In the Matter of:

MATTHEW P. COPPOLA, SR., **ARB CASE NO. 02-114**

COMPLAINANT, **ALJ CASE NO. 02-STA-13**

v. **DATE: August 29, 2003**

QUALITY ASSOCIATES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Lawrence C. Sgrignari, Esq., ***Gesmonde, Pietrosimone, Sgrignari & Pinkus, L.L.C., Hamden, Connecticut***

For the Respondent:
Jennifer L. Cox, Esq., ***Pepe & Hazard, LLP, Southport, Connecticut***

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), and the implementing regulations at 29 C.F.R. Part 1978 (2001). Based on our review of the record and the ALJ's decision, we adopt the ALJ's recommendation to deny the complaint.

BACKGROUND

The STAA protects employees from retaliation for engaging in specific types of activities that are related to motor carrier vehicle safety. 49 U.S.C.A. § 31105(a)(1)(A) – (B). On or about June 22, 2001, the Complainant Matthew P. Coppola, Sr., filed a complaint alleging that the Respondent, Quality Associates, Inc. (Quality), retaliated against him for pursuing safety-related issues covered by the STAA. Specifically, Coppola alleged that Quality terminated him from his work driving a dump truck because he had raised vehicle safety concerns to his employer and

had participated in an accident investigation conducted by the Department of Labor's Occupational Health and Safety Administration (OSHA). Following investigation of Coppola's termination complaint, OSHA dismissed the complaint as lacking merit. Coppola requested a hearing before an Administrative Law Judge (ALJ), which was held on February 7, 2002. Following that hearing, the ALJ issued a Recommended Decision and Order (R. D. & O.) concluding that the evidence established that Coppola had engaged in safety-related activities protected by the STAA but also established that Quality would have taken the same termination action in the absence of such activity. The ALJ accordingly recommended denial of the complaint.

Pursuant to 29 C.F.R. § 1978.109(a), (b) (2002), the ALJ forwarded the case to the Administrative Review Board for review. On July 8, 2002, the Board issued a Notice of Review and Briefing Schedule pursuant to Section 1978.109(c)(2), affording the parties an opportunity to file briefs. Each party responded that it would not file a brief in this matter.

DISCUSSION

The Board has jurisdiction to decide this case pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

Under the STAA, the Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp. Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making an initial decision. . . ." 5 U.S.C.A. § 557(b)(West 1996). *See also* 29 C.F.R. 1978.109(c) (providing for issuance of a final decision and order by the Board). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

The ALJ provided a thorough discussion of the relevant evidence and a clear explanation of his resolution of conflicts in the evidence. R. D. & O. at 3-20. Furthermore, the ALJ's conclusion that Quality would have terminated Coppola even if he had not engaged in protected activity is fully supported by the ALJ's factual findings and is otherwise in accord with applicable law. With the clarification of the ALJ's analysis that follows, we therefore incorporate herein the attached R. D. & O.

The ALJ found that Coppola had offered evidence of protected activity, evidence that Fernand F. Russo, Jr., the Quality manager who made the termination decision, was aware of the

protected activity when he made that decision, and evidence of temporal proximity between the protected activity and the termination decision. R. D. & O. at 21-23. The ALJ further concluded that this evidence was adequate to raise an inference of a causal nexus between the protected activity and the termination decision. *Id.* at 23. It is unclear, however, whether the ALJ properly determined that Coppola had carried his burden to establish – by a preponderance of the relevant evidence – that Coppola's protected activity played a role in the termination decision. R. D. & O. at 2-3, 21-25; *compare* R. D. & O. at 23 (concluding that "the Complainant has met his burden of establishing that the Respondent's termination decision was, at least in part, motivated by retaliatory considerations.") *with* R. D. & O. at 24 (stating that the credible evidence suggests that "the protected activity did not play a role in the Respondent's decision to terminate [the Complainant's] employment."). *See Ass't Sec'y v. Minn. Corn Processors, Inc. (Helgren),* ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003) and cases there cited.

Any error in the ALJ's analysis of whether Coppola had established the elements of his whistleblower case by a preponderance of the evidence is harmless, however, as it does not affect the outcome in the case. The ALJ's ultimate conclusion, that a preponderance of the evidence established that Quality terminated Coppola because of his speeding and performance problems, and that Quality would have terminated Coppola on those grounds even in the absence of his protected activity, R. D. & O. at 2-3, 25, is fully supported by the ALJ's factual findings. Furthermore, the ALJ's conclusion disposes of the case under the affirmative defense available to an employer in cases in which the adverse employment action was based both on activity protected by the STAA and on factors unrelated to such protected activity. *See Clean Harbors Envtl. Servs.*, 146 F.3d at 21-22. We therefore adopt the ALJ's recommendation to deny the complaint.

CONCLUSION

Accordingly, we adopt the ALJ's recommendation and, with the clarification set forth herein, incorporate the ALJ's recommended decision that is attached, and **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge