



**In the Matter of:**

**JOSHUA J. ISRAEL,**

**ARB CASE NO. 08-095**

**COMPLAINANT,**

**ALJ CASE NO. 2007-STA-043**

**v.**

**DATE: August 8, 2011**

**UNIMARK TRUCK TRANSPORT,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Joshua J. Israel, *pro se*, Shakopee, Minnesota**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

This case arises under the Surface Transportation Assistance Act (STAA or Act) of 1982.<sup>1</sup> Joshua J. Israel filed a complaint alleging that Unimark Truck Transport, Inc. retaliated against him for engaging in STAA-protected activities. On June 5, 2008, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) recommending dismissal of Israel's complaint. Upon review, we affirm.

---

<sup>1</sup> 49 U.S.C.A. § 31105 (Thomson/West 2007). Congress amended the STAA in 2007 after Israel filed his complaint with the Occupational Safety and Health Administration (OSHA). Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007).

## BACKGROUND

Unimark is a commercial motor carrier that delivers trucks to its customers in “decked loads.” These loads involve the linking of two or more trucks together using metal saddles and blocks of wood. Transcript (Tr.) at 21. Unimark trained Israel, a truck driver, to move decked loads on interstate highways. Israel and Unimark entered into an “Independent Contractor Agreement” (Agreement) on May 7, 2007. Respondent’s Exhibit (RX) 1 at 1-5. The Agreement indicates that Israel will apprise Unimark of his availability, and Unimark may thereafter assign loads to Israel for delivery. The Agreement also states that Israel “shall pay all costs and expenses incident to the performance of movements under this agreement, including but not limited to the following: fuel, transportation, food and lodging.” Agreement, para. 7.

During delivery of his second load for the company on May 20, 2007, Israel observed that a block of wood on the decking of his truck was damaged. According to Israel, the damage caused the truck to lean to one side, creating a safety hazard. Tr. at 30-31. He informed Unimark of the problem and drove to the company’s facility in Joplin, Missouri, where he replaced the wood. The following day, he discussed the incident with Donna Finch, a UTT safety manager, and Marcus Burns, Vice President of UTT. He completed delivery of the load on May 30, 2007. Tr. at 46-51.

Israel’s next assignment was to deliver a “four-way” decked load, involving four linked trucks, from California to Joplin on May 31, 2007. Robert Rauch, a Unimark dispatch manager, told Israel that Unimark expected him to drive 500 miles per day. Tr. at 53. Israel testified that he told Rauch that he could not drive that many miles, because the route involved driving through mountainous regions, and he would need to drive as slowly as twelve miles per hour during certain segments of the route. Tr. at 54. When Israel arrived in Joplin, he told Finch about Rauch’s expectations. Tr. at 55-56.

On or about June 4, 2007, Israel told Burns that he wanted Unimark to assign him only single units for transport. R. D. & O. at 19; Tr. at 114-116. Israel contacted Unimark two days later, and the company indicated that it had no assignments for him. On June 8, 2007, Unimark assigned Israel a load originating in Virginia, which required him to incur travel expenses. Complaint at 2. On June 12, 2007, Israel filed a complaint with OSHA alleging that Unimark violated the STAA by “dispatching load assignments to this Contractor that coerce this Contractor to operate at an extreme loss.” *Id.*

Unimark assigned Israel twelve more deliveries after he filed his STAA complaint. He completed the last of these assignments on July 26, 2007. RX 3. He incurred expenses while performing these assignments. On or about August 3, 2007, Israel informed Unimark that he “wasn’t going to accept any more assignments until [his STAA complaint was] resolved.” Tr. at 103.

OSHA denied Israel’s complaint on August 6, 2007. Israel requested a hearing on the complaint, which the ALJ conducted on February 6, 2008. Israel appeared pro se. Following the

hearing, the ALJ recommended dismissal of the complaint because Israel failed to prove that Unimark took any adverse employment action against him for engaging in STAA-protected whistleblower activity. R. D. & O. at 22. The ALJ forwarded the case to the Administrative Review Board (Board) pursuant to the STAA's automatic review provisions.<sup>2</sup> In response, the Board issued a Notice of Review and Briefing Schedule. Israel filed a brief in response to the Board's order; Unimark did not.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final administrative decisions in STAA cases to the Administrative Review Board.<sup>3</sup> In reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole.<sup>4</sup> The ARB reviews the ALJ's conclusions of law de novo.<sup>5</sup>

### DISCUSSION

The STAA provides that an employer may not “discharge,” “discipline,” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activities. These include: making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order,”<sup>6</sup> “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,”<sup>7</sup> or “refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.”<sup>8</sup>

---

<sup>2</sup> 29 C.F.R. § 1978.109(a).

<sup>3</sup> Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(c).

<sup>4</sup> 29 C.F.R. § 1978.109(c)(3); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

<sup>5</sup> *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

<sup>6</sup> 49 U.S.C.A. § 31105(a)(1)(A).

<sup>7</sup> 49 U.S.C.A. § 31105(a)(1)(B)(i).

<sup>8</sup> 49 U.S.C.A. § 31105(a)(1)(B)(ii).

To prevail on his STAA claim, Israel must prove by a preponderance of the evidence that he engaged in protected activity, that Unimark took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.<sup>9</sup>

We agree with the ALJ's conclusion that Israel engaged in STAA-protected activity on May 20 and 21, 2007, when he complained that a block of wood on the decking of his vehicle was damaged and could cause an accident. We further conclude that Israel may have engaged in protected activity on or about May 31, 2007, during his conversation with Rauch. The ALJ found that Israel failed to prove that Rauch required him to violate hours of service rules. R. D. & O. at 18, n.21. But the ALJ did not discuss Israel's testimony regarding his conversation with Rauch about his inability to drive 500 miles per day when driving a four-way load on steep roads. Arguably, Israel engaged in STAA-protected activity if he expressed his concern to Rauch that he would not be able to drive 500 miles per day under the conditions described at the hearing. *See* Tr. at 53-56. But we do not need to decide this issue because it does not affect our ultimate finding on the issue of retaliation.

Although Israel engaged in STAA-protected activity, the record supports the ALJ's conclusion that Israel failed to prove that Unimark discriminated against him in violation of the STAA. Israel informed Unimark that he wanted to be assigned single loads, and he was aware that such loads were less profitable and not often available. R. D. & O. at 19, citing Tr. at 114-15. Substantial evidence supports the ALJ's finding that the expenses Israel incurred were the result of his contractual relationship with Unimark. *See* RX 1 at 1-5 (Agreement), 6 (Independent Contractor Fee Schedule); 7 (Insurance); and 8 (Training Contract).

At the hearing, Israel submitted a cover page from a training manual, upon which he wrote that Unimark owed him for rental car and motel expenses. Complainant's Exhibit 7. However, the Agreement explicitly states that the contractor bears such costs. RX-1. Israel does not explain why his costs should have been an exception to the Agreement. Evidence of disparate treatment, for instance, that other drivers were reimbursed for such expenses, notwithstanding the Agreement, would have been relevant here, but Israel provided none.

Israel also alleges that Unimark cancelled his insurance, initiated a log audit of his assignments, forwarded a bill to him for union dues, and blacklisted him. Brief in Opposition to Findings and Decision of the ALJ at 9, 11, 16. But Unimark cancelled Israel's insurance

---

<sup>9</sup> *Williams v. American Airlines, Inc.*, ARB 09-018, 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010); *Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008). *See* 49 U.S.C.A. § 31105(b)(1). The ALJ concluded that legal burdens of proof established by the 2007 amendments to the STAA were inapplicable to this case. R. D. & O. at 1, n.1. We disagree. *See, e.g., Johnson v. Siemens Bldg. Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015, slip op. at 7 (ARB Mar. 31, 2011) (ARB begins with the presumption of applying the law in effect at the time of its decision). However, we need not remand this case to the ALJ because Israel failed to present any evidence supporting an essential element of his retaliation claim.

because he stopped taking assignments. R. D. & O. at 21, citing RX 1 and Tr. at 119-120. At the hearing, Israel admitted that he had no evidence that Unimark blacklisted him. Tr. at 80-82. And he has not indicated how the log audit and bill for union dues constitute adverse employment actions.

In sum, Israel failed to prove that Unimark took any adverse employment action against him for engaging in STAA-protected whistleblower activity. Because Israel did not present any evidence of causation (or retaliatory motive), we need not rule on the additional motions he has filed with the Board.<sup>10</sup>

### CONCLUSION

Accordingly, we **AFFIRM** the ALJ's R. D. & O. and **DISMISS** Israel's complaint.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

---

<sup>10</sup> See November 16, 2010 Motion to Proceed In Forma Pauperis; November 16, 2010 Motion to Supplement the Record (regarding bankruptcy stay); November 16, 2010 Motion to Vacate Judgment; March 27, 2009 Motion to Vacate Judgment; March 27, 2009 Motion for Directed Verdict; July 7, 2008 Motion to Strike Hearsay Evidence; and July 7, 2008 Motion to Strike Respondent's Exhibit RX-5.