In the Matter of:

RICKY D. FORREST, **ARB CASE NO. 04-052**

COMPLAINANT, **ALJ CASE NO. 2003-STA-53**

v. **DATE: July 29, 2005**

DALLAS AND MAVIS SPECIALIZED CARRIER COMPANY and ROBERTSON BROTHERS TRUCKING,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:
Ricky D. Forrest*, pro se, Alvin, Texas*

FINAL DECISION AND ORDER

Ricky D. Forrest complained that Dallas and Mavis Specialized Carrier Company and Robertson Brothers Trucking 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. We approve the Administrative Law Judge's (ALJ) Recommended Decision and Order (R. D. & O.) that Dallas and Mavis did not employ Forrest and that Robertson Brothers did not violate the STAA.

BACKGROUND

We adopt and summarize the ALJ's findings of fact. *See* R. D. & O. at 5-9. Forrest was a truck driver for Robertson Brothers from December 12, 2002, until his discharge on March 12, 2003. Robertson Brothers was an independent contractor for Dallas and Mavis. Both companies were commercial motor carriers. On March 7, 2003,

while en route from Chicago to Gary, Indiana, Forrest's brakes malfunctioned and he pulled into a truck stop to get the truck inspected and repaired. Over the telephone, one of the Robertson brothers denied authorization and, during an argument, told Forrest he was fired. One of the other Robertson brothers (there were three) was across the street at another truck stop and came over and unfroze the brakes. Robertson Brothers withdrew the termination for the present and told Forrest to pick up a load in Fort McCoy, Wisconsin and deliver it to Jacksonville, Florida. On the way, Forrest stopped for inspections in Illinois and Tennessee. The equipment defects were enough to warrant warnings, but did not render the truck out of service. Forrest's termination became effective when he arrived at Robertson Brothers's Millport, Alabama office on March 12, 2003, and the company gave him a bus ticket home.

Forrest contends that Robertson Brothers discharged him for making a safety complaint, the malfunctioning brakes. Robertson Brothers, however, had a list of reasons for discharging Forrest, including failing to follow company rules about seeking prior authorization for repairs; failing to mail in logs and paperwork after unloading cargo; failing to keep the company cell phone with him on the road; and refusing to drive an empty trailer to Alabama when another driver had done the same for him.

Forrest filed a complaint with the Occupational Safety and Health Administration (OSHA) on March 11, 2003, alleging that Dallas and Mavis and Robertson Brothers discharged him in violation of the STAA. After an investigation, OSHA issued a report on September 3, 2003, dismissing the complaint for lack of merit. Forrest appealed and requested an evidentiary hearing. An ALJ held the hearing on November 5 and 6, 2003, in Houston, Texas, and on January 29, 2004, issued the 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). On February 6, 2004, we issued a Notice of Review and Briefing Schedule, informing the parties of their right, pursuant to 29 C.F.R. § 1978.109(c)(2), to file a brief in support of or in opposition to the ALJ's R. D. & O. within thirty days of the date the ALJ issued the R. D. & O. (March 1, 2004). Both Dallas and Mavis and Robertson Brothers notified the Board that neither party intended to file a brief.

The Board's Notice of Review and Briefing Schedule sent to Forrest via certified mail was returned to the Board unclaimed. On March 15, 2005, the Board received a pro se "Notice of Appeal" and accompanying brief from Forrest. Forrest asserts that he did not receive notice of the R. D. & O. issued on January 29, 2004, until February 26, 2004, because he had been working as a truck driver "over the road" until that time. It is within the ARB's discretion to accept an untimely filed brief. *See Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, Order Accepting Petition for Review and Establishing Briefing Schedule (ARB Nov. 8, 1999); *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-011, ALJ No. 97-CAA-12, Order Accepting Appeal and Establishing Briefing Schedule (ARB Sept. 1, 1999). We accept the untimely filing for consideration and turn to the merits of the appeal.

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

We consider whether substantial evidence in the record supports the ALJ's rulings that Dallas and Mavis did not employ Forrest and so is not a proper respondent and that Robertson Brothers did not take adverse action against Forrest for making protected motor carrier safety complaints, and therefore did not violate the STAA.

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 of unlawful discrimination under the whistleblower protection provisions of the STAA, the complainant must establish that he is an employee and the respondent is an employer. *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 (ARB Oct. 31, 2003). The crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant's employment. *See Lewis v. Synagro Techs., Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 8 n.14, 9-10 (ARB Feb. 27, 2004) (environmental whistleblower acts) and cases cited therein. Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes. *Id.*, slip op. at 7. If a complainant is unable to establish the requisite control and thus an employer-employee relationship, the entire claim must fail. *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 9 (ARB Jan. 31, 2001) (environmental whistleblower acts).

If a complainant proves an employment relationship, he must also show 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; Regan; BSP Trans, Inc.; Schwartz.*

We begin with the question of whether there was an employer-employee relationship that could subject Dallas and Mavis to liability to Forrest under the STAA. The record supports the ALJ's findings that: Dallas and Mavis was a carrier that operated through independent contractor drivers under Dallas and Mavis's Department of Transportation (DOT) authorization. It paid its independent contractors a percentage (generally 75 percent) of gross receipts. Dallas and Mavis screened drivers to make sure they qualified under its liability insurance and DOT regulations. But it did not engage in the hiring or firing decisions of its independent contractors, who were responsible for withholding state and federal taxes and providing workers' compensation and unemployment insurance for their own employees. R. D. & O. at 5-7, 9-10.

Robertson Brothers was one of Dallas and Mavis's independent contractors. It hired, controlled and ultimately discharged Forrest. *Id.* The factual record supports the ALJ's conclusion that Forrest was an employee of Robertson Brothers and not Dallas and Mavis. "Since Forrest produced no credible evidence that that DM [Dallas and Mavis] played any [role] in Forrest's discharge or that DM was a joint employer, I find no evidence to hold DM responsible for Forrest's termination." *Id.* at 10. Accordingly, we agree that Dallas and Mavis is not a proper respondent and we adopt the ALJ's conclusion that they must be dismissed. *Id.*

We turn to the claim against Robertson Brothers and whether Forrest engaged in protected activity, Robertson Brothers was aware of that activity, and his protected activity was the reason for his discharge. The ALJ found that Forrest's action in

reporting frozen brakes on March 7, 2003, was protected activity under the STAA. *Id.* at 11. Because one of the Robertson brothers was notified and fixed the brakes, it is obvious the employer was aware of that activity. The ALJ found that Robertson Brothers took adverse action against Forrest, i.e., it fired him. *Id.* So the pivotal issue is whether Robertson Brothers fired Forrest because of his safety complaint.

Substantial record evidence supports the ALJ's ruling that legitimate, non-discriminatory reasons, and not Forrest's protected motor vehicle safety complaints, caused .Robertson Brothers to take adverse action against him. We accept the ALJ's conclusion:

> Based upon the entire record, I credit Tony Robertson that he terminated Forrest because he was an uncooperative employee who refused to follow company rules, involving seeking prior authorization for repairs, mailing in paperwork after delivering cargo, keeping a company cell phone with him when on the road and refusing to drive an empty trailer to Vernon, Alabama.

Id. at 9. *See also id.* at 11.

CONCLUSION

Thus, 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