U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

RONALD N. SCHWARTZ, **ARB CASE NO. 02-122**

COMPLAINANT, **ALJ CASE NO. 01-STA-33**

v. **DATE: October 31, 2003**

YOUNG'S COMMERCIAL TRANSFER, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Ronald N. Schwartz*, pro se, Fresno, California*

For the Respondent:
Larry D. Barber, Controller, *Porterville, California*

FINAL DECISION AND ORDER

This case arises under the employee protection provision 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 (2000). 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 August 9, 2000, the Complainant, Ronald N. Schwartz, filed a complaint with the Department of Labor Occupational Health and Safety Administration (OSHA) alleging that the Respondent, Young's Commercial Transport (YCT), retaliated against him for pursuing safety-related issues covered by the STAA. *See* OSHA Dep. Reg. Admr. Lee's ltr. dated Mar. 1, 2001 at attached Secretary's Findings, ¶3(a). Specifically, Schwartz alleged that YCT terminated him from his job hauling freshly harvested tomatoes to a processing plant because he had "refused to accommodate the company's illegal demand to drive in an unsafe condition," in order to comply with the "fatigue rule" applicable to commercial motor vehicle operators. *See id.* at attached Schwartz's ltr. dated July 8, 2000; *see also* 49 C.F.R. §§ 392.2 (Fed. Motor Carrier Safety Regs.; Applicable operating rules), 392.3 (Ill

or fatigued operator) (2000); Cal. Code Regs. tit. 13, § 1214 (Driver Condition) (2000).[1] Following investigation by OSHA, Schwartz's complaint was dismissed as lacking merit. Schwartz requested a hearing before an Administrative Law Judge (ALJ), which was held on February 26, 2002. Following that hearing, the ALJ issued a Recommended Decision and Order (R. D. & O.), concluding that Schwartz had not engaged in activity that qualified for STAA

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[1] Section 392.2 provides that :

> Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Highway Administration imposes a higher standard of care than the law, ordinance or regulation, the Federal Highway Administration regulation must be complied with.

49 C.F.R. § 392.2. Schwartz cites both the Federal Highway Administration fatigue rule and the State of California's counterpart to that provision in support of his complaint. *See, e.g.,* Schwartz's Post-Hearing Exhs. 2, 3, submitted Mar. 15, 2002. The California provision reads as follows:

> Driver Condition.
>
> > A driver shall not drive when his/her ability to operate a vehicle safely is adversely affected by fatigue, illness, or any other cause.

Cal. Code Regs. tit. 13, § 1214. The Federal provision reads as follows:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. However, in a case of grave emergency where the hazard to occupants of the commercial motor vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the commercial motor vehicle to the nearest place at which the hazard is removed.

49 C.F.R. § 392.3. The California provision arguably imposes a lower threshold of infirmity under which a driver would be considered impaired, in which case it would supersede the Federal provision at 49 C.F.R. § 392.3, pursuant to Section 392.2 of the Federal regulations quoted above. For purposes of deciding this case, it is unnecessary for us to resolve the question of which fatigue rule is controlling here.

protection. R. D. & O. at 6-9. The ALJ therefore concluded that Schwartz had failed to establish an essential element of his STAA complaint and accordingly recommended that the complaint be denied. R. D. & O. at 9.

Pursuant to 29 C.F.R. § 1978.109(a), (b) (2002), the ALJ forwarded the case to this Board for review. YCT advised the Board that it would not file a brief. Schwartz filed a brief in which he raises a number of objections to the ALJ's disposition of various discovery-related issues. *See* 29 C.F.R. § 1978.109(c)(2). We have 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. 64,272 (Oct. 17, 2002).

Based on careful review of the record and the ALJ's decision, we concur in the ALJ's ultimate conclusion that the complaint be denied. We agree, however, with Schwartz's contention that the ALJ failed to properly respond to Schwartz's requests that the ALJ authorize subpoenas or otherwise compel YCT to produce certain business records for Schwartz's examination. As we discuss herein, at least some of the YCT records Schwartz requested fell within the range of materials that are properly discoverable in an employment discrimination case. Furthermore, contrary to the ALJ's ruling, Schwartz's requests for intervention in the discovery process by the ALJ were timely made. Nonetheless, as we also explain, the facts that Schwartz hoped to establish through those records are not determinative of the outcome in this whistleblower complaint. As the ALJ's errors in responding to Schwartz's discovery-related requests do not affect the outcome of this case, we accordingly hold that those errors are harmless. *See generally Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 6-7 (ARB Aug. 1, 2002) (applying 29 C.F.R. § 18.103(a)(2) (exclusion or admission of evidence that would otherwise be erroneous will only support assignment of error if "a substantial right" of the complaining party has been affected by the evidentiary ruling)).

STANDARD OF REVIEW

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).

FACTUAL BACKGROUND

Unless otherwise noted, the following facts are essentially uncontested:[2]

YCT employed Schwartz to work as a truck driver hauling freshly harvested tomatoes from fields to a processing plant during the harvest season, which spans approximately three months. Pursuant to Section 395.1 of the Federal Highway Administration regulations, such agricultural transport operations are exempted from coverage by the Federal drivers' hours of service provisions found at 49 C.F.R. § 395.3. 49 C.F.R. § 395.1(a), (k); *see* OSHA Dep. Reg. Admr. Lee's ltr. dated Mar. 1, 2001 at attached Secretary's Findings, ¶6(a). The State of California hours of service regulations that apply to such agricultural transport permit a driver to drive continuously for longer periods and to drive for a greater number of aggregate hours within a specific number of days than are allowed for operations covered by the Federal regulation at Section 395.3. *Compare* Cal. Code Regs. tit. 13, § 1212(a), (k) *with* 49 C.F.R. § 395.3. Prior to being hired, Schwartz attended an orientation session conducted by YCT owner/manager Scott Daniel. Hearing Transcript (HT) at 36-37 (Daniel). Daniel explained that the drivers would be expected to work 12-hour shifts on a regular basis and to work an indefinite number of shifts on successive days. HT at 36-37 (Daniel). Schwartz testified that he understood when he took the job that working 12-hour shifts on successive work days was expected, and that he had worked 12-hour and even 16-hour shifts when previously employed in similar agricultural operations. HT at 25-26 (Schwartz).

YCT transports tomatoes around the clock during the harvest season, which starts around the beginning of July and runs for approximately 100 to 115 days. HT at 12 (Schwartz), 34, 36-37 (Daniel). Schwartz would have preferred to be assigned to the day shift, which ran from 6 a.m. to 6 p.m., but he was instead assigned to the night shift, working from 6 p.m. to 6 a.m. HT at 26-27, 52 (Schwartz).[3] Schwartz was advised on June 28 that he had been assigned to the night shift and that he should report for work on the evening of June 29. HT at 18 (Schwartz), 45-46 (Duncan). YCT expects drivers to need "a night, maybe two" to acclimate to working the

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[2] Because of the discovery-related errors that we discuss later in this decision, we cannot adopt the ALJ's factual findings as they are based on an evidentiary record that is arguably incomplete. *See* 29 C.F.R. § 1978.109(c)(3). To resolve that evidentiary issue, we base our disposition on facts that are not in dispute, i.e., where both parties have offered evidence regarding a relevant fact, which is essentially in agreement, or where only one party has offered evidence regarding a relevant fact and that evidence has not been challenged by the other party, even in argument.

[3] The parties dispute whether Schwartz had initially been told after the orientation session that he would be assigned to the day shift and that he was surprised when he received the YCT call on June 28 telling him that he would be assigned to the night shift. HT at 7, 26-28, 52 (Schwartz), 36 (Daniel).

night shift at the beginning of the season. HT at 39 (Daniel); *see* HT at 46 (Duncan). Daniel testified that it was critical to the operation, however, that the drivers begin within a few days to work 12-hour shifts so as to fully utilize YCT trucks around the clock and thus minimize the number of loads that YCT must contract out for hauling. HT at 38 (Daniel); *see* HT at 47 (Duncan). YCT drivers are paid on a per-load basis, with the amount per load based on the distance between the fields and the processing plant. HT at 12-14 (Schwartz), 36-37 (Daniel). YCT must pay contractors who drive their own trucks more than it pays YCT drivers. HT at 38 (Daniel); *see* HT at 47 (Duncan).

YCT transports tomatoes from fields in the San Joaquin Valley, beginning the season with hauling tomatoes from the fields in the southern part of the valley, where the tomatoes ripen first. HT at 13-14 (Schwartz). The processing plant that YCT serves is located in the central part of the Valley. HT at 13 (Schwartz). The trips from the fields to the plant are longer at the beginning and at the end of the season, when the harvest is being hauled from the fields at the southernmost and northernmost areas of the Valley. HT at 13-15 (Schwartz), 36-37 (Daniel). At the beginning of the season, the trips to the processing plant and back take approximately six hours, but the shorter trips later in the season take as little as two or three hours. HT at 15 (Schwartz), 36-37 (Daniel).

Schwartz began work on the night of June 29. Although the parties dispute whether Schwartz was asked to haul a second load on June 29, 30, July 1 and 3, the parties are in agreement that Schwartz did not haul a second load on those four nights. HT at 15-20, 28-30, 42-43, 49-50 (Schwartz), 38-40, 42 (Daniel), 46-49 (Duncan). Schwartz worked approximately six hours each of those four nights, hauling tomatoes from a site near Bakersfield to the processing plant at Helm, California, for a round-trip distance of approximately 240 miles. HT at 13 (Schwartz). On July 2 and 4, Schwartz hauled two loads each shift, and thus worked full 12-hour shifts each night. HT at 15-16 (Schwartz), 38-40, 42 (Daniel), 48-49 (Duncan). On July 4, Schwartz told the YCT dispatcher, Joseph Duncan, that he was tired, and he later paused to rest during the 12-hour shift. HT at 16, 18-19, 21, 58-61 (Schwartz), 48-49 (Duncan). On July 5 at about 3 p.m., Schwartz telephoned the day shift dispatcher to advise that he "only felt safe to do one run, not two" that night. HT at 20-21 (Schwartz). When consulted by the dispatcher, Daniel decided that Schwartz should simply not report for work that night, because a contractor would not want to handle just one load. HT at 40 (Daniel). Schwartz complied. HT at 20 (Schwartz).

On July 6, Daniel phoned Schwartz and told him that his employment was terminated. HT at 20 (Schwartz), 39-41 (Daniel). Daniel testified that he terminated Schwartz's employment because he did not believe that Schwartz would "get the job done" for YCT. HT at 39-40 (Daniel). After pursuing relief through State government agencies in California, Schwartz was

referred to the regional OSHA office, where he filed this complaint on August 9, 2000. *See* OSHA Dep. Reg. Admr. Lee's Ltr. dated Mar. 1, 2001 and attachments.[4]

ISSUES PRESENTED

This case presents these two basic legal issues:

1) Did the ALJ commit prejudicial error in denying the Complainant's requests for subpoenas and other assistance to compel production of YCT records in discovery?

2) Did YCT terminate the Complainant's employment because he engaged in protected activity?

DISCUSSION

Discovery-related issues

Schwartz urges that the ALJ erred in denying his requests that the ALJ authorize subpoenas or otherwise compel YCT to produce specified business records for Schwartz's examination.[5] The ALJ denied Schwartz's December 26, 2001 request for subpoenas covering

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[4] Schwartz initially attempted to include a breach of contract claim under California law in this complaint. HT at 7, 26-27 (Schwartz). The ALJ properly advised Schwartz that the STAA employee protection provision does not cover such claims and that the breach of contract claim was not properly before him. HT at 7; *see* 49 U.S.C.A. § 31105.

[5] The procedural history of the case indicates that Schwartz experienced a number of problems in engaging in discovery. Schwartz made repeated written inquiries for clarification of the ALJ's orders and for other rulings necessary to facilitate discovery without obtaining significant results. *See* Schwartz's Aug. 23, Aug. 28, Sept. 2, Sept. 21, Sept. 27, Oct. 9, Oct. 24, Dec. 5, Dec. 10, Dec. 19, 2001 ltrs. to ALJ; Schwartz's Dec. 17, 2001 ltr. to YCT; ALJ's Nov. 6, 2001 Memorandum of Telephone Conference [held on Oct. 25, 2001]; ALJ's Jan. 17, 2002 Order [denying Schwartz's subpoenas request]. In addition, the ALJ directed Schwartz to the Federal Rules of Civil Procedure (FRCP) rather than the several discovery-related provisions contained in the Office of Administrative Law Judges Rules of Practice and Procedure at 29 C.F.R. Part 18. *See* Schwartz's Dec. 5, 2001 ltr. to YCT; Schwartz's Dec. 19, 2001 ltr. to ALJ; ALJ's Nov. 6, 2001 Memorandum of Telephone Conference. Section 1978.106(a) requires that the Part 18 rules be applied in STAA adjudications "[e]xcept as otherwise noted" under the Part 1978 regulations. 29 C.F.R. § 1978.106(a). Inasmuch as Part 1978 does not contain provisions for conducting discovery in STAA proceedings but clearly contemplates discovery as a part of STAA adjudications, Part 18 discovery procedures are fully applicable. *See* 29 C.F.R. §§ 1978.106 – 1978.111 (litigation provisions); *see also* 29 C.F.R. § 1978.107(a) (providing that the complainant can "engage in discovery, present evidence and act as a

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eight categories of YCT records.[6] In his January 17, 2002 Order, the ALJ stated that Schwartz's request for subpoenas was untimely, and he summarily concluded that Schwartz's document requests were "overly broad, vague and not relevant." ALJ Order dated Jan. 17, 2002. The ALJ did not cite any pertinent legal standards or otherwise provide a rationale for these rulings. *Id.; see Khandelwal v. Southern Calif. Edison,* ARB No. 98-159, ALJ No. 97-ERA-6, slip op. at 5 (ARB Nov. 30, 2000) (reversing as arbitrary judge's unexplained denial of request for extension of discovery deadline to accommodate party's jury duty obligation); *see also* 5 U.S.C.A. § 557(c)(3)(A) (West 1996) (requiring agency decisions to provide "a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or

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party," even in a case in which the Assistant Secretary for OSHA is prosecuting the case). Pursuant to Section 18.1(a), FRCP provisions "shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. § 18.1(a). The record indicates that the ALJ directed Schwartz to conform his requests for YCT documents to the requirements of the FRCP but contains no suggestion that the ALJ had found the rather detailed Part 18 discovery rules to be lacking, thereby necessitating resort to the FRCP for guidance. *See* ALJ's Nov. 6, 2002 Memorandum of Telephone Conference; *cf. Hasan v. Burns & Roe Enterprises,* ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 3-4 (ARB Jan. 30, 2001) (citing § 18.1(a) and drawing guidance from Supreme Court case law applying FRCP 26 regarding the scope of discovery).

[6] Schwartz requested subpoenas for the following documents, which YCT had not provided in response to his December 5, 2001 letter requesting documents production:

Item 1 – All phone number accounts involved in any communication from defendant or defendant's associates, to plaintiff that reflect calls to (559) area code and 439 prefix between the dates of 6/29/2000 until 7/8/2000;

Item 2 – All notes pertaining to all drivers similar to the note written by Joseph Duncan, identified as "attachment (b.2)" contained in plaintiff's employee file;

Item 3 – All truck dispatch records related to operations at the Helm facility from 6/29/00 to 7/8/00 which establish the dispatch and return times, and the fields serviced. Request made in reference to statements made in "attachment (b.1) & (b.2)" in plaintiff's employee file;

Item 4 – Records that establish which tomato trucks (and drivers) were processed through grading and at what times they were processed, limited to dates July 4 and July 5[,] 2000 at the processing plant at Helm, California;

Item 5 – All payroll records limited to drivers based at the Helm facility during tomato season 2000;

Item 6 – All driver's log records for tomato season 2000 at the Helm plant;

Item 7 – [B]usiness records which identify drivers terminated at the Helm facility for tomato season 2000;

Item 8 – [A]ll business records that identify accounts serviced by Helm facility for tomato season 2000.

Schwartz's Dec. 19, 2001 ltr. and attached subpoena forms.

discretion presented on the record . . . ."). At hearing, Schwartz requested the ALJ to reconsider the January 17 ruling in view of Daniel's testimony that YCT had records that would support Daniel's statements that all drivers, including Schwartz, had been offered second loads on all the six nights Schwartz worked. HT at 42-43 (Schwartz); *see* HT at 41-42 (Daniel). The ALJ again denied Schwartz's motion without providing an adequate rationale. HT at 43-44 (ALJ).

As indicated by Daniel's testimony, at least one category of YCT records sought by Schwartz was clearly relevant. Schwartz requested truck dispatch records for the period basically comprising his employment with YCT. Schwartz's Dec. 19, 2001 ltr. at attached subpoena form for Item Number Three (quoted in n.6 *supra*). Those records are relevant to the credibility of YCT's contention that Schwartz, and all other drivers, were offered second loads every night beginning with June 29, but that Schwartz declined to accept the second loads he was assigned on four of the six nights that he reported to work. *See* R. D. & O. at 3-4. Such evidence falls squarely within the parameters of materials that are properly discoverable in an employment discrimination case.[7] *See* 29 C.F.R. § 18.14(a) (Scope of discovery; providing that "the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding . . . ."). YCT's concerns regarding the disclosure of dispatch information containing references to other employees could have been effectively addressed through mutual agreement of the parties or a protective order issued by the ALJ. *See* 29 C.F.R. §§ 18.15, 18.21(d); *Hasan v. Burns & Roe Enterprises*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 3-4; *Khandelwal*, slip op. at 6, n.4 (majority opin.), at 8-9 (concurring opin. of Member Brown); *see also Administrator, Wage & Hour Div. v. HCA Med. Ctr. Hosp. (Nurses PRN of Denver, Inc.)*, ARB No. 97-131, ALJ No. 94-ARN-1, slip op. at 9-10 (ARB June 30, 1999). Finally, the ALJ's conclusion that Schwartz's December 26 request was untimely is simply not reasonable, particularly in view of the difficulties encountered by Schwartz – including the failures of both YCT and the ALJ to respond in a timely and proper manner to Schwartz's discovery requests.[8] *See* n.5 *supra*. For the reasons discussed below, the ALJ's discovery-related rulings do not affect the outcome of this case.

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[7] Another category of records identified by Schwartz in his December 26 request, drivers' logs, are similarly relevant, although the scope of the records sought should have been limited to Schwartz's period of employment rather than the entire 2000 tomato season. *See* Schwartz's Dec. 19, 2001 ltr. at attached subpoena form for Item Number Six (quoted in n.6 *supra*). In view of the pro se status of each party before the ALJ it might well have facilitated the proceedings if the ALJ had specifically referred the parties to the applicable provisions of 29 C.F.R. §§ 18.15, 18.19 and 18.21 early in the discovery process. *See generally Young v. Schlumberger Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003) (discussing ALJ's additional responsibilities in his role as neutral decision-maker when case involves a party who proceeds pro se).

[8] Schwartz's December 26 request was submitted two months before the hearing. The documents for which Schwartz requested subpoenas were the documents requested in Schwartz's December 5, 2001 letter to YCT. Moreover, they were also the documents Schwartz requested in

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The merits of the whistleblower complaint

To prevail in a STAA complaint, a complainant must establish by a preponderance of the evidence that he engaged in protected activity and the employer was aware of such activity, that the employer took adverse employment action against the complainant, and that there is a causal connection between the protected activity and the adverse employment action. *See Asst. 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) (citing *Moon v. Transp. Drivers*, 836 F.2d 226 (6th Cir. 1987) and *BSP Transp., supra*).

a) Protected activity

The ALJ correctly identified protected activity as an essential element of Schwartz's case and proceeded to weigh the conflicting evidence regarding whether Schwartz had established that he engaged in a protected work refusal on the afternoon of July 5. R. D. & O. at 6-9.[9] The ALJ found that Schwartz had failed to establish that he had engaged in activity protected by the STAA on July 5. *See id.*

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previous correspondence directed to the ALJ. *See* Schwartz's Aug. 23 and Oct. 9, 2001 ltrs. Schwartz served copies of the August 23 and October 9 letters – as well as all other inquiries regarding discovery that Schwartz addressed to the ALJ contained in the case record – on YCT. *See* n.5 *supra.* In regard to a complaint filed under the employee protection provisions of a number of the environmental protection statutes that are also administered by the Department of Labor, a Federal District Court recently held that an administrative law judge does not have authority to issue a subpoena without a specific statutory grant of such authority. *Bobreski v. U.S. Envt'l Prot. Agency*, No. 02-0732(RMU), 2003 WL 22246796, at *6-*8 (D.D.C. Sept. 30, 2003). Regardless of whether the ALJ is authorized to issue subpoenas pursuant to the STAA, he clearly does have the authority to take measures to compel production pursuant to Sections 18.6(d) and 18.21.

[9] The ALJ properly identified the elements that a complainant must establish to prevail in a STAA complaint, but referred to a complainant's prima facie case rather than the elements required to prevail on the complaint. R. D. & O. at 6, 9. Since all the issues of Schwartz's whistleblower complaint were adjudicated at hearing before the ALJ, consideration of whether Schwartz had met the preliminary requirement of establishing a prima facie case was unnecessary. *See U.S. Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 713-14 (1983); *Johnson v. Roadway Exp.,* ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 7 n.11 (ARB Mar. 29, 2000). After a whistleblower case has been fully tried on the merits, the question for the administrative law judge is whether a complainant has carried his ultimate burden of establishing the requisite elements of the case by a preponderance of the evidence. *See BSP Transp*., 160 F.3d at 46; *Moon*, 836 F.2d at 229.

However, in addition to the STAA protection for work refusals that was discussed by the ALJ, R. D. & O. at 6-9, *see* 49 U.S.C.A. § 31105(a)(1)(B), the STAA also protects the raising of complaints related to motor vehicle carrier safety, *see* 49 U.S.C.A. § 31105(a)(1)(A). Safety-related complaints that may qualify for coverage include those raised to an employer as well as to government authorities. *See Spinner v. Yellow Freight,* No. 90-STA-17, slip op. at 8-9, 10, 11-12 (Sec'y May 6, 1992), *aff'd sub nom. Yellow Freight v. Martin,* 983 F.2d 1195, 1198-99, 1200 (2d Cir. 1993). A complaint regarding fatigue that is made independent of a work refusal may qualify for protection under the STAA complaints clause. *See Asst. Sec'y v. Besco Steel Supply (Brown),* No. 93-STA-00030, slip op. at 3, 5 (Sec'y Jan. 24, 1995).

In this case, the complaint that Schwartz filed with OSHA on August 9, 2000, alleged retaliation for both the voicing of a safety concern on July 4 and for engaging in a work refusal on July 5. *See* Schwartz's ltr. dated Aug. 6, 2000 at attachment A. Both Schwartz and YCT dispatcher Duncan testified that Schwartz told Duncan that he was tired and needed to pause to rest before completing a 12-hour shift on the night of July 4. HT at 16-19 (Schwartz), 48-49 (Duncan). The record thus contains evidence of fatigue rule-related activity that may qualify for protection under the STAA.

b) Causation

At hearing, Daniel testified that he had decided to terminate Schwartz's employment based on Schwartz's performance on the six nights he had worked, June 29 through July 4, along with Schwartz's apparent inability to haul two loads on the night of July 5. Daniel stated that his review of Schwartz's work history as of July 6 brought him to the conclusion that Schwartz was not going "to get the job done" for YCT by working 12-hour shifts on a continuing basis. HT at 39-40 (Daniel).

The uncontradicted evidence regarding Schwartz's work history fully supports Daniel's testimony. As we explain in greater detail below, that evidence establishes that Schwartz failed to demonstrate that he was prepared to take on the rigors of performing, on a continuing basis, the 12-hour overnight shifts required by the YCT job. We therefore conclude that Schwartz has failed to establish by a preponderance of the evidence that YCT terminated his employment in retaliation for engaging in protected activity. *See Clement v. Milwaukee Transp. Servs.,* ARB No. 02-025, ALJ No. 01-STA-6, slip op. at 8-9 (ARB Aug. 29, 2003); *Schulman v. Clean Harbors Envtl. Servs.,* ARB No. 99-015, ALJ No. 98-STA-24, slip op. at 9-10 (ARB Oct. 18, 1999).

As we have already discussed within the context of the ALJ's discovery-related errors, the parties dispute whether or not Schwartz was offered second loads on the shifts that began on June 29, 30, July 1 and 3. It is uncontested, however, that regardless of the reason, Schwartz had worked a full, 12-hour shift on only two nights, July 2 and 4. HT 15-20, 28-30, 42-43, 49-50 (Schwartz), 38-40, 42 (Daniel), 46-49 (Duncan). It is also uncontested that Schwartz had complained of fatigue on one of those nights, July 4. HT at 16, 21, 18-19, 58-61 (Schwartz); 40 (Daniel), 48-49 (Duncan). It is similarly not disputed that Schwartz telephoned Duncan on July

5 and complained of fatigue that Schwartz believed would prevent him from completing a 12-hour shift beginning at 6 p.m. that evening. HT at 17, 19-20 (Schwartz), 40 (Daniel), 48-49 (Duncan). In short, it is undisputed that over the course of the seven nights he was scheduled to work, Schwartz had demonstrated his ability to work 12-hour shifts on two, non-consecutive nights; that he had advised the dispatcher on the second of those nights, July 4, that he needed to rest before completing the shift; and that he had then called in the following day, July 5, to advise that he was too fatigued to commit to a full 12-hour shift that night.

Furthermore, uncontradicted evidence establishes that the only reason given by Schwartz for his fatigue on July 4 and 5 was the demands of the job. HT 16, 18-20, 29-30, 58-61 (Schwartz), 48-49 (Duncan). At hearing, Schwartz contended that he had not been given adequate notice to provide time for a proper transition to overnight shift work. HT 18, 25-26, 52 (Schwartz). He also testified that, as the work week went on, he "was just overwhelmed." HT at 18 (Schwartz). The fact that Schwartz had been hauling only one load and thus working approximate 6-hour shifts on June 29, 30, and July 1, 3 – regardless of whether he had been offered second loads on those nights – bolsters Daniel's testimony that he believed Schwartz had been given adequate time to transition to the overnight shift by July 5. HT at 40 (Daniel). The number of hours worked by Schwartz in his seven days with YCT thus undermines his argument that he was suffering from an "accumulated sleep deficit" on July 5, *see* Schwartz's Mar. 19, 2003 ltr. to ARB at 10.

In addition, the record contains statements by Schwartz that effectively acknowledge that he was unprepared to take on the rigors of the 12-hour shift work on a continuing basis. At hearing, Schwartz stated that he found the 12-hour shift requirements of the YCT work "acceptable" but he added that being assigned to the overnight shift "produced a real difficult situation" that was "absolutely not acceptable." HT at 26-27 (Schwartz). Statements included in a January 12, 2002 letter to the ALJ that Schwartz submitted on March 15, 2002 as a post-hearing exhibit provide further support for the conclusion that Schwartz was not prepared to perform 12-hour shifts, consisting of two 6-hour round trips, on consecutive work days. Schwartz described his work with YCT thus:

> In that first week, the assignments initially required one (but sometimes, in the latter part of that week, two trips) from Helm, California to the intersection of State Route 166 and Interstate 5 (near Bakersfield, California). In my case, this was in addition to a daily two-hour commute from Fresno. In that first week Young's was not able to offer an assortment of assignments such that the 12-hour shift could be filled in a way other than two trips to Bakersfield because that was all that was available at the start of the season. I understood that as the season progressed, this situation would improve. On nights when two trips occurred the amount of work would almost fill 12 hours of continuous work, and sometimes more. In that first week there was consternation among the drivers because on the night shifts the company would, in the early part of the week, only deliver one run to Bakersfield

> (which paid about $65.00). This meant that some driver[s] could not earn close to the pay that was advertised, at least not in that first week. A few times during the latter part of the week the company did offer a second Bakersfield run, but even this was problematic because the time and mileage requirements would be so tight that on that second run, if the driver was delayed for any reason, their return time would go past 6:00 AM which would adversely affect the day schedule.

Schwartz's Jan. 12, 2002 ltr. at 5. Also in the January 12 letter, Schwartz stated that, despite his objections to YCT operations, "It didn't occur to me to quit the company, because I knew that it would take time for more, less distant fields to open up as the season progressed which would make the work more manageable for all concerned." *Id.* at 6. When the "less distant fields" were harvested, that meant shorter round trips for each load of tomatoes hauled, with some trips taking as little as two hours. *See* HT at 36-37 (Daniel). Considered in conjunction with the undisputed facts regarding Schwartz's performance at YCT, the foregoing statements suggest that Schwartz was anticipating the opportunity to work less rigorous shifts later in the harvest season.

Also in the January 12 letter, Schwartz indicated that his need to rest during the 12-hour shift on July 4 resulted from his having worked six consecutive days prior to July 4; he similarly pointed out that July 5 would have been his seventh consecutive day of work. *Id.* at 5. As already discussed, Schwartz had worked only partial shifts on four of those six work days, hauling only one load on each of those four days. Although Schwartz emphasizes this work schedule as a significant accomplishment, the number of hours worked is actually little more than half of what YCT would expect in a six-day period, and which YCT could expect pursuant to the applicable California regulations. *See* Cal. Code Regs. tit. 13, § 1212(k). Stated differently, Schwartz's reliance on a six-day work history that included four shifts of approximately 6 hours each as cause for his fatigue on July 4 and 5 further supports Daniel's testimony that he terminated Schwartz's employment because he was apparently not prepared to perform the routine requirements of 12-hour shifts consisting of two 6-hour round trips on a sustained basis.

Furthermore, in his January 12 letter, Schwartz stated that he had a daily two-hour commute to and from his home in Fresno to the YCT work-site. Schwartz's Jan. 12, 2002 ltr. at 4. This commute obviously added to the hours Schwartz spent driving each work day and may have detracted from Schwartz's ability and/or willingness "to get the job done" for YCT. Nonetheless, YCT was not required to accommodate Schwartz's daily commute time by lowering its expectation that a new driver demonstrate the ability and/or willingness to perform the 12-hour shifts it required on a routine basis.

Based on the foregoing undisputed facts and Schwartz's own statements, we conclude that YCT terminated Schwartz's employment based on his failure to demonstrate the willingness and/or the ability to perform the 12-hour shifts required by the YCT job on a regular basis. Schwartz has thus failed to establish that YCT terminated his employment in violation of the

STAA. *Cf. Sosnoskie v. Emery, Inc., Worldwide Moving*, ARB No. 02-010, ALJ No. 2002-STA-21, slip op. at 3 (ARB Aug. 28, 2003) (adopting judge's recommendation to deny complaint because evidence established that the termination was based on the complainant's pre-existing back injury, which rendered him unable to perform long haul driving and not on protected activity).

CONCLUSION and ORDER

For the foregoing reasons, we hold that Schwartz failed to prove by a preponderance of the evidence that his employment was terminated in violation of the STAA and we **DENY** the complaint.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge