In the Matter of:

JUAN G. RAMIREZ, **ARB CASE NO. 06-025**

COMPLAINANT, **ALJ CASE NO. 2005-STA-37**

v. **DATE: November 30, 2006**

FRITO-LAY, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Juan G. Ramirez complained that Frito-Lay Incorporated 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 discharged him in August 2004 and then blacklisted him in November of 2004. A Department of Labor Administrative Law Judge issued a Recommended Decision and Order (R. D. & O.) dismissing Ramirez's complaint. We also conclude that Frito-Lay did not violate the STAA, and therefore deny Ramirez's complaint.

BACKGROUND

The transcript of the August 18, 2005 hearing and the exhibits introduced therein[1] support the Administrative Law Judge's findings of fact. Ramirez began employment with Frito-Lay in December 1999 as a general merchandiser. As such, he assisted route salesmen in the "recovery" of stores, which meant he put products (e.g., Doritos, Fritos and Funyuns) on the shelves and maintained the appearance of displays. In June 2002, Ramirez became a route sales representative (RSR), which, besides recovery, required

[1] Hearing transcript (T.); Complainant's Exhibits (CX); Respondent's Exhibits (RX); Administrative Law Judge's Exhibits (ALJX).

him to drive Frito-Lay cargo vans and later 24-bulk trucks and to service accounts. An important part of his job was to "rotate" Frito-Lay products. "Rotating" the products required removing stale products and placing the newest, freshest products on the shelves behind older products that were already there, so that the latter would be sold first.

Ramirez was a "swing man" for other drivers who were on days off. On Sundays and Mondays, he serviced three stores; on Fridays and Saturdays, he serviced two; and on Tuesdays, he assisted another RSR. R. D. & O. at 3-4.

Ramirez's supervisor for most of his tenure was District Sales Leader Mario Hinojosa. According to Hinojosa, a typical workday for the drivers was to start deliveries at 4:00 or 5:00 in the morning, work until between 10:00 and noon, take a few hours off, and return to the stores in the late afternoon to do "pull-ups," T. at 156-57, 179, which included straightening up the shelves and removing unsold product to make room for the next day's deliveries. There was no reason why a RSR like Ramirez would not have at least eight hours to rest before he began the next day. T. at 159, 179, 194. Hinojosa said Ramirez complained only once that his work schedule prevented him from getting eight hours off before he had to start a new workday. T. at 157-159.

Hinojosa disciplined Ramirez under Frito-Lay's progressive discipline policy. Ramirez received a notice of verbal warning for backing into another delivery truck, RX 1; a written reminder for failing to follow the check in-process, RX 2; a note to the file for failing to perform his afternoon pull up and not responding to a page, RX 3; and a final written warning when there was a $2,246.08 discrepancy in his receipts. Ramirez's new supervisor, Polo DeLeon, suspended him on August 18, 2004, and then terminated his employment on August 25, 2004, for not meeting Frito-Lay's performance standards, because store managers complained that Ramirez's displays were not filled and serviced. T at 204-05; RX 7, RX 8.

Ramirez then applied for a driver position with TNT Logistics North America. When TNT required that Frito-Lay complete a form about his employment, and Frito-Lay initially replied that it had a "no reference" policy, RX 17, Ramirez thought Frito-Lay had blacklisted him. Subsequently, Frito-Lay's legal department did provide information that Ramirez had not had any reportable accidents and had passed drug and alcohol screening tests. T. at 224-27; RX 14.

Ramirez filed a complaint with the Occupational Safety and Health Administration (OSHA), which found no violation of the STAA. ALJX 2. Ramirez then appealed OSHA's determination, and requested an evidentiary hearing before an Administrative Law Judge (ALJ).

The ALJ issued an R. D. & O. on December 7, 2005, in which he concluded that Frito-Lay disciplined Ramirez for "multiple incidents for which disciplinary action was taken against him" and not as a result of any concerns Ramirez voiced to Hinojosa about not getting the requisite eight hours off between workdays; and further that Frito-Lay did not interfere with Ramirez's attempt to procure employment with TNT. R. D. & O. at

23-24. 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). Neither Ramirez nor Frito-Lay has elected to file a brief in response to our briefing order.

ISSUES

We review whether Frito-Lay violated the STAA for (1) firing Ramirez for making a protected safety complaint about not getting eight hours off between workdays, and (2) blacklisting him with regard to future employment with TNT.

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).

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

1. The legal standard

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). At issue are the Department of Transportation's Hours of Service regulations for drivers, 49 C.F.R. Part 395 (2005).

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 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).

2. The discharge complaint

The parties stipulated and the ALJ ruled that Ramirez was an employee and Frito-Lay was a person (employer) subject to the STAA. R. D. & O. at 2, 19.

Protected activity

The ALJ also found that Ramirez engaged in protected activity. R. D. & O. at 20-21. Ramirez testified that he worked long hours, not completing work until 7:00 p.m. and sometimes beginning at 2:00 a.m. T. at 45, 47. At trial he contended that, within a year of his termination, he complained to Hinojosa three to five times that his work schedule did not permit him to get the eight hours rest that he said were required under DOT regulations. T. at 53. However, at his deposition, taken earlier, Ramirez could only remember complaining once to Hinojosa about having inadequate time to rest and he did not recall mentioning the DOT regulations. T. at 89-91.

Hinojosa acknowledged that Ramirez once complained about not getting eight hours off, T. at 157-58, but denied that Ramirez referred to DOT regulations. T. at 175. Hinojosa testified that Ramirez had ample time to service his stores and get eight hours rest. T. at 159, 179, 194. Nevertheless, because Ramirez complained to his supervisor that his work hours did not permit adequate rest and because that complaint implicated the DOT hours of service regulations for commercial truck drivers, the ALJ concluded that Ramirez made a STAA protected complaint. R. D. & O. at 20-21.

Absence of causation

Ramirez did not prove that he was discharged because of his protected activity. Although Hinojosa disciplined Ramirez, he did not suspend or terminate him; DeLeon made those decisions. T. at 169, 206. Both Hinojosa and DeLeon testified that Hinojosa did not tell DeLeon about Ramirez's complaint about his hours. T. at 169, 207. Ramirez admitted that he never brought up his hours with DeLeon. T. at 25, 100. Therefore, Ramirez's protected STAA complaint could not have been the basis of DeLeon's decision to suspend and then discharge him. R. D. & O. at 23.

Moreover, Frito-Lay had legitimate, non-discriminatory reasons for taking adverse action against Ramirez. In January 2004, Hinojosa issued a final written warning because Ramirez had failed to reconcile his books between product delivered and payment received in the amount of $2,246.08. R. D. & O. at 11; RX 4. In June 2004, Hinojosa prepared a memo to Ramirez to go into his personnel file entitled "Attitude Adjustment." RX 5. In August 2004, Hinojosa did a memo following a store manager's complaint that Ramirez was not performing pull-ups in the afternoon. RX 6. Even though DeLeon had taken over supervision of Ramirez, Hinojosa continued to receive complaints about Ramirez in the fall of 2004. T. at 167; R. D. & O. at 12.

In August 2004, when DeLeon assumed responsibility, store managers complained that Ramirez was not accurate in his work; that he had problems keeping racks and shelves serviced; and that he could not be found when he was supposed to be working. T. at 204, 209, 214; R. D. & O. at 14-16. During inspections, DeLeon personally observed that product had not been rotated and that stores were not full. T. at 204. Following Frito-Lay's practice, DeLeon suspended Ramirez prior to terminating him. T. at 200; R. D. & O. at 15. Accordingly, substantial evidence supports the ALJ's conclusion that Frito-Lay discharged Ramirez for poor performance, and not because he complained about working without an adequate, eight-hour rest break. R. D. & O. at 23-24.

3. The blacklisting complaint

Following his termination with Frito-Lay, Ramirez applied for a truck driving job with TNT Logistics. He claimed that, by refusing to provide information about his prior employment, Frito-Lay blacklisted him and therefore violated the STAA.

The STAA provides a cause of action on behalf of an employee when his former employer blacklists him for having engaged in protected activity. *Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-36 (ARB July 31, 2006). We have said, "Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment." *Id.* at 5. Therefore, to prevail, Ramirez had to prove that Frito-Lay provided damaging information to TNT that prevented him from finding employment there. He did not meet that burden.

When Ramirez applied for employment with TNT, that company required information about his driving performance. When Ramirez called about obtaining his records, Hinojosa referred him to the zone administrator's office. T. at 170. DeLeon had no knowledge about the form Ramirez needed completed for his new job, and therefore could not have interfered with it. T. at 207-08. The TNT form went to the zone administrative office, and the assistant, following Frito-Lay's "no reference" policy, referred TNT to a toll free number or the company's website, which TNT could use to verify the fact of Ramirez's employment. T. at 247. The assistant did not know Ramirez and was not trying to keep him from getting a new job. T at 247, 249.

TNT's lawyer then spoke with an associate counsel for Frito-Lay, who by the time of the hearing, was a senior vice president for human resources. She knew that the DOT regulations had just changed, and Frito-Lay was required to give out more than just the dates for employment for Ramirez, who was considered a bulk driver. T. at 219, 224. She verbally confirmed that Ramirez passed the drug screen test and had no accidents that were considered reportable. T. at 224. She requested another copy of the required form and a second lawyer in the office returned it the day it was received. T. at 227. Some months later, TNT hired him. T. at 75-6.

Ramirez admitted that he did not know if anyone from Frito-Lay was trying to prevent him from obtaining a new job. T. at 123-24. His evidence consisted of a comment from a TNT supervisor that he must have done something "pretty bad" if Frito-Lay did not want to answer questions about his employment. T. at 74. But a "gut feeling" does not prove blacklisting. "[T]here must be evidence that a specific act of blacklisting occurred. Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place." *Murphy*, slip op. at 5-6. Thus, we concur with the ALJ's ruling that Frito-Lay did not blacklist Ramirez because of his protected activity. R. D. & O. at 24.

CONCLUSION

We have reviewed the record and conclude that substantial evidence supports the ALJ's findings of fact and that he correctly applied the law. Ramirez failed to prove that Frito-Lay fired him in retaliation for making a protected safety complaint about not getting eight hours off between workdays, and he failed to prove that Frito-Lay blacklisted him with regard to future employment with TNT. Therefore, for the reasons stated in the R. D. & O., and summarized here, we **DISMISS** Ramirez's STAA complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge