In the Matter of:

MICHAEL BUTLER,

COMPLAINANT,

v.

MIDNIGHT FLYER
AKA RW TRANSPORT,

RESPONDENT.

ARB CASE NO. 10-139

ALJ CASE NO. 2009-STA-007

DATE: March 30, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Michael Butler*, pro se*, Nashville, Indiana

BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2011)(STAA), and its implementing regulations at 29 C.F.R. Part 1978, 75 Fed. Reg. 53544 (Aug. 31 2010). The Complainant, Michael Butler, filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Midnight Flyer, violated the STAA's employee protection provisions when it terminated his employment. OSHA found Butler's complaint to be meritless. Butler requested a hearing before a Department of Labor Administrative Law Judge (ALJ). The ALJ dismissed Butler's complaint in a Recommended Decision and

Order (R. D. & O.) issued August 18, 2010. For the following reasons, the ARB summarily affirms the ALJ's decision dismissing Butler's complaint.

BACKGROUND AND PROCEEDINGS BELOW

Butler worked as a truck driver for Midnight Flyer. On Friday, August 8, 2008, Butler's route was from his home in Gosport, Indiana to Kentland, Indiana, from Kentland to Louisville, Kentucky, and back to drop his truck off at the shop. Butler testified that on visual inspection in Louisville, he noticed that the steer tire was bald and steel cords were showing on the right inside of the tire. Hearing Transcript (Tr.) at 116. Butler testified that he reported the problem to the maintenance manager, Brandon Williams. After an argument with Brandon Williams on the phone, Butler drove the truck back to the employer's facility, removed his things from the truck, and went home. R. D. & O. at 6. He was scheduled to drive the truck on Sunday, but saw on Saturday that the tire had not been repaired. Tr. at 161-162. Therefore, he did not drive the assigned load on Sunday. When he did not appear for the scheduled trip on Sunday, Ronald Williams, the owner/manager of Midnight Flyer, attempted to call Butler that evening and left a message asking why the was not working. Butler did not return to work for Midnight Flyer, and filed a complaint with OSHA alleging retaliation in violation of the STAA's whistleblower protection provisions. Specifically, Butler alleged that the Respondent terminated his employment because he filed a safety complaint on August 8, 2008, and refused to drive due to reasonable apprehension of safety violations on August 10, 2008.

Following an investigation, OSHA issued a determination letter rejecting Butler's complaint. Butler filed objections and requested a hearing before a Department of Labor ALJ. After an evidentiary hearing on the merits, the ALJ issued the R. D. & O. denying Butler's complaint. Butler timely appealed the R. D. & O. to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA and its implementing regulations. 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). 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. 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). 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 activity. To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay, terms, or privileges of employment; and that the employee's protected activity was a contributing factor in the adverse employment action. *Williams v. Domino's* Pizza, ARB No. 09-092, ALJ No. 2008-STA-052 (ARB Jan. 31, 2011); *Riess v. NuCor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB No. 30, 2010). Failure to prove any one of these essential elements means that a complainant cannot prevail on his retaliation claims.

Butler alleges that Midnight Flyer violated the STAA's whistleblower protection provisions by terminating his employment after he filed a safety complaint and refused to drive a truck with a faulty tire. The ALJ found that Butler did not make a safety complaint about the defective tire on Friday, August 8, 2008, and that Butler did not refuse to drive the truck on Sunday, August 10, 2008, based on a reasonable apprehension of safety. R. D. & O. at 18-19. Moreover, the ALJ found that Butler did not give his employer an opportunity to correct his claim of a safety issue after he brought the truck back on August 8. Therefore, the ALJ concluded that Butler did not engage in protected activity. The ALJ also found that even if Butler did establish protected activity, the evidence shows that Butler quit his job and was not terminated. *Id*. at 20. The ALJ thus concluded there is no evidence of an adverse employment action, and as Butler failed to establish two essential elements, the ALJ denied Butler's complaint under the Act.

Based on our review of the evidentiary record in its entirety, we agree with the ALJ's disposition.[1] The ALJ did not review the issue of whether Butler was terminated from his job under the Board's standard as outlined in *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 13-15 (Oct. 31, 2007)(holding that an ALJ must determine which party's behavior ultimately ended the relationship). *See also Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019, slip op. at 10 (ARB Sept. 20, 2010). However, the evidence establishes that following his return of the

[1] Because we affirm the ALJ's dismissal of the complaint on other grounds, we need not address his findings on protected activity. Nevertheless, we note that the ALJ may have erred in his analysis of Butler's protected activity by requiring that Butler complain about an actual violation of STAA regulations. Specifically, the ALJ stated "[w]ithout exposed steel cords, it is not clear that the tires violated the regulations." R. D. & O. at 18. However, a complainant need not demonstrate an actual violation for his communications to be protected under STAA. *Fabre v. Werner Enters., Inc.*, ARB No. 09-026, ALJ No. 2008-STA-010, slip op. at 5 (ARB Dec. 22, 2009).

truck to employer's facility, Butler did not communicate his safety concerns, his refusal to drive due to an apprehension for safety, or his demand that the tire be repaired before he would drive the truck. Moreover, the evidence also supports the ALJ's finding that the Respondent attempted to contact Butler to determine why he was not driving his scheduled loads, but received no response. Therefore, we affirm the ALJ's finding that Butler quit his job with Midnight Flyer and was not terminated as a result of protected activity as it is supported by substantial evidence.[2]

CONCLUSION

Because Butler failed to establish that he suffered an adverse action, we affirm the ALJ's determination that Butler failed to sustain a complaint against Midnight Flyer for violating the STAA. Accordingly, the Board **AFFIRMS** the ALJ's R. D. & O. for the reasons set forth above, and **DISMISSES** Butler's complaint.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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[2] In his decision, the ALJ referred to the burden-shifting standard employed under Title VII pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See* R. D. & O. at 15. However, on August 3, 2007, the burden of proof standard was amended as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). The Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to state that STAA whistleblower complaints will be governed by the legal burdens set out in AIR 21, 49 U.S.C.A. § 42121(b)(Thomson/West 2007), which contains whistleblower protections for employees in the aviation industry. See 49 U.S.C.A. 31105(b)(1) ("All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)."). Under that standard, complainants must show by a "preponderance of evidence" that a protected activity was a "contributing factor" to the adverse action described in the complaint. 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Act of 1982, 75 Fed. Reg. 53544, 53545, 53550 (Aug. 31, 2010). The employer can overcome that showing only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545; *see also id.* at 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii). As Butler failed to establish a vital element of his claim, we need not address the ALJ's error in citing the applicable law because it would not change the result.