In the Matter of:

NELSON HOGQUIST, **ARB CASE NO. 03-152**

COMPLAINANT, **ALJ CASE NO. 03-STA-31**

v. **DATE: November 30, 2004**

GREYHOUND LINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Nelson Hogquist, pro se*, Laredo, Texas*

For the Respondent:
Darren Harrington, Esq.*, The Barnes Law Firm, PC, Dallas, Texas*

FINAL DECISION AND ORDER

Nelson Hogquist complained that Greyhound Lines, Inc. violated 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), when it terminated his employment on January 15, 2003. We deny Hogquist's motion to admit new evidence and we approve Administrative Law Judge's Recommended Decision and Order (R. D. & O.) issued on August 28, 2003, that Greyhound did not violate the STAA.

BACKGROUND

Hogquist was an "extra board" (i.e., back-up) bus driver for Greyhound in Laredo and San Antonio, Texas from March 1998 until he was discharged on January 15, 2003. R. D. & O. at 3. After becoming a union steward, from February 12, 2002, until his discharge, Hogquist filed complaints and grievances with the union and federal agencies such as the Occupational Safety and Health Administration (OSHA) and the Federal

Motor Carrier Safety Administration (FMCA) on behalf of himself and fellow drivers. Among other things, the complaints charged safety violations, claimed that Greyhound's schedules forced drivers to exceed speed limits, and contended that company intimidation and harassment prevented drivers from making rest stops, thereby creating a safety hazard to highway users. *Id.* at 5, 10.

Greyhound had chronic problems with the way Hogquist logged his time and sought payment for his trips. He turned in duplicate claims or claims for one assignment when he actually worked another. Hogquist was often late in filing claims for payment. And he logged as on duty time when he was off duty, seeking payment for that time. *Id.* at 5-6. Greyhound gave Hogquist retraining on compliance with company pay procedures on March 26, 2002, and December 11, 2002, and a written warning on May 22, 2002. But he repeatedly told superiors that he would not comply with company policy. *Id.* at 6-7. That, according to Greyhound, was the reason it terminated his employment. *Id.* at 7.

Hogquist filed a complaint with OSHA on January 22, 2003, alleging that Greyhound discharged him in violation of the STAA. After an investigation, OSHA issued a report on April 18, 2003, dismissing the complaint for lack of merit. On May 1, 2003, Hogquist appealed and requested an evidentiary hearing. An ALJ held the hearing on June 17, 2003, in Laredo, Texas, and on August 23, 2003, issued a Recommended Decision and Order (R. D. & O.) denying the complaint. The case is now before us under the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2004). On February 9, 2004, Hogquist filed a motion for us to consider evidence that was not part of the record before the ALJ. We first take up that request and then consider the ALJ's R. D. & O.

ISSUES

The questions before us are: (1) whether the record should be amended to consider new evidence; and (2) whether substantial evidence already in the record supports the ALJ's ruling that Greyhound did not violate the STAA by taking adverse action against Hogquist for making protected motor carrier 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) (2004).

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

I. Consideration of new evidence

In a motion dated February 4, 2004, Hogquist asks us to amend the record (and presumably remand the case to the ALJ) to consider eight pieces of evidence that were not admitted when the case was before the ALJ. Complainant's Motion to Amend Record to Include Documents and Items not Available at Time of Trial and Motion to Amend Record to Include Documents and Items which Provide Evidence that Respondent's Agents and Witnesses Gave False Testimony under Oath at the Department of Labor Hearing Held on June 17, 2003 (Complainant's Motion to Amend Record).

We disfavor reopening a closed record. *Jackson v. Protein Express,* ARB No. 98-104, ALJ No. 95-STA-38 (ARB May 29, 1998). When a party claims to have newly discovered evidence, we look for guidance to Federal Rule of Civil Procedure 60(b), which provides for relief "from a final judgment, order, or proceeding" based upon "(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . .." Fed. R. Civ. P. 60(b)(2). *See Timmons v. Mattingly Testing Serv.,* No. 95-ERA-40 (ARB June 21, 1996). To prevail under this standard, a movant must show that: (1) the evidence was discovered after trial; (2) due diligence was exercised to discover the evidence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence is such that a new trial would probably produce a different result." *Mitchell v. Shalala,* 48 F.3d 1039, 141 (D.C. Cir. 1995).

As we now explain, we will not reopen the record to consider the evidence Hogquist proffers. Either he fails to show that the evidence was not available at the time of trial; or he merely offers it for impeachment; or he does not persuade us that considering it would produce a disposition of his case that would favor him.

Hogquist offers a memorandum dated January 1, 2001, from Craig Lentzsch, president and CEO of Greyhound Lines, stating that Greyhound is committed to equal opportunity in employment with regard to administration of personnel programs. Complainant's Motion to Amend Record, para. 1. Hogquist fails to persuade us that the memorandum was unavailable at the time of the June 17, 2003 hearing; that it is

proffered for any reason other than to impeach the testimony of Roland Rose that Greyhound did not always use progressive discipline; or that, should we grant reconsideration, the case outcome would be different.

Next, Hogquist asks us to include a Notice of Personnel Record Entry (NPRE) for a Greyhound employee who was given progressive discipline for dishonesty before Hogquist's hearing and an NPRE for a Greyhound union steward (Robert Bermudez) whose employment was terminated for dishonesty (unethical taking money from a passenger) without progressive discipline after Hogquist's hearing. Complainant's Motion to Amend Record, para. 2-3. The purpose of these proffers is not plain, but the first would have been available at the time of the June 17 hearing; they would be relevant only to show that Greyhound sometimes used progressive discipline and sometimes did not; and, even if these documents were admitted, they would have no probative value on the asserted need for progressive discipline in Hogquist's case. The record is clear that he was given progressive discipline in the form of retraining and warnings to no avail. He continued to refuse to follow company policy on logging his time and submitting claims for payment. R. D. & O. at 3-8.

The fourth, fifth and sixth items of evidence are tapes of hearings before the Texas Workforce Commission on March 3, 2003, the Texas Worker's Compensation Commission (TWCC) on November 17, 2003, and the Texas Workforce Commission pertaining to another employee. Complainant's Motion to Amend Record, para. 4-6. The March 3, 2003 hearing predates the hearing before the ALJ, and Hogquist makes no argument that it was unavailable to him. Hogquist would have us admit March 3 and November 17 tapes, because, by his account, they show Kenneth Padelecki contradicted himself and Rose about the circumstances of Hogquist's firing. *Id.* at 4-5. Even if that is true, the discovery of impeachment material is not a sufficient basis for reopening the record. *Mitchell,* 48 F.3d at 1041. And the question of who participated in the discharge decision is far less at issue than why it was made. The last tape, also before the Texas Workforce Commission and involving the Bermudez termination, purportedly demonstrates a false statement by Padelecki (regarding whether Greyhound paid off a Mexican official for a traffic accident). *Id.* at 6. We decline to reopen the record to consider a collateral matter.

The seventh proposed exhibit is a June 5, 2003 letter from the EEOC to Hogquist, who takes issue with the letter's description of another driver as a "fellow union member." Hogquist does not show that the letter was unobtainable before the hearing on the merits or represent that its admission would change the outcome of the instant case. The eighth piece of evidence is a December 26, 2003 letter from Hogquist to the Texas Workforce Commission about Bermudez's claim. Hogquist makes no argument about why we should consider this document, and we will not make one for him.

Thus, under the teaching of Fed. R. Civ. P. 60(b)(2) and *Mitchell,* we hold that we will not reopen the record to allow the ALJ to consider new evidence. The record will remain closed. We now turn to the merits of the ALJ's decision.

II. Consideration of the merits

We consider whether substantial record evidence supports the ALJ's ruling that Greyhound did not violate the STAA by taking adverse action against Hogquist for making protected motor carrier safety complaints.

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: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," § 31105(a)(1)(A); "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 "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 claim under the STAA, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action. *Densieski v. La Corte Farm Equip.*, 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); *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); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

Hogquist was an employee entitled to seek protection under the STAA and Greyhound was his employer. R. D. & O. at 2-3. There is no dispute over whether Greyhound was aware of activities that Hogquist asserts were protected. The ALJ found that at least some of Hogquist's complaints were STAA-protected, e.g., those charging safety violations, the claim that Greyhound's schedules forced drivers to exceed speed limits, and the contention that company intimidation and harassment created a safety hazard to highway users by preventing drivers from making rest stops. *Id.* at 10. However, as we further discuss, the ALJ also found that Hogquist's allegation that Greyhound required him to log on duty time as off duty time to avoid federal limitations on driving time was not protected because the company policy complied with federal regulations. *Id.* at 10-13. The case hinges on whether Greyhound discharged Hogquist illegally because of his activities that were protected.

We conclude that substantial record evidence supports the ALJ's ruling that legitimate, non-discriminatory reasons, and not Hogquist's protected motor vehicle safety complaints, were the cause of Greyhound's taking employment action against him. *Id.* at 10-13. Greyhound had long-standing problems with the way Hogquist logged his time

and applied for payment for his runs. These problems included his turning in duplicate claims or claims for one assignment when he actually worked another, and often filing claims for payment late. *Id.* at 5-6. And Hogquist logged as on duty (and sought payment for) time when the company regarded him as off duty. Although an "extra board" driver, Hogquist was entitled to the set amount regular drivers received if he was assigned a full trip. But neither he, nor the regular drivers, were eligible to be paid for off duty, break time during the tour. Under federal regulations, it was the employer's choice whether the driver should record stops made during the tour of duty as off duty time, so long as the driver was relieved of responsibility for the vehicle. *Id.* at 4-5, 10-13. Greyhound chose to have drivers record breaks as off duty time. Therefore, contrary to Hogquist's contention, the company did not require him to falsify his logs.

On March 26, 2002, and December 11, 2002, Greyhound provided Hogquist with retraining on compliance with company pay procedures and on May 22, 2002, the company gave him a written warning. But he repeatedly told superiors that he would not comply with company policy with regard to logging his time. *Id.* at 6-7, 13-15. The ALJ held, and we hold as well, that Hogquist's failure and refusal to comply with Greyhound policy with regard to logging his time and submitting it for payment, and not his safety-related complaints, was the authentic reason for his discharge. *Id.* at 14-15.

CONCLUSION

We adopt the ALJ's recommendation and **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge