



In the Matter of:

PHILIP FABRE,

ARB CASE NO. 09-026

COMPLAINANT,

ALJ CASE NO. 2008-STA-010

v.

DATE: December 22, 2009

WERNER ENTERPRISES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Philip Fabre, *pro se*, Aloha, Oregon

FINAL DECISION AND ORDER

Philip Fabre filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on June 22, 2007. He alleged that his employer, Drivers Management LLC, a subsidiary of Werner Enterprises, Inc. (Werner), violated the employee protection provisions of section 405 of the Surface Transportation Assistance Act (STAA or Act) of 1982,¹ and its implementing

¹ 49 U.S.C.A. § 31105 (Thomson/West 2007). The STAA has been amended and re-codified since Fabre filed his complaint. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide whether the amendments apply to this case because even if they did apply, they would not affect our decision.

regulations² when it discharged him on March 26, 2007. The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. A Department of Labor Administrative Law Judge (ALJ) recommended that we dismiss Fabre's complaint because Fabre has not proven by a preponderance of the evidence that Werner discriminated against Fabre in violation of the Act when it discharged him.³ We affirm.

BACKGROUND

Fabre drove commercial motor vehicles for Werner, a shipping company subject to the STAA.⁴ On March 20, 2007, while on his way to pick up freight in Freeport, New York, Fabre experienced delays on the roads around New York City. After the pick-up in Freeport, he checked his Qual satellite communication device (Qualcomm) to determine whether he had any legal drive time remaining. United States Department of Transportation (DOT) hours-of-service regulations limit the number of hours a commercial truck driver may operate a vehicle during any given day and 7-day period.⁵ Fabre found that the device was not working properly. He testified, "I was almost positive at this time that I was out of legal driving hours, but from what I knew, my Qualcomm was not going to provide me with that information."⁶ He nevertheless decided to continue his trip because employees of the Freeport shipper told him that it was not safe for him to stay in Freeport.

According to Werner, its Safety Department suspended Fabre on March 25, 2007, for 72 hours because of repeated safety violations, including DOT hours of service violations. When an employee informed Fabre of the suspension, he became belligerent, shouting that the DOT had no authority over him.⁷ On the next day, Fabre argued with Safety Department officials about his suspension and informed Jaime Maus, Manager of Log Compliance, that he did not recognize the DOT as a governing authority over him and that he did not intend to comply with its hours of service regulations.⁸ Fabre later

² 29 C.F.R. Part 1978 (2009).

³ ALJ's Recommended Decision and Order Dismissing Complaint (R. D. & O.) at 6.

⁴ R. D. & O. at 2-3, Stipulations 1-4.

⁵ See 49 C.F.R. § 395.3 (2009).

⁶ Complainant's Exhibit (CX) -16 at 16.5.

⁷ ALJ Exhibit (ALJX) -2 at 1.

⁸ Transcript (Tr.) at 86; ALJX-2 at 2.

also told John Elliott, Manager of the Corporate Training Center, that he was unwilling to comply with DOT regulations. Elliott terminated his employment.⁹

Fabre's version of the March 25 and 26 events is quite different. Fabre stated that nothing of significance happened on March 25, but on March 26 his Qualcomm device directed him to report to the Safety/Logs office. When he did so, an employee told him that he was suspended for three days for his actions on March 20 when he violated hours of service regulations while driving around New York City. He explained to both the employee and to Maus, the employee's supervisor, that his Qualcomm device was not functioning properly on March 20. He stated that Maus told him that there was no problem with the device and that she would investigate further. He also said, "I refused to recognize the DOT hours of service regulations as having any authority over me as long as my computer system [the Qualcomm unit] was not working properly. . . ." ¹⁰

According to Fabre, when he returned from breakfast, Maus told him that Werner would not suspend him if its investigation revealed that the Qualcomm device was faulty. Fabre stated that when Elliott returned, he told him, "You are not being punished, go to your truck."¹¹ When he went to pick up a truck, however, a guard told him to return to the Safety/Logs Department. Upon his return, he met with Elliott.

Elliott testified that when he asked Fabre to confirm that he would support and operate under DOT's paperless log system and Warner policy, Fabre refused to do so.

On that basis, I took it upon myself to end his employment because all drivers of Werner Enterprises have to operate under those guidelines, and each driver who is an employee of Werner Enterprises during the orientation process must sign an acknowledgment that they would, in fact, comply with all federal, state, and corporate rules in regards to regulatory compliance in the work place.¹²

Elliott terminated Fabre for "violation of Werner policies."¹³

⁹ Tr. at 91-92.

¹⁰ CX-16 at 5.

¹¹ CX-16 at 6.

¹² Tr. at 93.

¹³ CX-16 at 7; Respondent's Exhibit (RX) -5 at 1.

Werner avers that Fabre never mentioned to any of its personnel that he had a problem with his Qualcomm device, or that the device caused him to exceed DOT hours of service regulations. Fabre's trial exhibits, however, contain texts of Qualcomm message traffic between Fabre's truck and Werner employees monitoring the Qualcomm. The messages show that a Werner employee acknowledged Fabre's messages reporting a faulty Qualcomm device on February 7, 11, and 27, and March 7 and 9.¹⁴

In his June 22, 2007 complaint with OSHA, Fabre claimed that Werner fired him in retaliation for complaining about his Qualcomm device. OSHA denied Fabre's complaint, and he timely requested a hearing before an ALJ. On November 19, 2008, the ALJ found that Fabre did not "meet his burden to demonstrate, by a preponderance of the evidence, that his termination was the product of discrimination prohibited by the STAA."¹⁵ Accordingly, the ALJ denied his claim.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or Board) the authority to issue final agency decisions under the STAA and its implementing regulations.¹⁶ We are bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.¹⁷ We review the ALJ's conclusions of law de novo.¹⁸ This case is before the ARB pursuant to the STAA's automatic review provisions.¹⁹ The ARB issued a Notice of Review and Briefing reminding the parties of their right to submit briefs in support of or in opposition to the ALJ's order. In response to the Board's order, Fabre filed a brief in opposition to the ALJ's decision; Werner filed a letter indicating that it agreed with the ALJ's decision and would not file a brief.

¹⁴ CX-31 at 5, 14, 22, 25, 43; R. D. & O. at 6.

¹⁵ R. D. & O. at 17.

¹⁶ Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. Part § 1978.

¹⁷ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998).

¹⁸ *Werner Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Werner Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029, slip op. at 2 (ARB Oct. 31, 2003).

¹⁹ 49 U.S.C.A. § 31105(b)(2)(C); see 29 C.F.R. § 1978.109(c)(1).

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 making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order”²⁰ Protection is also afforded where an employee “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”²¹

To prevail on his STAA claim, Fabre must prove by a preponderance of the evidence that: 1) he engaged in protected activity, 2) Werner was aware of the protected activity, 3) Werner discharged him, or disciplined, or discriminated against him with respect to pay, terms, or privileges of employment, and 4) there is a causal connection between the protected activity and the adverse action.²² Fabre bears the burden of persuading the trier of fact that he was subjected to discrimination.²³ If Fabre does not prove one of these requisite elements, his entire claim fails.²⁴

The ALJ found that Fabre filed his complaint under the complaint clause of the STAA, and Fabre does not dispute this finding.²⁵ Under the complaint clause, a complainant need not prove an actual violation of a motor vehicle safety regulation, standard, or order. The complainant, however, at least must be acting on a reasonable belief regarding the existence of a violation.²⁶ Thus, 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.”²⁷

²⁰ 49 U.S.C.A. § 31105(a)(1)(A).

²¹ 49 U.S.C.A. § 31105(a)(1)(B)(i).

²² *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005).

²³ *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

²⁴ *West v. Kasbar, Inc /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

²⁵ R. D. & O. at 11.

²⁶ 49 U.S.C.A. § 31105(a)(1)(A). *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 3 (ARB July 31, 2003).

Fabre alleges that Werner fired him on March 26, 2007, because he complained about a faulty Qualcomm satellite communication device in his truck.²⁸ He further alleges that his complaint about the Qualcomm device was protected activity under the STAA because truck drivers use the device to record their service hours and to communicate with dispatchers. The ALJ found that Fabre's complaint did not relate to a violation of a safety regulation, standard, or order, and therefore did not constitute protected activity.

Substantial evidence supports the ALJ's finding that Fabre's complaints about his malfunctioning Qualcomm were not protected activity, and we affirm her legal conclusion that Fabre did not engage in protected activity. Operating a truck with a faulty Qualcomm is not a violation of a motor vehicle regulation unless the employee fails to use a paper back-up. The hours of service regulation in effect at the time the alleged violation occurred provided a choice of using the traditional paper grid form to record hours manually or using an automatic on-board recording device.²⁹ Therefore, operating a truck with a faulty Qualcomm device is not in itself a violation of the regulation.

We next consider whether Fabre had a reasonable belief that the operation of his truck with a faulty Qualcomm device was a violation of commercial motor vehicle regulations. As stated above, the STAA protects employees, who in the absence of an actual violation of motor vehicle safety regulations, reasonably believe that a violation has occurred.³⁰ The regulation governing use of automatic on-board recording devices provides, in pertinent part, as follows:

Drivers are required to note any failure of automatic on-board recording devices, and to reconstruct the driver's record of duty status for the current day, and the past 7 days, less any days for which the drivers have records, and to continue to prepare a handwritten record of all

²⁷ *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 5 (ARB Dec. 31, 2002).

²⁸ The ALJ found that Fabre notified Werner that his Qualcomm device was malfunctioning, but she also found that, Elliott, who was solely responsible for Fabre's termination, was not aware of his complaint about the device. R. D. & O. at 12, 15; *see* Tr. at 94.

²⁹ *See* 49 C.F.R. § 395.8(a).

³⁰ 49 U.S.C.A. § 31105(a); *Israel v. Schneider Nat'l Carriers, Inc.*, ARB No. 06-040, ALJ No. 2005-STA-051, slip op. at 7 (ARB July 31, 2008).

subsequent duty status until the device is again operational.^[31]

In compliance with this regulation, Werner's Driver's Handbook, which it provided to all employees, required that a blank logbook be kept in every truck for use by the driver in the event of a Qualcomm failure. Fabre was aware of the handbook and offered portions of it in evidence at the hearing. Moreover, he testified that the handbook provided "that I would be instructed at some time to keep a paper log"³² Fabre could not have reasonably believed that the faulty Qualcomm device violated safety regulations because he knew that his Driver's Handbook provided for an alternative method of reporting hours of service, a handwritten record. Like the ALJ, we find that Fabre's notification to Werner that his Qualcomm device had failed was not a notification of a violation, but rather was an integral part of compliance with the regulations.

We therefore affirm the ALJ's determination that Fabre failed to demonstrate that he engaged in protected activity under the STAA. Since he failed to prove protected activity, an essential element of his claim, his entire claim must fail.³³

CONCLUSION

Substantial evidence in the record supports the ALJ's findings. Accordingly, we **AFFIRM** the ALJ's R. D. & O. and **DENY** Fabre's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

³¹ 49 C.F.R. § 395.15(f).

³² Tr. at 47-48.

³³ The ALJ went on to find that Elliott and Maus, both of whom had a role in Fabre's termination, were not aware of Fabre's complaints about his Qualcomm device, that his complaints about the Qualcomm device did not have a causal connection to his termination, and that Werner's reasons for firing Fabre were legitimate. R. D. & O. at 15-17. Substantial evidence supports these determinations.