



**In the Matter of:**

**CHARLES W. FELTNER,**

**ARB CASE NO. 03-118**

**COMPLAINANT,**

**ALJ CASE NOS. 2003-STA-1  
2003-STA-2**

**v.**

**DATE: October 27, 2004**

**CENTURY TRUCKING, LTD.,**

**and**

**MAINLINE ROAD AND BRIDGE CONSTRUCTION, INC.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Charles W. Feltner, pro se, Springfield, Ohio**

*For Respondent Century Trucking, Ltd.:*

**David L. Hall, Esq., Altwick & Corwin, Dayton, Ohio**

*For Respondent Mainline Road and Bridge Construction, Inc.:*

**James Kordik, Esq., Amy Blair, Esq., Rogers & Greenberg LLP, Dayton, Ohio**

### **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 2004), and its implementing regulations, 29 C.F.R. Part 1978 (2004). Charles W. Feltner filed a complaint alleging that Century Trucking, Ltd., and Mainline Road and Bridge Construction, Inc. violated the STAA by firing him for making safety complaints to Mainline employees and the Occupational Safety and Health

Administration (OSHA). With some modification of the analysis, we affirm the Administrative Law Judge's Recommended Decision and Order (R. D. & O.) issued on June 30, 2003, recommending dismissal of the complaint.

## **BACKGROUND**

We adopt and summarize the ALJ's findings of fact. Feltner was an independent contractor who drove a truck for Century. Century contracted with other companies to provide those companies with trucks and truck drivers. Feltner and other drivers would contact Century between 3:00 p.m. and 5:00 p.m. to request work for the following day. Transcript (Tr.) 54-55, 63-64.

Mainline, one of the companies that relied on Century's services, was a contractor for a road reconstruction project on James H. McGee Road in Dayton, Ohio. To obtain trucking services, Mainline would call Century and request a specific number of trucks that would be needed for a particular day. Tr. 18, 25, 29-30.

On August 12, 2002, Century dispatched Feltner to work for Mainline at the road project. On August 13, 2002, Dean Moore, a loader operator employed by Mainline, was loading Feltner's truck when Feltner told Moore that he "had already called OSHA and if one more spec [sic] of dirt fell in that road when [Feltner] went and dumped it, that [Feltner] was to call them and they would be right back out there." Tr. 17, 54-55.

Moore contacted Anthony Donofrio, superintendent for Mainline, and told Donofrio that Feltner was creating a stressful situation that precluded him from loading Feltner's truck. Donofrio spoke to Feltner and Feltner opined that Moore was overloading his truck. Feltner also told Donofrio that he had contacted OSHA and that he would call them again if Moore continued to overload his truck. Donofrio instructed Feltner to work in a different location on the project. Neither Moore nor Donofrio ever told Feltner that he was fired. Tr. 25-30.

Mainline contacted Teresa Miniard, the owner of Century, and told her that Feltner was arguing with one of the loaders. She went to the work site to speak to Feltner. Feltner told her, "I am sick of them overloading my truck, I'm calling OSHA." Tr. 61. She did not tell him that she was terminating her agreement with him. Jim Miniard, an estimator for Century and Teresa Miniard's husband, also went to the site. He observed Mainline loading trucks and spoke to other drivers who told him that their trucks were not being overloaded. He told Feltner that if he felt his truck was being overloaded, he could have it weighed and Century would pay the cost after Feltner turned in the weigh slip. Tr. 44. Feltner never submitted a weigh slip.

Later that day, Donofrio went to Feltner and instructed him to retrieve a load of gravel. Feltner refused on the ground that his tailgate would not fully close and leaked gravel. Donofrio "asked for his ticket," indicating that Feltner would not be performing any further services for Mainline on that day. Feltner asked Donofrio multiple times if he was being fired. Tr. 28. Donofrio told Feltner that he did not have the authority to fire

him. Donofrio then signed Feltner's ticket. Later that day, Donofrio contacted Teresa Miniard to tell her how many trucks he needed for the following day. He also told her that he would prefer that Feltner not be sent back to the project. Tr. 29-30.

Feltner contacted Century on the evening of August 13, 2002. Jim Miniard told him that Donofrio did not want him back at the McGee project. Feltner did not request other work from Century for the following day. Tr. 97. On August 14, 2002, Feltner filed a complaint with OSHA alleging that the Respondents violated the STAA by "releasing" him from employment.

On August 16, 2002, Feltner began working for Associated Trucking at a project in Springfield, Ohio. Tr. 51. While at Associated, Feltner spoke to Mike Greer, an owner of Associated, telling him that he had a "problem with Mainline" and was "doing [his] own thing now." Tr. 47. Theresa Miniard informed Associated that she no longer insured Feltner. Tr. 57-58.

Following an investigation of Feltner's complaint, OSHA denied relief. Feltner appealed OSHA's ruling and requested an evidentiary hearing. An ALJ held the hearing on March 25, 2003, and concluded that Mainline considered Feltner to be argumentative and confrontational, and its request that Feltner not be sent back to the McGee project was a legitimate and non-discriminatory reason that overcame the claim of discrimination. R. D. & O. at 22. The ALJ also held that Century did not violate the STAA by refusing to send Feltner back to Mainline's construction project. Feltner abandoned his employment relationship with Century by not requesting work on August 13, 2002. *Id.* at 22-23.

### **ISSUE PRESENTED**

The question before us is whether Feltner proved by a preponderance of the evidence that either Century or Mainline violated the STAA by taking adverse action against him for making safety complaints.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated her jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) to the Administrative Review Board (ARB or Board). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c).

When reviewing STAA cases, the ARB 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 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). Substantial evidence is defined as "such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion.” *Clean Harbors Envtl. Servs., Inc. 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 legal conclusions, the Board, as the Secretary’s designee, 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 legal conclusions de novo. See *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

## DISCUSSION

The STAA provides that an employer may not “discharge,” “discipline” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activities. These protected activities include (1) making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order,” § 31105(a)(1)(A); (2) “refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health,” § 31105(a)(1)(B)(i); or (3) “refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition, § 31105(a)(1)(B)(ii).

To prevail on a complaint of unlawful discrimination under the STAA, the complainant must establish by a preponderance of the evidence that the respondent took adverse action against the complainant because he engaged in protected activity. *BSP Trans, Inc. v. United States Dep’t of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equipment*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

As we explained in *Densieski*, slip op. at 4, the Board in STAA cases may apply the framework of burdens of production and proof developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws, such as the Age Discrimination in Employment Act. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Regan*, slip op. at 5-6; *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5-6 (ARB June 28, 2002).

Under the burden-shifting framework, the complainant must first establish a prima facie case, thus raising an inference of unlawful discrimination. The complainant meets this burden by showing that the employer is subject to the STAA, that the

complainant engaged in activity protected under the statute of which the employer was aware, that he suffered adverse employment action and that a nexus existed between the protected activity and adverse action. *Densieski*, slip op. at 4.

The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. At that stage, the burden is one of production, not persuasion. If the respondent carries this burden, the complainant then must prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. *Id.*; *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The fact finder may consider the evidence establishing the complainant's prima facie case and inferences properly drawn therefrom in deciding that the respondent's explanation is pretextual. *Reeves*, 530 U.S. at 146; *Densieski*, slip op. at 4. The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Densieski*, slip op. at 4; *Gale v. Ocean Imaging and Ocean Res., Inc.*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002); *Poll*, slip op. at 5.

Although we have said that the focus in a case tried on the merits should be on a complainant's ultimate burden of proof rather than the shifting burdens of going forward with the evidence, see *Densieski*, slip op. at 5; *Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01-021, ALJ No. 99-CAA-15 (ARB May 20, 2003), it appears in this case that the ALJ has erroneously equated Feltner's threshold burden of adducing evidence to establish a prima facie case with his ultimate burden of proof. The ALJ breaks his analysis into the "PRIMA FACIE CASE" and "REBUTTING THE PRIMA FACIE CASE" sections. R. D. & O. at 14, 21. During the discussion of the prima facie phase of proof, the ALJ refers to the need to "prove," *id.* at 14, and "establish," *id.* at 15, the prima facie elements; makes credibility assessments, *id.* at 15-21; and states that a complainant must "prove" (rather than create an inference of) a causal connection between his protected activity and the adverse action and suggests that Feltner had actually done so, *id.* at 21. The weighing of evidence like this is normally reserved for whether the complainant preponderated with the evidence, not whether he established a prima facie case.

However, the ALJ correctly placed the ultimate burden of proof on Feltner and held that he did not prove discrimination. *Id.* at 22-23. Perhaps the ALJ's error is merely one of nomenclature, i.e., terming the ultimate elements of proof the "prima facie" case. Nevertheless, because of the potential for confusion we have described, we review the record, deferring to the ALJ's factual findings as supported by substantial evidence.

Feltner was a covered "employee." He had an independent contractor relationship with Century, *id.* at 4, and the STAA covers independent contractors, 49 U.S.C.A. § 31101(2) (defining an "employee" as a driver of a commercial motor vehicle, "including an independent contractor when personally operating a commercial motor vehicle"). See also 29 C.F.R. § 1978.101(d). Mainline was not Feltner's immediate employer, but it did exercise control over his employment by requesting that Century not send him back to the

job. R. D. & O. at 4-5, 8, 10; Tr. 29-30, 56. This control is sufficient to establish STAA coverage. *Cf. High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 03-026, ALJ No. 96-CAA-8, slip op. at 9 (ARB Sept. 29, 2004) (“If the respondent is not the complainant’s direct employer, . . . [t]he ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is evidence of the requisite degree of control.”).

However, Feltner did not make a covered complaint. The ALJ concluded that Feltner’s “safety” complaints were not protected under the STAA. R. D. & O. at 15-17. His truck, like the rest, was loaded with four or five buckets. He did not weigh it. And he could not have had a good faith belief that during his half-mile run, dirt clods would fall off and hit someone, who would in turn shoot Feltner.<sup>1</sup> Nor did Feltner engage in protected activity when he complained about driving with a misaligned tailgate. He testified that the tailgate could be pushed closed, and would remain sealed once it was closed. He also testified that, after he left the McGee project he continued to drive with a misaligned tailgate, which indicates that he was not apprehensive about creating an unsafe condition. R. D. & O. at 16-17. Because Feltner’s underlying “safety” complaints were not genuine, we similarly rule that he did not engage in protected activity on August 13, 2002, when he told Theresa Miniard and Donofrio that he had voiced them to OSHA.

Feltner also did not prove discrimination against Mainline. Although Donofrio’s request that Century not send Feltner back to the James McGee project, *id.* at 17-18, is properly viewed as an adverse action, Mainline had legitimate, nondiscriminatory reasons. Feltner’s unreasonable contention that Moore was overloading his truck created stress with Moore and caused Theresa and Jim Miniard to come to the work site. Because Moore would not continue to load Feltner, Donofrio directed Feltner to work at another location on the project. But when Feltner refused another load on the ground that his tailgate leaked gravel, Donofrio signed his ticket, ending his work for the day. Feltner

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<sup>1</sup> The ALJ elicited the following testimony from Feltner:

JUDGE ROKETENETZ: What were your concerns about being overloaded? You just told me one, that you were afraid someone would shoot at you in that neighborhood.

THE WITNESS: Yeah, because if one of them dirt clods hit one of them people over there, then they shoot over all the time anyway on the west side of Dayton. It’s bad over there anyway.

JUDGE ROKETENETZ: What other concerns did you have?

THE WITNESS: That was my only safety concern. Long as them black boys leave me alone, I was fine.

JUDGE ROKETENETZ: You were concerned about your safety.

THE WITNESS: Yes.

Tr. 91.

confronted both Moore and Donofrio with the charge that they had fired him, although neither had done so or had that authority. The record supports the ALJ's finding that Feltner was "argumentative [and] confrontational" in these dealings. *Id.* at 22. Deferring to the ALJ's credibility assessments, we agree that Feltner failed in his burden to prove that Donofrio's stated reason for asking Century not to send him back to the Mainline construction project was pretextual. *Id.* at 22-23.

Feltner additionally did not prove discrimination against Century. Century did not subject Feltner to an adverse action in retaliation for his "safety" complaints or the phone call he claimed he made to OSHA on August 13, 2002. Century did not terminate an agreement with Feltner, nor did it tell him that he would no longer receive assignments. The record indicates that Feltner failed on August 13, 2002, and on subsequent days, to request work for the next day, which he was expected to do under company practice. Feltner's inaction constitutes abandonment of the employment relationship. That he went to Associated and told Greer that he was "on his own" further suggests that he did not intend to maintain his relationship with Century. *Id.* at 20. Further, Century did not blacklist him. Theresa Miniard merely informed Associated that Feltner was not covered by Century's insurance. *Id.* at 20; Tr. 57-58. We therefore conclude that Feltner failed to establish by a preponderance of the evidence that Century engaged in unlawful discrimination under the STAA.

#### CONCLUSION

Feltner failed to prove that Century or Mainline violated the STAA. We accept the ALJ's recommendation and **DENY** the Complaint.

**SO ORDERED.**

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

**WAYNE C. BEYER**  
**Administrative Appeals Judge**