In the Matter of:

RICKY D. FORREST, **ARB CASE NO. 08-111**

COMPLAINANT, **ALJ CASE NO. 2007-STA-009**

v. **DATE: September 21, 2010**

SMART TRANSPORTATION SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Ricky D. Forrest, *pro se*, Alvin, Texas

For the Respondent:
Richard G. Baker, Esq., *Baker & Zbranek, PC*, Liberty, Texas

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Wayne C. Beyer, *Administrative Appeals Judge*; and Luis Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Ricky D. Forrest complained that Smart Transportation Services, Incorporated (Smart), 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 Smart terminated his employment after he complained about exceeding the hours-of-service regulation for truck drivers.[2] On June 25, 2008, a Department of Labor (DOL) Administrative Law Judge (ALJ) recommended dismissal of Forrest's complaint. Upon review, 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 5-27. We reiterate briefly.

Forrest began work as an over-the-road driver for Smart on August 17, 2006, operating out of Houston, Texas. Smart fired Forrest August 29, 2006, after he refused to drive to Dallas because he claimed that he would not have enough legal hours to make the delivery. Hearing Transcript (TR) at 106-20, Respondent's Exhibit (RX) 6 at 17-19. Forrest filed a complaint with DOL's Occupational Safety and Health Administration

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31105(b)(1)(Thomson/West Supp. 2010). As Forrest 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. 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).

(OSHA). Subsequently, Forrest and Smart agreed to a settlement, and Forrest returned to work on September 14, 2006, making local deliveries.[3] Complainant's Exhibit (CX) 16.

On September 21, 2006, Forrest accepted a dispatch to haul a load of beer in a sleeper cab to Alexandria, Louisiana. He arrived about 4:00 p.m. Smart then asked him to pick up a load of paper at DeRidder, which is on the way back to Houston, and deliver it to the port in Houston by 7:00 a.m. the next day. He stopped in Orange, Texas, however, because he was out of hours and did not make the delivery on time. TR at 259-64, RX 6 at 32.

Forrest testified that he preferred weekend long-haul trips, which Smart provided three times in October. TR at 189, 272-78, 292. On Friday, October 13, he refused to drive to California contending that he did not have enough hours to make the trip. TR at 273. He testified, however, that he turned down the load because his father's aunt had died and he wanted to attend the funeral in Grossbeck, Texas. TR at 281.

When Forrest returned to work on Monday, October 16, he received a three-day suspension, but he made local deliveries on October 18. RX 1, 6. On October 20, Smart fired Forrest because he would not submit his logbooks to verify that he did not have hours available to make the California trip the previous weekend. CX 8.

Forrest filed a complaint with OSHA on October 30, 2006, alleging that he was suspended and then discharged after he informed Smart that he was refusing a dispatch because he was out of service hours. CX 19. On November 17, 2006, OSHA found the complaint to be without merit. CX 2. Forrest requested a hearing, which was held on October 30, 2007. The ALJ dismissed Forrest's complaint on June 25, 2008. The case is now before the 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).[4] We affirm.

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).

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[3] Forrest accepted the settlement in mid-September after he had returned to work. The ALJ informed Forrest at the hearing that the settlement agreement was not part of his complaint and excluded several exhibits relevant to it. TR at 49-52.

[4] 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 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," 49 U.S.C.A. § 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," 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 injury to the employee or the public because of the vehicle's unsafe condition," 49 U.S.C.A. § 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 found that Forrest lacked credibility because, among other reasons, his "demeanor and appearance were not convincing" and because he "repeatedly contradicted and corrected himself" at the hearing. The ALJ added that Forrest's testimony was of "very limited probative value" unless corroborated by independent sources. By contrast, the ALJ found the testimony of Steven Johnson, Smart's safety manager, "much more credible." R. D. & O. at 27. The ALJ's credibility determinations are within his discretion and his findings in this case are 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

The ALJ found that that Forrest's refusal to drive on September 21, 2006, constituted protected activity because to do so would have violated the hours-of-service regulation. R. D. & O. at 29-30. We affirm this finding as based on substantial evidence. Forrest told the dispatcher that he could not deliver a load of paper to the dock in Houston by 7:00 a.m. on September 22 without violating the hours-of-service regulation. Forrest's logs show that, after delivering a load of Budweiser to Alexandria, Louisiana, he continued to DeRidder, where he picked up the paper and arrived in Orange, Texas, at 11:00 p.m. CX 6. At that point, he had driven 10.75 hours that day, and Houston was two hours away. If he had continued to Houston, he would have exceeded the 11-hour driving limit.[5]

Causal relationship

The ALJ found sufficient evidence of a temporal relationship between Forrest's protected activity on September 21 and his suspension and discharge a month later to warrant an inference of motivation.[6] He found, however, that Smart suspended Forrest because he refused to submit his logbooks and fired him, not because he refused to continue his trip on September 21, but because he refused the dispatch to California for reasons unrelated to any protected activity. The ALJ therefore concluded that Forrest failed to meet his burden to prove the required relationship between his protected activity and his suspension and discharge. R. D. & O. at 31-32.

Forrest's logbooks show that he worked steadily after his protected activity on September 21 and Smart offered him the weekend trip to California after being on duty from 8:00 until 11:30 a.m. on October 13. RX 6 at 50-59. He testified that he asked Smart to reschedule the California delivery from Monday until Tuesday, which Smart did, but then claimed that he would run out of service hours. TR at 272-81. However, the logbooks for the week of October 9, which were produced during discovery, show that Forrest had 39 hours of the 70-hour limit available to drive to California over the weekend. RX 6 at 33-38.

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[5] The ALJ made no specific finding that Smart knew of Forrest's protected activity, but Forrest testified credibly that he informed the dispatcher that he had run out of hours, TR at 164-69, and Johnson indicated that he was aware of Forrest's claim, TR at 360-61. In any event, Smart has not contested the issue.

[6] 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).

The ALJ credited Johnson's testimony that asking over-the-road drivers to submit their logbooks was common practice and that Forrest refused to turn in his logs to verify his-out-of-hours claim for the California trip. TR at 350-55, 367, 381. Manager Sheila Cunningham stated in the letter suspending Forrest[7] that when Smart informed him of the later delivery day, he replied that "he didn't want to run that lane" or "go to California." CX 10 at 5. Forrest himself testified that he attended the relative's funeral instead of making the trip. TR at 281.

The ALJ thoroughly reviewed the relevant facts underlying the reason for Forrest's discharge. He determined that Forrest was simply not as credible as Johnson. 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 conclusive. *See* 29 C.F.R. § 1978.109(c)(3).

CONCLUSION

Substantial evidence in the record supports the ALJ's findings of fact. He applied the correct law to those findings.[8] Therefore, we affirm the ALJ's recommended decision and **DISMISS** Forrest's complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

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[7] While on suspension for refusing to submit his logs, Forrest worked 3.5 hours on October 16 and 3.75 hours on October 18. RX 6 at 45-49; *see* CX 18.

[8] The ALJ mistakenly relied on two early ARB cases in stating that a complainant must show an actual violation of a commercial motor vehicle safety regulation, and that his reasonable good-faith about a violation was insufficient to afford him protected status. R. D. & O. at 4. The error is harmless, however, as the ALJ applied the correct reasonable belief standard in finding protected activity. R. D. & O. at 30.