**U.S. Department of Labor**

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**In the Matter of:**

**DWIGHT TOLAND,** **ARB CASE NO. 09-091**

**COMPLAINANT,** **ALJ CASE NO. 2009-STA-011**

**v.** **DATE: March 8, 2011**

**FIRSTFLEET, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

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

## ORDER DENYING RECONSIDERATION

Dwight Toland filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on October 17, 2008. Toland alleged that his employer, Firstfleet, Inc., violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, when it terminated his employment. 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2010). The STAA protects employees from discrimination when they report violations of commercial motor vehicle safety rules, when they refuse to operate a vehicle when such operation would violate those rules, when they accurately report hours on duty, when they cooperate with a safety or security investigation, or when they furnish information about accidents that resulted in injury or death in connection with commercial motor vehicle transportation.

A Department of Labor Administrative Law Judge (ALJ) granted Firstfleet's motion for summary decision and dismissed Toland's complaint because Toland failed to set forth specific facts or present evidence from which some issue of material fact could be discerned and because Firstfleet was entitled to judgment as a matter of law.

On January 19, 2011, the Administrative Review Board (ARB or Board) issued a Final Decision and Order (F. D. & O.) summarily affirming the ALJ because Toland could not establish an essential element of his retaliation claim.

On February 8, 2011, Toland filed a Motion for Reconsideration of the F. D. & O., requesting reconsideration of our ruling. Toland asserts that he was fired in violation of the STAA because "[t]ermination for failing to comply with personnel policies is . . . an activity protected under STA." Firstfleet filed a response to Toland's motion on February 23, 2011.

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007). As an initial matter, we note that Toland filed his Motion twenty-seven days after the Board issued its F. D. & O. Given the Board's rulings in other cases, there is a substantial question whether Toland's motion was timely filed. *See, e.g., Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 4 (ARB Dec. 21, 2007), citing *Henrich*, slip op. at 17; *Spearman v. Roadway Express, Inc.*, 1992-STA-001, slip op. at 1 (Sec'y Oct. 27, 1992). But even if it had been timely, upon consideration of the Motion's merits, we would nevertheless deny reconsideration.

Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ." Fed. R. App. P. 40(a)(2). In considering a motion for reconsideration, the Board has applied a four-part test to determine whether the movant has demonstrated:

> (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.

*Getman v. Southwest Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 2 (ARB Mar. 7, 2006).

Toland asserts that Firstfleet fired him because he engaged in protected activity. He states in his brief that "Toland was fired because he did not provide the Human Resources Department (the HR Department) with the appropriate documentation for the extended medical leave he requested beginning on September 7, 2008." He states that he is protected under the STAA from termination for failing to comply with personnel policies.

Firstfleet asserts that Toland has presented no new evidence, nor presented any new argument regarding his case and that Toland is merely dissatisfied with the Board's decision.

In presenting the allegations contained in his motion, Toland has not demonstrated that any of the provisions of the Board's four-part test apply. He does not argue that there has been a change in the law or that new facts have arisen since we issued our F. D. & O. And he does not indicate that we did not consider material facts prior to issuing our ruling. Instead, he repeats the statements he presented to the Board and the ALJ. Contrary to his assertion, he is not protected under the STAA from termination for failing to comply with personnel policies. Failing to comply with personnel policies is not protected activity under the STAA. *See* 49 U.S.C.A. § 31105. We considered and rejected his assertions in our F. D. & O. F. D. & O. at 2.

Accordingly, Toland's Motion for Reconsideration is **DENIED**.

**SO ORDERED.**

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

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

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