First, there was even closer temporal proximity between the time Tripp called Stricklen on January 17 or 18 and told him about what Busse had said to him on January 16 about stealing lumber. The timing of this incident, which occurred after the initial notification of vehicle deficiencies at the company yard on January 16, supports a conclusion that this specific declaration, attributed to the Complainant by the same individual who had recommended him for the job in the first place, was the proximate cause of Complainant's discharge. Moreover, Stricklen was the decision-maker on the discharge and he flatly denied making the decision to terminate Complainant because of repair work to Truck 12.

I find that Stricklen was a credible witness. His testimony was precise and not embellished. He conceded in a non-evasive way when his memory was not good. His testimony was consistent with the timeline of events and with the documentary evidence of record.

Against Stricklen's precise testimony, Complainant offers only speculation that he was fired for taking Truck 12 in for repairs. Having a merely plausible theory of motivation is insufficient to carry Complainant's burden of establishing contributory factor causation by a preponderance of the evidence.[7]

The relevant inquiry is Respondent's perception of its justification for the discharge. *Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 230 (6th Cir. 1987). A complainant cannot prove contributory factor causation primarily based on a respondent's inability to prove the appropriateness of a disciplinary charge. A respondent does not have the burden of proving the correctness of a disciplinary charge, but rather that protected activity did not cause the discipline in whole or in part. *Wevers v. Montana Rail Link, Inc.,* ARB No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. at 12 (ARB June 17, 2019) (per curiam). Complainant's speculation as to Stricklen's motives is just that – speculation. Contributory factor causation is not a high burden for a complainant. However, in this case, the scant evidence supporting Complainant's version of events does not outweigh the other evidence of record supporting Stricklen's credible and unambiguous testimony that the decision to terminate was made after Tripp told him that Complainant threatened to steal timber to make up for perceived lost wages.

On this point, I find that Stricklen credibly testified that Busse told him on January 16, 2015 that he would look for ways to make up for he anticipated loss of wages if he was to switch to the new truck. However, it was only after Tripp called Stricklen sometime on January 17 or 18, 2015 and relayed a conversation with Complainant where he said that he would steal lumber to make up for the difference that Stricklen realized what Busse intended. After that conversation, Stricklen decided to fire Busse, with Hageny in agreement. That Stricklen took no action against Complainant during the walk around on January 16 and, in fact, specifically authorized Busse to take the truck in for repairs on Monday, January 19, supports this conclusion especially in the context of the company's long standing history of emphasizing vehicle safety and always authorizing drivers to get necessary repairs without first having to get pre-approval from management. It belies common sense that Stricklen retaliated against Busse for taking Truck 12 in for service when he authorized that service in the first place.

Regarding Respondent's contributing factor burden, my role is not to question whether Tom Stricklen's decision to fire William Busse was wise or based on sufficient "cause" under Hageny's personnel policies, but only whether looking at all the evidence, did the protected activity contribute at all to Stricklen's decision to fire Busse.[8] I find it did not. The decision to fire Busse was not made until Tripp called Stricklen after the vehicle walk-around on January 16, 2015 and relayed Busse's threat of stealing customer property. Whether Busse actually intended to steal property is immaterial. What is material is Stricklen reasonably believed Busse was

[7] *See Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461 (9th Cir. 2018) (finding that, at the merits stage, an FRSA complainant must show by a preponderance of the evidence that the protected activity was a contributory factor in the adverse action, not just that circumstances would permit that inference).

[8] The STAA does not forbid unfair employment actions; it forbids retaliatory ones. *See, e.g., Toy Collins v. American Red Cross*, 715 F.3d 994, 999 (7th Cir. 2013); *Brown v. Advocate S. Suburban Hosp*., 700 F.3d 1101, 1106 (7th Cir. 2012).

serious. As a company supervisor, Stricklen could not risk putting Hageny Timber in legal jeopardy by taking the chance Busse was simply joking.[9]

The decision to terminate Complainant as a driver for Hageny was a business decision, and not in retaliation for bringing Truck 12 to the repair shop or complaining about what needed to be fixed. Whether this court would have made the same decision is not the issue as "federal courts do not sit as a super-personnel department that re-examines" an employment decision. *Kuduk v. BNSF Ry. Co.,* 768 F.3d 786, 792 (8th Cir. 2014). I find that Complainant has not established by a preponderance of the evidence that any protected activity contributed to Respondent's decision to fire Complainant. In other words, Respondent did not retaliate against Complainant under the Act.

Respondent's Affirmative Defense

As I find that Complainant's protected activity did not contribute to Respondent's decision to fire him, Respondent is not required to establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

SUMMARY

Complainant's firing is an adverse action under the Act. I also find Complainant engaged in protected activity under the Act's "file a complaint" clause when he identified problems with Truck 12 on January 16, 2015 and noted various repairs that were needed on January 19, 2015. However, I find such protected activity did not contribute in any way to Complainant's January 19, 2015 discharge, which was based solely on his threat to steal lumber to make up for the reduction in income he thought would happen with the transfer to Truck 12.

[9] *See Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13, slip op. at 9 (ARB Mar. 11, 2019) (per curiam) (finding that even if the complainant sincerely believed that she was not stealing, it would not change the effect of the supervisor's belief that there had been a theft when making the determination to fire the Complainant).

ORDER

Accordingly, IT IS ORDERED that the complaint filed by William Busse with the Occupational Safety and Health Administration against Hageny Timber is DENIED.[10]

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

[10] The regulations [at 29 C.F.R. 1978.109(d)(2)] provide that "[i]f the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint." *Buie v. Spee-Dee Delivery Services, Inc*., ARB No. 2019-015, OALJ No. 2014-STA-00037 slip op. at 2 (ARB Oct. 31, 2019) (per curiam).

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. § 1982.110(a). 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. § 1982.110(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, 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, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(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. §§ 1982.109(e) and 1982.110(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. §§ 1982.110(a) and (b).