



In the Matter of:

JOSHUA J. ISRAEL,

ARB CASE NO. 09-069

COMPLAINANT,

ALJ CASE NO. 2008-STA-001

v.

DATE: September 29, 2011

BRANRICH, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:

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

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER ON RECONSIDERATION

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended.¹ On April 30, 2007, Joshua Israel (Complainant or Israel) filed a complaint with the Occupational Safety and Health Administration (OSHA)

¹ 49 U.S.C.A. § 31105(a) (Thomson/West 2007). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2007). The STAA has been amended since Israel filed his complaint. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

alleging that BranRich, Inc. (BranRich or Respondent)² violated the STAA when it retaliated against him because he engaged in protected activity. On September 19, 2007, OSHA dismissed Israel's complaint. Israel timely filed his objections and a hearing was held on October 29, 2007, in St. Paul, Minnesota. After hearing and briefing, the Administrative Law Judge (ALJ) held that Israel failed to prove that he engaged in protected activity and that BranRich did not violate the STAA. Under the STAA regulations in force when Israel filed his complaint, the Administrative Review Board (Board or ARB) automatically reviews an ALJ's Recommended Decision and Order (R. D. & O.).³ On review, we affirm the ALJ's finding that Israel did not engage in protected activity and dismiss his appeal.

BACKGROUND

Israel began working at BranRich on March 14, 2007, as an independent contractor. At BranRich, Charlie Hartwig, BranRich's General Manager and Dispatcher, and Jeff Stanley, BranRich's Safety Officer and Vice President, supervised Israel. R. D. & O. at 3, 6.

BranRich drivers deliver special-purpose commercial vehicles such as cement and trash trucks to a specified destination by road and return to the point of origin by air. A driver generally receives 24 hours' notice before the truck must be on the road. When Israel began work, BranRich informed him of the company's typical assignment and the procedure for returning to the point of origin by air. Hartwig also informed Israel that occasionally a rental car would be provided for the return trip. R. D. & O. at 7 n.23. During Israel's orientation, BranRich informed him of its expectation for drivers to complete 600 miles per day and the need to keep accurate logbooks. R. D. & O. at 3. After the orientation meeting, Israel informed Hartwig of his motion sickness but did not inform him that this prevented him from flying. Transcript (Tr.) at 32, 45-46, 119-20.

BranRich drivers are paid by the mile and receive some reimbursement for expenses incurred during assignments. Tr. at 197. By contract, drivers are responsible for other expenses such as food and lodging.⁴ The vehicles BranRich delivers do not have sleeper berths, but

² In March 2009, BranRich informed the Board that it had ceased operation. In June 2009, BranRich informed the Board that it had completed all the final administrative steps to conclude its business. As a result, the Board issued an Order asking parties to respond to BranRich's corporate status and to show cause why Israel's appeal should not be dismissed. Israel responded but did not address BranRich's corporate status. Finding no adequate response, the Board dismissed Israel's appeal. Israel filed a request for reconsideration raising substantive issues concerning BranRich's status. Reviewing Israel's submission, we granted reconsideration and this order follows.

³ 29 C.F.R. § 1978.109(a). The DOL's new STAA regulations became effective on August 31, 2010.

⁴ Respondent's Exhibits (RX) 1-1 (contract between drivers and company) provides:

BranRich has a policy of reimbursing drivers for hotel lodging if incurred during the transportation of freight to the destination.

Israel completed his first assignment, a delivery to Georgia, in March 2007. A fellow BranRich employee driving a separate vehicle accompanied Israel on the trip to serve as a mentor. Tr. at 34, 137-38. Israel complained that the other driver violated the speed limit and that he warned the driver about speeding and the state police. Tr. at 37. According to Israel, the driver did not stop for breaks and suggested Israel eat while driving.

Mid-route during the Georgia trip, Israel notified Hartwig that he would not return to the point of origin in Rochester, Minnesota by plane due to motion sickness. Tr. at 40-41, 75, 120. BranRich usually paid for airfare on return trips. Because Israel presented the unique circumstance of refusing to return by plane, BranRich developed the policy of reimbursing drivers for rental and fuel costs on return trips by car up to the amount it would have paid for return airfare. Tr. at 84, 121-22. In response to his inability to return by plane, BranRich scheduled a rental car for Israel for 24 hours. Israel complained that 24 hours would not give him enough time to get back to Minnesota. According to Israel, Hartwig then agreed to a hotel and a 48-hour rental. Tr. at 44. After learning that Israel would not fly to the point of origin, Hartwig informed Israel that he would only assign him one-day trips. Tr. at 72-73.

Upon completion of the Georgia assignment, BranRich learned that the costs of the rental car and fuel exceeded the amount a return trip by air would cost. Despite being more than the cost of airfare, BranRich paid for the rental car and fuel. In addition, Israel requested reimbursement for lodging expenditures on the return trip from Georgia to Minneapolis. Israel claimed BranRich promised to pay for the hotel for one night. Compl. at 1. Ultimately, BranRich did not pay for Israel's hotel costs incurred on the Georgia assignment. R. D. & O. at 5.

On or about April 3, Israel had a conversation with Stanley in which he voiced his concerns about motel reimbursement, fatigue, speeding, and hours-of-service violations in relation to the 600-mile-per-day goal. R. D. & O. at 6-7 & n.20. Israel felt the requirement pushed drivers to exceed speed limits. According to Israel, Stanley responded that a driver can reach 650 miles per day legally. Tr. at 58.

Contractor further agrees to personally pay all necessary expenses, which may be incurred. Such expenses shall include but not be limited to: fuel, transportation cost(s) to and from origin and/or destination, meals, lodging, ground or air travel and any other expenses whatsoever, except vehicle breakdowns which are not caused or contributed to by Contractor's negligence. Upon the Contractor's pick-up of the Load, the Companies will advance up to three hundred dollars (\$300.00) for use on authorized road expenses. The amount of the advances will be determined solely by the Companies.

On or about April 25, Hartwig assigned Israel a Bloomington, Illinois route, which, at 420 miles, would compensate a driver approximately \$159.20. Tr. at 197. Upon further consideration, Hartwig decided to assign the Bloomington route to another driver who typically arrived at the BranRich facility at 3 a.m. whereas Israel typically arrived at 7 a.m. Tr. at 127-28; R. D. & O. at 9. Under the plan, the other driver would leave earlier, complete the assignment, rent a car, and then pick up Israel who would be delivering freight to a closer destination. Tr. at 128.

Hartwig informed Israel of the assignment change and requested Israel confirm the assignment. Israel refused to give an answer whether he would take the shorter route because he did not know if the other driver was a smoker. Tr. at 55-56; R. D. & O. at 6. Stanley told Israel to call the driver to determine whether he smoked, but Israel was not able to reach the driver.

Israel complained to Hartwig and Stanley that he felt that they were retaliating against him for raising complaints about refusing to fly. Tr. at 54, 55, 131; R. D. & O. at 5. Hartwig told Israel to talk to Stanley about it. Israel told Stanley that he had been assigned a longer more lucrative trip, but Hartwig took it away. R. D. & O. at 5-6, 15. After Israel told this to Stanley, Israel testified Stanley said, "If I hear you say that word one more time I'm going . . . [to] terminate this contract." Tr. at 56. Stanley testified that he did not say these exact words. According to Stanley, he told Israel, "Okay, I understand what you're talking about with discrimination. Let's get past that point and let's, you know, we need to work and try to figure out how we can make this work together." Tr. at 190-91. Stanley then asked to speak with Hartwig. Following Stanley's discussion with Hartwig, Hartwig terminated Israel's employment. Tr. at 182-83; R. D. & O. at 6, 9, 11.

According to Hartwig, he and Stanley jointly made the termination decision. Tr. at 130. Hartwig testified that the main reason for terminating Israel's employment was the fact that they could not get an answer out of him concerning a time-sensitive Illinois trip. Tr. at 130, 151-52. Hartwig testified that prior to terminating Israel's contract, he spoke with Stanley regarding Israel's conduct, arriving late, and making late deliveries. Tr. at 190.

Israel filed his complaint with OSHA on April 30, 2007. Israel claimed that BranRich violated STAA by discriminating against him for engaging in protected activity. Israel complained that the 600-mile-per-day requirement and inadequate hotel and rental reimbursement pushed drivers to exceed the speed limit and violate fatigue and hours-of-service regulations. Israel claimed BranRich retaliated by refusing to make hotel reimbursements and taking away load assignments. OSHA dismissed the claim on September 19, 2007, concluding that Israel's complaint had no merit and that he could not preponderate that he suffered an adverse action in retaliation for protected activity. Israel filed objections with the OALJ. The ALJ held hearing and issued his R. D. & O. finding against Israel on February 27, 2009.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA. *See* Secretary's Order 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). When reviewing STAA cases, the Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 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); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). The Board reviews the ALJ's legal conclusions de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

A. 600 Miles and Speeding

Israel complained that BranRich had a policy of encouraging drivers to complete 600 miles per day. Israel felt that this distance could not be accomplished without violating hours-of-service rules and local speed limits and that he informed Stanley of these concerns on April 3. Tr. at 38.

The 600-miles-per-day requirement was not a set requirement but merely an expectation. Israel testified that he was not punished or reprimanded when he failed to meet the 600-mile goal. Tr. at 76-77, 86-88. According to Stanley, the speed limit was 65 mph in many jurisdictions and the expected distance could be accomplished within the applicable regulations. Israel conceded that the speed limit was 65 mph in many jurisdictions but commented that road construction might be a factor to consider. Tr. at 85-86.

The ALJ concluded the safety complaint on 600 miles per day was unfounded. R. D. & O. at 13-14. According to the ALJ, Israel's belief was unreasonable because the 600-mile goal was not a set requirement, was obtainable, and because BranRich had a track record of compliance with hours-of-service rules. *Id.*

On appeal, Israel claims he had a reasonable apprehension of an unsafe condition because BranRich's schedule required exceeding a 55-mph speed limit and created a situation of fatigue and possible injury to himself and the public. Israel Br. at 11. Israel also claims he was pushed to drive more than 600 miles on occasion. Israel Br. at 16; Tr. at 61.

The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "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;" or who "refuses 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)(A). 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." *Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-

034, slip op. at 3-4 (ARB Aug. 8, 1997); *Luckie v. United Parcel Serv., Inc.*, ARB Nos. 05-026, -054; ALJ No. 2003-STA-039, slip op. at 13 (ARB June 29, 2007). To warrant protection under this section, the employee must “at least be acting on a reasonable belief regarding the existence of a safety violation.” *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 8 (ARB Dec. 31, 2007); *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 6 (ARB Dec. 31, 2002).

We agree with the ALJ’s legal conclusions and find substantial evidence supports the ALJ’s factual findings. While federal regulations prohibit a company from creating or enforcing a schedule that violates local regulations, 49 C.F.R. § 392.6 (2007), Israel has not shown a reasonable belief that BranRich violated this or other related safety regulations. Substantial evidence supports the ALJ’s finding that BranRich drivers can adjust their schedule to comply with local regulations, and drivers did not face penalties if they failed to meet the 600-mile goal.⁵ More specifically, the substantial evidence of record supports the ALJ’s finding that it was not reasonable to believe that the 600-mile goal by itself was a safety violation where such goal was achievable in many circumstances.

B. Fatigue and Hours of Service

Israel complained to Hartwig about receiving a 24-hour rental car without hotel reimbursement, which encouraged him to exceed the hours-of-service requirements and violate fatigue rules (drive all day on duty, rent a car off duty, and drive back within the 24-hour period). Tr. at 81-82.

BranRich argues complaints of fatigue and hours of service for rental cars do not constitute protected activity under the STAA. The ALJ agreed and concluded hours-of-service and fatigue complaints concerning the rental car were not covered because the rental car was not a “commercial vehicle” as it does not have the required weight. R. D. & O. at 12-13.

On appeal, Israel has not provided any law to counter BranRich or the ALJ on the coverage of the rental car. We agree with BranRich and the ALJ that Israel’s rental car is not covered under the STAA.⁶ Even if the rental car were covered, Israel has not demonstrated a

⁵ Tr. at 76-77, 86-88. We limit our holding to the facts and circumstances of this particular case. Under different circumstances, for example those involving rough weather and/or terrain, concerns expressed regarding an employer’s distance requirement or expectation might constitute protected activity under STAA. See *Israel v. Unimark Truck Transport*, ARB No. 08-095, ALJ No. 2007-STA-043, slip op. at 4 (ARB Aug. 8, 2011). We found no such qualifying conditions in this record.

⁶ The STAA defines a covered employee as “a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who (A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier.” 49 U.S.C.A. § 31101(2)(A). The term “commercial motor vehicle” is defined in the statute as “a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle[:]

reasonable belief that BranRich violated fatigue or hours-of-service rules by failing to reimburse him for hotel costs or failing to extend his rental period for his travel back to Minnesota. Israel was off duty and free to stop to get a hotel or extend the rental period at his own expense if he so wished.

C. Refusing to fly

Israel claimed to suffer from motion sickness and further claimed that he informed BranRich of his flying condition at the orientation meeting. Tr. at 32, 45-46. Hartwig conceded Israel's disclosure but testified that he did not understand this to mean Israel would not fly. Tr. at 119.

The ALJ held Israel's refusal to fly was not covered within the STAA. Even if refusal to fly were protected, the ALJ further found that Israel's refusal was not the cause of any retaliation. R. D. & O. at 18. The ALJ reasoned, the company accommodated his inability to fly with shorter assignments and assigned Israel several jobs after learning of his inability to fly. *Id.*

Israel has not provided any persuasive argument or authority for STAA coverage for refusing to fly on an airplane while off-duty returning to Minnesota. Therefore, we agree with the ALJ that Israel did not engage in protected activity by refusing to fly an airplane on his return trips.

CONCLUSION

We **AFFIRM** the ALJ's holding that Israel did not engage in protected activity and **DISMISS** Israel's appeal. In light of our ruling, other evidentiary and legal issues the ALJ addressed or Israel raised on appeal are moot.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater . . .” § 31101(1); *Bauman v. U.S. Cargo & Courier Serv.*, ARB No. 01-016, ALJ No. 1999-STA-045 (ARB June 29, 2001).