In the Matter of:

JOSHUA J. ISRAEL, **ARB CASE NO. 06-040**

COMPLAINANT, **ALJ CASE NO. 2005-STA-051**

v. **DATE: July 31, 2008**

SCHNEIDER NATIONAL CARRIERS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Joshua J. Israel, *pro se*, Shakopee, Minnesota

For the Respondent:
James C. Hardman, Esq., Little Canada, Minnesota

FINAL DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified.[1] On June 4, 2005, the Complainant, Joshua Israel, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Schneider National Carriers, violated the STAA when Schneider retaliated against Israel because he complained of unsafe training conditions. On July 20, 2005, OSHA dismissed Israel's case. Israel timely filed his objections

[1] 49 U.S.C.A. § 31105(a) (West 1997). The STAA's implementing regulations are found at 29 C.F.R. Part 1978 (2007). The STAA has been amended since Israel filed his complaint. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

and a Department of Labor Administrative Law Judge (ALJ) held a hearing on August 30, 2005, in St. Paul, Minnesota. The ALJ found that Israel failed to prove that Schneider violated the STAA and further that Schneider fired Israel for a legitimate, non-discriminatory reason. The Administrative Review Board (Board or ARB) automatically reviews an ALJ's Recommended Decision and Order (R. D. & O.) under the STAA.[2] We affirm in part and remand in part.

BACKGROUND

The ALJ's January 17, 2006 decision provides a detailed accounting of the facts. We briefly summarize. Israel started work with Schneider on December 24, 2004. Israel's then direct supervisor was Eric Shack, Service Team Leader, and Shack's then direct supervisor was Bruce Wilkinson, Team Operations Manager. In January 2005, Israel started his mandatory four-week training program, which consisted of two weeks in the classroom and two weeks on the road. For the on-the-road portion, Israel drove with Schneider's trainer, John Steigerwald.

Israel and Steigerwald had a tense relationship. On January 12, 2005, after eight days of traveling with Steigerwald, Israel was issued a citation for inoperable tail lights. Israel was driving Steigerwald's truck at the time. Israel was upset because the citation affected his driving record. After their argument, Steigerwald called the operating center and requested that Schneider relieve Steigerwald from training Israel.[3]

On January 14, Israel hand-delivered the tail light citation to Deborah Knaus, the Regional Loss Prevention Manager at Schneider.[4] Israel stated that he wrote a complaint about Steigerwald on the back of the citation. Knaus testified that she received the citation, but was not aware that a complaint was written on the back.[5] Israel's complaint alleged that Steigerwald improperly filled out log entries, sped on the highway ramps, took corners sharply, did not try to avoid or slow down for pot holes and fell asleep while driving.[6] Israel claimed that Steigerwald's unsafe driving caused Israel to injure his back while sitting in the truck's passenger seat. Israel further testified that he was sick, vomiting, experiencing hot flashes, and felt like his back was dislodged.[7] After filing the complaint, Israel testified that he was called

---

[2] 29 C.F.R. § 1978.109(a).

[3] Transcript (Tr.). 68.

[4] Tr. 66-67; R. D. & O. at 4. Israel wrote a December memorandum to Knaus complaining that he was placed in a smoking training room. R. D. & O. at 9; Tr. 149.

[5] Tr. 168-69, 68-71. Israel sent a follow-up letter about Steigerwald to Knaus on Feb. 19. Tr. 179-80, 319-20.

[6] Tr. 42-44, 54-55, 67; R. D. & O. at 4.

[7] Tr. 56-57; R. D. & O. at 4.

into a meeting with four management representatives regarding his interaction with Steigerwald. Israel claimed that after the meeting, he was relieved of further training and began taking assignments.[8] In March, Israel followed up on his complaint about Steigerwald by filing a complaint with human resources.[9]

As a result of his complaints, Israel alleges that he experienced several retaliatory acts. Israel complained that he was late on delivering a trailer to a warehouse because the time for pick up was moved up from 11:00 a.m. to 8:00 a.m. and he had not been informed of the change. Israel also complained about being assigned to pick up an empty trailer that was not at the assigned location.[10] R. D. & O. at 5. He was sent to another location, but because of the delay was not able to complete the trip within his permissible hours of service. Israel lost several days and the income that he could have earned if driving.[11] Israel also complained that Schneider assigned him loads on his day off and assigned more than four weeks at a time even though his schedule was only for three weeks. Israel met with Wilkinson about the Steigerwald complaint filed with human resources in March.[12] After the meeting, Schneider assigned Israel to pick up a trailer. The trailer, however, was missing brake parts and his request for repair was not relayed to the repair service. This resulted in several additional hours of delay.

After a company reorganization in April 2005, Becky Collar became Israel's supervisor.[13] On May 19, Schneider assigned Israel to take an empty trailer to a shipper and then load the truck himself. Israel refused the assignment and informed customer service that physical labor hurt his back and that if he took the load he might not be able to drive.[14] Collar told Israel that Schneider's policy required drivers to be able to load or unload a trailer on

---

[8] Israel testified that he had a meeting with four representatives after filing the complaint with Knaus. He does not know the names of the four representatives with whom he had a meeting, but acknowledged that they told him that he no longer needed to drive with Steigerwald. Tr. 68. Earlier, Israel testified that Steigerwald called the operating center after their argument and suggested to "a training engineer or service team leader or somebody there" that he be relieved from training Israel. Israel then got on the phone and spoke with this person, who told him that he did not need to complete the training. Tr. 52.

[9] Tr. 67; Complainant's Exhibit (CX) 1, 2; R. D. & O. at 6.

[10] R. D. & O. at 5.

[11] Tr. 74-75; R. D. & O. at 5.

[12] Israel also had a March meeting with Shack, Wilkinson, and Knaus concerning Israel's schedule. R. D. & O. at 6.

[13] Collar testified that in April and May 2005, Israel had conflicts with Collar over assignments and Collar's refusal to extend Israel's driving time. Tr. 269-70, 291; R. D. & O. at 13-14.

[14] Tr. 101-04; R. D. & O. at 7.

occasion.[15] Because he was not able to perform this function, Collar said he could not receive more assignments until he was cleared to perform the duties required in Schneider's manual. Collar also told him to file a workers' compensation claim for his back injury. Israel entered non-work status and began seeing a doctor. Israel received a work ability report on May 25, 2005, faxed a copy to the workers' compensation adjuster and contacted Collar.[16] Israel also received a letter from Schneider informing him of his duties as driver while he was unable to work. The notice directed Israel to keep daily logs to send to payroll or monthly logs if he expected to be out of work for an extended period.[17] Israel complied with the policy and sent his last logs in July 2005.

On June 4, 2005, Israel filed a complaint with OSHA, and OSHA initiated an investigation. On June 22, 2005, Collar called Israel and asked him to remove his personal items from the truck because Schneider wanted to place the truck back in service. Israel testified that he was suspicious as the request occurred right after his complaint to OSHA.[18] Israel asked Collar if the she made the request because he had filed an OSHA claim and if he was being terminated. Collar stated they wanted to put the truck back into service to generate revenue and he was not being terminated.[19]

On that same day, Israel also spoke with Collar's new boss, Kimani Jefferson, and told him that he could take an assignment if it did not involve loading or unloading a trailer. Israel informed them that he had an approaching doctor's appointment and Jefferson decided to wait on further action until he received the result of the appointment. The result was inconclusive and he needed to have a second appointment in two weeks. Jefferson testified that he agreed to wait until after his second appointment, but that after waiting he only received a fax cover letter from the second report and not the report itself.[20] He requested that Israel re-fax the second report but did not receive a response.[21] Israel stated that Jefferson gave him a number to call if he had any concerns. Israel testified that he did call but did not leave a message.[22]

---

15 R. D. & O. at 7; Respondent's Exhibit (RX) 3.

16 Tr. 122-23; CX 10, 11; R. D. & O. at 7.

17 Tr. 123-25; CX 26.

18 Tr. 126-27; R. D. & O. at 8.

19 Tr. 273; R. D. & O. at 8.

20 Tr. 305-07; R. D. & O. at 15.

21 Tr. 307; R. D. & O. at 15.

22 Tr. 130-31. Israel testified that he felt the matter was concluded and that they were going to put the truck back into service and for that reason he did not need to follow up with them. Tr. 130-32.

Collar testified that she twice tried calling Israel in July.[23] On one of the occasions, at Jefferson's instruction, Collar left a message for him to clean out his personal belongings by a certain day.[24] Israel testified that by the time he had received that call, he had already cleaned out his belongings but that he had not informed anyone because he had complied with the request within the time frame.[25]

In his complaint filed with OSHA, prior to Collar's request for Israel to remove his belongings, Israel alleged that Schneider had harassed and discriminated against him and had removed him from active employment for engaging in whistleblower activities. Schneider terminated Israel's employment after he filed his complaint and thus he did not mention his termination as an alleged adverse act in his OSHA complaint. From the time of Collar's last call to his discharge on August 16, 2005, Israel testified that he had no further communication with Schneider.[26] Jefferson testified that after five to six weeks with no contact from Israel, Jefferson contacted legal counsel and issued a termination letter on August 16th.[27] Jefferson testified that his reason for terminating Israel was his failure to communicate with the company for an extended period of time and his trefusal to return the keys when requested.[28] The ALJ concluded that Israel did not prove that Schneider violated STAA as Israel failed to prove that Schneider's actions were in retaliation for Israel's protected activity.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA.[29] When reviewing STAA cases, the Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a

---

[23] R. D. & O. at 14.

[24] Tr. 307-08, 324-25.

[25] Tr. 131; R. D. & O. at 8.

[26] Tr. 134; RX 19; R. D. & O. at 8.

[27] Tr. 308-09; R. D. & O. at 15; RX 19.

[28] Tr. 309-310, 317; R. D. & O. at 15. Israel testified that they never told him that they needed the keys. Tr. 133. Collar testified that they did ask for the keys. Tr. 273. Jefferson stated that at the time Israel informed him of the doctor's appointment, there was not a demand for the keys. Tr. 306. Tr. 308, 310, 317 (Jefferson stated not returning the keys along with lack of communication were the reasons for his termination).

[29] Secretary's Order No. 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

whole.[30] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[31] The Board reviews the ALJ's legal conclusions de novo.[32]

DISCUSSION

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity,[33] 2) his employer was aware of the protected activity, 3) the employer discharged him, or disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and 4) there is a causal connection between the protected activity and the adverse action.[34] The complainant bears the burden of persuading the trier of fact that the employer discriminated against him.[35]

In STAA cases, the Board adopts the burdens of proof framework developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination

---

30 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. 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).

31 *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)).

32 *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

33 A person may not retaliate against an employee because:

> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> (B) the employee refuses to operate a vehicle because –
> (i) the operation violates a regulation, standard, or order of the United States related to the commercial motor vehicle safety or health; or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C.A. § 31105(a) (2005).

34 *BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987).

35 *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

laws, such as the Age Discrimination in Employment Act.[36] Under this burden-shifting framework, the complainant must first establish a prima facie case of discrimination. That is, the complainant must adduce evidence that he engaged in STAA-protected activity, that the respondent employer was aware of this activity, and that the employer took adverse action against the complainant because of the protected activity. Evidence of each of these elements raises an inference that the employer violated STAA. Only if the complainant makes this prima facie showing does the burden shift to the employer respondent to articulate a legitimate, non-discriminatory reason for the adverse action. At that stage, the employer's burden is one of production, not persuasion. If the respondent carries this burden, the inference drops from the case and the complainant must prove by a preponderance of the evidence that the respondent discriminated because of complainant's protected activity.[37]

The ALJ addresses two distinct "complaints" raised by Israel. First, she addresses Israel's complaint to OSHA that Schneider took various adverse actions against Israel because he reported safety concerns to his employer. Second, she addresses Schneider's termination of Israel shortly after he filed his safety complaint with OSHA. We address these two issues in order.

OSHA Complaint

The ALJ found that Israel engaged in protected activity when he reported concerns about his training instructor and the condition of the equipment.[38] Israel complained that Steigerwald's driving and conduct while training Israel violated safety regulations. STAA protects employees who complain about activities that violate or that the complainant reasonably believes violate commercial motor safety regulations.[39] Substantial evidence supports the ALJ's finding of protected activity and we affirm her legal conclusion that Israel engaged in protected activity.

The ALJ discussed Israel's allegations of adverse actions including being treated unfairly, the change of his arrival time without being notified, being directed to pick up an empty trailer

---

[36] *Feltner v. Century Trucking, Ltd.*, ARB No. 03-118, ALJ Nos. 2003-STA-001, 2003-STA-002, slip op. at 4-5 (ARB Oct. 27, 2004); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004). *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Hicks*, 509 U.S. at 513; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

[37] *Hicks*, 509 U.S. at 507-08; *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 4 (ARB Nov. 27, 2002).

[38] R. D. & O. at 17. The ALJ did not address whether Israel's filing an OSHA complaint was protected activity though Israel testified that he believed that Schneider may have made the June 22nd inquiries because he filed an OSHA complaint. Tr. 126-27.

[39] 49 U.S.C.A. § 31105(a); 49 C.F.R. § 392 (2005).

that was not at the designated location, being assigned a trailer that was not in good operating condition, and interference with his time at home. But the ALJ did not expressly state whether these other actions were adverse actions under STAA.[40]

Nonetheless, the ALJ found that Schneider did not retaliate against Israel for protected activity. The ALJ noted that Schneider complied with its "at-home" policy in making assignments and any variation in Israel's schedule was attributable to the scheduling process and not retaliation for protected activity.[41] Collar testified that they attempted to work with Israel to facilitate his preferences.[42] The ALJ further found that Israel's medical condition, not his protected activity, caused Schneider to remove Israel from active duty.[43] Schneider's policies require occasional loading and unloading, and a person with a back injury, as Israel claimed he had, could not perform these tasks.[44]

The ALJ noted that Schneider "provided credible testimony that when [Israel] brought theses instances [of retaliation] to his supervisors' attention, either action was taken to correct the problem or [Israel] was absolved of responsibility."[45] Thereafter, Israel continued to receive assignments and Schneider attempted to increase his compensation by assigning him longer hauls. While the ALJ did not make clear adverse action findings as to Israel's pre-June allegations, the ALJ did make a general lack-of-causation finding that Israel "failed to provide testimony or any other evidence that demonstrates that these incidents occurred in retaliation for his complaints, and were not common occurrences for Respondent's other drivers."[46] Substantial evidence supports this finding. Thus, Israel failed to prove an essential element of his case – a causal connection between his protected activity and Schneider's alleged acts of retaliation. Therefore, we affirm the ALJ's dismissal of his original complaint.

---

40 R. D. & O. at 17.

41 R. D. & O. at 18; RX 16.

42 Tr. 262-63; R. D. & O. at 17-18.

43 R. D. & O. at 18, 19. The ALJ also suggested that there are grounds for not believing that Israel was injured at all. Israel stated that he did not report the alleged January injury because he did not have health insurance until March. The ALJ noted that he did not provide evidence that he sought medical treatment in March. R. D. & O. at 18. The ALJ noted that Schneider did assign another load to Israel after his refusal to take loads, but found that this assignment was not a deviation from policy but instead a means to allow Israel to return home. R. D. & O. at 18-19.

44 R. D. & O. at 19; RX 3.

45 R. D. & O. at 17-18.

46 R. D. & O. at 17.

Israel's Termination after Filing his OSHA Complaint

Shortly before the hearing, Schneider terminated Israel. Schneider included evidence surrounding the termination in its pre-hearing statement. At the hearing, the ALJ consolidated the termination with the original complaint filed with OSHA. Israel objected at the hearing and maintains on appeal that he was prejudiced by the ALJ's inclusion of his termination in the hearing and subsequent conclusion that Schneider had a legitimate, non-discriminatory reason for terminating his employment.[47] We agree with Israel and remand for further proceedings.

Israel's original complaint with OSHA only covered his January incident with Steigerwald and several alleged employer acts of retaliation occurring between February and May 2005.[48] Since he had not yet been terminated, the termination was not a part of the OSHA complaint. After Israel appealed OSHA's findings (unrelated to the termination), the ALJ issued a Notice of Hearing and Pre-Hearing Order on August 4, 2005. The ALJ's notice specified that pre-hearing statements should be filed five days (August 24th) before the hearing scheduled for August 30th.[49] On August 15th, Israel filed his pre-hearing statement. The next day, August 16th, Schneider terminated Israel. Schneider filed its pre-hearing statement on August 23, 2005 and included evidence and argument surrounding the termination.[50] Schneider served Israel with the pre-hearing statement on or about August 24th. At the hearing, Israel objected to the pre-hearing statement because he was not prepared to address his termination. The ALJ emphasized her strong preference to hear the entire case in this setting and proceeded to hear evidence on the termination as a continuing violation.[51]

---

[47] At the hearing, Israel objected to the fact that the attorney for Schneider did not deliver copies of the documentary evidence to be submitted at the hearing to Israel per the instructions set forth in the Pre-Hearing Notice. Tr. 8-9. Israel only received a list of the proposed exhibits.

[48] Prior to his June 4th complaint, Israel previously attempted to file STAA complaints with OSHA. Israel Pre-Hearing Statement at 7.

[49] Aug. 4 Pre-Hearing Notice at 1-2. The ALJ Rules provide that when the judge issues the hearing order, he or she may order the prosecuting party to file a pre-hearing statement of position, which shall briefly set forth the issues involved in the proceeding and the remedy requested. The prosecuting party shall file this pre-hearing statement within three days of the receipt of the hearing order and shall serve it on all parties by certified mail. Thereafter, within three days of receipt of the prosecuting party's pre-hearing statement, the other parties to the proceeding shall file pre-hearing statements of position. 29 C.F.R. § 1978.106(d).

[50] Schneider Pre-Hearing Statement.

[51] Tr. 330. During the opening statement, the ALJ did notify Israel that he could file a second OSHA complaint. Tr. 15-16.

We review allegations of procedural errors under the abuse of discretion standard.[52] Under ALJ Rule 18.5(e) and Rule 43(c), the ALJ may allow the introduction of evidence outside of the pleadings when issues not raised in the request for hearing, pre-hearing stipulation or pre-hearing order are tried by express or implied consent.[53] In this case, Israel's termination was first raised in a pre-hearing statement. There was neither a pre-hearing conference nor a stipulation to evidence, theories, and witnesses on the issue of Israel's termination.[54] The ALJ Rules do not expressly address the case where a party objects to an amendment at a hearing, but Federal Rule of Civil Procedure 15(b) does:

> If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.[55]

---

52 *Cox v. Lockheed Martin Energy Sys., Inc.*, ARB No. 99-040, ALJ No. 1997-ERA-017, slip op. at 4 (ARB Mar. 30, 2001). *See generally Khandelwal v. Southern Cal. Edison*, ARB No. 98-159, ALJ No. 1997-ERA-006 (ARB Nov. 30, 2000); *Malpass v. General Elec. Co.*, Nos. 1985-ERA-038, 039, slip op. at 5-6 (Sec'y Mar. 1, 1994) (discussing ALJ's authority to conduct trial hearings under the Administrative Procedure Act).

53 29 C.F.R. § 18.43(c) ("When issues not raised by the request for hearing, prehearing stipulation, or prehearing order are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence may be made on motion of any party at any time; but failure to so amend does not affect the result of the hearing of these issues. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence."); 29 C.F.R. § 18.5(e) ("When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The administrative law judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved.").

54 29 C.F.R. §§ 18.7-8; Pre-Hearing Notice at 3 ("[U]nless good cause is shown, parties will not be permitted to litigate issues, call witnesses, or introduce evidence not listed on their pre-trial statement and served as ordered herein. Failure to fully comply with this order may result in other sanctions.").

55 Fed. R. Civ. P. 15(b).

At the hearing, Israel objected that the introduction of evidence on the termination "prejudices my case because I'm not prepared . . . to demonstrate pretext."[56] In overruling Israel's objection, the ALJ determined that Israel was not prejudiced by the amendment of the pleadings to include the termination.[57] Israel further objected that OSHA has not reviewed the second violation and that he did not file a second complaint because he "was not aware of it until I had to come here."[58] The ALJ felt that the termination only changed the amount of damages Israel would win.[59]

> ALJ: And it was in August that the Respondent issued its termination letter?
>
> ISRAEL: Yes. They issued it after these proceedings began.
>
> ALJ: I gotcha. But, I mean, there are two things we could have done, Mr. Israel. I think we are doing the common-sense choice for your case. We could have sent the case back where you could start all over again with OSHA or we can consider continuing this violation, which would give me jurisdiction. Doesn't it make sense that I'm here hearing it all? Don't you want it wrapped up?
>
> ISRAEL: They are bringing up new issues to me and I'm not prepared to argue pretext. I don't understand everything they are trying to say to me. This is - this is just another act of retaliation because I initiated these actions.
>
> ALJ: Did you file a new complaint based upon the August incident?
>
> ISRAEL: No. It just happened.
>
> ALJ: What is the point of having OSHA do an investigation? I mean, you didn't like what they did for you the first time. I don't mean to be argumentative. How is having OSHA come in and look at the termination and discuss -
>
> ISRAEL: Maybe if OSHA would take another look at this, you know.
>
> ALJ: But you don't need OSHA, you've got me.
>
> ISRAEL: Well, if OSHA would investigate, maybe they will not dismiss my complaint.
>
> ALJ: It doesn't matter. You are before me. It just

---

56 Tr. 9.

57 R. D. & O. at 2 n.1.

58 Tr. 16.

59 Tr. 111.

> doesn't matter. Trust me. I don't rubber stamp OSHA. OSHA's findings mean nothing, zero, zilch. They have this much (indicating) significance.
>
> . . . I don't think going back to OSHA is in your favor. You're going to have two different hearings on what is essentially a continuum of circumstances. Do you see what I'm saying?
>
> ISRAEL: This is - and you are right, but to me it's two STAA violations and that is why I did not - it has not been investigated by the Department of Labor.[60]

The ALJ reiterated that she did not see the point of having two separate cases by excluding employer actions occurring after May in this hearing.[61] The ALJ noted that she would retain jurisdiction if he filed a second complaint.[62] At the hearing, Schneider's attorney introduced Jefferson as a potential witness. Israel also objects to Jefferson's testimony because he was not on the pre-hearing list of witnesses.[63] The ALJ allowed Jefferson's testimony and indicated that he would only be allowed for rebuttal purposes since he was not on the witness list.[64]

We agree with Israel. We find the ALJ abused her discretion in consolidating the termination into Israel's STAA complaint without giving Israel proper time to prepare his case on the termination and by discouraging him from filing a new OSHA complaint. Parties in STAA cases have the right to know the theory on which the agency or a complainant will proceed.[65] Congress incorporated these notions of due process in the Administrative Procedure

---

60 Tr. 108-10.

61 Tr. 112.

62 *Id.*

63 The Pre-Hearing Notice required the name and address of each witness who will actually testify with a statement of "precisely" what the testimony of each witness will prove and the documentary evidence each party expects to admit to the record. Aug. 4, 2005 Pre-Hearing Notice at 2.

64 Tr. 19.

65 The Sixth Circuit held in *Yellow Freight* that the Secretary deprived the company of due process because she decided the case under a section of the STAA that was neither charged in any notice given Yellow Freight nor tried by the express or implied consent of the parties. *Yellow Freight Sys. Inc. v. Martin***,** 954 F.2d 353, 357-359 (6th Cir. 1992) ("[T]he test is one of fairness under the circumstances of each case-whether the [party] knew what conduct was in issue and had an opportunity to present his [case]."); 29 C.F.R. §§ 18.5(e), 43(c); *Bendix Corp. v. FTC,* 450 F.2d 534, 542 (6th Cir.1971); *Rodale Press, Inc. v. FTC,* 407 F.2d 1252, 1256 (D.C. Cir. 1968) ("An agency may not change theories in midstream without giving respondents reasonable notice of the change.");

Act, which mandates that the parties shall be timely informed of (1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted.[66]

Moreover, the ALJ's inclusion of Jefferson's testimony also prejudiced Israel. Jefferson was the ultimate decision maker in Israel's termination. Although the ALJ was to consider Jefferson only as a rebuttal witness, the R. D. & O. appears to have "fully credited" Jefferson's substantive testimony that the primary reason he discharged Israel was because Israel failed to communicate and return the keys.[67] Further, Jefferson testified he would terminate the employment of any driver who failed to communicate his status for an extended period of time.[68] We note that even if the ALJ thought Schneider's reason for the termination was legitimate and that Israel would not win, nevertheless, she should have afforded Israel proper notice and time to conduct discovery and prepare a case against his termination.[69]

In an effort to cure the prejudice to Israel, the ALJ informed Israel mid-hearing that she would hold proceedings open for Israel to submit further evidence to meet the issue of his termination.[70] By the end of the hearing, however, it was unclear whether the record was open for additional evidence.[71] Toward the end of the hearing, the ALJ also asked whether there was any further evidence that Israel felt he was not able to address. Israel responded in the negative. Despite the negative response, upon review of the transcript in its entirety, we do not believe that the ALJ's attempts to facilitate the consolidation of the termination cured the prejudice to Israel. When Israel said he had no more evidence to present, it is not unambiguously clear that he meant for that day, or at a later time. He did not have time to reflect.

Roberts v. Marshall Durbin Co., ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-035, slip op. at 9-10 (ARB Aug. 6, 2004).

66 5 U.S.C.A. § 554(b); *Roberts*, slip op. at 9-10.

67 R. D. & O. at 19.

68 Tr. 310.

69 "Even where the trier of fact finds that sufficient evidence exists to establish an unpleaded violation, the respondent in those cases must have had notice of the new violation and a fair opportunity to defend before such a violation may be found." *In re Ortex Prod. of Calif.*, FIFRA-09-0829-C-93-04, 1994 WL 730499 (ALJ Dec. 15, 1994), citing *Carlisle Equip. Co. v. U.S. Sec'y of Labor & Occupational Safety*, 24 F.3d 790, 795 (6th Cir. 1994).

70 Tr. 113.

71 Tr. 330-31 ("So with that said, we will close today's hearing. The record stays open for receipt of the statement [on damages], which will be due in about a couple weeks, and then the submission of written closing arguments.").

Israel did have time to reflect by the time he made post-hearing filings. But those filings do not go beyond a statement that he the ALJ denied him due process, and do not include a statement of why the ALJ should re-open the case for additional discovery and evidence on the termination. The same can be said of his briefs to us. Israel says he was prejudiced because he did not have an opportunity to show that the reason articulated for his termination was pretext, but he does not say specifically how the prejudice should be cured.[72]

Although we can conclude that there was clear prejudice at the hearing, we are not convinced from the filings before us that Israel is entitled to a re-opening of the record. Therefore, we remand for the ALJ to conduct an inquiry[73] giving Israel the opportunity to indicate what additional discovery or evidence Israel would seek if the ALJ were to decide to re-open the record. Thereafter, the ALJ can determine if any further proceedings are necessary. The burden is on Israel to put forward facts or witnesses that, if true, could result in a successful legal conclusion. If he cannot do this, the ALJ may conclude that he is not entitled to a hearing and dismiss the case.

Israel's Motion for Sanctions and Motion to Supplement the Record

In his Motion for Rule 11 Sanctions, Israel claimed that Schneider made false accusations in July 2005 before the August 30th hearing by claiming that Israel was "berating" a caller, by falsely stating that Israel refused to indicate whether he would return the keys and by falsely accusing Israel of leaving the keys in the truck after removing his personal items.[74]

The Board may not impose Rule 11 sanctions.[75] The Secretary has observed that "the incorporation of the Federal Rules in 29 C.F.R. § 18.29 is for purposes of procedure and case management to fill in any gaps where no specific provision in the Rules of Practice is applicable. . . . [The Federal Rules do] not give the Secretary the authority directly to impose sanctions and

---

[72] Israel brief at 1-2.

[73] The ALJ may choose to proceed by teleconference, preliminary hearing, show cause order or some other appropriate means.

[74] Motion for Rule 11 Sanctions at 1. Israel's Motion also seeks sanctions on grounds that encompass his other arguments concerning procedural due process and the merits of his STAA claim.

[75] The Administrative Procedure Act, § 558(b) provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C.A. § 558(b) (West 2007); *see Saporito v. Florida Power & Light Co.*, 1990-ERA-027, 047, slip op. at 3 (Sec'y Aug. 8, 1994) (Rule 11 not available for Dep't of Labor ALJs); *Malpass v. General Elec. Co.*, 1985-ERA-038, 039, slip op. at 11 (Sec'y Mar. 1, 1994) (Federal Rules of Civil Procedure do not give the Secretary the authority to impose sanctions and penalties if not otherwise authorized by law); *In re Slavin*, ARB No. 02-109, ALJ No. 2002-SWD-001 (ARB June 30, 2003).

penalties if not otherwise authorized by law."[76] Even if the Board could impose Rule 11 sanctions, Israel has failed to identify any pleadings, motions, or advocacy before the ALJ in which Rule 11 violations occurred.[77] Israel also moves for sanctions under the ALJ Rules, 29 C.F.R. § 18.6(d)(2)(iii), because Schneider called Jefferson as a witness even though Jefferson was not listed on the pre-hearing statement.[78] We address the inclusion of Jefferson's testimony in the discussion on remand. For the reasons above, we **DENY** Israel's Motion for Rule 11 Sanctions.

Israel also filed a Motion to Supplement the Record that consisted of proposed corrections to the transcript. Israel had the opportunity to obtain a copy of the transcript and present any alleged errors according to the procedure set forth in 29 C.F.R. § 18.52.[79] For the above reasons, we also **DENY** Israel's Motion to Supplement the Record.

CONCLUSION

Israel appealed the ALJ's consolidation of his termination as prejudicing his case for a lack of time to prepare his case. We find that Israel was prejudiced and that the ALJ abused her discretion in overruling his objection. We **REMAND** the case for the ALJ to give Israel the opportunity to establish the necessity for additional discovery and further proceedings. We **AFFIRM** the ALJ's finding that Israel failed to prove that the claimed adverse actions from February to May were in retaliation his complaints about unsafe training conditions.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

---

[76] *Malpass*, slip op. at 11; *Windhauser v. Trane*, ARB No. 05-127, ALJ No. 2005-SOX-017, slip op. at 4 (ARB Oct. 31, 2007).

[77] Fed. R. Civ. P. 11(b).

[78] The Rules of Practice for ALJs provides for sanctions against parties failing to comply with discovery requests or an order. 29 C.F.R. § 18.6(d)(2).

[79] 29 C.F.R. § 18.52(b) ("Corrections to the official transcript will be permitted upon motion. Motions for correction must be submitted within ten (10) days of the receipt of the transcript unless additional time is permitted by the administrative law judge. Corrections of the official transcript will be permitted only when errors of substance are involved and only upon approval of the administrative law judge.").