



**In the Matter of:**

**STEVEN C. BATES,**

**ARB CASE NO. 07-086**

**COMPLAINANT,**

**ALJ CASE NO. 2005-STA-029**

**v.**

**DATE: May 20, 2009**

**USF REDDAWAY, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Steven C. Bates, *pro se*, Visalia, California**

***For the Respondent:***

**T. Merritt Bumpass, Jr., Esq. and Joel R. Hlavaty, Esq., *Frantz Ward LLP*, Cleveland, Ohio**

**FINAL DECISION AND ORDER**

The Complainant, Steven C. Bates (Bates), filed a complaint on December 6, 2004, with the Department of Labor's Occupational Safety and Health Administration (OSHA) contending that his former employer, USF Reddaway, Inc. (Reddaway), violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 2008), and its implementing regulations, 29 C.F.R. Part 1978 (2007), when it suspended him and later terminated his employment.<sup>1</sup> Bates claimed that he refused to

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<sup>1</sup> The STAA has been amended since Bates filed his complaint on December 6, 2004. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266

drive a certain run because he was sick and that Reddaway suspended him and terminated his employment based on that refusal. Reddaway asserted, however, that it suspended Bates because he refused his manager's order to take the run; that it suspended him for insubordination and not for his alleged illness. Reddaway conducted an investigation following Bates's suspension. As a result of this investigation, Reddaway officials determined that Bates had falsified his logbook by entering a false explanation for why he returned late from driving a run. Reddaway terminated Bates's employment for falsification of his logbook. Following a hearing on the merits, an Administrative Law Judge (ALJ) concluded that Reddaway did not discriminate against Bates in violation of the STAA when it suspended him and later terminated his employment. Therefore, in a Recommended Decision and Order (R. D. & O.) the ALJ recommended that Bates's Complaint be dismissed. We affirm.

### BACKGROUND

The parties stipulated that at all pertinent times, Reddaway was engaged in interstate trucking operations and maintained its principal place of business in Clackamas, Oregon, and was covered by the STAA. Hearing Transcript (T.) at 7-8. Reddaway hired Bates in May 2003 as a commercial vehicle driver; Bates was Reddaway's employee and Thomas Karl Hawker (Hawker), manager of its Fresno, California terminal, was his supervisor. *Id.* at 8-10.

#### **Bates returns late from Medford, Oregon to Sacramento, California, on August 6, 2004**

On August 6, 2004, Bates returned late to Reddaway's Sacramento, California terminal from his usual bid run to Medford, Oregon. T. at 10-11. Bates left Medford August 5, 2004, at approximately 10:45 a.m. and was scheduled to arrive at the Sacramento terminal at approximately 4:30 a.m. the next day. *Id.* Bates actually arrived in Sacramento at approximately 7:00 a.m. *Id.* Bates testified that he explained to Dan McKeehan (McKeehan), the Sacramento terminal manager, that the delay was because, "I had to stop several times to use the restroom and find some facilities. I had to delay at the scale. And I had to delay at the truck stop, because I had to clean myself." *Id.* at 117. On cross-examination, Bates denied that he had told McKeehan only that he had had to make some stops and never told him that he was sick.<sup>2</sup> *Id.* at 118. Bates admitted, however, that he did not indicate in his daily logs for August 5 and August 6 that he was sick and never called his employer from the road to indicate that he was sick. T. at 118; *see* Respondent's Exhibit 13.

In an August 2004 statement Bates submitted to OSHA with his Complaint, Bates wrote that on his return trip from Medford to Sacramento, he became ill and had to stop in Weed, California, where he was delayed "45 minutes due to the illness." August \_\_, 2004 (partially illegible) statement signed by Bates, contained in OSHA Complaint. Bates also wrote that he

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(Aug. 3, 2007). It is unnecessary for us to determine whether the amendments apply to Bates's complaint because they are not implicated by the issues presented and thus, even if the amendments were applicable to this complaint, they would not affect our decision.

<sup>2</sup> McKeehan reported in his 7:37 a.m. August 6, 2004 e-mail to Hawker that Bates had, *inter alia*, "stopped a couple of time[s] to use the restroom." Respondent's Exhibit 8; *see* T. at 165.

drove from Weed and arrived at the “Dunsmuir Grade CHP [California Highway Patrol]” facility at approximately 1:45 a.m., August 6, 2004. He claimed that CHP weighed and reweighed his truck, then directed him to park the truck, and subsequently inspected “my log book and bills” without asking him for either his driver’s license or vehicle registration. *Id.* Bates indicated that he used the restroom there “due to my illness.” *Id.* Bates wrote that he left the “Dunsmuir Scale at approximately 2:15 a.m.” and “had several unscheduled stops due to illness” at Lakehead, Corning, Willows, and Dunnigan, before he arrived late at Reddaway’s Sacramento terminal. *Id.* Bates wrote, “I made this run in the safest and most timely manner possible at the time due to my illness and the delay at the Dunsmuir CHP Grade Facility.” *Id.*

### **Bates’s logbook**

Bates then drove from the Sacramento terminal to the Fresno terminal, his base terminal, where Lana Aguilar (Aguilar), who had customer service, dispatch, and payroll duties, asked Bates for a copy of his logbook at Hawker’s request. T. at 69, 70, 83-84; *see* Respondent’s Exhibit 10. Bates testified that he did not turn in his logbook for the August 6 Medford to Fresno run because that log was incomplete; he could not complete it until midnight August 6 when the “hours clicked off” for that day. T. at 121-123; *see also* at 166-167. Bates asserted in his Complaint that he told Aguilar that he was sick. OSHA Complaint.

### **Bates’s claim of sickness**

Bates testified that he then drove from Fresno to his home in Visalia, California, a drive which, he explained, takes between forty-five minutes and one-hour and fifteen-minutes. T. at 121, 125. Bates’s wife, Kathleen Bates, testified that after he arrived home, Bates showered, took Nyquil, and slept from approximately 1:30 p.m. to 4:30 or 5 p.m. T. at 26-27. Hawker called Bates’s home to speak to him. Mrs. Bates answered the call and had Bates return the call when he awoke.<sup>3</sup> T. at 26-27.

In that conversation, Hawker asked Bates why he had not given Aguilar his logbook for the August 6 Medford to Fresno run. Bates told Hawker that he could not turn in his logbook because it was not complete for the day. OSHA Complaint. Hawker told Bates that he was suspended until he provided his logbook, and that if he did not do so he would be terminated immediately. T. at 126, OSHA Complaint. Bates “hung up abruptly” on Hawker. OSHA Complaint.

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<sup>3</sup> Mrs. Bates testified that when Hawker called, she told Hawker that Bates was sick. T. at 26-27. Mrs. Bates also testified that when Bates returned Hawker’s call, she overheard Bates tell Hawker that he was sick by placing her ear next to the phone. T. at 27, 35-36. At the hearing, Hawker denied that either Mrs. Bates or Bates told him that Bates was sick. T. at 168, 170, 171, 194-196, 212; *see* Respondent’s Exhibit 11. The ALJ found that Mrs. Bates’s testimony was not credible. The ALJ stated, “Placing one’s ear next to a phone to hear a conversation is not a typical thing to do, nor would Mrs. Bates need to do so to hear her husband’s side of the conversation, as she was present at the time.” R. D. & O. at 15.

## **Bates refuses to drive the Bakersfield-Stockton-Willows run and is suspended**

Bates then drove back to the Fresno terminal from his home.<sup>4</sup> Bates's testimony, complaint, and statements differ from Hawker's testimony as to what happened next.

Bates testified that he gave his logbook to Hawker. T. at 123. Hawker asked him why he had arrived late at the Sacramento terminal. Bates told Hawker that he "was not feeling very well" and explained what had happened on that run; that he had become sick in Weed, California, and had made many stops "due to my illness." OSHA Complaint. Bates testified that he told Hawker that he could take his usual run to Medford, Oregon, scheduled to leave at 11:30 p.m. that night. T. at 124, 125. Bates testified that he was not then packed to go on the road, but he would have driven back home from the Fresno terminal, packed, and then driven back to the Fresno terminal to take his run to Medford, Oregon, where he would have spent an overnight as usual. T. at 124-125. But Hawker told Bates that that run was no longer available and that he needed him to drive to Bakersfield and Stockton and then back to Fresno, where he would rest ten hours and, the next morning, drive to Willows. T. at 172-173. Bates stated that he told Hawker that he would "pass" on that run "because I'm very upset (my nerves are shot) and right now I really don't want to be here." OSHA Complaint. Bates testified that Hawker "demanded" that he drive to Bakersfield and Stockton and back to Fresno, where he would spend the night, and then on to Willows the next morning, a run which Bates again refused. T. at 124-127. Bates claimed in his Complaint that he told Hawker, "I'm sick[.] I reported it this morning. You know about it[.] Lana [Aguilar] knows about it," and, "I'm sick, I think I will just go home sick." OSHA Complaint.

Hawker's testimony differs from Bates's as to the events at the Fresno terminal on the evening of August 6. Hawker testified that Bates arrived "unannounced" at the Fresno terminal at approximately 8:15 p.m and gave him his logbook. T. at 173. Hawker told Bates that that he had reassigned his usual Medford, Oregon, run because Bates had hung up on him and he did not think that Bates was coming to work that night. T. at 172-173. Hawker testified that "a driver had just called off out of Bakersfield" and that he told Bates that he needed him to drive to Bakersfield and Stockton and then back to Fresno, where he would rest ten hours and, the next morning, drive to Willows. *Id.* According to Hawker, Bates refused to drive the run, and, after Hawker again asked him to drive the run, Bates refused the run a second time. Therefore, Hawker told Bates to go home. T. at 173-176.

Hawker then made a phone call to Gary Holyoak, Vice President of Transportation, who advised Hawker to try again to get Bates to take the run. *Id.* at 174. Hawker had Bates brought back to his office. T. at 173-176. Hawker again asked Bates to take the Bakersfield-Stockton-ten hours rest at Fresno-Willows run, but Bates refused the run for the third time and told Hawker that he wanted to drive his usual bid run to Medford, Oregon. *Id.* at 175-176. Hawker

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<sup>4</sup> Bates testified that he arrived at the Fresno terminal at about 5:30 p.m. T. at 122. But in his Complaint, Bates indicated that he arrived at approximately 6:45 p.m. OSHA Complaint.

testified that he responded, “I don’t have your Medford bid run,” and, at that point, Bates replied, “Well, I’m sick. I can’t go.” T. at 176. Hawker testified that this was the first time Bates had indicated to him that he was sick. *Id.* Hawker asked Bates to explain what he meant, that he could drive to Medford, Oregon, but not to Bakersfield and Stockton and on to Willows the next day. *Id.* According to Hawker, Bates replied, “Well, I can suck it up and be sick and go to Medford, but I can’t go to Stockton or Bakersfield” because “I can stop more often.”<sup>5</sup> *Id.* Hawker testified that he did not see the logic in Bates’s willingness to take the Medford run but refusal to take the run he ordered him to take. T. at 176, 201-204. Hawker then suspended Bates. T. at 176, 204.

The ALJ found that Hawker was a credible witness and resolved factual disputes arising from Hawker’s testimony in Reddaway’s favor. R. D. & O. at 13, 14, 15. Critically, the ALJ found, based on Hawker’s testimony, that, “Complainant refused Mr. Hawker’s order three times to take the Stockton and Bakersfield runs, and only on the third time did he assert that he was ill. . . . Moreover, Complainant merely told Hawker that he was sick, without any explanation of his illness or its possible impairment of his motor abilities. Complainant’s statements thus were not ‘explicit enough to convey to Respondent that the refusal . . . to drive was because the complainant’s ability to do so was impaired.’” R. D. & O. at 15 (citation omitted). Substantial evidence in the record thus supports Hawker’s version of events.

In his August 9, 2004 Letter of Suspension, Hawker wrote that Bates had refused his order to take the Bakersfield-Stockton-ten hours rest at Fresno-Willows run and suspended Bates without pay “for failure to follow instructions by your terminal manager.” Respondent’s Exhibit 12. Hawker also advised Bates that Reddaway would “investigate these incidents.” *Id.*

### **Reddaway determines that Bates falsified his logbook and terminates his employment**

During the course of its investigation, Reddaway officials determined that although Bates indicated in his logbook for August 6, 2004, that he had been delayed at the Dunsmuir Scales for an inspection, that facility had no record that Bates was ever there on that day. T. at 179-181, Respondent’s Exhibits 14, 15. Specifically, California Highway Patrol officers investigated their records at Reddaway’s request and informed Hawker and other Reddaway officials that there would have been a record of Bates’s stop there, but there was no record that Bates was inspected or detained at the Dunsmuir scales for the forty-five minute period he claimed in his logbook. T.

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<sup>5</sup> Bates testified at the hearing that the run from Fresno to Bakersfield and Stockton is “almost the same” in distance as the run from Fresno to Medford, Oregon. T. at 128. But in his Complaint, Bates wrote, “Medford is 488 miles and has more leway [sic] on time if I had to stop . . . The Stockton-Bakersfield run is 650 plus miles and no leway [sic].” OSHA Complaint. Bates thereby asserted that the Medford run was shorter. It is not clear from the Complaint, however, whether Bates included in his miles calculation for the “Stockton-Bakersfield” run the return to Fresno and/or the next day’s run to Willows. Bates did acknowledge at the hearing that on the Medford run, he would have had to spend the night there, while on the other run he would have driven to Bakersfield and Stockton and then returned to Fresno, his base facility, where he would have spent the night in his own home before continuing to Willows the next morning. T. at 128.

at 179-181; Respondent's Exhibits 14, 15. As a result of this investigation, Hawker and other Reddaway managers concluded that Bates had falsified his logbook; Hawker terminated his employment on August 25, 2004, stating, "I believe you attempted to mislead the company as to your delay into Sacramento and in doing so falsified a company document." T. at 181, Respondent's Exhibit 16.

### **Reddaway changes Bates's termination to a suspension and Bates returns to work but loses his bid run.**

James Draper (Draper), Reddaway's vice president of Human Resources, testified that per Bates's request he investigated the circumstances surrounding his termination. T. at 225-226. As a result of the investigation, Draper upheld Reddaway's termination of Bates's employment because he concluded that the evidence showed that, as Hawker had alleged, Bates had falsified his logbook and been insubordinate. *Id.*; Respondent's Exhibit 19. On reconsideration, Draper found that it was difficult to substantiate some of the facts related to the Dunsmuir Scales. Therefore, Draper determined that the termination of Bates's employment should be changed to a suspension and Bates given the opportunity to return to work. T. at 227-228.

On November 1, 2004, Bates signed a Letter of Information wherein Hawker detailed the conditions of Bates's October 20, 2004 return to work. Respondent's Exhibit 28. Bates could not claim any monetary compensation during his suspension and would be placed as a full time employee "on the bottom of the 'Extra Board'" at Fresno whereon seniority would take precedence for any work Reddaway would offer him. *Id.*; *see also* Respondent's Exhibit 29. Bates testified that he retained his seniority when he returned to work, but that he lost his bid run. T. at 140.

### **Reddaway changes Bates to part time status**

Hawker thereafter changed Bates's status from a full-time employee to a part-time employee, citing "seasonal fluctuations in business." T. at 186; Complaint's Exhibit 17. Hawker explained in a letter dated November 22, 2004:

Due to slow business levels since you had been suspended in August 2004, you and Alan Holstine [sic] were placed on the "[Fresno] Extra Board" as full time employees. As we closed out the month of October 2004, we were 24 bills behind plan per day, and \$4,456.00 behind plan per day. Because of these poor results, you were changed from full time status to part time status on Monday November 1<sup>st</sup>, 2004. As of [today], we are running 30 bills behind plan per day, and \$5,084.00 behind plan per day.

Respondent's Exhibit 29. Hawker testified that even if Reddaway had not terminated Bates's employment in August 2004, it still would have changed Bates's status to part-time and Bates still would have lost his bid run because his seniority placed him, and Al Holstein, at the bottom of the bid run list. T. at 188; Respondent's Exhibit 29.

## **Reddaway lays off Bates**

Hawker subsequently laid off Bates in March 2005, because, he testified, Reddaway's business continued to decline. T. at 191-194. Hawker testified that even if Reddaway had not terminated Bates's employment in August 2004, Reddaway still would have laid him off in March 2005, because Bates was least senior. T. at 193.

## **The Procedural History**

In December 2004, prior to his March 2005 lay off, Bates filed a Complaint with OSHA. OSHA Complaint. OSHA investigated the complaint. OSHA's San Francisco, California, deputy regional administrator stated in his March 21, 2005 determination letter to Bates that the investigation "failed to show that you notified Respondent of your illness immediately following your return to your worksite on August 6, 2004" and that "[t]he investigation could only establish that you notified Thomas Hawker, Respondent's terminal manager, of your illness after you returned to the site later in the day when you rejected an assignment." March 15, 2005 OSHA determination at 1-2. Because OSHA found "insufficient evidence to establish that [Bates] reported a protected activity in the manner in which [he] alleged, the Office recommends that your complaint be dismissed." *Id.* at 2. Bates objected to these findings, and requested a hearing. A Department of Labor Administrative Law Judge held a hearing on November 22, 2006, in Santa Rosa, California.

The ALJ found that when Bates refused Hawker's order that he drive the Bakersfield-Stockton-ten hours rest at Fresno-Willows run because he said he was sick, he also offered to drive his usual bid run to Medford, Oregon. R. D. & O. at 13. The ALJ also found that when Bates refused Hawker's order to drive the run, Bates did not claim that he was too sick to drive it safely. *Id.* Therefore, the ALJ determined that Bates did not establish how his illness impaired or was likely to impair his alertness or ability to drive the Bakersfield-Stockton-ten hours rest at Fresno-Willows run, such that to drive it would have created "an unsafe driving condition." *Id.* The ALJ concluded that Bates failed to establish that he engaged in STAA-protected activity.

Alternatively, the ALJ found that even if Bates had established that he had engaged in protected activity, Reddaway did not suspend Bates or terminate his employment based on Bates's illness but on, respectively, evidence tending to show that Bates falsified his logbook and on evidence that Bates was insubordinate in refusing to follow Hawker's order to drive a run. Accordingly, the ALJ dismissed Bates's Complaint.

## **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct.17, 2002). This case

is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a). We are bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 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); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). However, the Board reviews questions of law de novo. See *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express*, 929 F.2d at 1063.

## DISCUSSION

### I. The legal standard

To prevail on a claim of unlawful discrimination under the STAA's whistleblower protection provisions, 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 regarding pay, terms, or privileges of employment; and that the protected activity was the reason for the adverse action. *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 12-13 (ARB May 24, 2007); *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005). If the complainant fails to allege and prove one of these requisite elements, his entire claim must fail. *Davis v. Rock Hard Aggregate, LLC*, ARB No. 07-041, ALJ No. 2006-STA-049, slip op. at 2, 3 (ARB Mar. 27, 2009).

The employee activities the STAA protects include: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A), and "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," 49 U.S.C.A. § 31105(a)(1)(B)(i); or "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious illness to the employee or the public because of the vehicle's unsafe condition," 49 U.S.C.A. § 31105(a)(1)(B)(ii). This case only involves 49 U.S.C.A. § 31105(a)(1)(B)(i).

The STAA protects, inter alia, a category of work refusal, commonly referred to as the "actual violation" subsection. *Eash*, slip op. at 6; *Leach v. Basin W., Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 3 (ARB July 31, 2003). Pertinent to this case, the provision at 49 U.S.C.A. § 31105(a)(1)(B)(i) deals with conditions as they actually exist, and whether a refusal to drive qualifies for STAA protection thereunder requires evaluation of the circumstances surrounding the refusal. See *Eash*, slip op. at 6; *Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-005, slip op. at 7-8 (ARB Mar. 29, 2000) (the ALJ properly considered all the circumstances of the complainant's refusal to drive, including his work record and medical excuses).



Relevant to this case, Bates's refusal to drive may be protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i) if his operation of a motor vehicle would have violated a Department of Transportation (DOT) regulation that states:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3 (2008). This regulation, known colloquially as the "fatigue rule," plainly covers a driver whose driving ability or alertness is so impaired or who anticipates that his or her ability or alertness is so likely to become impaired that it would be unsafe to begin or continue driving. *See Eash*, slip op. at 6; *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-021, slip op. at 5 (ARB July 31, 2001).

To invoke protection under the refusal to drive provision under 49 U.S.C.A. § 31105(a)(1)(B)(i), a STAA complainant must prove, however, that an actual violation would have occurred. The complainant must prove that operation of the motor vehicle would in fact violate the specific requirements of the fatigue rule at the time he or she refused to drive - a "mere good-faith belief in a violation does not suffice." *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 6 (ARB Sept. 30, 2008) citing *Eash*, slip op. at 6; *Yellow Freight Sys. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993); and *Cortes v. Lucky Stores, Inc.*, ARB No. 98-019, ALJ No. 1996-STA-030, slip op. at 4 (ARB Feb. 27, 1998). Therefore, a "threshold inquiry" when a complainant alleges that he was retaliated against for a refusal to drive protected under 49 U.S.C.A. § 31105(a)(1)(B)(i) is whether the complainant's operation of the vehicle as scheduled would have constituted a violation of an applicable regulation. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 10 (ARB Oct. 31, 2007) and cases cited therein. A complainant must introduce sufficient evidence to demonstrate that his driving ability is or would be so impaired that actual unsafe operation of a motor vehicle would result. *Melton*, slip op. at 6, citing *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 2000-STA-048, slip op. at 6 (ARB July 31, 2003) (complainant who claimed sickness failed to produce sufficient evidence to demonstrate an actual violation of the fatigue rule).

## **II. Bates did not engage in protected activity when he refused to drive the Bakersfield-Stockton-ten hours rest at Fresno-Willows run**

To show that he engaged in protected activity, Bates must prove that he refused Hawker's order to drive the run because his ability or alertness was in fact impaired, or was likely to become impaired, by his illness, as to make it unsafe for him to have taken the run at the time he refused to take it. *Wrobel*, slip op. at 4.

The ALJ found evidence that Bates was sick on August 5 and 6, 2004. R. D. & O. at 13. But the ALJ determined that Bates did not establish that his sickness impaired or was likely to

impair his ability or alertness such that it would have been unsafe for him to drive the run when he refused to drive it. *Id.* Specifically, the ALJ found that Bates eventually told Hawker that he was sick and could not drive the Bakersfield-Stockton-ten hours rest at Fresno-Willows run, although at the same time he told Hawker that he would drive the Medford, Oregon, run.<sup>6</sup> *Id.* The ALJ found that Bates did not establish that he would have created an unsafe driving condition had he accepted the Bakersfield-Stockton-ten hours rest at Fresno-Willows run. *Id.* Therefore, the ALJ concluded that Bates had failed to meet his burden to establish, by a preponderance of the evidence, that he engaged in activity protected by the STAA when he refused to drive the Bakersfield-Stockton-ten hours rest at Fresno-Willows run because he was sick. *Id.* at 14.

The ALJ essentially concluded that when Bates refused Hawker's order to drive the Bakersfield-Stockton-ten hours rest at Fresno-Willows run because he said that he was sick, he did not engage in STAA-protected activity because he did not explain how his illness impaired or was likely to impair his ability to drive that run, as he must do to invoke the STAA's employee protections. Bates never told his employer that he was too sick to drive safely the run he refused. The facts as found by the ALJ accurately reflect the record and thus are supported by substantial evidence.

Bates testified that upon his late arrival in Sacramento, he told McKeehan that he was delayed because, "I had to stop several times to use the restroom and find some facilities. I had to delay at the scale. And I had to delay at the truck stop, because I had to clean myself." T. at 117, 118. Even accepting Bates's testimony as true, Bates never told McKeehan, a manager, that he was too sick to drive. Also, Bates never called in from the road to tell his employer that he had become sick and could not safely complete the run. T. at 118.

Bates then drove, without incident, to the Fresno terminal, and then to his home in Visalia, which was a forty-five minute to one-hour and fifteen-minute drive.<sup>7</sup> *See* T. at 121, 125. Bates testified that when Hawker called him at home later that day, he told Hawker that he was sick, which Hawker denied. But Bates never asserted that he told Hawker that he was too sick to drive. In fact, Bates then drove, without incident, to the Fresno terminal to turn in his logbook to Hawker to comply with Hawker's demand that he turn in his logbook or be suspended until he

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<sup>6</sup> Addressing the issue of whether Reddaway was aware of the alleged protected activity, the ALJ found that Bates told Hawker that he was sick when he refused, for the third time, to take the Bakersfield-Stockton-ten hours rest in Fresno-Willows run. R. D. & O. at 15. The ALJ also determined that Bates did not explain "his illness or its possible impairment of his motor abilities." *Id.*

<sup>7</sup> Bates testified that he told Aguilar at the Fresno terminal that he was sick, but Aguilar denied it. Even accepting Bates's testimony as true, his statement to Aguilar cannot help him prove protected activity because Aguilar was not a supervisor or manager responsible for disciplining employees; he was Bates's fellow employee. *Luckie v. United Parcel Serv., Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-039 (ARB June 29, 2007)(complainant must prove that those responsible for the adverse action knew of the protected activity). Moreover, Bates never claimed that he told Aguilar that he was too sick to drive.

did. Moreover, Bates never indicated in his daily logs for August 5 and August 6 that he was sick. T. at 118; *see* Respondent's Exhibit 13. While Bates ultimately told Hawker that he was sick, he did not tell him that he was too sick to drive the run he refused. Bates did not tell his employer, as he must, that he could not safely drive that run as his illness impaired or had the potential to impair his alertness or driving ability. *See Wrobel*, slip op. at 4.

By his own testimony, Bates admitted that at the same time he refused Hawker's directive to take the Bakersfield-Stockton-ten hours rest at Fresno-Willows run because he said he was sick, he offered to drive his usual bid run to Medford, Oregon. T. at 124, 125, 127, 128. Moreover, only after twice refusing to take the Bakersfield-Stockton-ten hours rest at Fresno-Willows run, did Bates claim he was sick.

Bates also did not profess that to have actually driven the Bakersfield-Stockton-ten hours rest in Fresno-Willows run would have resulted in an actual violation of the fatigue rule in that his sickness caused him or would potentially cause him to drive unsafely on that run.<sup>8</sup> Bates never asserted an actual violation of the requirements of the fatigue rule as he must to invoke the protection of the refusal to drive provision at 49 U.S.C.A. § 31105(a)(1)(B)(i). *Eash*, slip op. at 7.

Therefore, we find on this record that Bates did not engage in STAA- protected activity when he refused Hawker's directive to drive the Bakersfield-Stockton-ten hours rest in Fresno-Willows run because he told Hawker that he was sick. We conclude, as did the ALJ, that Bates did not meet his burden to establish by a preponderance of the evidence that he engaged in activity protected under 49 U.S.C.A. § 31105(a)(1)(B)(i).

### **III. Reddaway did not suspend Bates, terminate his employment, or later change his status and eventually lay him off because of protected activity.**

Bates has failed to prove that he engaged in any activity protected by the STAA. Therefore, his whistleblower case fails. *Davis*, slip op. at 2, 3. In the alternative, the ALJ found that Bates did not prove a causal connection between his alleged protected activity and the adverse actions that Reddaway took against him because Reddaway had legitimate non-discriminatory reasons for suspending Bates, terminating his employment, and ultimately laying him off. Substantial evidence in the record supports the ALJ's findings.

The ALJ found that the preponderance of the evidence supported Reddaway's legitimate, non-discriminatory reasons for suspending and terminating Bates in August 2004. Namely, that Reddaway suspended Bates and terminated his employment for misleading the company and

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<sup>8</sup> Bates testified that he saw a doctor, Dr. Flynn, on August 9, 2004. T. at 132. On August 17, 2004, another physician in Dr. Flynn's practice wrote a note in which he indicated that Bates was "excused from work due to illness from 8/6/04 through 8/11/04" and that Bates was "able to return to work 8/12/04." Respondent's Exhibit 23. While Bates testified that Dr. Flynn diagnosed "bowel distress," T. at 120, 132, 135, there is no medical diagnosis in this record and no medical opinion that any condition impaired or would have been likely to impair Bates's alertness or ability to drive safely the run he refused to drive at the time he refused to drive it. *See Wrobel*, slip op. at 3; R. D. & O. at 15-16.

falsifying his logbook. R. D. & O. at 18. The ALJ also determined that after Bates's October 2004 return to work, he would have lost his bid run and Reddaway would have changed his status to part time even if Reddaway had not previously terminated his employment in August. The ALJ also found that the evidence proved that Reddaway laid off Bates in March 2005, due to declining company business and not because of his previous suspension or Reddaway's termination of his employment. *Id.* at 19. Lastly, the ALJ determined that Bates had not established that Reddaway's articulated legitimate, non-discriminatory reasons were pretext for retaliation. *Id.* at 20. Bates did not produce sufficient evidence to establish a causal connection between the alleged protected activity and any adverse action.

Reddaway established that Hawker suspended Bates on August 9, 2004, because of his August 6 refusal to comply with Hawker's "direct order ... to run line to" Bakersfield, Stockton, and Willows. Respondent's Exhibit 12. Bates did not dispute before the ALJ that he refused this order.

After suspending Bates, Reddaway investigated the events of Bates's August 6, 2004 delayed arrival in Sacramento. California Highway Patrol officials reported to Reddaway that there would have been a record had Bates stopped at the Dunsmuir Scales for an inspection or had officials otherwise detained him there, but they had no such record. As a result of this investigation, Hawker, as well as other managers, determined that Bates had misled the company as to why he arrived late in Sacramento and had falsified his logbook by writing that he had been delayed forty-five minutes at the Dunsmuir scales for an inspection. Reddaway officials had learned from California Highway Patrol officials at that facility that they had no record that Bates was ever there on that day, and Hawker so testified. T. at 179-181; Respondent's Exhibits 14, 15. Hawker, and other Reddaway managers, thus concluded that Bates had falsified his logbook and they terminated his employment.

Hawker terminated Bates's employment on August 25, 2004, stating, "I believe you attempted to mislead the company as to your delay into Sacramento and in doing so falsified a company document." T. at 181, Respondent's Exhibit 16. Bates disputed Reddaway's determination that he had falsified his logbook and sought reconsideration of its termination of his employment on that basis. But, Bates adduced no evidence tending to prove that he was at the Dunsmuir Scales as he noted he was in his logbook. The record supports Reddaway's articulated reasons for suspending Bates and then terminating his employment, namely that he falsified his logbook and was insubordinate.

In October 2005, Bates returned to work. Bates signed a Letter of Information in which Hawker detailed the conditions of his return, including placing Bates at the bottom of the "Extra Board" for the Fresno terminal – with no change in seniority but with no bid run and with on call status. T. at 140, 146, 185, 186-189; Respondent's Exhibits 28, 29; Complainant's Exhibit 17. When, in November 2004, Reddaway changed Bates's status from full time to part time, Hawker explained that the change was necessitated by "seasonal fluctuations in business." *Id.* While Bates testified that Hawker was thereby "playing games," he did acknowledge that Hawker was "trying to cut his overhead" and "get his numbers to correct" by "lower[ing] the costs for his operating expenses ... ." T. at 143. Bates did not adduce any evidence tending to show that

Hawker's explanation that Reddaway had experienced "seasonal fluctuations in business" was pretext for retaliation.

Hawker also testified that he laid off Bates in March 2005, because Reddaway's business had continued to decline, and Bates was least senior. T. 191-194. Similarly, Bates adduced no evidence tending to show that Reddaway's business had not continued to decline or that Bates was not least senior and subject to lay off.

Therefore, we conclude, as did the ALJ, that Bates failed in his ultimate burden of proving that any protected activity was the reason for any adverse action Reddaway took against him.

### **CONCLUSION**

Substantial evidence in the record supports the ALJ's findings of fact and she correctly applied the law when she held that Bates did not establish that he engaged in any STAA-protected activity or that Reddaway took any adverse action against him because of any STAA-protected activity. Because the Board agrees that Reddaway did not violate the employee protection provisions of the STAA, we **AFFIRM** the ALJ's R. D. & O. and **DISMISS** Bates's complaint.

**SO ORDERED.**

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

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**