



**In the Matter of:**

**RICKY DON FORREST,**

**ARB CASE NO. 03-005**

**COMPLAINANT,**

**ALJ CASE NO. 02-STA-39**

**v.**

**DATE: April 30, 2004**

**NATIONWIDE BOAT TRANSPORT,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearance:**

***For the Complainant:***

**Ricky Don Forrest, pro se, Alvin, Texas**

**FINAL DECISION AND ORDER OF DISMISSAL**

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C.A. § 31105 (West 1997) and implementing regulations at 29 C.F.R. Part 1978 (2003). The Complainant, Ricky Don Forrest, alleged that the Respondent, Nationwide Boat Transport (Nationwide), terminated his employment and subjected him to kidnapping in retaliation for activities protected under the STAA.

The Department of Labor's Occupational Safety and Health Administration (OSHA) dismissed Forrest's complaint<sup>1</sup> after finding that he was not discharged for any

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<sup>1</sup> The complaint was not included in the record before us although OSHA's April 11, 2002 letter to the Department's Chief Administrative Law Judge enclosing its April 11, 2002 dismissal letter to the Complainant stated that it was enclosed. Instead, OSHA's letter encloses its Discrimination Case Activity Worksheet, which may have been substituted

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protected activity, but rather for using profanity during long-distance telephone calls to the Respondent. Apr. 11, 2002 OSHA dismissal letter at 2.

Pursuant to the Complainant's request, a Department of Labor Administrative Law Judge (ALJ) held a hearing on July 31, 2002, in which only the Complainant appeared and participated. On September 27, 2002, the ALJ issued a Recommended Decision and Order (R. D. & O.) dismissing the complaint because the "Complainant has not demonstrated a link between any protected activity and any adverse action." R. D. & O. at 6. As explained below, we agree with the ALJ that the complaint should be dismissed. However, our dismissal is predicated upon the STAA's complaint provision, rather than its "refusal to drive" provision.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).<sup>2</sup> Pursuant to 29 C.F.R. § 1978.109(c)(1), the Board is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."

When reviewing STAA cases, the Administrative Review Board is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, 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); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). 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 Env'tl. Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision ... ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. See *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th

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inadvertently for the original complaint. See 29 C.F.R. § 1978.104(b), requiring OSHA to file the complaint with the Chief Administrative Law Judge.

<sup>2</sup> This regulation provides, "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

Cir. 1993); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

In addition, the Board accords special weight to an ALJ's demeanor-based credibility determinations. *McDede*, slip op. at 3; *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 2000-STA-48 and cases cited, slip op. at 2 (ARB Jul. 31, 2003).<sup>3</sup>

#### FACTUAL BACKGROUND<sup>4</sup>

Responding to an Internet notice, Forrest drove from his home in Alvin, Texas to seek employment with the Respondent boat hauler at its Palmetto, Florida facility. Nationwide's manager, Brad Scruggs, hired Forrest on May 14, 2001, and provided him with motel accommodations. Apparently to put Scruggs on notice that Forrest was aware of his nondiscrimination rights under the STAA if the Respondent should ever consider taking any improper action against him,<sup>5</sup> Forrest told Scruggs that he was already involved in STAA whistleblower proceedings.<sup>6</sup>

As part of his first (and only assignment), Nationwide provided Forrest with airfare and some expense money on May 15, 2001, to fly to Providence, Rhode Island to retrieve Nationwide's empty tractor-trailer. Arriving in Rhode Island late in the evening, Forrest took a taxi to the site of the vehicle in Connecticut. After finding that it would not start, Forrest slept in the truck until morning.

The next morning, Forrest phoned Nationwide's dispatcher in Palmetto to tell her that the truck would not start. She told him to call a local road service center to remedy the problem. According to Forrest, the road service center requested that the Palmetto facility phone it directly. When Forrest phoned Palmetto to request that the facility handle the questions of payment and repair authorization with the Connecticut road service, a series of heated arguments ensued between Forrest, the dispatcher and Scruggs, who insisted that Forrest resolve the matter on his own, without their intervention. During the course of these conversations, Forrest told the dispatcher that he was going to

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<sup>3</sup> The R. D. & O. did not contain any credibility determinations regarding the Complainant's testimony.

<sup>4</sup> The ALJ's R. D. & O. contains complete factual findings that we summarize for purpose of this decision.

<sup>5</sup> See Transcript (Tr.) at 39-40.

<sup>6</sup> See *Forrest v. Transwood, Logistics, Inc.*, ARB No. 01-090, ALJ No. 01-STA-43 (ARB Jan. 25, 2002), subsequently denying Forrest's complaint.

quit and Scruggs “told me I was fired, after cussing me out real good and accusing me of cussing.” Tr. at 27.

Forrest then called the local police, complaining that Nationwide had “kidnapped” him because “I was deceptively lured there ... under the promise of employment that did not exist.” Tr. at 27. In support of this allegation, Forrest testified that the “[OSHA] investigation has clearly revealed that this company had really ceased operations financially at the very time – at or near the time it hired me.” *Id.*<sup>7</sup>

Forrest eventually returned to Florida to reclaim his car. Nationwide never paid him for his brief employment.

### DISCUSSION

Although the ALJ’s factual findings are supported by substantial evidence on the record as a whole and are therefore conclusive under 29 C.F.R. § 1978.109(c)(3), the ALJ’s reliance on the refusal to drive provision of the STAA, 49 U.S.C.A. § 31105(a)(1)(B),<sup>8</sup> as the basis for his decision is erroneous. *See* R. D. & O. at 5-6, holding that neither clauses (i) nor (ii) of Section 31105(a)(1)(B) were violated since the inability of the vehicle to start obviously precluded the Complainant from refusing to operate it.

Rather, this proceeding was brought under the STAA employee complaint provision at 49 U.S.C.A. § 31105(a)(1)(A), which states:

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<sup>7</sup> The Connecticut police found no evidence supporting his kidnapping claim in the legal sense. Apr. 11, 2002 OSHA dismissal letter at 2.

<sup>8</sup> The ALJ quoted a prior version of the refusal to drive provisions, inapplicable to this case. *See* R. D. & O. at 5. 49 U.S.C.A. § 31105(a)(1)(B) now provides:

A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

(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 or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.

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, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding

...

See Apr. 11, 2002 OSHA dismissal letter at 2 (reciting Forrest's allegation of discharge for informing Nationwide that the truck had depleted batteries, no state license plate on the trailer, and an over-width problem with rear axle; alleged kidnapping to coerce him to withdraw his political and public service efforts in the trucking industry; and termination, in part, because he informed the Respondent of his pending STAA case); Complainant's May 7, 2002 Notice of Objection to OSHA's dismissal at 2; CX 3, Complainant's May 16, 2001 record of events at 2 (informing the Respondent of dead batteries, need for license plate and width problem from dual-axle trailer wheels; Tr. at 19-32 (informing Nationwide that the vehicle would not start and the matter of the alleged kidnapping); Tr. at 39-45 (informing Nationwide during the hiring process that he had acted as a whistleblower in a pending STAA proceeding against another employer); Complainant's Oct. 1, 2002 Notice of Appeal to the ARB at 4, 8-9 (Nationwide's action was in retaliation for Forrest's discovery of unsafe "out of service" criteria; Forrest's concerns included lack of proper registration and over-width condition of trailer in addition to fact that vehicle would not start).

Safety-related complaints under 49 U.S.C.A. § 31105(a)(1)(A) include complaints raised to an employer as well as to government authorities. *Clean Harbors*, 146 F.3d at 19-21; *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 9 (ARB Oct. 31, 2003); *Bettner v. Daymark, Inc.*, ARB No. 01-088, ALJ No. 00-STA-041, slip op. at 23 (Oct. 31, 2003).

Similarly, an employee's STAA proceeding against another employer is cognizable under 49 U.S.C.A. § 31105(a)(1)(A) (person may not discharge an employee because he has "begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or order, or has testified . . . in such a proceeding"). See *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992).

However, even assuming that Forrest's communications to Nationwide about the dead batteries, and overwidth problems were protected internal complaints and his notice to Nationwide of his whistleblower activity in a separate STAA proceeding was protected external complaint activity under 49 U.S.C.A. § 31105(a)(1)(A), Forrest did not prove that any of these activities played any role in his discharge.

Forrest himself testified that the dispatcher and Scruggs responded to his report about needed repairs by directing him to contact a repair facility and use the company credit card for payment. The company thereby indicated that it wanted the repairs completed and bore no animus towards him because of his report of deficiencies.

Forrest also submitted no evidence supporting his contention that his previous STAA-protected activity motivated the company to send him to Connecticut for the purpose of leaving him stranded. Forrest produced no evidence that the company had a negative opinion of his whistleblowing activities in his pending STAA case (or any of his other alleged past protected activity). Forrest's testimony that the company furnished him with \$100 cash for expenses and a company credit card, as well as the absence of evidence that the company knew that the truck would not start and that the vehicle license plate was missing, also run contrary to his contention.

### CONCLUSION

In sum, Forrest has failed to show by a preponderance of the evidence that Nationwide fired him for his alleged protected activity, rather than for his heated, profanity-laden conversation with the dispatcher and Scruggs. Moreover, he has failed to show by a preponderance of the evidence that the company sent him to Connecticut for the purpose of stranding him there in retaliation for prior activity protected under the STAA.<sup>9</sup>

Accordingly, the complaint in this case is **DISMISSED**.

**SO ORDERED.**

**JUDITH S. BOGGS**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

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<sup>9</sup> OSHA's dismissal letter stated that its investigation revealed that Nationwide informed Forrest that the replacement license plate information would be faxed to the service center. *Id.* at 2.