**U.S. Department of Labor**

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

**In the Matter of:**

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| **NATHAN LEAKS,** | **ARB CASE NO. 15-079** |
| **COMPLAINANT,** | **ALJ CASE NO. 2014-STA-080** |
| **v.** | **DATE: February 7, 2017** |
| **ARCTIC GLACIER,** | |
| **RESPONDENT.** | |

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant*:**
**Nathan Leaks, *pro se*, Las Vegas, Nevada**

***For the Respondent:***
**Ashley D. Brightwell, Esq.; *Alston & Bird, LLP*; Atlanta, Georgia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Administrative Appeals Judge*; and Leonard J. Howie, *Administrative Appeals Judge***

## FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, 49 U.S.C.A. § 31105 (Thomson Reuters 2016), and its implementing regulations, 29 C.F.R. Part 1978 (2016). Complainant Nathan Leaks filed a complaint alleging that Respondent Arctic Glacier retaliated against him in violation of the STAA's whistleblower protection provisions. Leaks appeals from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on July 28, 2015, after a hearing on the merits, finding that Leaks failed to establish that he engaged in any STAA-protected activity or that Respondent had taken any adverse personnel action against him.

## BACKGROUND

Respondent Arctic Glacier hired Complainant Leaks in mid-July of 2013 as a local delivery driver in Las Vegas and Henderson, Nevada, delivering ice with a tractor and 45-foot trailer.[1] Leaks typically drove an International model tractor attached to a trailer on his routes. Avelino Orosco[2] usually drove the same tractor-trailer for routes when Leaks was not working. On August 26, 2013, Respondent had to send the International to the shop for repairs, so it assigned Leaks to drive a Freightliner model tractor. Leaks believed that the gears did not shift smoothly on the Freightliner, and he was afraid to drive it, but he was able to complete his route on August 26, 2013. On August 27, 2013, Leaks tried to start the Freightliner, but the ignition cut off within ten seconds. Leaks told Orosco and Christian Sanchez, Leaks' supervisor, about the problem, and Sanchez had a mechanic inspect the tractor. Following his inspection, the mechanic advised Leaks that he could drive his route with the tractor that day.[3] Leaks completed his route on August 27, 2013, and did not work for the next two days. Leaks did not report any concerns he had about the Freightliner on August 26, or 27, to Orosco or Sanchez. When Respondent safely returned the Freightliner to the Penske rental agency a few weeks later (on September 6, 2013) and no damage or repairs were reported.

When Leaks returned to work the morning of August 30, 2013, he discovered that Orosco would be driving the International, and that Respondent assigned him to drive the Freightliner.[4] Leaks became upset and told Orosco that he did not feel safe driving the Freightliner, although he did not explain why.[5] Nor did Leaks ask to drive the International. Leaks did not have any further conversations with Orosco, but instead addressed his concerns to Sanchez, initially in a text message at approximately 5:00 a.m. informing Sanchez that he felt unsafe driving the

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[1] The citations in this paragraph are to the ALJ's D. & O. at 2-4, 8-9.

[2] Avelino Orosco was the lead driver in the warehouse in which Leaks worked in Henderson, Nevada. Leaks considered Orosco to be his supervisor, although Christian Sanchez, Respondent's plant manager, was actually Leaks' direct supervisor.

[3] When the mechanic inspected the Freightliner, Sanchez also raised a concern about low fluid levels in the tractor. The mechanic apparently identified a leak in the tractor's radiator, although the mechanic's subsequently submitted work order indicated that he found no problems and made no repairs. D. & O. at 3. Notwithstanding the ALJ's inclusion of the radiator issue within his Findings of Fact, Complainant did not present any evidence nor assert that he engaged in any protected activity specifically regarding a problem with the tractor's radiator.

[4] The citations in this paragraph are to the ALJ's D. & O. at 4, 8.

[5] At hearing before the ALJ, Leaks testified that he felt that Orosco was getting special treatment and was angry that Orosco was driving a tractor that Leaks felt was his to drive. D. & O. at 4.

Freightliner. Leaks and Sanchez subsequently spoke by phone, during which Leaks complained about the tractor assignment and informed Sanchez that there were issues with the Freightliner's gears grinding.[6] Sanchez offered Leaks additional training and told him that he had to report any mechanical issues with the truck. Leaks also told Sanchez that he was having a hard time waking up in the morning and getting to work. Sanchez asked Leaks if he wanted to continue working for Arctic Glacier, and Leaks said no. Sanchez told Leaks to turn in his keys and gas card and this was the last communication the two men had other than Leaks getting his final paycheck. Leaks disputed that he told Sanchez that he did not want to work for Arctic Glacier anymore, instead stating that he told Sanchez that he was refusing to drive the Freightliner. Sanchez and Orosco established that the grinding Leaks experienced was more than likely due to Leaks shifting gears incorrectly and that Leaks should have recognized this with his experience level.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to this Board to issue final agency decisions in STAA cases.[7] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence.[8]

## DISCUSSION

The STAA provides that "[a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because" the employee has engaged in certain protected activities.[9] More specifically, 49 U.S.C.A. § 31105(a)(1)(B) provides: "A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because . . . the employee refuses to operate a vehicle because (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) 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." The statute specifies at section 31105(a)(2) that under section 31105(a)(1)(B)(ii), "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real

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[6] The citations in this paragraph are to the ALJ's D. & O. at 4, 8, 10.

[7] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

[8] 29 C.F.R. § 1978.110(b); *Lachica v. Trans-Bridge Lines*, ARB No. 10-088, ALJ No. 2010-STA-027, slip op. at 2, n.3 (ARB Feb. 1, 2012) (citation omitted).

[9] 49 U.S.C.A. § 31105(a)(1).

danger of accident, injury, or serious impairment to health," and "[t]o qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition."

Complaints filed under the STAA are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[10] 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.[11] 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.[12]

Upon review of the ALJ's decision, the record on appeal, and the parties' respective legal briefs and arguments, the Board summarily affirms the ALJ's Decision and Order for the reasons stated by the ALJ. The Board limits its discussion to the issue of STAA-protected activity.

The ALJ found that Leaks failed to engage in protected activity on August 30, 2013.[13] Specifically, the ALJ found that Leaks failed to prove that he engaged in protected activity under section 31105(a)(1)(B)(i) because he failed to prove that he refused to drive the Freightliner because its operation violated a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security.[14] The ALJ also found that Leaks failed to prove that he engaged in protected activity within the meaning of section 31105(a)(1)(B)(ii) because he failed to establish that he refused to drive because of a reasonable apprehension of serious injury to himself or the public due to any hazardous safety or security condition of the

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[10] 49 U.S.C.A. § 31105(b)(1); *see* 49 U.S.C.A. § 42121 (Thomson Reuters 2016).

[11] 49 U.S.C.A. § 42121(b)(2)(B)(iii).

[12] 49 U.S.C.A. § 42121(b)(2)(B)(iv).

[13] The references in this paragraph are to D. & O. at 7-10.

[14] The ALJ cited *Ass't Sec'y & Bailey v. Koch Foods, LLC,* ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 9 (ARB Sept. 30, 2011), for the proposition that this section applies to refusals to drive because an employee reasonably believes in the existence of a violation. However, this case was reversed by the Eleventh Circuit in which the court stated that "(B)(i) unambiguously covers only those situations where the record shows that operation of a motor vehicle would result in the violation of a regulation, standard, or order related to commercial motor vehicle safety, health or security." *Koch Foods, Inc. v. Sec'y, U.S. Dep't of Labor & Bailey*, 712 F.3d 476, 486 (11th Cir. 2013). As the ALJ also found that Leaks failed to show that operating the truck would have violated a motor vehicle safety law, his other finding about whether Leaks had a reasonable belief in a violation is harmless error.

Freightliner. Nor did Leaks prove that a reasonable person would have concluded under the circumstances that there was a defect in the truck likely to cause a serious injury.[15]

The ALJ did not believe Leaks' testimony that he left work on August 30, 2013, because he had safety concerns with the truck that he was scheduled to drive. The ALJ found that Leaks was not a credible witness, and that his reason for leaving work on August 30, 2013, was anger that Orosco was driving a truck that Leaks felt was "his."[16] The ALJ relied on the character, quality, and substance of Leaks' testimony, as well as Leaks' demeanor at the hearing, to find that he was not credible.[17] The ALJ found Orosco and Sanchez, on the other hand, to be credible witnesses and gave their testimony more weight than Leaks' testimony. He found their testimony and recollections of events to be consistent with other evidence in the record.[18] Thus, the ALJ found that Leaks did not refuse to drive the truck because of safety, but left the workplace angry because he did not want to drive the Freightliner, did not have enough experience to know how to properly shift the gears on the truck he was scheduled to drive, refused additional training on how to properly shift gears, and told Sanchez that he no longer wished to work for Arctic Glacier before quitting his employment.[19]

## CONCLUSION

Because the substantial evidence in the record supports the ALJ's findings of fact, including the ALJ's credibility determinations, and because the Decision and Order is otherwise in accordance with applicable law, the Board **AFFIRMS** the ALJ's Decision and Order.

**SO ORDERED.**

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

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

**LEONARD J. HOWIE**
**Administrative Appeals Judge**

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15 D. & O. at 10.

16 *Id.* at 7.

17 *Id.*

18 *Id.*

19 *Id.* at 8-10, 12.