In the Matter of:

JAMES M. MINNE and ROBERT W. PRIVOTT,

COMPLAINANTS,

v.

STAR AIR, INC.,

RESPONDENT.

ARB CASE NO. 05-005

ALJ CASE NO. 04-STA-26

DATE: October 31, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Bruce B. Elfvin, Esq., *Elfvin & Besser,* Cleveland, Ohio

For the Respondent:
Christopher J. Freeman, Esq., *Zollinger, D'Atri, Gruber, Thomas & Co.,* North Canton, Ohio

ORDER OF REMAND

James M. Minne and Robert W. Privott complained that Star Air, Inc. violated the employee protection provision of the Surface Transportation Assistance Act (STAA)[1] by removing them from its payroll and work schedule after they engaged in protected work refusals. Because the Administrative Law Judge (ALJ) did not make the determinations necessary in order to reach a conclusion as to whether Minne and Privott engaged in

[1] 49 U.S.C.A. § 31105 (West 2007); *see also* 29 C.F.R. Part 1978 (2007) (implementing regulations for section 31105 of the STAA).

protected activity, or were subjected to adverse action, we remand for further consideration.

BACKGROUND

Star was a company operating commercial motor vehicles in the course of its business selling ammunition at gun shows. Recommended Decision and Order (R. D. & O.) at 2-3. Robert Custer was Star's president and owner. *Id*.

Minne and Privott worked for Star on weekends as "commission sales representatives." R. D. & O. at 3. They drove to gun shows, unloaded and sold ammunition, reloaded whatever did not sell and then drove back to Star. *Id*. Their pay consisted solely of a commission on the ammunition they sold. *Id*.

Events involving Privott

On January 10, 2003 when Privott was on his way to a gun show in Richmond, Virginia, he was issued a warning citation by the West Virginia Department of Transportation. The citation listed the following violations:

> 1. [Privott] was hauling a load in excess of 10,000 pounds without a Class A CDL [Commercial Driver's License]; 2. the trailer was 12,800 pounds overweight; 3. the truck did not display the name of the company, its home base, or its DOT number; and 4. Privott was not carrying a log book.

R. D. & O. at 3 (summarizing CX 58). After initially impounding the entire pickup and trailer combination, the officer later permitted Privott to return to Star with the pickup and leave the trailer to be picked up by a driver with a Class A CDL. R. D. & O. at 2-3.

According to Privott, he told Custer about all the violations listed on the citation and refused to drive again for Star until they were fixed. Transcript (T.) at 132. As Privott recounted it, after he told Custer that "the issues need to be taken care of before I can take this out again," Custer replied "that if [Privott] wasn't willing to drive the trucks, there was certainly someone out there that would be." T. 132-33. Privott testified that Custer told him the next day that "this didn't happen very often, and it would be a big mess to weave through it and figure out what the law really wanted us to do and it was just cheaper to keep going along as we have been going along." T. 135. According to Privott, he told Custer in reply: "I can't do that." *Id*.

Custer denied making these statements. R. D. & O. at 4. Custer did confirm that Privott had informed him about receiving the citation, but testified that he did not remember being told about all the violations listed on the citation. Rather, Custer said, he could "recollect" only that the trailer was overweight. T. 214. Privott agreed that he had

not given Custer a copy of the citation, but testified that this was because Custer had told him to work with Custer's secretary, Carmen Neidert, to correct the violations. T. 157.

During the next week, Neidert "arranged to have the correct weight stickers placed on the trucks" and re-registered the F 250 truck to increase its permitted gross vehicle weight to 26,000 pounds. R. D. & O. at 4.

Although the citation had not listed any violations of regulations relating to hazardous materials, Privott during that week became concerned about Star's possible noncompliance with these regulations. T. 137. Privott and Neidert inquired about the steps necessary to comply with these and the other regulations, and discussed what they had discovered. R. D. & O. at 4; T. 142. Because of these discussions, Privott believed that both Neidert and Custer "were aware that the specific [citations on the warning notice] had led to me looking into other things, hazmat being one of them." T. 155.

According to Privott, as the week went on he and Neidert concluded that "on almost every occasion we had problems with – we at least had carried some" materials classifiable as hazardous. T. 142. Privott testified that he told Custer "on several occasions" during that week that he "couldn't operate the truck to do the show [in Indiana] until it was corrected." T. 138.

Privott did not believe that renting a truck would solve the problems, because in his opinion even a rented truck would not comply with all applicable regulations. R. D. & O. at 4; T. 138. According to Privott, he "knew [the truck] didn't have" Star's name, address and DOT number on display, and he "didn't know" if it was legal to use a rented truck that did not display this information. T. 161-62; R. D. & O. at 4. Privott also "knew that several items in the load were hazmat suspect," T. 162, and knew also that there were no plans for the truck to display any hazmat placards or follow any of the other requirements governing the transport of hazardous materials.

Privott recognized that he and Custer disagreed about whether the rented truck would be in compliance: "[F]rom [Custer's] standpoint, the ["issues"] were being worked through and from my standpoint, they weren't being thoroughly worked through." T. 163. Privott also recognized that Star had corrected "some" of the violations. T. 173. But according to Privott, Star was "reluctant" to address other violations "because of the financial burden. . . . Specifically hazmat . . . was a point of disagreement between us." *Id*. According to Privott, Custer's attitude was that "[s]ince [hazmat] wasn't specifically listed on the citation, can't we put that off until later, may be after Indy, maybe later." *Id.*

Ultimately, Privott testified, he told Neidert on Thursday evening that "there's no way we can have this done" – meaning that Star would not be able by the next day to comply with all applicable regulations, including hazardous materials regulations, even by renting a truck. T. 139. According to Privott, Neidert replied: "I don't think so either." *Id*.

Privott testified that after this exchange, he believed that he had conveyed to Neidert that he would not drive to Indiana the next day. T. 138. Privott believed that, through Neidert and in light of the discussions during that week, his message also had gotten through to Custer: "Custer was aware that [I] wasn't willing to drive the truck if it wasn't in compliance and we certainly talked about my believe [sic] that the truck was not in compliance." T. 163.

In fact, however, it appears that Privott's message did not get through. Neidert rented a truck for Privott to drive to Indianapolis the next day (Friday, January 17). R. D. & O. at 4. Neidert testified that she believed that Privott could drive a rented truck in compliance with all applicable regulations, and that she rented the truck because she believed that Privott would drive it. R. D. & O. at 4; T. 364. Custer testified that he also had believed that Privott would drive to Indianapolis. T. 392.

Privott did not make the trip to Indianapolis. R. D. & O. at 4. According to Privott, this irritated Custer. T. 145. The next day, another Star employee testified, Star placed a hold on Privott's company credit card. Privott's name was not initially removed from Star's assignment board, but Privott did not drive again for Star. During the next few weeks, a few days before each show Star assigned other drivers to cover Privott's shows. T. 245, 310-11, 326-27, 431-32.[2]

Star made no further attempts to address the regulatory compliance issues that Privott had identified. By some time in February, Privott came to believe that Custer would never address these issues. Because Privott remained firm in refusing to resume driving for Star until and unless those issues were addressed, Privott concluded that his employment with Star was over. Although he acknowledged that Star had not used any term such as "terminated, disciplined or discharged" to describe his status, Privott testified that – at least in light of Custer's subsequent lack of progress on coming into compliance – he believed that Custer's statement to him on Friday, January 10 had constituted warning that Custer preferred to end his employment rather than fix the trucks. As Privott put it, "I believe the statement was that if I wasn't willing to drive the trucks, they would find someone who would. So does that mean I'm terminated? In my mind, it does." T. 174.

Privott testified that his belief was strengthened by several conversations he had with Neidert. T. 148. According to Privott, he initially had used those conversations to seek updates on the progress of the regulatory compliance effort, but the conversations became "less and less focused on this because . . . it wasn't going to be something that

[2] The ALJ did not explain the basis for his statement, R. D. & O. at 4, that Minne's and Privott's "names were not removed from the scheduling board." Because Custer testified that the names were permanently removed some time in February, T. 244, we assume that the ALJ's statement was meant to indicate that the names were not immediately removed, rather than that the names were never removed.

was going to be corrected. It wasn't something that they were concerned with anymore." T. 149.

Although he was aware of Custer's position that Star had not "fired" him, R. D. & O. at 4, Privott filed for unemployment benefits. Privott spoke with Custer in February regarding that unemployment filing. T. 145. According to Privott, after Custer characterized the situation as one in which Privott had quit, Privott responded: "[E]ither I quit because I refused to drive an illegal truck or you fired me for refusing, but either way the trucks are illegal and I can't drive them." *Id*.; *see also* T. 174 (Privott told Custer that "[Y]ou fired me because I wasn't willing to drive the trucks, one way or the other. It was just a matter of wording.").

Custer did not make any further efforts to address the regulatory compliance issues, and instead had Privott's name removed from the assignment board and from the payroll. T. 327.

Events involving Minne

On January 10, 2003 Minne was en route to a show in Belleville, Illinois when Privott called him and told him about the West Virginia citation. R. D. & O. at 2-3. Minne then called Custer and told him that he planned to return to Star rather than continue to Belleville and risk a similar citation. *Id*.

As Minne described their conversation, Custer asked him not to return, and "offered . . . [to] pay [Minne] more if [he would] keep on going." T. 64. After Minne declined, R. D. & O. at 3, Custer asked whether Minne planned to drive future trips. Minne responded that he "would be willing to go [on future trips] but [he] couldn't drive the vehicles illegally." T. 65; R. D. & O. at 4. Custer then said that "it was less expensive for [Custer] to pay the occasional ticket than it would be to make the vehicles compliant, and that [Custer] would pay any ticket expenses . . . should they ever arise." T. 66. Custer also stated that "we could either drive the vehicles as they were or somebody else would." T. 89.

Custer denied making these statements, and the ALJ did not determine whose version was correct.

After returning, Minne called Star on Tuesday, January 14 in order to check in. T. 69. He spoke to Neidert, who told him that she was bringing the registered weights of Star's vehicles into compliance. *Id*. Minne also spoke to Custer. T. 71. According to Minne, Custer said that his "intent was not to do any hazmat placarding or anything like that. It was more expensive [and]. . . . He didn't believe that they [the vehicles] needed to be placarded." *Id*.

On Friday, January 17 Custer drove to a gun show in Medina, Ohio. T. 217-18. There was conflicting testimony, which the ALJ did not resolve, as to whether Minne had

been scheduled for this show and then removed by Custer. There was uncontested testimony that other drivers were assigned to cover Minne's subsequent shows. T. 245, 326-27.

On January 31, Minne called Star "to get an update on the condition of the vehicles," because he "needed to know when to come back." T. 72. As Minne explained it: "Once the vehicles were compliant, I could come back to work." *Id.* Minne spoke to Neidert. T. 73. According to Minne, Neidert told him that one vehicle (always driven by another driver) had been brought into compliance, and said that she did not know whether Custer planned to fix any of the other vehicles. *Id*. Neidert denied saying this, T. 361, and the ALJ did not make a finding as to whose version was correct.

In mid-February, while Minne was on vacation in Florida, he attempted to reserve a rental car using the company credit card he had previously been issued. The card was declined. According to Minne, the credit card company said that the card had been "deactivated." T. 74.

Minne immediately called Star. He first spoke with Neidert to ask whether the vehicles were yet in compliance. According to Minne, Neidert responded that since January 31 no further compliance efforts had been undertaken. T. 73-75.

Minne then spoke to Custer. Minne described the conversation as follows:

> I told him I was upset. At that moment I realized that they were letting me go. They cancelled my credit card. . . . I said so you've actually fired me, and [Custer] said . . . no, no, no, we haven't fired you . . . why don't you come in . . . and we'll talk about the vehicles, and I said there's nothing to talk about. The vehicles . . . still aren't compliant.

T. 75; *see also* T. 98-99. The conversation continued but, according to Minne, it soon became "apparent" that Custer "had no interest in making the vehicles compliant." T. 75. Minne testified that after he had reached this conclusion, he told Custer "[F]ine" and hung up. *Id.* Custer testified that he did not recall this conversation. T. 240.

According to another Star employee, Minne's name was removed from the payroll at around this time. T. 327. It is not clear whether that removal occurred before or after Minne's conversation with Custer.

Minne did not call again, nor did he return to Star seeking work. As Minne explained it, despite Custer's assurance that he had not fired Minne, "[a]ctions speak louder than words, and . . . two and a half months later there was still only one vehicle that was compliant, yet he had . . . four or five salesmen that were operating. So that means . . . only one of them was operating legally. The rest were still operating illegally." T. 82.

When asked at the hearing whether Star had "disciplined" him for his refusal, Minne expressed the view that Star had done so. Specifically, he said he "ha[d]n't earned an income all year long because someone refuses to make the vehicles compliant." T. 96-97.

Case History

Minne and Privott each filed a complaint with OSHA. R. D. & O. at 1. OSHA dismissed each complaint on the ground that "the investigation did not reveal any evidence that you were told verbally or in writing that your employment with the respondent was terminated." Letter from OSHA to Minne, December 10, 2003; Letter from OSHA to Privott, December 10, 2003.

Minne and Privott jointly requested a hearing. After the hearing, a Department of Labor ALJ dismissed their claims because "the evidence does not show that Complainants were fired, disciplined, or suffered any other adverse employment action." R. D. & O. at 5. Minne and Privott then appealed, filing a joint brief with the ARB. Star also filed a brief, and sought leave to file a reply brief.[3]

JURISDICTION; SCOPE AND STANDARD OF REVIEW

We have jurisdiction under 29 C.F.R. § 1979.109(a) (requiring ARB to review all ALJ decisions issued under the authority of section 109(a)); *see also* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2000) (delegating to Board authority and responsibility to act for Secretary of Labor in review of ALJ decisions in cases arising under the STAA).

The regulations implementing the STAA require us to review every ALJ decision issued under Section 109(a), even if no party files a brief. Thus, these regulations require us to examine the ALJ's decision even if the parties either do not file briefs upon appeal or file briefs that do not identify the dispositive legal issues.[4] In examining the ALJ's

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[3] Star's reply brief, in addition to repeating certain arguments made in its initial brief, primarily addresses the constructive discharge argument that Minne and Privott emphasize upon appeal. But because a constructive discharge did not occur in this case – as we explain below in footnote 15 – a reply to that argument is not necessary. Therefore, we deny leave for the submission of Star's reply brief.

[4] *See, e.g., Galvin v. Munson Transp., Inc.*, 1991-STA-41, slip op. at 1 & n.1 (Sec'y Aug. 31, 1992) (where parties did not file briefs before Secretary, Secretary considered arguments made in post-hearing briefs); *see also Western Truck Manpower, Inc. v. U.S. Dep't of Labor*, 943 F.2d 56, *2 (9th Cir. 1991) (unpublished disposition remanding case to Secretary for further consideration) (complainant's "mere failure to recite a case name does not constitute waiver of its right to have the Secretary apply the legal principle established in

decision, we review his legal conclusions de novo, and his factual findings under the substantial evidence standard.[5]

DISCUSSION

To prevail in a complaint brought under the STAA, a complainant must show that he suffered an adverse action motivated at least in part by an activity protected by the STAA.[6] We first discuss coverage before turning to the ALJ's conclusions regarding protected activity and adverse action.

Coverage

Coverage does not appear to have been disputed, and the ALJ appears to have assumed it. Nonetheless, it would have been helpful if the ALJ had stated this explicitly in his opinion, along with his reasons. Absent such a discussion in the ALJ's recommended decision, we briefly include the analysis here.

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that case," because that legal principle was "encompassed" within the argument actually raised).

[5] *See* 5 U.S.C.A. § 557(b) (West 1996) ("On appeal from or on review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . . "); 29 C.F.R. § 109(c)(3)(on review before ARB, the ALJ's "findings . . . with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive"); *see also Palmer v. Western Truck Manpower, Inc.*, 1985-STA-6, slip op. at 1-2 (Sec'y Jan. 16, 1987) ("I have limited my review to an examination of whether the case record contains substantial evidence to support the ALJ's findings of fact and whether the ALJ's decision is in accordance with law. This is the standard of review which I will apply to all ALJ decisions covered by the newly promulgated regulations implementing section 2305 of the STAA."), *vacated and remanded on other grounds, Western Truck Manpower*, 943 F.2d at 56 (unpublished).

[6] *See Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-8 (ARB July 28, 1999) (quoting *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (referring to the elements of a prima facie case under the STAA)), *rev' d in part on other grounds (mootness)* by *Roadway Express v. ARB*, 6 Fed. Appx. 297 (6th Cir. 2001); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994) (discussing application to STAA of *McDonnell-Douglas* prima facie case and burden-shifting rules); *Nix v. Nehi-RC Bottling Co., Inc.*, 1984-STA-1, slip op. at 5 (Sec'y July 13, 1984) ("I will review cases arising under the employee protection provision of the [STAA] in accordance with the same prescription for allocating burdens of proof and burdens of production or going forward with the evidence as I have applied to analogous employee protection laws under 29 C.F.R. Part 24.") (citing *Dartey v. Zack Co.*, 1982-ERA-2 (Sec'y Apr. 25, 1983)).

The STAA applies to any "person" in a position to discharge, discipline or discriminate against an "employee." 49 U.S.C.A. § 31105(a)(1). According to Department of Labor regulations implementing the STAA's employee protection provision, an "employee" is any "driver of a commercial motor vehicle . . . or [employee] of a commercial motor carrier . . . who in the course of his employment directly affects commercial motor vehicle safety." 29 C.F.R. § 1978.101(d)(1). Although "commercial motor vehicle" is not further defined in these regulations, Title 49 defines "commercial motor vehicle" as a "vehicle used on the highways in interstate commerce to transport . . . property, if the vehicle – A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater; . . . or D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103." 49 U.S.C.A. § 31132(1).

The parties stipulated that Minne and Privott drove "commercial motor vehicles loaded with ammunition to gun shows" in other states. R. D. & O. at 2. The record shows that Minne and Privott regularly drove vehicles with a gross weight exceeding 10,001 pounds. *See* R. D. & O. at 3; Exhibit 42 at 3-5 (listing load weights for trucks driven by Minne and Privott). Therefore, Minne and Privott were covered employees.

As Minne's and Privott's employer, Star was in a position to discharge, discipline or discriminate against them. Therefore, Star was covered by the STAA.

Protected Activity

Minne and Privott argued that they engaged in activity protected under the STAA's first "refusal to drive" provision, which we have called the "actual violation" provision.[7] At that time, this provision prohibited retaliation against an employee because that employee "refuses 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." 49 U.S.C.A. § 31105(a)(1)(B)(i).[8]

Although the ALJ concluded that Minne and Privott did engage in activity protected by Section (B)(i), the ALJ applied the wrong standard.

The ALJ analyzed whether Minne and Privott had a "perception" that Star was violating applicable regulations. R. D. & O. at 5. The ALJ found that they did, stating

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[7] *Ass't Sec'y & Freeze v. Consol. Freightways*, ARB No. 99-030, ALJ No. 1998-STA-26, slip op. at 5 (ARB Apr. 22, 1999).

[8] Recent amendments to the STAA have broadened this provision, changing "safety or health" to "safety, health, or security." Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat. 266, 464 (Aug. 3, 2007).

that Minne and Privott ceased driving "because they *believed* that the trucks that they were assigned to drive were not in compliance with the applicable regulations." *Id.* (emphasis added). The ALJ further found that this perception was "justified," although it "may have been mistaken." *Id*. Having made these two findings, the ALJ appears to have concluded that the refusals based upon this justified perception constituted "protected activity." *Id*.

The ALJ appears to have applied the standard applicable to a complaint brought under the STAA's complaint provision, 49 U.S.C.A. § 31105(a)(1)(A). But Minne and Privott brought their complaint under the (B)(i) refusal provision.[9]

As we have repeatedly stated, in order to "invoke protection under [the refusal provision], a Complainant must prove that an actual violation would have occurred. . . . A reasonable and good faith belief . . . is not enough."[10] Therefore, a "threshold inquiry" when a complainant alleges that he was retaliated against for a refusal protected under (B)(i) "is whether Complainant's operation of a vehicle as scheduled . . . would have constituted a violation" of an applicable regulation.[11]

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[9] Where a complainant brings his complaint only under the STAA's refusal provision, we must not find a violation under the complaint provision unless the employer had notice of or actually litigated a section (a) complaint. *See Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992) (where complainant raised only a refusal claim under section (b) and not a complaint claim under section (a), Secretary violated Due Process by finding that employer violated section (a)). There is no indication in the record that Minne and Privott made a section (a) complaint, or that such a complaint was litigated at the hearing. Moreover, there is no indication in the record that Minne and Privott engaged in or argued that they engaged in a refusal protected under section (B)(ii), despite their apparent attempt to recast their complaint on appeal. *See* Complainants' Brief (CB) at 5 (arguing that conditions at Star put Minne and Privott in "extreme danger"), 9-10 (citing to (B)(ii)). Therefore, we consider only whether Minne and Privott engaged in activity protected under the (B)(i) refusal provision.

[10] *Ass't Sec'y & Vilanj v. Lee & Eastes Tank Lines, Inc.*, 1995-STA-36, slip op. at 5 (Sec'y Apr. 11, 1996) (citations omitted); *see also, e.g., Harris v. C&N Trucking*, ALJ No. 2004-STA-37, slip op. at 5 (Sept. 9, 2004) (adopted by ARB No. 04-175, Jan. 31, 2007) (same, citing cases); *Eash v. Roadway Express, Inc.*, ARB No. 04-036, ALJ No. 1998-STA-28, slip op. at 6 (ARB Sept. 30, 2005) (same, citing cases); *Freeze*, slip op. at 6 (same, citing federal cases); *Brunner v. Dunn's Tree Serv.*, 1994-STA-55, slip op. at 2 (Sec'y Aug. 4, 1995) (same, citing cases).

[11] *D'Agostino v. B&Q Distribution Serv., Inc.*, 1988-STA-11, slip op. at 2 (Sec'y May 10, 1989); *see also, e.g., Jackson v. Protein Express*, 1995-STA-38, slip op. at 3 (ARB Jan. 9, 1997) (complainant engaged in protected refusal where after telling employer on January 13th that he would not drive unsafe truck "until it's fixed," he again refused to drive that truck on January 14th); *Ass't Sec'y & Zessin v. ASAP Express, Inc.*, 1992-STA-33, slip op. at 5 (Sec'y Jan. 19, 1993) (reiterating that "ALJs may determine whether operating a vehicle would constitute violation of a Federal safety regulation, even in the absence of a citation");

The ALJ did not make a clear determination as to whether, at the times that Minne and Privott refused to drive, driving would have violated an applicable regulation.[12] The ALJ first stated that "[i]t is evident that Respondent operated in a shoddy manner and was either unaware of or chose to ignore the applicable motor vehicle regulations." R. D. & O. at 5. The ALJ then stated that Star "was making good faith, although belated *efforts* to bring its transportation *into* compliance." *Id*. But the ALJ did not reach a conclusion as to whether these "efforts" had succeeded.[13]

Because a refusal under (B)(i) is not protected unless driving would have constituted a violation, and the ALJ did not determine whether driving would have constituted a violation, the ALJ's conclusion that Minne and Privott engaged in protected activity under (B)(i) was not reached in accordance with law. Therefore, we cannot affirm that conclusion.

Hadley v. Southeast Coop. Serv. Co., 1986-STA-24, slip op. at 2 n.3 (Sec'y June 28, 1991) (finding Complainant's refusal protected where "Respondent admit[ted] the brake lights were deficient" and "[o]perating the truck would have, therefore, violated a federal regulation applicable to commercial motor vehicle safety"); *Ertel v. Giroux Bros. Transp., Inc.*, 1988-STA-24, slip op. at 14 (Sec'y Feb. 15, 1989) (holding that because federal regulations prohibit removal of out-of-service sticker or operation of stickered vehicle until repairs have been completed, complainant engaged in protected refusal by refusing to remove out-of-service sticker and then drive on highway); *Newkirk v. Cypress Trucking Lines, Inc.*, 1988-STA-17, slip op. at 3 (Sec'y Feb. 13, 1989) (refusal was protected under section (b) when driving "would have violated" regulation); *Robinson v. Duff Truck Line, Inc.*, 1986-STA-3, slip op. at 4-5 (Sec'y Mar. 6, 1987) (explaining that whether a refusal is a protected refusal "is dependent upon whether" the cited regulation "would have" been violated if the complainant had driven); *McGavock v. Elbar, Inc.*, 1986-STA-5, slip op. at 3-4 (Sec'y July 9, 1986) (holding that complainant's statement that in future he would not violate regulations was protected activity, because complainant had proven that regulation would have been violated if he had driven by showing that "DOT regulations as to excessive speed and falsification of logs were being violated and . . . [although "Respondent was well aware" of these violations,] not only did Respondent fail to take corrective action but Respondent's policies required drivers to engage in such violations").

[12] Depending upon the ALJ's findings with regard to each complainant's behavior, it may become necessary to analyze Minne's and Privott's actions separately.

[13] Nor did the ALJ discuss Minne's and Privott's assertions that Neidert told them that no further efforts had been made; that Custer told them it would be cheaper to pay the fines than to bring the trucks into compliance; and that even on the date of the hearing Star was not in compliance. *See, e.g.*, T. 94-96 (Minne testimony that "as of today [the date of the hearing] the vehicles still aren't compliant. . . . I've just seen them. . . . [Y]ou can see clearly that there is no name and base of operation. There's no DOT numbers. There's no hazmat . . . chart").

The ALJ's error might be harmless if we were able to accept the ALJ's conclusion that Minne and Privott did not suffer any adverse action. But as we discuss in the next section, we cannot accept this latter conclusion either.

Adverse Action

The ALJ found that Minne and Privott were never "fired or disciplined" by Star. R. D. & O. at 5. The ALJ also found that Minne and Privott "voluntarily decided not to return to their jobs." From these two findings, the ALJ concluded that Minne and Privott had not suffered adverse action. R. D. & O. at 5.

Again, however, the ALJ applied the wrong standard and thereby committed two legal errors.[14]

First, the ALJ did not examine all three potential sources of adverse action. The STAA prohibits "discharge . . . discipline *or discriminat[ion] . . . regarding pay, terms, or privileges of employment*" because of protected activity. 49 U.S.C.A. § 31105(a)(1) (emphasis added). Although the ALJ found that "the evidence does not show that [Minne and Privott] were fired, disciplined, or suffered any other adverse employment action," the ALJ did not actually discuss whether Star had discriminated against Minne and Privott. Yet it is possible that Minne and Privott suffered such discrimination – for example, when Star found replacement drivers for Minne's and Privott's shows while Minne's and Privott's names still were listed on the assignment board, yet failed to offer Minne and Privott work that did not require participation in possible violations.[15] For

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[14] Star argues that the ALJ's "determination . . . that no adverse action had ever been taken" is a "factual determination" that we should not disturb because it is supported by substantial evidence. Respondent's Brief at 3. We disagree. Though it depends upon the existence or nonexistence of certain facts, a determination as to whether there has been adverse action is a legal conclusion which we review de novo. *See, e.g., Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) ("[C]onstructive discharge is, at least partially, a question of law and must therefore be reviewed by this Court *de novo*."); *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 64 (5th Cir. 1980) ("applying the facts as found by the district court to the law of constructive discharge").

[15] *See Holloway v. Lewis Grocer Co.*, 1987-STA-16, slip op. at 4 (Sec'y Jan. 25, 1988) (rejecting respondent's "argu[ment] that Complainants were merely replaced by other drivers and that, due to overstaffing, Respondent continued to use other drivers rather than Complainants," and holding that "it is clear that each of the Complainants was discharged . . . . [R]eplacement of an employee because he engages in a protected activity is just as much a prohibited act under the STAA as discharge for that reason."). *Compare Shoup v. Kloepfer Concrete*, 1995-STA-33, slip op. at 3 (Sec'y Jan. 11, 1996) (holding that employer had not taken adverse action when, after protected refusal based on violation, employer offered legal work alternative). Although Custer testified that "there were other things to do at Star Air like . . . become a commissioned sales person over the phone . . . during the week," T. 412,

simplicity's sake, we focus the remainder of our discussion primarily upon the termination of Minne's and Privott's employment. On remand, however, we expect that the ALJ will examine all potential instances of adverse action.

Second, the ALJ erred in determining that Minne and Privott were not "fired."

As we have noted, under the STAA any "discharge" is an adverse action. A discharge is any termination of employment *by an employer*. (When an employment relationship is ended by an employee's resignation, of course, then there is no discharge.)

Although the ALJ found no evidence that Star explicitly "fired" Minne and Privott, the ALJ also did not discuss any evidence that either Minne or Privott actually *resigned*. Thus, it appears that the employment relationship was ended by one-sided or perhaps mutual assumption by the parties – i.e., by means of behavior from which the parties deduced that the employment relationship was at an end.

The ALJ appears to have believed that it was Minne's and Privott's behavior which ended the relationship.[16] The ALJ found that Minne and Privott "decided not to

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Minne and Privott worked weekends. Moreover, Custer did not indicate that he actually had offered Minne or Privott a position as a commissioned sales person. Rather, he indicated only that he "would have been happy" if either had asked him for such a position.

[16] Minne and Privott argue that Star's behavior terminated the relationship by constructively discharging them, because Star offered them only trucks that were in violation of applicable regulations. *See* CB at 4-7. But Minne and Privott also argue that they did not resign. *See* CB at 6 (arguing that "Complainants were eager to return to work"), 8 ("the record contains no evidence that [their "conduct" in ceasing to work for Star] was in any way voluntary"), 11 ("the conclusion that the Complainants resigned is not supported by the facts"). We agree that constructive discharge can be found when a former employee proves that his resignation was "compelled" by intolerable circumstances of employment. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004)). But under our precedent, constructive discharge has been found only when a complainant *actually resigned*. *See Earwood v. D.T.X. Corp.*, 1988-STA-21, slip op. at 4 (Sec'y Mar. 8, 1991) (despite respondent's assertion that it intended to comply with regulations in the future, complainants were constructively discharged when, at the time *they resigned*, the "[p]ervasive coercion to violate DOT regulations was intolerable . . . . [and] a reasonable person in Complainant's position would have felt compelled to quit"); *Taylor v. Hampton Recreation & Hampton Manpower Servs.*, 1982-CETA-198, slip op. at 7-9 (Sec'y Apr. 24, 1987) (holding *employee's resignation* was constructive discharge because employment conditions were intolerable); *Hollis v. Double DD Truck Lines, Inc.*, 1984-STA-13, slip op. at 4 (Under Sec'y Mar. 18, 1985) (holding that although ALJ correctly found that complainant Johnnie Reagan had resigned, that resignation constituted a constructive discharge because it was due to intolerable work conditions); *see also Perez v. Guthmiller Trucking Co.*, 1987-STA-13, (Sec'y Dec. 7, 1988), slip op. at 17-19 (complainant's resignation did not constitute constructive discharge where objective conditions were not intolerable and complainant resigned because of his emotional state).

return to their jobs," R. D. & O. at 5, and appears to have assumed that because they did so "voluntarily" they therefore did not suffer an adverse action.

But it is clear that Star's behavior, rather than Minne's and Privott's, ultimately ended the relationship. Star chose to react to Minne's and Privott's refusal to work by considering them to have resigned, rather than by addressing all the issues they had raised. And under our precedent, except where an employee actually has resigned[17] an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee.[18]

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[17] *See, e.g., Bettner v. Daymark, Inc.*, ARB No. 01-088, ALJ No. 2000-STA-41, slip op. at 20-24 (ARB Oct. 31, 2003) (where employee sent text message resigning and offering to rescind that resignation upon favorable resolution of unprotected complaint concerning reimbursement, employer did not discharge employee by accepting resignation rather than addressing unprotected complaint); *Waters v. Exel North Am. Road Transp.*, ARB No. 02-083, ALJ No. 2002-STA-3, slip op. at 3 (ARB Aug. 26, 2003) (adopting ALJ decision, June 4, 2002, slip op. at 5, that complainant did not suffer adverse action where employer did not make request that complainant return equipment until after complainant had "confirmed that he had secured work elsewhere").

[18] *See, e.g., Prior v. Hughes Transp., Inc.*, ARB No. 04-044, ALJ No. 2004-STA-1, slip op. at 3 (adopting ALJ decision, Jan. 13, 2004, slip op. at 4, that "Complainant's conduct in voluntarily leaving his job . . . was the cause of his termination"); *Mason v. Potters Express, Inc.*, ARB No. 00-004, ALJ No. 1999-STA-27, slip op. at 2, 6 (ARB Nov. 21, 2000) (affirming ALJ decision to reject respondent's argument that complainant had quit and instead hold that respondent had discharged complainant by replying "it's been nice knowing you" in answer to complainant's question "are you going to fire me or not," and to hold that complainant had failed to prove retaliation and thus did not prevail); *Jackson v. Protein Express*, slip op. at 3-4 (overturning ALJ's ruling that complainant had "abandoned" his job and thus had not suffered adverse action, Secretary held that where complainant had refused to drive truck "until it's fixed," employer had discharged complainant by removing his belongings from truck without offering him another truck to drive and without clarifying his status); *Ass't Sec'y & Vilanj v. Lee & Eastes Tank Lines*, slip op. at 4-6 (employer violated STAA when it reacted to complainant's refusal to drive by "consider[ing] [complainant] to have voluntarily quit" rather than by addressing condition complainant had raised, thus by implication employer engaged in adverse action by deciding that complainant had "quit"); *Ass't Sec'y & Lajoie v. Envtl. Mgmt. Sys., Inc.*, 1990-STA-31, slip op. at 5-6 (Sec'y Oct. 27, 1992) (overturning ALJ's determination that employee had "voluntarily quit," Secretary held that employer had "engaged in adverse action" by "discharg[ing]" employee when employer "was not willing to address [employee's] complaint and considered [complainant] discharged if he failed to capitulate" by driving even though employer had not addressed complainant's concern); *Galvin v. Munson Transp., Inc.*, 1991-STA-41, slip op. at 4 (Sec'y Aug. 31, 1992) (overturning ALJ's determination that complainant had not alleged adverse action and thus had not made prima facie case, Secretary held that complainant "had sufficiently [alleged] adverse action by showing that following his refusal to drive the overweight truck, he was instructed to remove his belongings from the truck, he could not complete the assigned job, he did not return to work for respondent, and he was denied rehire" several months later,

Because Minne and Privott did not actually resign but simply "did not return to their jobs," Star's decision to remove Minne and Privott from the payroll rather than address the issues they had raised constituted a decision to terminate them for what Star presumed was job abandonment.

As we have noted, under the STAA any discharge by an employer constitutes adverse action. Thus Star's decision to discharge Minne and Privott constituted an

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"despite Respondent's characterization of [Complainant's behavior] as a voluntary quit"; nonetheless Secretary held that there was insufficient evidence to prove retaliation and so dismissed complaint); *Robinson v. Duff Truck Line, Inc.*, slip op. at 10 (holding that employer took adverse action when it "discharged" complainant by telling complainant that his protected refusal to drive was a "voluntary quit"), *affirmed by Duff Truck, Inc. v. Brock*, 848 F.2d 189, *4 (6th Cir. 1988) (unpublished); *see also Dixon v. City of New Richmond*, 334 F.3d 691, 695 (7th Cir. 2003) ("We recognize four types of job termination . . . [including] constructive resignation [i.e., telling an employee that by his conduct he has ended the employment relationship]") (citing *Patterson v. Portch*, 853 F.2d 1399, 1406 (7th Cir. 1988), which held that one form of termination by employer is constructive resignation: the "situation[] in which the employee abandons (without formally resigning) his job and the employer treats the employee as if he had formally resigned")); *Fronczak v. N.Y. State Dep't of Corr. Servs.*, 2 Fed. Appx. 213, 215-17 (2d Cir. 2001) (unpublished) (noting without discussion that where employer's letter warned that 10-day absence would be interpreted as resignation, end of employment due to such absence was termination and thus adverse action). *But see, e.g., Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 448 (6th Cir. 1999) (noting – though not in employment discrimination case – that under 1941 and 1949 Ohio state law decisions "constructive resignation" may at times be interpreted as a resignation rather than a termination); *Borja v. Hines Nurseries, Inc.*, 172 Fed. Appx. 927, 929 (11th Cir. 2006) (unpublished) (holding that in light of company's written policy informing employee that leaving job would be interpreted as resignation, end of employee's employment was due to employee's decision to leave job and thus was not adverse action). Although the ARB did recently adopt an ALJ decision holding that a complainant's job abandonment was a resignation rather than a cause for termination, *see Smith v. Jordan Carriers*, ARB No. 05-042, ALJ No. 2004-STA-47, slip op. at 1-2 (ARB Aug. 26, 2006) (adopting without discussion ALJ decision to dismiss complaint), the ALJ in his decision had not only held that there was no adverse action but also had held that the complainant had not engaged in protected activity and had not provided sufficient evidence of retaliation. *See Smith v. Jordan Carriers*, slip op. at 18-19 (ALJ Dec. 16, 2004) (holding, based upon *Walker*, that complainant had not suffered adverse action because complainant "chose to sever his employment" by "walk[ing] away" without "thereafter contact[ing] Respondent for dispatch, inquir[ing] about his status or return[ing] to work"; further holding that complainant had not proven protected activity or causation). Because the ALJ's adverse action determination in *Smith v. Jordan Carriers* was not clearly dispositive and because the ARB did not provide any discussion of or explanation for its determination to adopt the ALJ's decision as a whole, the ARB did not in adopting the ALJ's decision in *Smith v. Jordan Carriers* overturn any of its or the Secretary's earlier decisions cited above. Therefore, we continue to be bound by the conclusions reached by those earlier decisions.

adverse action. We discuss in the next section whether the infliction of this adverse action violated the STAA.

Causation

To show causation, Minne and Privott must show that they suffered adverse action because of protected activity. The ALJ did not discuss causation because he determined that there was no adverse action. It appears from the ALJ's analysis, however, that the ALJ assumed that Star was justified in deciding that Minne and Privott had left their jobs – and thus assumed that Star did not violate the STAA by deciding to terminate their employment for this presumed job abandonment.

In so assuming, the ALJ may again have erred.

To show that an employer retaliated in violation of the STAA, a complainant must show that the employer took adverse action against that complainant because of protected activity. The ALJ found that Minne and Privott decided not to return to their jobs "because they believed that the trucks that they were assigned to drive were not in compliance with the applicable regulations." R. D. & O. at 5.

But as we discussed in the Protected Activity section, if Minne's and Privott's belief was correct and there were violations, then their decisions to stop driving may have constituted protected refusals to drive. And if Minne and Privott engaged in such protected refusals to drive, then it is possible that Star's decision to discharge them for job abandonment was based upon those protected refusals.[19]

An employer violates the STAA by taking adverse action against an employee – including discharging an employee – because of a protected refusal.[20] Therefore, the STAA prohibits an employer from interpreting a protected refusal as a job abandonment justifying termination of employment. An "employer is not allowed to impose unreasonable conditions on an employee and then [terminate the employee's employment] when the employee fails to comply with them."[21]

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[19] Of course, if the ALJ determines on remand that Minne and Privott did not engage in any protected refusals, then Star's action in discharging them cannot have been due to such activity and by definition no causation could be found.

[20] *See Ass't Sec'y & Self v. Carolina Freight Carriers Corp.*, 1991-STA-25, slip op. at 4-5 (Sec'y Aug. 6, 1992) ("Section 2305 seeks to prevent employees from being coerced into operating vehicles when it would result in violation or from suffering employment discrimination as the result of their refusal to act illegally.").

[21] *Patterson*, 853 F.2d at 1407.

So if Star treated protected refusals as grounds for any adverse action, including a determination that Minne and Privott had quit, then by definition Star violated the STAA.[22]

As the above discussion shows, whether Star violated the STAA depends in large part upon whether and when Minne and Privott engaged in protected refusals – which in turn depends in large part upon whether driving, at various times, would have violated applicable regulations. Yet as we explained in the Protected Activity section, the ALJ did not make these determinations.

We recognize that both parties told the ALJ that it was not necessary to determine whether driving would have violated any applicable regulations.[23] But parties cannot

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[22] *See Ass't Sec'y & Ciotti v. Sysco Foods*, ARB No. 98-103, ALJ No. 1997-STA-30, slip op. at 7 (ARB July 8, 1998) ("[T]here is no distinction . . . between Ciotti's protected activity of refusing to drive . . . and his absence from work. They are the same thing. . . . Taking adverse action against Ciotti because he was absent from work under these circumstances is the same as taking adverse action against him because of his protected activity;" thus employer violated STAA by giving Ciotti "untenable choice" between driving and thereby violating federal regulations, or refusing to drive and being suspended); *Cook v. Guardian Lubricants, Inc.*, 1995-STA-43, slip op. at 9-15 (Sec'y May 1, 1996) (holding causation shown where employer was hostile to complaints, told drivers it would reimburse them for fines, had no interest in correcting violations but rather viewed overweight as routine occurrence, and intended to replace complainant with driver who would routinely drive overweight); *Ass't Sec'y & Phillips v. MJB Contractors*, 1992-STA-22, slip op. at 2 (Sec'y Oct. 6, 1992) (employer violated STAA by forcing complainant to choose between driving unsafe vehicle and going home); *Kenneway v. Matlack, Inc.*, 1988-STA-20, slip op. at 6 (Sec'y June 15, 1989) (holding that employer "lacked the authority to direct [an employee] to violate Federal regulations, and any instruction to engage in an illegal act was patently unreasonable," so employer violated the STAA by terminating employee who refused to comply with such instructions); *Ertel v. Giroux Bros.*, slip op. at 15 (holding that complainant had "effectively demonstrated" causation – i.e., that discharge was based upon protected refusal – by "instructing [complainant] to violate federal regulations, and in doing so themselves readily and apparently without compunction"); *Robinson v. Duff Truck Line, Inc.*, slip op. at 10 (noting that employer had admitted causation by admitting that it took adverse action against employee "because he refused to drive"). *Compare, e.g., Bettner v. Daymark, Inc.*, slip op. at 20-24 (where employer accepted employee's resignation rather than employee's offer to rescind that resignation upon favorable resolution of employee's unprotected complaint, employer's decision did not constitute retaliation because employer genuinely believed employee had resigned and the text message conveying the resignation did not constitute protected activity).

[23] Minne's counsel stated in his opening statement that "[t]he primary dispute in this case is not going to be whether the vehicles were illegal . . . but whether or not Mr. Privott and Mr. Minne are entitled to protection under the law because they were terminated." T. 17-18. Star's counsel stated in his opening statement that "Star Air is not on trial here with regard to the conditions of the trucks. I think the evidence will show that Star Air was not perfect. . . . Mr. Custer, his staff and others at Star Air worked hard to satisfy their employees

agree to deviate from applicable standards of law, nor can we affirm a conclusion that rests upon the wrong legal standard.[24] Instead, we remand so that the ALJ can make the initial determination as to whether there would have been a violation if Minne and Privott had driven.[25]

With regard to this determination, we note that a complainant generally has the burden to prove this element of his case. Thus, if a record does not contain sufficient evidence to prove that driving would have violated an applicable regulation, then an ALJ generally "cannot conclude that [the] Complainant's refusal was protected" under (B)(i).[26] Here, however, the ALJ appears to have cut off testimony aimed at proving actual violations would have occurred.[27] Therefore, if necessary, the ALJ may wish to consider allowing supplementary evidence on this point.

CONCLUSION

Whether Minne and Privott engaged in protected activity, and whether Star's treatment of them violated the STAA, cannot be determined without several prior determinations – the first of which is whether applicable regulations would have been violated if Minne and Privott had driven. We therefore **REMAND** for further proceedings consistent with this decision.

SO ORDERED.

A. LOUISE OLIVER
Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

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and bring the trucks into compliance. Did they do it? Perhaps not. Did they try? Absolutely." T. 26.

[24] *See, e.g., United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (noting that "the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent . . . simply because the parties agree upon it").

[25] *See* 29 C.F.R. § 1978.109(a); *see also Brown v. Wilson Trucking Corp.*, 1994-STA-54, slip op. at 3-4 (Sec'y Jan. 25, 1996) (remanding because "STAA regulations confer the primary role in resolving disputed issues of fact to the ALJ").

[26] *Settle v. BWD Trucking Co., Inc.*, 1992-STA-16, slip op. at 2 (Sec'y May 18, 1994).

[27] The ALJ stated that "what the safety violations actually were is really irrelevant. It's whether they perceived them to have violations and complained of them. So the exact nature of those violations I don't think is really relevant." T. 126-27.