U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 November 2019

CASE NO.: 2019-STA-8

In The Matter Of

D'VORAK SMITH,
Pro Se Complainant,

v.

JONES BROS. DIRT & PAVING CONTRACTORS INC.,
Respondent.

APPEARANCES:

JEFFERY THOMASON, Esq.,
for Respondent.

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act (the Act)[1], and the regulations promulgated thereunder,[2] which are employee protective provisions. 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.

PROCEDURAL BACKGROUND

Complainant filed his initial complaint with the Occupational Health and Safety Administration (OSHA) on 3 Oct 18. OSHA dismissed the complaint on 3 Feb 17, citing Complainant's refusal to assist in its investigation. Complainant objected and requested a de novo hearing before the Office of Administrative Law Judges. On 16 Jul 19, 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.[3]

[1] 49 U.S.C. § 31105 et seq.
[2] 29 C.F.R. Part 1978.
[3] On page 68, the transcript begins to refer to me as "Judge Romero." That is a typographical error and I, not Judge Romero, was the judge speaking in the hearing. Claimant did not file a post hearing brief.

My decision is based on the entire record, which consists of the following:[4]

Witness Testimony of

Complainant
Billy Torres
Steve Scalzo

Exhibits

Respondent's Exhibits (RX) 1-9

FACTUAL BACKGROUND

Complainant was working for Respondent as a truck driver when he refused to operate a truck. He was suspended for a short period of time, returned to work, but ultimately lost his commercial truck driving license for reasons unrelated to his employment with Respondent.

ISSUES IN DISPUTE AND POSITION OF THE PARTIES

Complainant maintains that Respondent suspended him after he engaged in protected activity when he complained about unsafe tires on one truck and refused to drive another with the same problem. Respondent denies that he ever engaged in protected activity by making any such complaints and argues that it suspended him because he refused to operate a truck that was safe to drive.

LAW

The Act provides that

> (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, or …
> (B) the employee refuses to operate a vehicle because--
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security;
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition …
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or

[4] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

> security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.[5]

To prevail on his claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the respondent took an adverse employment action against him, and that his protected activity was a contributing factor in the unfavorable personnel action. If he proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.[6]

Although it is not necessary that a complaint expressly cite the specific motor vehicle standard that it is alleges has been violated, the complaint must "relate" to a violation of a commercial motor vehicle safety standard. For a finding of protected activity under the complaint clause of the Act, a Complainant must show that he reasonably believed he was complaining about the existence of a safety violation.[7]

Where a complainant's protected activity is a refusal to drive because it would have resulted in a violation of a regulation, standard, or order, he must prove the operation of a vehicle would actually violate safety laws under his reasonable belief of the facts at the time he refuses to operate the vehicle. The reasonableness of the refusal must be subjectively and objectively determined.[8]

A complainant must prove that operation of the vehicle would in fact violate the specific requirements of the fatigue rule at the time he refused to drive.[9] If the refusal is based on an apprehension of injury, it must be reasonable.[10]

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[5] 49 U.S.C. § 31105.

[6] 75 Fed. Reg. 53545, 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii); *Salata v. City Concrete, LLC*, 2008-STA-12 and -41 (ARB Sept. 15, 2011).

[7] *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-23, slip op. at 8 (ARB Dec. 31, 2007); *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 11 (ARB Sept. 14, 2007); *Ulrich v. Swift Transportation Corp.*, 2010-STA-41 (ARB Mar. 27, 2012).

[8] *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No 10-001, Sept. 30, 2011; *Sinkfield v.Marten Trans. Ltd.*, ARB No. 16-037 (ARB Jan. 17, 2018).

[9] *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ARB Sept. 30, 2008.

[10] *Roadway Exp., Inc. v. Dole, 929 F.2d 1060*, (C.A.5 1991).

EVIDENCE

Complainant testified at hearing*[11] *and deposition*[12] *in pertinent part:

He was born in 1965 in Odessa, Texas. He went to Permian High School, but dropped out in the eleventh grade. He got his first commercial driver's license in 2008. He has worked for four different companies as a driver. He first started with Respondent as a laborer, but started driving for them in 2016. He drove cabs with various trailers attached. It just depended on what they needed that day. He was making $1,500 or $1,600 a week.

Respondent has a subcontractor who works for a tire company that checks the tires, but only when they complain about the tires. The contractor doesn't get out of his truck and wasn't there on 27 Sep 18, anyway. If a tire is bad, the contractor is paid to change them. He tells the contractors about bad tires every day. Respondents' equipment is trash. They make all that money, but won't buy any tires.

On 27 Sep 18, he went to work and popped his hood for his pre-trip inspection. If he remembers correctly, he might have already run a load that day to Rankin. He doesn't think he did. He noticed the tires were slick and had Steven Scalzo and Nicholas Brewer look at them. He told them he was not going to drive the truck with those slick and unsafe tires. They didn't get out of their truck, but just looked out the door at the tires. The tires with the problem were on the driver-side back cab. In the yard, they came right up to the truck to see if they smelled alcohol.

Scalzo told him to go get another unit and drove off with Brewer. He complained about that truck to them, also. He's not sure if they came over to look at the second truck. They drove back up about three minutes later and told him to sign a paper saying that he was suspended for three days for insubordination. The paper is RX-1. He signed it. His signature is not on RX-1, but he doesn't know what would have happened to the original. The signature on RX-1 is not his. He signed the original on the right side. He does not recall Brewer suspending him because he refused to drive.

He recalls his deposition and remembers being asked to bring all communication concerning unsafe equipment. He recalls that he brought the logbook to the deposition. One page of the logbook goes to the company and he keeps one page. He answered that the pre-trip book was the only communication he had. He might've worded that wrong.

At his deposition he testified that the last inspection in his log book was from 27 Sep 18 with truck 8321 and trailer 61962. He testified at the deposition that the logbook entry was in his handwriting and signed by him. When asked at his deposition to bring all documents supporting his claim that he refused to operate unsafe equipment, he answered that before the suspension he would say his pre-trip inspection log would be the only document.

[11] Tr. 29-71.
[12] RX-2.

RX-4 is his copy of the pre-trip inspection report for 27 Sep 18. He falsified the report to show that the tires were bad. RX-5 is the original of the inspection and says the tires are good. He lied on the form in order to make a living. The original of the document does not show that the tires are bad, but the other copy does, so he made a mistake. He submitted the false pre-trip inspection report even though the tires were slick as shown in the pictures. He did that and lied to Respondent to make money.

He did not do a pre-trip inspection report on the second unit they asked him to drive, because he was angry. He may have said in his deposition that it was because he was lazy. Either way, the tires were messed up.

He does not recall if he took the pictures of the tires when he came back from the suspension. At his deposition, he was asked to show the pictures of the tires from his phone. He testified at his deposition that he took the pictures before he left that day. His answers might be a little inconsistent. Eventually, the judge ordered him to send the pictures to Respondent's Counsel. He doesn't know if the pictures were actually taken six days after he was suspended. He took the pictures when he came back. He thought he took them the day he was suspended, but after they looked at his phone, they said the pictures were from 2 Oct 18. He was nervous at his deposition.

The pictures do show how the tires looked the morning of 27 Sep 18. He believes the first two pictures in RX-6 are from 8321, the first truck he refused to drive. There is nothing on the pictures of the tires that shows the tires belonged to one of Respondent's trucks. He made that mistake when he took the pictures.

A log entry for 26 Sep 18 included an inspection report of the same truck and indicated that the tires were satisfactory. He doesn't know if 8321 was a new truck. If it was a new truck, he doesn't understand why the tires were bad.

He is pretty sure that there was a warning light that came up on truck 8321. He doesn't recall if it happened the day of his suspension. He doesn't recall taking a picture of the dashboard warning. At his deposition he said he wasn't sure which one was the second unit he was asked to drive. He didn't take pictures of the second truck.

The tires didn't become slick all of a sudden. They were like that for a time. He finally decided to complain about it because he got sick and tired of all the unsafe equipment. That day he decided enough was enough. Everyone else was scared to speak up.

After he received the paper suspending him, he left the yard. He thinks he got a few belongings out of his truck. He was out for three days on suspension and probably lost about $600. When he came back to work after the suspension, the tires were still on the truck. He went ahead and drove the truck because he needed the money. He lied on his inspection book when he said the tires were in good condition.

After he made his claim, Respondent started giving him lighter loads, which meant less money. He figures the total he lost was about $4,000. He does not recall if he was on probation during the time he was suspended. He had to stop driving because his driver's license was suspended after a DWI.

Billy Torres testified at hearing in pertinent part:[13]

He has worked for Respondent for 18-19 years. He is currently a supervisor/foreman in the trucking department. He would have been one of Complainant's supervisors. RX-1 is an employee disciplinary report. It has his signature about a third of the way from the bottom. He signed the document because Complainant refused to drive a truck that they asked him to drive. Respondent had two other trucks that needed drivers. He was Complainant's supervisor at the time. He took over for Nicholas Brewer in June 2018. Brewer moved to a new department and would've had no supervisory authority over Complainant. Brewer was not present at the yard on the day Complainant was suspended.

On that day, Complainant called him between 7:30 and 8:00 am, complaining that truck 8321 had a failed sensor and was going into shutdown mode. The truck was a 2017 model. He told Complainant to park the truck and unhook the trailer, so he could take the truck to the dealership for repair. Complainant refused to drive it even that far because it would be unsafe. He told Complainant that was all right, but to get another truck and hook it up to the trailer.

Complainant immediately responded that he was not going to do that and drive any "raggedy ass" truck. Complainant did not take time to inspect another truck, but told him he was going home. It was Complainant's idea to go home. No one told him to leave. Complainant was then suspended for not taking the second truck. The log indicates that Complainant drove the unit for approximately 130 miles on 27 Sep 18. There is no indication of any problem with the tires.

RX-5 is a driver vehicle inspection report for unit 8321, the unit with the sensor problem. Respondent does have a contractor who comes out every morning to inspect the tires and make sure they are safe. Since they are paid to replace tires, they have an incentive to identify and correct safety problems with tires. His experience with the contractor is that they fix unsafe tires when they see them. He would be surprised if a bad report was made on unit 8321, because the truck is only a little more than a year old and subject to regular inspections by the contractor.

The type of wear in the pictures in RX-6 would take months to accumulate. It would not happen in two or three days. It would not be on one of Respondent's trucks, because they are inspected.

After Complainant left, he told Scalzo what had happened. They decided to suspend Complainant and wrote the disciplinary report. When Complainant came back they gave him the report, but he refused to sign it.

[13] Tr. 80-95.

Stephen Scalzo testified at hearing in pertinent part:[14]

He is Respondent's Superintendent for DOT compliance in trucking. He was Billy Torres' supervisor on 27 Sep 18. He had no conversations with Complainant about the condition of any equipment in Respondent's lot on that day. Complainant did not point to him or otherwise communicate with him that there were bad tires on some of the equipment.

The first time he heard of any problems was from his foreman, Billy Torres. Torres told him that Complainant had refused to drive a truck that was available and left work. Torres told him Complainant had said he was not going to drive any "raggedy ass" truck. He took that to mean Complainant just didn't want to work that day. Complainant had never complained about tires on other trucks.

Respondent has a third-party contractor who inspects equipment for safety, including tires. Tire replacement is a significant part of their business with that contractor. Unit 8321 was a new unit. He was never informed that there were tire deficiencies on unit 8321.

The reason Complainant was suspended was because he refused to follow directions to take a second vehicle out. The suspension had nothing to do with unit 8321. RX-5 indicates that unit 8321 was safe to drive. On 27 Sep 18, Nicholas Brewer was not present at the yard where Complainant was assigned.

Nicholas Brewer testified at deposition in pertinent part:[15]

He is currently employed with Herc Rentals as a tractor-trailer driver. He started working for Respondent in 2015. He was friends with Complainant at work, although they did not socialize away from the job. There was one time before June 2018 that he had to write Complainant up for insubordination. He told Complainant to do something and Complainant refused.

He moved out of Complainant's department in June 2018 and was no longer Complainant's supervisor. He had nothing to do with the disciplinary action in September 2018. He first became aware that Complainant had filed a complaint against Respondent when he received a notice for this deposition. Complainant never asked him to testify on his behalf against Respondent.

[14] Tr. 97-103.
[15] RX-8.

DISCUSSION

Complainant's testimony was relatively consistent with the allegations in his bill of particulars and OSHA complaint. He asserts that he went to work, complained about unsafe tires on one truck, was told to drive another truck, saw the other truck also had unsafe tires, refused to drive it, and was suspended.

However, his testimony was fraught with inconsistencies, uncertainties, and confusion. His demeanor on the stand gave the impression that he truly believes he had been wronged, but simply was unable to clearly and reliably either recall or communicate the facts of what happened. Much of what he said was contradicted by other evidence.

For example, he was uncertain as to whether he had already run a load before complaining about the tires on the first truck, but didn't think he did. Torres testified that the logs established that Complainant had already driven the truck for about 130 miles. That would be consistent with Torres's testimony that the real problem Complainant told him about with the first truck, was a failed sensor. Complainant testified that a warning light did come up on that truck, but couldn't recall what date it happened.

Complainant was certain that he reported the bad tires to both Scalzo and Brewer and was frustrated with the suggestion that Brewer wasn't there. However, both Brewer and Torres testified that Brewer was no longer assigned to that yard and Scalzo corroborated that testimony.

Complainant testified at deposition that he took the pictures of the tires the same day he refused to drive the trucks, but then decided at hearing that he wasn't sure when he took the pictures. He further testified that he was suspended the same day he refused to drive. However, Torres' and Scalzo's statements are consistent that he was not given the disciplinary suspension report until he returned to work a few days later.

Complainant testified that the tires had been unsafe for a time, but he had finally decided not to put up with it. He also indicated that he was not sure that the first truck was a new truck, but if it was, he agreed he could not understand why the tires would be worn down that quickly. He conceded that Respondent had a contractor to check the tires for wear, but said the contractor didn't do its job. On the other hand, Torres and Scalzo explained that the contractor was paid for the work it did, and would have every motive to report and repair problems.

In short, while Complainant appeared to be earnest, his testimony was internally inconsistent, contradicted by other reliable evidence, and not particularly credible. The other witnesses' testimony was more consistent and credible. Based on the weight of the probative evidence in the record, I find that more likely than not:

> On 27 Sep 18, Complainant took truck 8321 and drove it for approximately 130 miles. While he was driving, a shutdown sensor light illuminated. He reported the failed sensor to Torres, who instructed him to detach the trailer and take the truck to the dealership for repair. Complainant objected, telling Torres that would be unsafe to drive the truck even that far.

> Torres accommodated Complainant's objection by asking him to get another truck and hook it up to the trailer so the delivery could still be made. Complainant refused, telling Torres he was not going to drive any "raggedy ass" truck and was going home. When Complainant returned to work a few days later, he was given a suspension for refusing to take the second truck.

Given the unreliable nature of his testimony, the record fails to establish that Complainant ever communicated to Respondent he was concerned about worn tires or even had a reasonable belief that the tires were unsafe. His refusal to drive the second truck was not a protected activity.

Complainant did engage in protected activity when he refused to drive the truck with the sensor warning and potential shutdown issue, but Respondent simply asked him to take another truck. Complainant did suffer an adverse action when he was suspended, but only after refusing to drive the second truck. The evidence falls far short of establishing that it is more likely than not that the refusal to drive the truck with the sensor warning contributed in any way to the suspension.

ORDER

The complaint is dismissed.

ORDERED this 20th day of November, 2019 at Covington, Louisiana.

PATRICK M. ROSENOW
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

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, 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).