In the Matter of:

TIMOTHY J. ELBERT, **ARB CASE NO. 07-031**

COMPLAINANT, **ALJ CASE NO. 2005-STA-036**

v. **DATE: December 18, 2009**

TRUE VALUE COMPANY, and JOHN DOE and MARY ROE,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Paul O. Taylor, Esq., *Truckers Justice Center,* Burnsville, Minnesota

For the Respondents:
Thomas F. Hurka, Esq., *Morgan, Lewis & Bockius LLP*, Chicago, Illinois

FINAL DECISION AND ORDER

Timothy J. Elbert filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that when his former employer, the True Value Company, discharged him, it violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified.[1] The STAA protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules.

[1] 49 U.S.C.A. § 31105 (Thomson/West 2007).

After a hearing, a Labor Department Administrative Law Judge (ALJ) recommended that Elbert's complaint be dismissed. We affirm.

BACKGROUND

True Value operates hardware stores with headquarters in Chicago, Illinois.[2] In 1989 True Value hired Elbert to drive trucks delivering merchandise to its stores. He worked out of the Mankato, Minnesota regional distribution center.[3] During his employment Elbert received an 11-year safe driver award and numerous other driving awards.[4]

Gerald Gainer, the overall manager of the Mankato distribution center, testified that in March 2002 Elbert became argumentative when he was accused of falsifying his driver's log.[5] In May 2004, Elbert received a verbal warning from his immediate supervisor, Gene Struck, after arguing about a route assignment with Lisa Floer, a True Value traffic clerk.[6] For this incident, Elbert received a written "Notice of Disciplinary Action Due to Employee Work Rule Violation." Struck placed this notice in Elbert's personnel file.[7] The written notice was removed after six months had elapsed, pursuant to an agreement reached between Elbert, Struck, and Gainer.[8] Gainer also testified that in December 2004 he verbally warned Elbert that he was "walking on thin ice" because of additional confrontations with supervisors.[9]

According to Floer, on January 11, 2005, she asked Elbert two or three times to initial a written notice that Struck had issued to drivers regarding the procedure for tracking fuel use and mileage. He refused. She then threatened to have his paycheck withheld, even though she did not have the authority to do so.[10] After some argument, Floer left the traffic office, where Elbert remained, and went to speak with Leroy Gappa, a shipping supervisor and the only management

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2 Hearing Transcript (HT) at 378; Mar. 2, 2005 Complaint.

3 HT at 378, 690.

4 *Id.* at 491-492; Complainant's Exhibits (CX) 1-2, 24.

5 HT at 147, 991-992; Respondent's Exhibit (RX) 5.

6 CX 29.

7 *Id*.

8 HT at 16, 141-142, 404-409, 608-611.

9 *Id.* at 1001-1003, 1005.

10 *Id.* at 1131-1133, 1136.

official on duty at the time.[11] Gappa testified that Floer was near tears and informed him that she could not perform her job while Elbert was in the office and, therefore, would not return to the office until Elbert left.[12]

Gappa called Gainer at his home to report the incident, and Gainer instructed Gappa that if Elbert did not leave the office, he should be suspended.[13] Gappa then went to the office and asked Elbert to leave a number of times. Elbert finally left.[14]

Elbert testified that after he left the office he inspected the trailer that he was assigned to drive the following day.[15] He discovered that the trailer brakes would not release.[16] Another driver, Jerry Waisanen, testified that he saw that Elbert was having a problem with the brakes, and he assisted Elbert in attempting to get the brakes to release.[17]

Elbert returned to the traffic office. He testified that he asked Floer to call a mechanic to fix the trailer's brake.[18] After some back and forth about who should fix the brakes, Gappa testified that Floer came to him and said that Elbert was in the office again.[19] Gappa then went to the office, where Elbert informed him about the brake problem.[20] Gappa eventually called a mechanic, Jerry Ibberson, after which Elbert went home for the night.[21] Gappa also called Gainer again to inform him that Elbert had returned to the traffic office complaining about the brakes and confronted Floer. Gainer asked Gappa to make notes of what had occurred.[22] Ibberson testified that he found nothing wrong with the trailer's brakes.[23]

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11 *Id.* at 308, 314, 1134-1135.

12 *Id.* at 310, 321.

13 *Id.* at 319-320, 1012-1013.

14 *Id.* at 215, 220, 224-225, 310, 315, 323-324, 348; *see also* HT at 542, 1136, 1155-1156.

15 *Id.* at 508-509, 519-523, 545-554.

16 *Id.* at 554.

17 *Id.* at 362-364.

18 *Id.* at 568.

19 *Id.* at 316, 324.

20 *Id.* at 316, 325.

21 *Id.* at 317-318, 325; *see also* HT at 574-577.

22 *Id.* at 327, 1015.

23 *Id.* at 1191-1194, 1203-1204.

The next day, January 12, 2005, Elbert reported to work and went on a two-day driving assignment to Wisconsin and back.[24] Meanwhile, Gainer interviewed everyone who witnessed the Elbert-Floer confrontations the day before.[25] Gainer testified that after he learned that Ibberson found nothing wrong with the trailer brakes, he believed that Elbert's complaint about the brakes was merely an excuse to return to the traffic office and confront Floer again.[26]

Gainer and Struck met with Elbert upon his return on January 13, 2005, and Gainer discharged Elbert.[27] Gainer first told Elbert that his not initialing the memo Floer had handed him had nothing to do with the termination. Gainer added that "the trailer brake deal, there was nothing wrong with the trailer brakes." Elbert then informed Gainer that there had indeed been a problem with the brakes and that Waisanen, whom Gainer had not interviewed, could verify that fact. Gainer told Elbert that even if there had been a problem with the brakes, he was firing him because of "insubordination" and "failure to operate in a team environment."[28] Elbert secretly tape recorded this meeting.[29]

At Elbert's request, Gainer wrote a formal termination letter to Elbert on February 10, 2005, in which Gainer stated that True Value had terminated Elbert's employment for "insubordination and failure to contribute to a team work environment." This letter noted "similar problems with unacceptable communication within the department" and that "previous warnings" about his conduct had not resulted in "lasting improvement."[30]

Elbert filed his complaint with OSHA on March 2, 2005, alleging that True Value violated the STAA when it fired him because of his complaint about the brake problem.[31] OSHA investigated but dismissed the complaint. Elbert requested a hearing before an ALJ. After the hearing, the ALJ issued her November 16, 2006 Recommended Decision and Order (R. D. & O.) dismissing the complaint.

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[24] CX 6.

[25] HT at 58, 1017-1018, 1027.

[26] *Id.* at 1019-1020.

[27] *Id.* at 40-41, 616.

[28] CX 27, at 9-10.

[29] HT at 41, 616-617; *see* CX 26-27.

[30] CX 13.

[31] CX 21.

The Administrative Review Board automatically reviews an ALJ's recommended STAA decision.[32] The Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge."[33] The Board issued a Notice of Review and Briefing Schedule permitting the parties to submit briefs in support of or in opposition to the ALJ's order by December 18, 2006, and Elbert timely filed a brief.[34]

Order to Show Cause

On August 3, 2007, the President signed the Implementing Recommendations of the 9/11 Commission Act of 2007,[35] which amended the STAA's whistleblower protection provisions to permit de novo review in federal district court. As a result, 49 U.S.C.A. § 31105(c) now reads:

> (c) DE NOVO REVIEW. - With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

On August 7, 2007, Elbert filed "Complainant's Notice of Commencement of Civil Action Pursuant to 49 U.S.C. § 31105(c)." Elbert informed the Board that on August 6, 2007, he had "commenced a civil action for de novo review of Complainant's complaint in the United

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[32] 29 C.F.R. § 1978.109(c)(1)-(2) (2009).

[33] 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001).

[34] In a letter dated December 21, 2006, True Value inquired whether a brief was warranted in this case, but its brief was already overdue at that time. On January 17, 2007, True Value requested leave to file a brief. The only cause True Value cited for its failure to timely file a brief was that it did not receive a physical copy of Elbert's brief until after the filing deadline had lapsed. In a February 12, 2007 Order Denying Respondent's Motion to File Brief Out of Time, the Board noted that the ALJ's Notice of Review in her recommended decision and order clearly informed True Value that the applicable STAA regulations at 29 C.F.R. § 1978.109(c)(2) (2006) plainly anticipate simultaneous filing of briefs and do not allow for a reply brief. Thus, True Value's motion was denied for failure to show good cause.

[35] Pub. L. 110-53.

States District Court for the District of Minnesota in accordance with 49 U.S.C. § 31105(c). The case is now pending as civil action no. 07-CV-3629."[36]

On August 17, 2007, True Value filed a "Response to Complainant's Notice of Commencement of Civil Action and Request for Issuance of a Final Decision." True Value asserted that "nothing in the amendment to the STAA, 49 U.S.C. § 31105(b)(2)(C), supports the proposition that the filing of a lawsuit by a complainant requires, or should result in, the termination of proceedings before the Department of Labor."

Although Elbert filed his STAA complaint before August 3, 2007, he cited no authority in support of his assumption that the amendment applies retroactively to complaints such as his and, therefore, divests the Board of jurisdiction to issue a final decision in this case. Thus, on September 19, 2007, the Board ordered Elbert to show cause why we should not proceed with his case and issue the final agency decision. Elbert responded, contending that the Board no longer has jurisdiction pursuant to 49 U.S.C. § 31105(c). True Value replied, arguing that the amendment does not apply retroactively to previously filed or pending cases.

Shortly thereafter, True Value filed "Respondent True Value Company's Notice of Dismissal of Complainant's Civil Action and Request for Issuance of Final Decision." True Value explained that on December 11, 2007, the District Court had, upon its motion, dismissed Elbert's complaint with prejudice, finding that it did not have jurisdiction over the complaint because the amendment to the STAA did not apply retroactively to pending claims.[37] Thus, True Value requested that the Board deny Elbert's request that this case be terminated for lack of jurisdiction and that the Board proceed to issue a final decision.

Ultimately, True Value notified the Board that on December 19, 2008, the United States Court of Appeals for the Eighth Circuit affirmed the dismissal of Elbert's district court complaint, holding that the STAA amendment permitting de novo review in district court does not apply to complaints filed before the effective date of the amendment.[38] Accordingly, we shall proceed with consideration of this case and issue the final agency decision herein.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the STAA.[39] Under the STAA, we are bound by the ALJ's

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[36] *Elbert v. True Value Co.*, No. 07-CV-3629 (D. Minn.).

[37] *Elbert v. True Value Co.*, No. 07-CV-3629, slip op. at 7-8 (D. Minn., Dec. 11, 2007).

[38] *Elbert v. True Value Co.*, 550 F.3d 690 (8th Cir. 2008).

[39] 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).

fact findings if substantial evidence on the record considered as a whole supports those findings.[40] Substantial evidence does not, however, require a degree of proof "that would foreclose the possibility of an alternate conclusion."[41] In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[42] Therefore, the Board reviews the ALJ's conclusions of law de novo.[43]

DISCUSSION

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 activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "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;" or who "refuses 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."[44]

To prevail on this STAA claim, Elbert must prove by a preponderance of the evidence that he engaged in protected activity, that True Value was aware of the protected activity, that True Value took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.[45] True Value avoids liability if

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[40] 29 C.F.R. § 1978.109(c)(3); *BSP Transp., 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). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

[41] *BSP Trans, Inc.*, 160 F.3d at 45.

[42] 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

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

[44] 49 U.S.C.A. § 31105(a)(1).

[45] *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004)

it proves by a preponderance of the evidence that it would have discharged Elbert in the absence of his protected activity, namely, Elbert's complaint about the brake problem.[46]

Protected Activity and Adverse Action

As just noted, the STAA protects a truck driver who complains to his employer about a violation of a commercial motor vehicle safety regulation.[47] The ALJ found that Elbert engaged in protected activity under this section when, on January 11, 2005, he reported that the brakes for his assigned trailer were not working and requested that a mechanic be called to fix the problem.[48] Substantial evidence supports this finding since there is no question that Elbert complained to Gappa about the brakes and since United States Department of Transportation safety regulations specifically require that "[n]o commercial motor vehicle shall be driven unless the driver is satisfied that" certain "parts and accessories are in good working order," including "service brakes" and "trailer brake connections."[49] The Secretary of Labor, the ARB, and federal courts have agreed that an "internal complaint to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA."[50] And since the STAA specifically prohibits an employer from "discharging" a protected driver, True Value took adverse action against Elbert.

Causation

The ALJ concluded that True Value did not violate the STAA because Elbert did not prove by a preponderance of the evidence that True Value terminated his employment because he complained that the trailer brakes were not working.[51] Substantial evidence supports this conclusion.

The ALJ found that Gainer did not terminate Elbert due to his complaint about the trailer brake problem because when he met with Elbert on January 13, 2005, to fire him, Gainer at first

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46 *See Muzyk v. Carlsward Transp.*, ARB 06-149, ALJ No. 2005-STA-060, slip op. at 5 (ARB Sept. 28, 2007) (citations omitted).

47 49 U.S.C.A. § 31105(a)(1)(A)(i).

48 R. D. & O. at 25.

49 49 C.F.R. § 392.7 (2009).

50 *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 6 (ARB Dec. 31, 2002), *aff'd Harrison v. Admin. Review Bd.*, 390 F.3d 752, 759 (2d Cir. 2004) (citing *Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 97-090, ALJ No.1995-STA-034, slip op. at 3-4 (ARB Aug. 8, 1997), *cited with approval in Clean Harbors Envtl. Servs., Inc.*, 146 F.3d at 19.

51 R. D. & O. at 23-26.

did not know that the brakes actually were not working on January 11.[52] The record supports this finding. When the meeting began and Gainer told Elbert that he was terminating him, Gainer knew only that Ibberson had found nothing wrong with the trailer's brake and believed that Elbert's complaint about the brakes was merely a fabricated excuse for Elbert to confront Floer again.[53] As the ALJ found, the record contains no evidence that Elbert informed Gainer or anyone else prior to the termination meeting that Waisanen, whom Gainer had not interviewed, witnessed Elbert having a problem with the trailer's brakes on January 11, 2005, and had assisted Elbert in attempting to get the brakes to release.[54]

Elbert argues that the ALJ "improperly focused" on Gainer's mistaken belief that Elbert had not engaged in protected activity. This was error, says Elbert, because an employer could always defeat a STAA claim merely by claiming that it did not believe that its employee had engaged in protected activity.[55] But this argument fails because, as we just explained, substantial evidence supports a finding that when Gainer fired Elbert at the outset of their meeting on January 13, he did not know that the brakes were problematic. Thus, Elbert did not prove by a preponderance of evidence, as he must, that Gainer knew about his protected activity when he fired him.

The record shows that after telling him that he was fired, Gainer explained that Elbert's refusing to initial the memo "really didn't have a lot to do" with the termination. Instead, he told Elbert, it was for returning to the office to confront Floer about "the trailer brake deal" when "there was nothing wrong with the trailer brakes." Elbert then explained that there had indeed been a brake problem and that Waisanen could verify that fact. And when Elbert pressed Gainer for the reason for the termination, Gainer said "insubordination" and "a failure to operate in a team environment." Elbert again brought up the fact that there really had been a problem with the trailer brakes and wondered if that could still be a reason for discharging him. Gainer said, "Then you can take that out and use the other two, Tim," by which he meant that even if there had been a problem with the brakes, he was firing him because of "insubordination" and "failure to operate in a team environment."[56]

Elbert argues that because Gainer said "trailer brake deal" when explaining to Elbert why he was discharging him, and thereby referred to Elbert's protected activity, the ALJ erred in not finding that Elbert was terminated because of his protected activity.[57] But this argument avails

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52 R. D. & O. at 23-24; *see also* HT at 1072.

53 R. D. & O. at 24; HT at 1019-1020.

54 R. D. & O. at 24.

55 Elbert Brief at 1, 13-18.

56 CX 27 – MT at 8-10.

57 Elbert Brief at 1, 14, 18-24.

Elbert nothing because even if he had proven that the "trailer brake deal" was part of Gainer's motivation for discharging him, True Value avoids liability because substantial evidence supports the ALJ's finding that True Value would have terminated Elbert absent his protected activity.[58]

As the ALJ found, Gainer plainly told Elbert that even if there actually had been a problem with the brakes, he was firing him for insubordination and failure to operate in a team environment.[59] And the record clearly shows that discharging Elbert for insubordination was not a pretext. Gainer testified that his decision to discharge Elbert was based on Elbert's history of misconduct that was similar to what he said and how he acted on January 11 when confronting Floer.[60] This fact is also reflected in Gainer's February 10, 2005 formal termination letter, which indicated that "previous warnings" to Elbert about his conduct had not resulted in "lasting improvement."[61] In addition, the record showed, and Elbert acknowledged, that True Value drivers had never been disciplined for reporting similar safety problems.[62]

Elbert's last argument is that the ALJ erred in not applying the "leeway doctrine" that the Secretary of Labor explained in *Kenneway v. Matlack, Inc.*:

> [T]he right to engage in statutorily-protected behavior permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts. A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and shop discipline.[63]

Therefore, Elbert argues, True Value cannot terminate him for insubordination because he must be given some leeway for his intemperate conduct in reporting the truck brake problem on January 11.[64]

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58 *See Muzyk*, slip op. at 5.

59 R. D. & O. at 26; CX 27 – MT at 10.

60 R. D. & O. at 25; *see* HT at 14-15, 19, 21, 146-148, 176, 215, 220, 224-225, 310, 315, 323-324, 348, 542, 991-992, 1001-1003, 1005, 1136, 1155-1156; CX 3, 13, 29; RX 5, 8.

61 CX 13.

62 R. D. & O. at 25-26; *see* HT at 150-151, 228-229, 345, 375-377, 879, 1098-1099; CX 17.

63 1988-STA-020, slip op. at 6 (Sec'y June 15, 1989).

64 Elbert Brief at 24-26.

But we will not consider this argument because Elbert did not make it to the ALJ.[65] And even if he had, we note that Gappa testified that after Floer's first confrontation with Elbert about signing the notice, Floer told Gappa that she would not go back into her office until Elbert left. She told Gappa that she could not do her job with Elbert there. She was "near tears."[66] Moreover, Gappa testified that he asked Elbert to leave three or four times, and Elbert testified that Gappa told him to leave so Floer could finish her work.[67] Gappa also testified that after the second confrontation regarding the brakes, Floer went to see him and was in tears.[68] And Elbert's return bothered Gappa because he was hindering Floer's productivity.[69] Therefore, the record contains substantial evidence that Elbert was disrupting business on January 11 and, as a result, cannot invoke the leeway doctrine.

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ's findings that though Elbert engaged in STAA protected activity when he complained about the trailer brakes, True Value did not discharge him because of his complaint but because of insubordination and not operating in a team environment. Therefore, True Value did not violate the employee protection section of the STAA. Accordingly, we **DENY** Elbert's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

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65 *See Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Apr. 3, 2007) (corrected); *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-023, slip op. at 7 (ARB Sept. 29, 2006).

66 HT at 310, 321.

67 *Id.* at 323-324, 542.

68 *Id.* at 328.

69 *Id.* at 316.