In the Matter of:

MARVIN E. GILBERT,

COMPLAINANT,

v.

BAUER'S WORLDWIDE TRANSPORTATION,

RESPONDENT.

ARB CASE NO. 11-019

ALJ CASE NO. 2010-STA-022

DATE: November 28, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Marvin E. Gilbert, *pro se*, San Francisco, California

***For the Respondent*:**
Joshua D. Kienitz, Esq.; Alexis A. Sohrakoff, Esq.; *Littler Mendelson, P.C.*; San Francisco, California

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

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2012) (STAA), and its implementing regulations at 29 C.F.R. Part 1978 (Aug. 31, 2010). Marvin Gilbert filed a complaint alleging that Bauer's Worldwide Transportation (BWT) violated the STAA whistleblower statute by suspending him and then coercing him into signing a severance agreement allegedly because of his complaints and refusal to drive. The Occupational Safety and Health Administration (OSHA) dismissed his complaint. On December 3, 2010, after a hearing, the presiding Administrative Law Judge (ALJ) found that the severance agreement was a deliberate, valid, and informed release of Gilbert's claim, and further, that the Respondent did not unlawfully discriminate against Gilbert because of any protected activity. Therefore, the ALJ dismissed Gilbert's claim. We affirm on narrow grounds.

JURISDICTION AND STANDARD OF REVIEW

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.[1] The ARB "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."[2] We are bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.[3] The ARB reviews the ALJ's conclusions of law de novo.[4]

BACKGROUND

The ALJ made thorough findings of fact that we find are supported by substantial evidence of record. For proper context, we recite some of his fact findings.

On August 28, 2007, the Complainant began working for Respondent BWT, which employed approximately two hundred drivers. BWT had two main bus yards, one in Santa Clara and one in San Francisco, California. Gilbert lived in Santa Clara, California, when he first started with BWT. BWT provided corporate transit and charter/retail chauffeur services.

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[1] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

[2] *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

[3] 29 C.F.R. § 1978.110(b).

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

In the corporate transit line, BWT provided transportation service for employees of several companies in the San Francisco Bay area, including Google, Inc., its biggest client. The Google shuttle service involved approximately 40 BWT shuttle drivers transporting Google employees between various commuter stops and the Google campus in Mountain View, California. Typically, each Google shuttle driver was assigned a particular route and consistent work schedule each week. Decision and Order (D. & O.) at 2. The base pay for corporate transit work increased from $15.00 per hour to $15.50 per hour during the Complainant's employment.

For its charter/retail services, BWT hired part-time and full-time drivers. Approximately forty percent of its drivers did charter/retail work full-time. Drivers generally earned $10 per hour, plus an automatic gratuity, but some events garnered up to $25 or $30 per hour. Retail drivers also earned cash tips directly from customers, tips that were not reflected in the pay stub.

August 2007 to January 3, 2008

In September and October 2007, BWT usually scheduled Gilbert to drive a Google shuttle bus for a four-hour shift in the morning and a five-hour shift in the afternoon. Like some other Google drivers, he had an approximately six-hour break between the morning and afternoon shifts (the "split"). Gilbert drove from his home to BWT's office on the Google campus in Mountain View, picked up his morning timesheet, clocked in, and then picked up BWT's bus at the Santa Clara parking lot. After conducting a pre-trip inspection, Gilbert drove to San Francisco to pick up Google employees and drove them to the Google campus. After his morning shift, Gilbert parked the Google shuttle at the Shoreline Amphitheater parking lot in Mountain View, picked up his afternoon schedule at BWT's office on the Google campus, and then began his split. D. & O. at 3.

BWT did not restrict how Google shuttle drivers used their time during the split. Google drivers who stayed on the Google campus had free access to various Google facilities, such as the gym, volleyball courts, a golf course, and a dozen restaurants where drivers could eat for free. BWT had a lounge on the Google campus. Many drivers used the split time to set up doctor's appointments and run personal errands. Those drivers who wanted to return to their original reporting location could catch a free shuttle that operated twice a day.[5] But to have drivers available for dispatch during the split time, BWT paid drivers for two hours of their split time if they stayed on the Google campus.[6] During his split time, the Complainant usually ate,

[5] It is unclear whether Gilbert drove his own vehicle to the Google campus and, if so, whether he would have been stranded if he missed the free shuttles leaving the Google campus. This is a fact issue that raises questions about the extent of the Google driver's freedom to go where they wanted when they wanted.

[6] This finding about needing "available drivers" makes it unclear whether the Google drivers were completely released during their split time if they stayed on the Google campus.

slept or went to BWT's Google campus lounge. Lon Baylor, the Manager of Shuttle Operations, gave Gilbert "permission" to go home after his morning run.[7] *See generally* D. & O. at 3-4.

On November 1, 2007, following Gilbert's complaints about the lengthy split time, Gilbert's supervisor (Lon Baylor) assigned him to a different route with a shorter split time. Gilbert reported to work at 4:30 a.m. and finished his shift at 2:30 p.m. He also moved to San Francisco. Shuttle drivers with more seniority than Gilbert complained about Gilbert's preferential route, causing Baylor to return Gilbert to a route with a five- to six-hour split between shifts beginning on January 3, 2008. D. & O. at 5.

Meanwhile, on December 14, 2007, Gilbert had contacted Noel Columna at the California Highway Patrol (CHP) Motor Carrier Safety Division about the Record on Duty Status (RODS) logs he believed Google drivers should have been completing pursuant to 49 C.F.R. § 395.8.[8] CHP investigated the complaint around January 14, 2008, and recommended that the drivers use the RODS logs. On January 23, 2008, management began requiring use of the RODS logs. D. & O. at 5.

January to February 2008

Throughout January 2008, Gilbert continued to complain about the lengthy split time between shifts and argued that they violated the hours of service (HOS) regulations found at Section 395.5.[9] Management explained to him that the split in the shift was "off-duty" time that did not count towards the 15-hour on duty limitation. On January 28, 2008, Gilbert was scheduled to drive a morning shift from 4:30 a.m. to 9:35 a.m. and an afternoon shift from 2:45 p.m. to 7:45 p.m. with a five hour and ten minute split between the shifts. After completing his morning shift, Gilbert informed Baylor that he would not drive the second half of his afternoon shift because it would take him fifteen minutes over the 15-hour on duty limit. BWT then needed to find a replacement driver. Over the next two weeks, BWT did not assign Gilbert a different Google route, and he instead accepted and rejected some retail work that BWT offered him. D. & O. at 5.

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[7] This finding about "permission" also creates some ambiguity about the extent of the freedom that Google shuttle drivers had.

[8] Regulation 49 C.F.R. § 395.8(a) (the RODs log requirement) required all non-exempt motor carriers "to record his/her duty status for each 24 hour period using the methods prescribed in either paragraphs (a)(1) or (2) of this section." Under section 395.8, drivers were required to record information on a grid pertaining to their duty status throughout the 24 hours (off duty, sleeping in sleeper berth, driving, or "on-duty not driving").

[9] Section 395.5 provides the maximum driving time for passenger-carrying vehicles**.** Specifically, it states that "no motor carrier shall permit or require any driver used by it to drive a passenger-carrying commercial motor vehicle, nor shall any such driver drive a passenger-carrying commercial motor vehicle . . . for any period after having been on duty 15 hours following 8 consecutive hours off duty." 49 C.F.R. § 395.5(a)(2).

On February 15, 2008, Gary Bauer met with Gilbert to discuss the legality of the split schedule and the applicability of the HOS regulations. Because Gilbert refused to work his assigned Google route, Bauer offered him a job in the charter/retail line. Gilbert rejected the option to do retail work, signed an "Agreement and Release" (the "Severance Agreement") in exchange for $1,030.75, and his relationship with BWT ended.

On July 25, 2008, Gilbert filed a complaint with OSHA, alleging a violation of the STAA whistleblower provisions. *See* 49 U.S.C.A. § 31105. OSHA found no nexus between protected activity and any unfavorable employment action because (1) Gilbert's belief of an HOS regulation violation was unreasonable and (2) the Respondent did not know of his complaint with CHP until after Gilbert's employment ended. After an evidentiary hearing on the merits, the presiding ALJ dismissed Gilbert's claim on two grounds: (1) Gilbert signed a valid Severance Agreement releasing his right to file a STAA whistleblower claim against BWT; and (2) Gilbert engaged in some protected activity but none of the protected activity contributed to BWT's employment actions. Gilbert appealed to the Board.

DISCUSSION

The Severance Agreement

As a preliminary matter, we first consider whether the Severance Agreement precludes us from considering the merits of this case. Gilbert argues that the Severance Agreement is invalid because he signed it under duress. BWT obviously disagrees and argues that Gilbert knowingly and voluntarily released his right to file a STAA claim. It is undisputed that BWT paid Gilbert $1,030.75 as part of the consideration for the Severance Agreement. The ALJ agreed with BWT. The first question is whether we have authority to dismiss a STAA whistleblower complaint because of a Severance Agreement, or otherwise adjudicate the validity and/or terms of the agreement.

In adjudicating a STAA whistleblower complaint, the ALJ and Board have only the authority expressly or implicitly provided by law.[10] The STAA requires the Secretary to (1) investigate a STAA whistleblower complaint and issue findings; (2) permit parties to object to the Secretary's findings and participate in an evidentiary hearing before an ALJ; and (3) issue a final order, including relief for the complainant if the Secretary believes that a STAA violation occurred. See 49 U.S.C.A. § 31105(b)(2) and (3). Pursuant to 49 U.S.C.A. § 31105(b)(2)(C), a pending whistleblower "proceeding may be ended by a settlement agreement made by the Secretary of Labor, the complainant, and the person alleged to have committed the violation." The Secretary, the complainant, and the respondent did not enter into the Severance Agreement

[10] *See, e.g., Wonsock v. Merit Sys. Prot. Bd.*, 296 Fed. Appx. 48, 50 (Fed. Cir. 2008) (Federal Circuit Court agreed with the Merit Systems Protection Board that the administrative law judge had no jurisdiction to review the Office of Personnel Management's discretionary decision pertaining to benefit rules).

in this case; therefore, it does not fall within any of the STAA's express provisions. Next, we look to the regulations.

The STAA implementing regulations provide some additional guidance pertaining to settlement agreements but no guidance pertaining to pre-filing severance agreements. The regulations allow the Secretary to dismiss a whistleblower complaint if the parties enter into an "investigative settlement" approved by the Secretary "after the filing of a STAA complaint and before the findings and/or order are objected to or become a final order by operation of law . . . ." 29 C.F.R. § 1978.111(d)(1). The regulations allow an ALJ or the ARB to dismiss a whistleblower complaint upon approving an "adjudicatory settlement" reached "after the filing of objections to the Assistant Secretary's findings and/or order." 29 C.F.R. § 1978.111(d)(2). The regulations also allow the Assistant Secretary to decline the role of prosecuting attorney if the Assistant Secretary believes that the complainant refused a "fair and equitable settlement of all matters at issue." Nowhere do the regulations allow the Secretary, Board, or ALJ to dismiss a whistleblower complaint on the basis of a severance agreement executed before a whistleblower complaint was filed. We found no previous ARB decision holding that we have the authority to dismiss a STAA claim because of a pre-filing severance agreement.[11] In the end, we find no statute or regulation expressly empowering or requiring the Board to adjudicate pre-filing severance agreements. Because we affirm the ALJ's dismissal on other grounds, we need not resolve this issue today.[12]

Protected Activity

To prevail on a whistleblower claim under the STAA, a complainant must prove by a preponderance of the evidence that: (1) he engaged in activity or conduct the statute protects; (2) the respondent took an unfavorable action against him; and (3) the protected activity was a

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[11] We note that, in *Khandelwal v. Southern Calif. Edison*, ARB No. 98-159, ALJ No. 1997-ERA-006 (ARB Nov. 30, 2000), the Board considered a case filed under the Energy Reorganization Act in which the complainant filed an ERA complaint after signing a severance agreement releasing all claims. The Board held that an employer named in an ERA complaint should be allowed to rely on a severance agreement as a waiver of the employee's right to recover damages. We also note that BWT certainly had the option of seeking judicial intervention to enforce the alleged benefit of its bargain. *See Harrell v. Sysco Foods of Baltimore*, ARB Nos. 08-022, -065; ALJ No. 2003-STA-050 (ARB May 14, 2010)(Sysco sued the employee alleging breach of contract on several grounds, including the employee's failure to dismiss his STAA whistleblower claim). However, it did not do so.

[12] Specifically, we need not decide whether the Board has inherent authority to adjudicate contract disputes related to pre-filing severance agreements. Inherent authority permits adjudicatory bodies the power "to achieve the orderly and expeditious disposition of cases." *Rose v. ATC Vancom, Inc.*, ARB No. 05-091, ALJ No. 2005-STA-014, slip op. at 3 (ARB Aug. 31, 2006) (citing *Link v. Wabash R. R. Co.*, 370 U.S. 630-31). For example, inherent power includes the power to dismiss a case for lack of prosecution, *Ophardt v. Ison Int'l, LLC*, ARB No. 10-099, ALJ No. 2010-STA-010 (ARB Feb. 24, 2012).

contributing factor in the adverse personnel action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011). Failure to prove any one of these essential elements requires dismissal of Gilbert's whistleblower claim. If, however, the complainant meets his or her burden of proof, the employer may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event. *Id.*[13]

There is no question that Gilbert refused to drive the Google route assigned to him beginning on January 28, 2008. The undisputed reason for Gilbert's refusal was his belief that driving an extra fifteen minutes wouldviolate the HOS rules. BWT would not change Gilbert's schedule, and Gilbert refused to drive retail. Given Gilbert's refusal to drive the assigned Google route or accept retail work, Gilbert and BWT ended their working relationship. Consequently, Gilbert's claim of retaliatory suspension and termination turns entirely on whether Gilbert's refusal was protected activity. The ALJ found that the basis for Gilbert's refusal to finish his shift on January 28th was unreasonable and, therefore, not protected activity. D. & O. at 19. We agree with the ALJ's ultimate finding that Gilbert's basis for refusal was unreasonable in the specific circumstances of this case.

The STAA whistleblower statute protects an employee who (1) raises concerns "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order," or (2) "refuses 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." 49 U.S.C.A. § 31105(a)(1)(A), (B)(i). The employee "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." *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011). However, the reasonableness of a complaint or the refusal to drive must be subjectively and objectively reasonable. The "subjective" component of the reasonable belief test is satisfied by showing that the employee actually believed that the conduct he complained of constituted a violation of relevant law. *See, e.g., Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 3 (ARB Sept. 30, 2011).[14] It is undisputed that Gilbert subjectively believed that BWT was violating the 15-hour on duty limit. He repeatedly raised this concern for months and filed a complaint with CHP on February 4, 2008, reportedly for violations of § 395.5. The real debate turns on objective reasonableness, which "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009).[15]

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[13] *See* 49 U.S.C.A. § 31105(b)(1) and 49 U.S.C.A. § 42121(b)(2)(B).

[14] *See also Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (STAA protection not dependent upon whether complainant proves a safety violation).

[15] *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 14 (ARB May 25, 2011).

On January 28, 2008, Gilbert refused to drive because he believed he would violate the HOS 15-hour on duty rule (Section 395.5) by fifteen minutes.[16] Gilbert testified that it was "fifteen minutes pretty much every day." Hearing Transcript (Tr.) at 85. Section 395.5(a)(2) prohibits a covered driver from driving "after having been on duty 15 hours following 8 consecutive hours off duty." Section 395.1 generally defines "on duty time" as the time that the driver begins to work or "required to be in readiness," "waiting to be dispatched," "inspecting, servicing, or conditioning" a commercial motor vehicle, driving, loading/unloading, and "repairing a disabled commercial vehicle," among other things. "On duty time" does not include "time spent resting in or on a parked vehicle" except in certain instances, and "time spent resting in a sleeper berth." While the regulatory definition certainly has some gray areas, it makes clear that certain activity is considered "off duty," such as sleeping and resting. Moreover, taking a meal break would not fit in the definitions of "on duty" unless Gilbert convinced the ALJ that he was a in a state of "readiness to work." The ALJ understood that Gilbert believed every minute of the split time was "on duty." Gilbert did not present evidence that he was doing work for BWT during the split time. To the contrary, the ALJ found that Gilbert usually slept, ate, and went home during his split time. D. & O. at 4. As the party carrying the burden of proof, Gilbert failed to prove to the ALJ that it was reasonable to believe that sleeping, eating, and resting at home was "on duty" for purposes of the 15-hour on duty limit. Whether a belief is reasonable is a case-by-case determination. In this case, Gilbert relied solely on his own opinion at the hearing and that was not enough in this particular case. He presented no corroborating witness testimony to show that his belief was reasonable. No exhibit in the record proves that Gilbert's understanding was reasonable. Consequently, substantial evidence supports the ALJ's conclusion that it was unreasonable for Gilbert to believe that he would be violating the 15-hour on duty limit by driving a total of 15 hours and 15 minutes because of a morning shift from 4:30 a.m. to 9:35 a.m., and an afternoon shift from 2:45 p.m. to 7:30 p.m. Because Gilbert refused to drive the Google shuttle on January 28, 2008, and thereafter, due to his belief about the allegedly illegal split shift, it was not protected activity that caused his injury but his own unreasonable belief. Therefore, we affirm the ALJ's dismissal of Gilbert's complaint.

[16] We understand that Gilbert raised concerns about BWT's failure to comply with Section 395.8 by not requiring BWT Google drivers to complete RODS logs. He also contacted CHP about rules violations. But it is undisputed that the reason Gilbert did not finish his assigned Google route on January 28, 2008 and thereafter was because of his belief that he would violate the 15-hour on duty limit, not because of the RODS log requirements or because he called CHP. Moreover, it is undisputed that, on January 23, 2008, BWT began to require drivers to complete the RODs logs.

CONCLUSION

For the foregoing reasons, the ALJ's decision dismissing the complaint is **AFFIRMED** on the ground that Gilbert failed to prove that he engaged in protected activity that contributed to an unfavorable personnel action.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge