



**In the Matter of:**

**ROQUE LACHICA, Jr.,**

**ARB CASE NO. 10-088**

**COMPLAINANT,**

**ALJ CASE NO. 2010-STA-027**

**v.**

**DATE: February 1, 2012**

**TRANS-BRIDGE LINES,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Roque Lachica, *pro se*, Allentown, Pennsylvania**

***For the Respondent:***

**R. Michael Carr, Esq., *Stevens & Lee*, Bethlehem, Pennsylvania**

**Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER OF REMAND**

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) and its implementing regulations.<sup>1</sup> Roque Lachica complained

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

that Trans-Bridge Lines violated the STAA when it fired him on August 14, 2009, in retaliation for complaining about non-working cameras in his bus.<sup>2</sup>

After being fired, Lachica filed a grievance with Local 1603 of the Amalgamated Transit Union, and a hearing was held on August 31, 2009. While his grievance was still pending, Lachica filed a complaint with the Department of Labor's (DOL's) Occupational Safety and Health Administration (OSHA) on October 26, 2009. Trans-Bridge denied Lachica's grievance and the union requested arbitration pursuant to its collective bargaining agreement. The arbitrator held a hearing on January 5, 2010. Meanwhile, OSHA denied Lachica's complaint, and he timely requested a hearing before an administrative law judge (ALJ).

On April 8, 2010, Trans-Bridge filed a motion with the ALJ to defer to the arbitrator's March 31, 2010 decision and dismiss Lachica's complaint. The arbitrator determined that Trans-Bridge had just cause to discharge Lachica, and dismiss his complaint. Lachica objected to the motion and requested that the ALJ continue with the hearing. On April 19, 2010, the ALJ issued a Recommended Decision and Order deferring to the arbitration decision, canceled the hearing, and dismissed Lachica's STAA complaint.

The case is before the ARB pursuant to the STAA's now-obsolete automatic review provision.<sup>3</sup> We issued a briefing order on April 30, 2010. In its response, Trans-Bridge argued that Lachica failed to present any evidence of retaliation and that his discharge was due to his rude and unprofessional behavior toward bus passengers. Lachica did not submit a brief.

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<sup>2</sup> Lachica started part-time with Trans-Bridge on February 25, 2008, working as a bus driver with a regular commuter route from the Lehigh Valley Industrial Park into New York City. On August 6, 2009, he worked overtime on a different route – the Wall Street run – and had a confrontation with two passengers who complained. Trans-Bridge fired Lachica on August 14, 2009 for unprofessional behavior, following a grievance hearing. Under the collective bargaining agreement, Lachica's discharge went to arbitration and was denied. American Arbitration Case No. 14 300 01968 09 (Mar. 31, 2010).

<sup>3</sup> See 29 C.F.R. § 1978.109(a) (2009). 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). The ARB "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted). We are 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). 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.<sup>4</sup> The employee activities the STAA protects include: making a complaint “related to a violation of a commercial motor vehicle safety or security regulation, standard, or order,”<sup>5</sup> “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, health, or security,”<sup>6</sup> 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 hazardous safety or security condition.”<sup>7</sup>

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action. Once the complainant has established that the protected activity was a contributing factor in the employer’s decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.<sup>8</sup>

Prior to 2010 the DOL’s implementing regulations permitted an employee who filed a STAA complaint to seek remedies pursuant to grievance arbitration proceedings in collective bargaining agreements.<sup>9</sup> The regulation has since been deleted to conform to other OSHA whistleblower regulations that do not contain similar provisions.<sup>10</sup> Because Lachica filed his complaint on October 26, 2009, the regulation applied. The deleted regulation permitted the Secretary to defer to the outcome of those proceedings, but only when the arbitration “dealt adequately with all factual issues,” the proceedings were “fair, regular, and free of procedural

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<sup>4</sup> 49 U.S.C.A. § 31105.

<sup>5</sup> 49 U.S.C.A. § 31105(a)(1)(A).

<sup>6</sup> 49 U.S.C.A. § 31105(a)(1)(B)(i).

<sup>7</sup> 49 U.S.C.A. § 31105(a)(1)(B)(ii).

<sup>8</sup> *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ Nos. 2008-STA-043, -44; slip op. at 4-5 (ARB Dec. 18, 2009).

<sup>9</sup> 29 C.F.R. § 1978.112.

<sup>10</sup> *See* Comments, 75 Fed. Reg. 53552 (Aug. 31, 2010).

infirmities,” and the outcome of the proceedings “was not repugnant to the purpose and policy of the Act.”<sup>11</sup>

After reviewing the transcript of the arbitration hearing and the decision of the arbitrator, the ALJ found that the proceedings “dealt adequately with all factual issues, were fair, regular, and free of procedural infirmities, and that the outcome was not repugnant to the purpose and policy of the STAA.” Accordingly, the ALJ dismissed Lachica’s complaint and cancelled the May 10, 2010 hearing.<sup>12</sup>

Without deciding whether application of a deleted regulation is appropriate,<sup>13</sup> we must vacate the ALJ’s dismissal and remand this case for a hearing on the merits because the arbitrator’s decision failed to address all factual issues. Following the arbitration hearing on January 5, 2010, the arbitrator determined that Trans-Bridge violated the collective bargaining agreement by failing to produce witnesses at Lachica’s pre-disciplinary hearing but that the violation did not warrant reversal of his discharge. The arbitrator then considered the testimony of Lachica and the witnesses on Lachica’s bus on August 6, 2009, as well as their statements and other documentary evidence. The arbitrator concluded that Trans-Bridge fired Lachica for just cause in that he engaged in unprofessional behavior toward passengers.<sup>14</sup>

The record of the arbitration clearly indicates that neither the subject matter of the hearing nor the decision of the arbitrator addressed the whistleblower protections the STAA provides. For example, Lachica claimed that Trans-Bridge laid him off in February 2009 after he made safety complaints to his managers that the audio-video surveillance cameras in his bus did not work.<sup>15</sup> The arbitrator did not determine whether these complaints constituted activity the STAA protects or whether such activity contributed to Lachica’s February lay-off and eventual discharge. Further, the arbitrator denied Lachica’s grievance by finding that Trans-Bridge had just cause to fire him but did not address whether the company would have fired him regardless of whether he engaged in STAA-protected activity. Because the arbitrator’s decision did not deal adequately with the factual issues in this case, the arbitration failed to consider fully

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<sup>11</sup> 29 C.F.R. § 1978.112(c).

<sup>12</sup> *Lachica v. Trans-Bridge Lines*, ALJ No. 2010-STA-027 (Apr. 19, 2010).

<sup>13</sup> See *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STAA-015, slip op. at 4-5 (ARB Aug. 1, 2002) (ARB defers to the outcome of another preceding only if the tribunal has given full consideration to the parties’ claims and rights under the STAA) *aff’d Calmat Co. v. United States Dep’t of Labor [Germann]*, 364 F.3d 1117, 1125-1126 (9th Cir. 2004).

<sup>14</sup> American Arbitration Case No. 14 300 01968 09 at 6, 15 (Mar. 31, 2010).

<sup>15</sup> Arbitration hearing transcript at 140-41, 143-46; 156-58; Oct. 26, 2009 Complaint at 1-2.

the parties' claims and rights under the STAA. For these reasons, we vacate the ALJ's dismissal of Lachica's complaint and remand this case for further proceedings.<sup>16</sup>

### CONCLUSION

The ALJ erred in dismissing Lachica's complaint pursuant to 29 C.F.R. § 1978.112. We therefore **REVERSE** his dismissal and **REMAND** this case for further proceedings consistent with this opinion.

**SO ORDERED.**

**LUIS A. CORCHADO**  
Administrative Appeals Judge

**E. COOPER BROWN**  
Deputy Chief Administrative Appeals Judge

**LISA WILSON EDWARDS**  
Administrative Appeals Judge

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<sup>16</sup> *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-008, slip op. at 9 (ARB July 28, 1999); *cf. Porter v. Greyhound Bus Lines*, ARB No. 98-116, ALJ No. 1996-STA-023, slip op. at 2 (ARB June 12, 1998).