In the Matter of:

ALVIN B. JACKSON,

COMPLAINANT,

v.

ARROW CRITICAL SUPPLY SOLUTIONS, INC.,

RESPONDENT.

ARB CASE NO. 08-109

ALJ CASE NO. 2007-STA-042

DATE: September 24, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Alvin B. Jackson, *pro se*, Brooklyn, New York

For the Respondent:
Jeffrey M. Schlossberg, Esq., *Ruskin, Moscou, Faltischek, PC,* Uniondale, New York

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, Wayne C. Beyer, *Administrative Appeals Judge*, and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Alvin B. Jackson complained that Arrow Critical Supply Solutions, Incorporated (Arrow), violated the employee protection provisions of the Surface Transportation Assistance Act of 1982[1] (STAA), as amended and recodified, 49 U.S.C.A. § 31105

[1] Congress amended the STAA in 2007 to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121(b) (Thomson/West 2007). *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); 49 U.S.C.A. §

(Thomson/West 2007), and its implementing regulations, 29 C.F.R. Part 1978 (2009). He alleged that Arrow terminated his employment after he complained about exceeding the hours-of-service regulation for truck drivers.[2] On June 30, 2008, a Department of Labor (DOL) Administrative Law Judge (ALJ) recommended dismissal of Jackson's complaint. The case is now before the Administrative Review Board (ARB) under the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1).[3] We affirm.

BACKGROUND

The ALJ summarized the facts and the documentary evidence in this case in detail. Recommended Decision and Order (R. D. & O.) at 3-15. We reiterate briefly.

Alvin Jackson began work as an over-the-road driver for Arrow on September 27, 2005, delivering cargo to customers in the Northeast region from the company's Great Neck, New York facility. Complainant's Exhibit (CX) 1, Employer's Exhibit (EX) 16.

31105(b)(1)(Thomson/West Supp. 2010). As Jackson filed his complaint prior to the effective date of the amendments, they do not apply in this case.

[2] The hours of service regulation limits the number of hours a commercial truck driver may operate his or her vehicle during any given day and 7-day period. *See* Employer's Exhibit (EX) 19. The regulation applicable in 2006-07 provided:

> (a) Except as provided in §§ 395.1(b)(1), 395.1(f), and 395.1(h), no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:
> (1) More than 11 hours following 10 consecutive hours off duty; or
> (2) For any period after having been on duty 14 hours following 10 consecutive hours off duty.
> (b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after—
> (1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
> (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. § 395.3 (2009).

[3] This regulation provides: "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

In September 2006 after a charge account audit covering January through July 2006, Arrow accused Jackson of using the company's debit fuel card to supply his personal vehicle. EX 18. Jackson denied such usage and claimed that someone else had used his code, the last four digits of his social security number. Hearing transcript (TR) at 43-47. Nonetheless, Jackson allowed Arrow's owner, Matthew Cohen, to deduct five percent of Jackson's gross weekly salary over a year to reimburse Arrow the $1,584.69 worth of non-diesel gas Jackson was charged with improperly appropriating. EX 18, TR at 214-18.

In November 2006, Jackson was sent to Boston to pick up a load and deliver it to Leominster, Massachusetts. TR at 33. After he arrived in Leominster at 5:00 p.m., Arrow dispatched him to pick up another load in New Hampshire, but Jackson reported that he had run out of legal hours; he then returned to Great Neck, New York. TR at 34. Arrow suspended Jackson for three days because, as Cohen explained and Jackson admitted, he was not asked to violate the regulations and go immediately to New Hampshire – he should have stayed overnight and gone the next day to get the load. TR at 71-78, 180-84.

Jackson complained anonymously to the Department of Transportation (DOT) and stated that he had violated the hours-of-service regulation at least three times a week during his employment. CX 3, TR at 33-38. Jackson testified that although he had not recorded his driving hours up to that time, he began noting the hours accurately in late November.[4] TR at 36.

On December 27, 2006, Jackson complained to DOT's Federal Motor Carrier Safety Administration that he and every Arrow driver were working more than 70 hours almost every week, but were manipulating the times recorded in their logbooks to show legal hours. CX 1.

Cohen issued Jackson a memorandum dated March 5, 2007, placing him on probation until June 30 because he failed to report an accident – his third – on February 23, 2007. The memo added that he went "off route" on a delivery to Rochester, New York. In the process, he received a ticket, damaged the truck, and incurred unnecessary expenses for gas and tolls. In addition, he drove for two weeks without replacing a missing license plate or reporting the incident. CX 2; EX 4, 9. Cohen testified that Jackson went over his hours during the Rochester delivery because, instead of taking 10 hours of down time and making the delivery the next morning, he drove home to New York and started off the next morning. TR at 207-09.

After Arrow placed Jackson on probation, he filed a second complaint on March 12, 2007, stating that he "was forced to violate" the hours-of-service regulation on March

[4] Over-the-road truck drivers are required to log their hours of work on-duty, on-duty driving, and off-duty to ensure that they comply with 49 C.F.R. § 395.3 (2009).

5 and 9, 2007. Jackson alleged that these violations involved trips to Erie, Pennsylvania and Winslow, Maine. CX 1.

Three other drivers testified that they had manipulated their logbooks to show legal hours. Anthony Marcano admitted, however, that he was never forced to take a job in violation of the hours-of-service regulation; he wanted the extra jobs. TR at 160-70. Afzal "Ozzie" Basrudin stated that he manipulated his logbooks to keep his license clean. TR at 131, 147-50. Alfonso Miller, a part-time driver who was paid to move Arrow's trucks parked on the street at night to avoid tickets, testified that he was told to keep driving on a trip to Syracuse, New York, but agreed that his logbook did not reflect any hours-of-service violations. TR at 96-114.

On March 13, 2007, Jackson met with dispatcher Mitch Crisci to discuss the probation discipline. TR at 67. Cohen testified that the purpose of the meeting was to persuade Jackson to improve his performance, not to fire him. Cohen stated, however, that Crisci reported after the meeting that Jackson "took absolutely no responsibility" for his actions. TR at 205-06. Cohen then spoke with Jackson and they got into a "heated discussion" about the reasons for Jackson's probation. TR at 68, 206-12. Cohen then fired Jackson.

Jackson filed a complaint with the Occupational Safety and Health Administration (OSHA) on March 26, 2007, alleging that Arrow had fired him in reprisal for refusing continually to drive in violation of the hours-of-service regulation. EX 2. OSHA found, after investigation, that Arrow did not violate the STAA and dismissed Jackson's complaint. EX 15-16. Jackson requested a hearing, which a DOL ALJ held on November 26, 2007. The ALJ dismissed the complaint because Jackson failed to prove that his probation and discharge were related to his protected activity. The case is now before the Administrative Review Board (ARB) pursuant to the automatic review regulation. 29 C.F.R. § 1978.109(a).

JURISDICTION

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a).

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. 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). The ARB reviews the ALJ's conclusions of law de novo. *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

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," § 31105(a)(1)(A); "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," § 31105(a)(1)(B)(i); 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," § 31105(a)(1)(B)(ii).

To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay or terms or privileges of employment; and that the employer took such action because he engaged in protected activity. *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, -159, ALJ No. 2005-STA-063, slip op. at 11 (ARB June 30, 2008). The ARB has interpreted "because" to mean that a STAA complainant must show that the protected activity was a "motivating factor" in the employer's decision to take adverse action. *Id*. An employee's failure to prove any one of these elements requires dismissal of the complaint. *Harris v. Allstates Freight Sys.*, ARB No. 05-146, ALJ No. 2004-STA-017, slip op. at 3 (ARB Dec. 29, 2005).

Initially, the ALJ noted that she had evaluated the testimonial evidence by assessing its inherent consistency and its consistency with other record evidence. She added that she had assessed the credibility of the witnesses, considering the source of information, its reasonableness, and the demeanor and behavior of the witnesses. R. D. & O. at 4. We affirm the ALJ's credibility determinations as within her discretion and not "inherently incredible or patently unreasonable." *Simon v. Sancken Trucking Co*., ARB Nos. 06-039, -088, ALJ No. 2005-STA-040, slip op. at 9(ARB Nov. 30, 2007).

Protected activity/knowledge

The ALJ found that Arrow knew that Jackson drove more than his allowed hours on occasion because Cohen acknowledged that his DOT compliance specialist informed him in late 2006 that drivers were not documenting their hours properly. The ALJ stated that it was "conceivable" that Arrow knew that Jackson allegedly falsified logbooks. R. D. & O. at 19. But the ALJ did not find that Jackson complained to Arrow that he or other drivers drove too many hours or falsified log books. And in fact, Cohen testified that Jackson did not report any violations of service hours to him. TR at 183-84, 221-22, EX 21. Accordingly, in the absence of a complaint to Arrow that the drivers were driving too many hours or falsifying the logbooks, the driving-hours violation or the falsification alone did not constitute protected activity. In other words, a complainant does not engage

in protected activity simply by committing a safety violation, he must actually complain that a safety violation has been committed.

We agree with the ALJ that Jackson did engage in protected activity when he complained to DOT on December 27, 2006, that he had to drive more than 70 hours in one week and on March 12, 2007, when he alleged that he was forced to drive over his hours limit to Erie, Pennsylvania and Winslow, Maine. CX 1, R. D. & O. at 18. We also agree that the ALJ properly credited Cohen's testimony that he knew nothing of these complaints until the OSHA investigation disclosed them. R. D. & O. at 21, TR at 184, 197. Thus, Jackson failed to establish that Cohen, who imposed probation and then fired Jackson, knew that he had engaged in protected activity. Such failure to establish an essential element of Jackson's complaint would require dismissal.

Causal relationship

Nonetheless, the ALJ considered whether Jackson's protected activity caused his discharge. Noting that close proximity between protected activity and adverse action may raise an inference of causation, the ALJ found sufficient evidence of a temporal relationship between Jackson's complaints to DOT in December 2006 and March 2007 and his probation and discharge in March 2007 to establish a nexus.[5] R. D. & O. at 21. However, she concluded that the inference was insufficient to meet Jackson's burden to prove by a preponderance of the evidence that Arrow put him on probation and then fired him because of his protected activity. *Id*. at 22.

The ALJ relied on Cohen's reasons for firing Jackson, as stated in the March 5, 2007 letter placing him on probation until June 30, 2007. CX 2. First, the ALJ credited Cohen's testimony that Jackson failed to report promptly an accident on February 23, 2007, which caused $3,800.00 worth of damage. Jackson claimed that he had called the dispatcher, but Cohen stated that he first learned of the accident when the other party involved called him on his cell telephone while he was visiting in Israel and that Jackson had given out this number. TR at 52-58, 200-05.

Second, the letter stated that Jackson had delayed a delivery to Rochester, New York on March 1, 2007, because he had returned home to Great Neck from Albany instead of sleeping over and making the delivery the next day; thus incurring an unnecessary expense of $100.00 for gas and tolls. Jackson testified that he asked Cohen about this incident but got no answer. TR at 60-64. The ALJ credited Cohen's testimony that Jackson's own logbook showed that he had gone home instead of laying over as he was supposed to do. TR at 206-09.

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[5] Although temporal proximity may support an inference of retaliation, the inference is not necessarily dispositive; temporal proximity is "just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action." *Clemmons v. Ameristar Airways, Inc*., ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010).

Third, the letter stated that Jackson failed to report a missing license plate for two weeks and ensure that it was replaced. During that time he received a ticket for the missing plate. Cohen testified that when confronted with this incident at the meeting with Crisci on March 13, 2007, Jackson threw his pre-inspection book at Crisci and stated that all he had to do was log the missing plate. TR at 209-11.

Jackson admitted at the hearing that he got into a heated discussion with Crisci and Cohen about the probation and that the exchange led to his discharge. TR at 67-68. The ALJ credited Cohen's testimony that Jackson's reaction to the probation letter was unacceptable because he refused to take any responsibility for his actions or indicate that he would improve his performance.[6] R. D. & O. at 21-22, TR at 205-06, 212-13.

The ALJ thoroughly and fairly discussed the relevant facts underlying the reason for Jackson's discharge. She determined that Jackson was simply not as credible as Cohen. We have reviewed the record and find that substantial evidence on the record as a whole supports the ALJ's factual findings. Those findings are therefore conclusive. 29 C.F.R. § 1978.109(c)(3).

CONCLUSION

Substantial evidence in the record supports the ALJ's findings of fact. She applied the correct law to those findings. Therefore, we affirm the ALJ's recommended decision and **DISMISS** Jackson's complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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[6] The record is clear that Cohen would have discharged Jackson even in the absence of protected activity. We note, however, that Jackson and three other Arrow employees testified that they manipulated their logs to conceal routine violations of the hours-of-service regulation. The record in this case does not demonstrate Arrow's clear knowledge of these violations (prior to the hearing) or whether it encouraged the practice on either an active or passive basis. The hours-of-service regulation is a critical part of the safety standards that the STAA enforces.