



In the Matter of:

CURTIS C. DICK,

ARB CASE NO. 10-036

COMPLAINANT,

ALJ CASE NO. 2009-STA-061

v.

DATE: November 16, 2011

J.B. HUNT TRANSPORT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Curtis C. Dick, *pro se*, Cedar Hill, Texas

For the Respondent:

Scott McDonald, Esq., Kevin S. Mullen, Esq., *Little Mendelson PC*, Dallas, Texas

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

FINAL DECISION AND ORDER

Curtis C. Dick complained that J.B. Hunt Transport, Incorporated (Hunt), violated the employee protection provisions of the Surface Transportation Assistance Act of 1982¹ (STAA) and its implementing regulations when Hunt terminated his employment after he raised motor vehicle safety issues. On December 8, 2009, a Department of Labor (DOL) Administrative Law Judge (ALJ) recommended denial of Dick's complaint after conducting a hearing on the merits. The case is now before the Administrative Review Board (ARB) for automatic review under the STAA.² We affirm.

BACKGROUND

The ALJ summarized the facts and the documentary evidence in this case in detail.³ We reiterate the relevant facts as found by the ALJ.

Curtis C. Dick, a truck driver since 1992, started working for J.B. Hunt in October 2008. Dick worked out of Hunt's Haslet, Texas facility hauling freight from the Burlington Northern/Santa Fe railhead and the Kansas City Southern railhead to destinations throughout Texas, Louisiana, and Oklahoma, and then back to the railheads.⁴ From the start, his relationship with Hunt supervisors and other personnel was marred by disciplinary actions, job misunderstandings, and medical problems.

On October 16, 2008, Janice Hamm, Hunt's fleet manager and Dick's immediate supervisor,⁵ issued Dick a verbal warning for cutting off another vehicle while changing lanes.⁶ On November 14, 2008, Hamm and operations manager Richard Doarn suspended Dick for three days because of a service failure,⁷ violation of the hours-of-

¹ 49 U.S.C.A. § 31105 (Thomson/West 2011); 29 C.F.R. Part 1978 (2010).

² 29 C.F.R. § 1978.109(c)(1).

³ Recommended Decision and Order (R. D. & O.) at 3-15.

⁴ Hearing transcript (TR) at 168-70.

⁵ At the time of the hearing, Hamm no longer worked at Hunt.

⁶ Respondent's Exhibit (RX) 23, TR at 176-77.

⁷ Doarn testified at the hearing that Hunt defines a service failure as being late with a delivery or pick-up due to the driver's failure to manage his hours correctly and that service failures meant lost business. TR at 179. Dick admitted that the service failure was his fault because he "messed up on figuring my logs." TR at 47-52.

service rules by 27 minutes,⁸ incorrect parking of a load, inadequate pre-trip inspection (two flat tires), and failure to respond to warnings on the OBC (on board computer) electronic log⁹

In a November 16, 2008 letter to Hunt vice president Michael Brothers regarding his suspension, Dick admitted that he was not figuring out his 70-hours a week correctly, but claimed that Hamm had fabricated the reasons for his suspension, which made him appear as if he had an “unsafe, poor, and lackadaisical attitude.” Dick informed Brothers about delivering a load to the Brownwood, Texas location of the Kohler Company, which was “pitch black dark” and that was a safety issue.¹⁰

On December 23, 2008, Dick received a verbal warning for being idle 49.1 percent that day with an eight-week average of 41.15 percent idle time.¹¹ On January 26, 2009, Dick received a written warning for a second lane-change violation when he pulled

⁸ 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 applicable regulation 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). Over-the-road truck drivers are required to log their hours of work as on-duty, on-duty not driving, and off-duty to ensure that they comply with 49 C.F.R. § 395.3 (2011).

⁹ Complainant’s Exhibit (CX) 5, RX 24; TR at 128, 178.

¹⁰ RX 8.

¹¹ RX 25.

in front of another driver too quickly.¹² On February 2, 2009, Dick received a verbal warning after being five hours late with a load and on February 3, 2009, Hamm and Doarn again suspended Dick for three days for service failures due to missing his estimated times of availability (ETA) on January 30-31 and February 2, 2009.¹³

In a February 8, 2009 letter to Brothers, Dick stated that Hamm and Doarn were not clear about proper DOT logging procedures, “unless it is to get a driver in trouble . . . trying to make a case against him.” Dick claimed that Hamm told him to record as driving time all the time spent loading and unloading inside the rail yard.¹⁴ Dick testified that according to DOT regulations, he was not driving while unloading or loading in the rail yard and that to record his time that way would be wrong.¹⁵

Dick’s medical issues and absence from work began in mid-February. Safety representative Kevin Neil Hartgrove stated in his deposition that Dick called Hunt’s Safety Casualty Claims Department in Lowell, Arkansas on February 17, 2009. Dick complained of being unfairly treated by people within the company, which caused him mental unrest and distress. Dick said he did not know how to classify his “mental unhealth” at the moment and wanted to seek treatment.¹⁶ Per company policy, Hartgrove advised Dick that he was not clear to drive. By letter dated February 17, 2009, Doarn informed Dick that he was entitled to six weeks of unpaid personal medical.¹⁷

Dick testified that on February 19, 2009, safety manager Mark Hanback told him that he needed a physical examination from a DOT-qualified physician before he could return to work, and that as soon as he got the physical clearing him, he could drive again.¹⁸ On February 20, 2009, Dick went to the DOT physician’s office but left without getting the physical and therefore did not obtain his back-to-work certification.¹⁹

¹² RX 26-27, TR at 189.

¹³ RX 29, TR at 131-34, 541-44, 550, 557.

¹⁴ CX 22.

¹⁵ TR at 40-47.

¹⁶ RX 36.

¹⁷ CX 14, RX 10, TR at 366.

¹⁸ TR at 95-96. *See* 49 C.R.F. § 391.41 *et al.* Hanback testified that Hunt’s return-to-work policy required that a driver who was absent for three days or more must obtain a physician’s release of no restrictions and undergo an examination by a DOT-certified doctor showing that he was fit to drive. TR at 414-20.

¹⁹ TR at 98-102, 164, 463-64.

By letter dated March 18, 2009, Hunt's benefits representative Kayla Elzey warned Dick that if he were "unable to return to work from your six weeks of personal medical leave prior to [March 30, 2009], your employment with J.B. Hunt will end." On March 31, 2009, Hunt fired Dick.²⁰

Dick filed a complaint with OSHA on April 20, 2009. He claimed that Hunt fired him after directing him to violate federal motor vehicle safety regulations by falsifying his logbooks and pick up loads in an unsafe location that had zero visibility.²¹ Following an investigation, OSHA dismissed his complaint. Dick requested a hearing, which the ALJ held in Dallas, Texas on September 23-24, 2009.

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 1978.²² 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.²³ The ARB reviews the ALJ's conclusions of law de novo.²⁴

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," or "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," or "refus[ing] to operate a

²⁰ CX 24, RX 16, 35.

²¹ CX 8.

²² 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).

²³ 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).

²⁴ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.”²⁵

To prevail on his STAA claim, Dick must prove by a preponderance of the evidence that he engaged in protected activity, that Hunt took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.²⁶ An employee's failure to prove any one of these elements requires dismissal of the complaint.²⁷

Protected activity

In filing a complaint with OSHA, a complainant need not prove an actual violation of a motor vehicle safety regulation, standard, or order, but must at least be acting on a reasonable belief regarding the existence of an actual or potential violation.²⁸ 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.”²⁹ Protected activity has two elements: (1) the complaint itself must involve a purported violation of a regulation relating to commercial motor vehicle safety, and (2) the complainant's belief must be objectively reasonable.³⁰

The ALJ concluded that neither of Dick's complaints related to an actual violation of a federal motor carrier safety regulation and therefore did not constitute protected activity under the STAA. His complaint in November 2008 about the dark pick-up location in Brownwood, Texas, was not related to any commercial motor vehicle safety regulation that Hunt violated. Also, Dick was trained to handle such situations under Hunt's “Get Out and Look” program. The ALJ found that Dick failed to demonstrate that he had a reasonable belief that Hunt violated a motor safety regulation; “nor did [his

²⁵ 49 U.S.C.A. § 31105(a)(1).

²⁶ *Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009).

²⁷ *Harris v. Allstates Freight Sys.*, ARB No. 05-146, ALJ No. 2004-STA-017, slip op. at 3 (ARB Dec. 29, 2005).

²⁸ *Fabre v. Werner Enters., Inc.*, ARB No. 09-026, ALJ No. 2008-STA-010, slip op. at 5 (ARB Dec. 22, 2009).

²⁹ *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 5 (ARB Dec. 31, 2002).

³⁰ *Johnson v. Econo Steel, LLC*, ARB No. 07-111, ALJ No. 2007-STA-012, slip op. at 6 (ARB Feb. 23, 2009).

complaint] concern conduct that was reasonably necessary to satisfy Complainant about the safe operating condition of his truck.”³¹

Noting that a driver’s refusal to falsify logbook entries would constitute protected activity, the ALJ found that Dick failed to show that he was instructed to falsify his logbooks. Rather, Dick acknowledged that he was instructed numerous times to “log it as you do it,” and that this was Hunt’s policy. The ALJ credited Doarn’s testimony that he wanted Dick to complete his logbooks to match the new, more accurate, computerized logging system. The ALJ found that Doarn’s testimony and the evidence established that Dick was instead refusing to complete the entries correctly.³²

The dark company parking lot

After making a night-time delivery at the Brownwood, Texas location of the Kohler Company, Dick complained to Hamm and Doarn in November 2008 that the parking lot was “pitch black dark.” Dick testified at the hearing that he could not see the back of the trailer and did not know if someone was back there, working around it, and that was a safety matter.³³ Dick stated that Doarn told him that drivers had been going there for years and had had “no problems.” But Dick stated that he thought about “how many times something has maybe happened there, and drivers never said anything, and damage be [sic] found when the sun comes up.” Dick testified that he had “no problem” delivering there during the day and had made three or four deliveries there without incident but did not “feel comfortable” going there at night.³⁴

Doarn is in charge of more than 250 drivers. He testified that Hunt trained its drivers to deal with dark parking lots through its “GOL” policy - “get out and look,” - which is spelled out in Hunt’s employee manual.³⁵ Doarn stated that the drivers had flashlights and four-way flashers and were told to get out of the truck and identify any perceived safety hazard before backing up to a loading dock. He added that Hunt had no control over a customer’s parking lot and that Dick never refused to deliver loads there.³⁶

Safety manager Hanback corroborated Doarn’s testimony. Hanback testified that drivers followed a protocol in delivering to customers - they were trained to walk around

³¹ R. D. & O. at 10.

³² *Id.* at 11.

³³ CX 8; TR at 16-20, 33-37.

³⁴ TR at 53-55.

³⁵ RX 5.

³⁶ TR at 185-87, 222-27.

the truck and inspect the area of delivery with a flashlight to ensure that no obstacles were in the way of unloading. Also, the vehicles had backing lights and four-way flashers. He added that there had been no other complaints, accidents, or injuries at the Brownwood lot.³⁷

We agree with the ALJ that Dick failed to demonstrate an objectively reasonable belief that the dark parking lot involved a safety violation issue. Dick expressed no concerns about his own safety but merely speculated that something “could happen” and that he didn’t “feel comfortable.” When asked at the hearing what was unsafe about a dark parking lot or what motor vehicle safety regulation had been violated, Dick responded, “I just know it’s unsafe.”³⁸ Dick may have thought that the lot was unsafe but mere speculation about motor vehicle safety is insufficient to demonstrate that his belief was objectively reasonable.

The logbook issue

At the hearing, Dick testified that Hamm instructed him to record all his time loading and unloading at the railhead as on-duty driving. He submitted a computer message from her stating, “I told you to log off duty at 1:03 on the 14th. All time spent in the rail yard is driving time.”³⁹ Dick admitted that he had to drive inside the rail yard to deliver and pick up loads and that recording this time as on-duty driving meant fewer hours to drive over the road, but he believed that Hamm’s message instructed him to make false entries in his logbook, which violates the safety regulations governing a driver’s hours of service.⁴⁰

Doarn testified at the hearing that Hunt instructed its drivers to “log it as you do it,” but was training them to use an OBC for logging their hours. While training, they also had to maintain their paper logbooks. The OBC shows a driver “on duty, not driving” whenever the truck speed drops below 20 mph or travels less than 7/10 of a mile. The paper log requires drivers to record all their hours in 15-minute increments. Doarn stated that logging rail yard time as driving time electronically provided a more accurate record of the actual time an employee spent driving.⁴¹ Doarn added that Dick became “confused” during the training when he was instructed to record on the paper log

³⁷ TR at 410-11.

³⁸ TR at 143-45.

³⁹ CX 22.

⁴⁰ TR at 146-48. 49 C.F.R. § 395.3 (Maximum driving time for property-carrying vehicles) and 49 C.F.R. § 395.8 (Driver’s record of duty status).

⁴¹ TR at 235-36, 239.

his actual unloading time as on-duty, not driving but all other time in the rail yard - a square mile in size - as driving time.⁴²

Had the ALJ found that Dick reasonably believed that he was being instructed to enter false information, Dick's concerns would constitute protected activity. Substantial evidence, however, supports the ALJ's finding that Dick was not being told to falsify his logbooks but rather was being instructed to complete them correctly during the training. Therefore, Dick's belief was not objectively reasonable and the ALJ correctly concluded that Dick did not engage in protected activity when he complained about Hamm's message.⁴³

We affirm only the ALJ's conclusion that Dick did not engage in protected activity, a required element of his complaint. Because this issue is dispositive of this matter, we do not rule on other issues raised on appeal.⁴⁴ We note, however, that the ALJ erred in his analysis of causation because, assuming protected activity, he required Dick to prove that his safety complaints "motivated" Hunt to take adverse action. Under the amended STAA, a complainant need prove only that his protected activity was a contributing factor to the employer's adverse action.⁴⁵ Further, the ALJ found that Hunt was "justified" in discharging Dick. Justification is not the proper standard of proof. If a complainant proves by a preponderance of the evidence that his protected activity was a contributing factor, the employer may escape liability only if it proves by clear and convincing evidence that it would have taken the same adverse action absent the employee's protected activity.⁴⁶

⁴² TR at 211, 229-46.

⁴³ *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 11 (ARB Dec. 31, 2007).

⁴⁴ See *Wainscott v. Pavco Trucking, Inc.*, ARB No. 05-089, ALJ No. 2004-STA-054, slip op. at 5 (ARB Oct. 31, 2007) (failure to prove any one of the essential elements of a complaint results in dismissal).

⁴⁵ 49 U.S.C.A. § 31105 (b). *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

⁴⁶ 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. 1979.109(a).

CONCLUSION

Substantial evidence in the record supports the ALJ's findings of fact that underlie his conclusion that Dick failed to establish protected activity, a required element of his complaint. Therefore, we affirm the ALJ's recommended decision and **DISMISS** Dick's complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge