



In the Matter of:

LINDA S. WALTERS,

ARB CASE NO. 05-018

COMPLAINANT,

ALJ CASE NO. 04-STA-39

v.

DATE: October 26, 2006

ANGELO LUPPINO, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

For the Complainant:

Linda S. Walters, pro se, Ashland, Wisconsin

For the Respondent:

Paul Luppino, Esq., Iron Belt, Wisconsin

FINAL DECISION AND ORDER

Linda S. Walters complained that Angelo Luppino, Inc. (Luppino) 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 (2006), when it laid her off in August 2003. We conclude that Luppino did not violate the STAA, and therefore we deny Walters's complaint.

BACKGROUND

The transcript of the June 22, 2004 hearing and the exhibits introduced therein¹ support the Administrative Law Judge's findings of fact. Luppino was a family-owned

¹ Hearing transcript (T.); Complainant's Exhibits (CX); Respondent's Exhibits (RX).

business located in Iron County, Wisconsin. CX 9. As relevant to Walters's employment, it operated a blacktop plant and various sand and gravel pits. *Id.* The work was seasonal, generally from May through September, depending on the weather. *Id.* In late April 2003, Luppino hired Walters to drive a 1984 dump truck to transport sand, gravel and asphalt. RX 1; RX 7.

On July 30, 2003, while Walters was hauling gravel/iron ore in Michigan, she requested that the Michigan State Police inspect her truck. Recommended Decision and Order (R. D. & O.) at 3; T. at 16; RX 7. The State Police found major safety deficiencies and took the truck out of service. R. D. & O. at 3; T. at 16. Luppino laid her off, which Walters claimed was in retaliation for having the truck inspected. Luppino did not provide Walters with another truck to drive or provide her with odd jobs while mechanics repaired her truck. R. D. & O. at 4; T. at 40-41; RX 7. Luppino told Walters to call in on Wednesdays and Sundays to check on the status of the truck, which she did on August 3, 6, 10 and 13. *See* T. at 143; RX 7. She was informed that there was no other work and that the truck was still in repair. Walters did not call in after August 13 because she thought Luppino was lying about the repairs and was keeping her out of work in retaliation for her safety complaint. *See* R. D. & O. at 4; RX 7.

Luppino denied laying Walters off in retaliation for having the truck inspected. Luppino did not have another truck or other work for her to do. R. D. & O. at 7, 9; T. at 142. By August 13, the repairs were complete with the exception of welding that had to be done in another shop and that was completed by August 27. R. D. & O. at 6; T. at 98; RX 7. At that point, Walters had stopped calling in, the construction season was coming to a close, and Luppino was laying off other, more senior drivers. R. D. & O. at 6, 9; T. at 98, 142-43.

On August 15, 2003, Walters filed a complaint with the Occupational Safety and Health Administration (OSHA), which found no causal connection between her protected safety complaint and her lay off. RX 7. Walters then appealed OSHA's determination, and requested an evidentiary hearing before an Administrative Law Judge (ALJ), which was held on June 22, 2004, in Duluth, Minnesota.

The ALJ issued an R. D. & O. on November 8, 2004, in which he concluded that Luppino laid Walters off due to lack of work and lack of seniority, and not because she had complained about the truck's unsafe condition. R. D. & O. at 8-11. The case is now before us again under the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2006). Neither Walters nor Luppino has elected to file a brief in response to our briefing order.

ISSUE

We examine whether substantial evidence supports the ALJ's ruling that Luppino did not violate the STAA by taking adverse action against Walters for making a protected motor carrier safety complaint.

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. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c) (2006).

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: 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 she engaged in protected activity, that her employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against her, and that the protected activity was the reason for the adverse action. *BSP Trans, Inc.*, 160 F.3d at 45; *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *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); *Schwartz v.*

Young's Commercial Transfer, Inc., ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

If the complainant proves that retaliation was a motivating factor in the respondent's action, the burden shifts to the respondent to show that it would have taken the same action against the complainant even in the absence of protected activities. *Somerson v. Yellow Freight Sys., Inc.*, ARB No. 99-005, 036, ALJ No. 98-STA-9,11, slip op. at 19 (ARB Feb. 18, 1999).

It is undisputed that Walters was an employee and Luppino was an employer subject to the STAA. RX 7. The parties stipulated that Walters engaged in protected activity when she complained about the truck's safety, and that she suffered an adverse action when Luppino laid her off. R. D. & O. at 3, 8; T. at 17-18. It is also reasonable to infer, as the ALJ did, that Luppino knew about the protected activity. R. D. & O. at 8; T. at 152; CX 3. Thus, the determinative question is whether Luppino laid Walters off for requesting a safety inspection.

Substantial record evidence supports the ALJ's findings. Luppino offered legitimate, non-discriminatory reasons for laying off Walters. While her truck was being repaired, there was no other truck for her to drive and no other work for her to do. R. D. & O. at 7, 9; T. at 142. Walters had less seniority than eleven other truck drivers employed in August 2003. *Id.*

Walters did not prove that Luppino's stated reasons for not calling her back to work were pretextual. Walters did not demonstrate that Luppino had a policy of providing substitute trucks or alternative work. R. D. & O. at 9. Luppino's most senior driver was also laid off due to lack of work. R. D. & O. at 5; T.53, 55. By the time repairs on the truck were completed on August 27, Walters had stopped calling in to see if the truck was fixed or work was available, and she had already filed her OSHA complaint on August 15. R. D. & O. at 6, 9; T. at 98, 142.

Even if Walters's instigation of the safety inspection that took the truck off the road was a motivating factor Luppino's decision to lay her off, the ALJ concluded that Luppino would not have called her back to work in any event. R. D. & O. at 7, 10; T. at 144-45. We agree. Luppino proved by a preponderance of the evidence that, due to the seasonal nature of its business and the layoff of more senior drivers in August and September 2003, it would have laid Walters off regardless of her safety complaints. R. D. & O. at 10.

CONCLUSION

We hold that Walters failed to prove that Luppino discriminated against her in violation of the STAA. We **DENY** her complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge