



**In the Matter of:**

**CHARLES JENKINS,**

**ARB CASE NO. 05-013**

**COMPLAINANT,**

**ALJ CASE NO. 2004-STA-13**

**v.**

**DATE: January 27, 2006**

**OLD DOMINION RECYCLING,  
INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**FINAL DECISION AND ORDER**

Charles Jenkins complained that Old Dominion Recycling, 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 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2005), when it terminated his employment on October 20, 2003. We approve the Administrative Law Judge's Recommended Decision and Order (R. D. & O.) issued on October 29, 2004, that Old Dominion did not violate the STAA.

**BACKGROUND**

Old Dominion hired Jenkins as a local truck driver on October 7, 2003. He prepared vehicle inspection reports for his assigned truck on October 8, 9, 10, 13 and 14. Complainant's Exhibit (CX) 2. Jenkins complained to Old Dominion that there was play in the fifth wheel, a device that holds the trailer on the tractor; that the right (passenger) side of the tractor was missing a mirror and steps; that tires that should be inflated to 100 pounds were only inflated to 50; and that there was vibration in the steering wheel. Hearing Transcript (T.) at 17, 21, and 23. Jenkins's foreman, Steven St. Pierre, expected him to report deficiencies in his inspection reports. T. at 59, 67, and 69. Some repairs were made right away and some parts had to be ordered. T. 57-58. Nevertheless, St.

Pierre considered the truck safe to drive and in compliance with U. S. Department of Transportation (DOT) regulations. T. at 69.

On October 20, 2003, Jenkins was dispatched to a marine terminal to pick up a box of new aluminum wheel rims using Old Dominion's new roll-off truck. T. at 62. A roll-off truck is a straight, rather than tractor trailer truck that has a container box that slides on and off. T. at 56. Jenkins drove the roll-off truck to the marine terminal with an empty container box already on it. When he arrived, the people at the terminal told him they did not need an empty container box, so he had to return to Old Dominion without the container box with the rims. T. at 28. According to St. Pierre, Jenkins came back "ranting and raving" about why St. Pierre did not tell him not to take an empty box. St. Pierre said he was not going to argue with Jenkins. Jenkins should drop off the empty box and go back and pick up the customer's wheel rims. It was five minutes away. T. at 63. Finally St. Pierre said, "[I]f you don't drop it, you can leave. Make your choice. You can either go take care of the customer or go." T. at 63.

The warehouse manager, Gresham Sackett, was making room for the new rims, and corroborated St. Pierre's testimony. Jenkins "would not let up. It was getting to the point that something was going to happen here and [Jenkins] would not get out of [St. Pierre's] face." T. at 75. Jenkins then went to see Tim Hund, the owner of Old Dominion. He had prior knowledge of Jenkins's poor attitude and would not reverse St. Pierre's personnel decision. T. at 84. St. Pierre testified that, as he left the business, Jenkins called him a "punk-ass bitch" and "turned and left." T. at 64.

Jenkins filed a complaint with the Occupational Safety and Health Administration (OSHA) on October 29, 2003, alleging that Old Dominion discharged him in violation of the STAA because he had made protected safety complaints about his assigned truck. After an investigation, OSHA issued a report on November 13, 2003, dismissing the complaint for lack of merit. On December 3, 2003, Jenkins appealed and requested an evidentiary hearing. An ALJ held the hearing on July 28, 2004, in Newport News, Virginia, and on October 29, 2004, issued a Recommended Decision and Order (R. D. & O.) denying the complaint. The parties appeared pro se at the hearing and neither has filed a brief before us.

## **ISSUE**

The question we consider is whether substantial evidence in the record supports the ALJ's ruling that Old Dominion did not violate the STAA by taking adverse action against Jenkins 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) (2005).

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 now address whether Old Dominion discharged Jenkins because he made protected 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 of unlawful discrimination under the whistleblower protection provisions of the STAA, the complainant must allege and later prove by a preponderance of the evidence that he is an employee and the respondent is an employer; 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. *Forrest v. Dallas and Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-53, slip op. at 3-4 (ARB July 29, 2005); *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).

In this case, the parties stipulated that Jenkins was an employee and that Old Dominion was an employer subject to the STAA. R. D. & O. at 2. The ALJ concluded that Jenkins engaged in protected activity under the STAA, § 31105(a)(1)(A), when he

listed safety concerns in his pre-inspection reports. R. D. & O. at 7. Old Dominion encouraged Jenkins to list the problems with the truck and responded by making repairs, so the ALJ also found that Old Dominion was aware of Jenkins's safety complaints. *Id.* at 7. St. Pierre told Jenkins to go back to the marine terminal and pick up the wheel rims or go, which meant do his job or be fired. T. at 65; R. D. & O. at 7-8. And finally, Jenkins met his initial burden of showing a causal relationship between his protected activity and his discharge. His last inspection report was on October 14 and his termination occurred on October 20. R. D. & O. at 7-8.

However, employing the analytical framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the ALJ held that Jenkins did not prove discrimination. "The argument between Complainant and Mr. St. Pierre which took place provides a legitimate, non-discriminatory reason for Complainant's dismissal." R. D. & O. at 8. Jenkins argued with St. Pierre about his assignment to pick up the wheel rims and would not "let up." *Id.* Jenkins did not prove that his disrespect for his foreman, St. Pierre, was a mere pretext for his discharge. The ALJ noted that Jenkins had been assigned the new roll-off truck and had stopped complaining of deficiencies, that other Old Dominion witnesses supported St. Pierre's testimony, and that Jenkins's testimony was "often vague, and mostly inflammatory rather than substantive." *Id.* at 8-9. Accordingly, Old Dominion did not violate the STAA.

#### CONCLUSION

Substantial evidence in the record supports the ALJ's findings of fact. He applied the correct law to those findings. We therefore adopt his recommendation and **DISMISS** this case.

**SO ORDERED.**

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

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