

In the Matter of:

RICKEY C. NEWELL,

ARB CASE NO. 16-007

COMPLAINANT,

ALJ CASE NO. 2015-STA-006

v.

DATE: January 10, 2018

AIRGAS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Rickey C. Newell; *pro se*; West Monroe, Louisiana

For the Respondent:

Thomas Benjamin Huggett, Esq.; *Little Mendelson, P.C.*; Philadelphia, Pennsylvania

Before: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

Rickey C. Newell filed a complaint under the Surface Transportation Assistance Act of 1982 (STAA), as amended, and its implementing regulations.¹ He alleged that Airgas, Inc., fired him in violation of the STAA's whistleblower protection provisions after his repeated complaints about hours-of-service violations and refusals to drive in violation of the hours limitations. Following a hearing, a Department of Labor Administrative Law Judge (ALJ) dismissed Newell's complaint. He appealed to the Administrative Review Board (ARB or Board). For the following reasons, the Board vacates the ALJ's decision and remands this case for further proceedings.

¹ 49 U.S.C.A. § 31105 (Thomson Reuters 2016); 29 C.F.R. Part 1978 (2016).

BACKGROUND

Airgas hired Newell in October 2011 as a short-haul driver at its Shreveport facility delivering gas cylinders to customers. Newell testified, without contradiction, that from the first day of his employment, he learned that if he worked 12 hours, logged out, and was in his 10-hour rest period but was called back to work, Airgas expected him not to clock in, but just make the delivery and Airgas would pay him later for the additional driving. While at Shreveport, Newell was never required to exceed the hours-of-service restriction. But when he subsequently transferred to Airgas's West Monroe facility in February/March of 2012, working conditions changed. Newell testified that daily scheduling was in turmoil, with almost too many stops to count, and that he regularly worked at least 12 hours a day.²

Shortly after transferring to West Monroe, Newell's managers informed him that he would be making deliveries to Angus Chemical, one of Airgas's big accounts. When he protested about not having the hours to make deliveries, he was advised that they would pay him later. As a result, almost every week on a Tuesday, there was a long drive of around 300 miles that caused him to go over 12 hours. Newell testified about four instances where he was actually working more than 14 hours, including instances occurring on October 25, 2013, and March 21, 2014. Notwithstanding his repeated objections, Airgas informed Newell that the mandated procedure was a requirement of the job and if he did not comply, he would not be there very long.³

Again without contradiction, Newell testified that the entire time he worked at the West Monroe facility, from February of 2012 to March of 2014, his managers advised him on various occasions and with some regularity not to fill out the grid log even if he went over 12 hours. According to Newell, this not only happened almost every Tuesday, but also once or twice a month for a total of about five or six times a month.

On multiple occasions Newell complained about the hours-of-service violations, beginning with grid-log record-keeping requirements. Newell repeatedly complained about Airgas's failure to use grid log reports up until August of 2013, when Airgas implemented a new procedure that required drivers to complete grid logs if they worked between 12 and 14 hours.⁴ In response to his complaints prior to August 2013, Airgas managers told Newell that if he did not comply with company policy it would terminate his employment.⁵

² Decision and Order (D. & O.) at 7.

³ *Id.*

⁴ Federal regulations require drivers to record their duty status for each 24-hour period. Grid logs are detailed logs that a driver completes showing every stop the driver makes and its duration. A driver is exempt from the grid-log requirement for short-haul operations such as Airgas's if he operates within a 100-mile radius of the normal work location and returns to that location within 12 consecutive hours. 49 C.F.R. § 395.1(e) (2016).

⁵ D. & O. at 23.

In July 2013, after driving seven days in a row without a break, Newell complained vehemently about violating federal regulations governing hours of service,⁶ but managers told him that he would not be around long if he did not make the deliveries as needed.⁷ Newell further objected to Airgas's policy and practice regarding clocking in and out of driving assignments after exceeding 12 hours of driving. Drivers were directed not to submit a grid log when driving longer hours for "call-outs" because the extra hours would be logged on a different day and he would be paid for the additional hours separately.⁸

Newell encountered a similar situation regarding the requirement that a driver who had been on duty for seven or eight consecutive days must have 34 hours off duty before returning to work.⁹ In July of 2013, Newell worked 12 consecutive days without being afforded the 34-hour break. Upon complaining vehemently, managers again told him that he would not be around long if he did not continue to drive. For violation of the 34-hour restart rule, Newell received "bereavement pay" on a weekend, which Newell understood was a way to justify paying him without having the records show that he was driving.¹⁰

Newell testified that after Ary became his manager,¹¹ he worked more than 14 hours a day on October 25, 2013, and March 21, 2014. On October 25, Newell clocked out at 6:00 p.m. but then saw a note from Ary that a nursing/rehabilitation home had run out of oxygen. Newell called Ary, who told him he had to make the delivery, which he did. The trip caused him to work more than 14 hours, but he did not clock in again. Newell stated that he objected but was again told that emergency deliveries were a requirement of the job, that he would be paid for the extra hours, and that if he did not comply with call-out procedures, he could lose his job.¹²

On Tuesday, March 18, 2014, dispatcher J.J. Dahlum asked Newell to drive to and from Shreveport, but he refused because the trip was outside the 100-mile limitation for short-haul operations and could not be done within the hours-of-service rules. Dahlum then gave Newell delivery tickets for his regular route. The following Friday, March 21, a former customer called Newell for help because its supplier had run out of nitrogen cylinders. Newell testified that he called Ary, who told him three times to make the delivery even though Newell objected that he

⁶ 49 C.F.R. § 395.3(b).

⁷ Hearing transcript (TR) at 32, 36-7.

⁸ *Id.* at 38-41.

⁹ 49 C.F.R. § 395.3(b), (c).

¹⁰ D. & O. at 8.

¹¹ J.T. Ary became branch manager of the West Monroe facility in August 2013. *Id.* at 7.

¹² TR at 75-78, 107-09.

was off the clock and out of hours. Newell nevertheless complied, and clocked back in around 10:00 p.m. and out after 2:00 a.m. on Saturday.¹³

On Monday, March 24, Ary called Susan Durbin, branch operations manager, and asked her how to submit the grid log that Newell had completed for his four-hour call-out the previous Friday-Saturday. Ary later told Newell that the Tulsa managers, who reviewed the drivers' logs every week, were unhappy about the hours-of-service violation on Friday and had instructed Ary to counsel the West Monroe drivers about the hours-of-service rules. The next day, according to Newell, dispatcher Dahlum told Newell that he needed to go to Shreveport or El Dorado for a pick-up, but Newell again refused to make that trip because it was outside the 100-mile limitation and would take longer than 12 hours. Instead he worked his usual route.¹⁴

On Friday, March 28, Newell arrived at work and participated in a conference call with Ary, coordinator Durbin, dispatcher Dahlum, and four Airgas managers including Vice-President Mike Thomas. They asked him "what I thought I was doing by making" the Friday-Saturday delivery the previous weekend. Newell testified that he told them he "was doing exactly what I've been made to do since the first day I started with this company. Every boss told me I would have to do this, from Mike Pate on down." Newell added that at the mention of Pate's name, Thomas remarked, "Well, Mike, I don't doubt that."¹⁵

The managers then asked Ary why he had sent Newell on the delivery in violation of the hours-of-service rule. Ary responded that he was uncertain about the hours-of-service rules. He understood that only driving time counted and that only drivers who were on the clock more than 12 hours had to submit a grid log. He added that he had previously approved "bereavement" pay to compensate drivers who put in extra hours.¹⁶

The managers—human resources director Tom Sprunger, safety director Ryan Bobstein, division director Mike Gibbs, and Vice-President Thomas—then dismissed Durbin, Newell, and Dahlum from the conference call. Ary remained on the conference call. After discussing the issues at West Monroe, including Ary's lack of training about the hours-of-service rules, the managers decided to fire Newell for deliberately violating the hours-of-service rule on March 21/22, 2014. Because it was his second policy violation within six months,¹⁷ the managers decided to terminate Newell's employment effective March 28, 2014.¹⁸

¹³ *Id.* at 46-47, 78-81, 91-93.

¹⁴ *Id.* at 47-51.

¹⁵ *Id.* at 51-54, 87.

¹⁶ Ary claimed at his deposition that that he did not know that he was violating an hours-of-service rule when he submitted a payroll record showing Newell's four-hour call-out had been worked on the following Saturday. Ary testified that he changed the record because that is the way he had seen it done previously to ensure that a driver got the correct pay. Ary Deposition at 10-13.

¹⁷ On September 25, 2013, Newell was driving and heard a "thunk" sound in his trailer. He backed up his truck 20 to 30 feet in the West Monroe facility bay while holding his cell phone on a

Newell filed a complaint with the Occupational Safety and Health Administration (OSHA) on June 4, 2014. On September 18, OSHA dismissed the complaint. Newell objected to the dismissal and requested a hearing, which was held on April 7, 2015. Newell appeared pro se. The ALJ dismissed Newell's complaint on October 2, 2015, and he appealed to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to this Board to issue final agency decisions in STAA cases.¹⁹ 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.²⁰ The ARB will uphold an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."²¹

DISCUSSION

The STAA provides that "a person may not discharge an employee, of discipline or discriminate against an employee regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities.²² To prevail on a STAA claim,²³ 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

return call from a customer, in violation of Airgas policy. His manager, J.T. Ary, saw him in the driver's seat with his cell phone in his hand and heard his truck blaring the back-up warning. After listening to Newell's explanation, Ary issued a warning letter and a one-day suspension. D. & O. at 10, 14; Complainant's Exhibits (CX) 3, 5.

¹⁸ Respondent's Exhibit (RX) 12, TR at 142. Airgas issued Ary a final written warning, which carried a suspension, for his lack of knowledge of DOT operational rules.

¹⁹ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

²⁰ 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) (citations omitted).

²¹ *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012).

²² 49 U.S.C.A. § 31105(a)(1).

²³ 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). 49 U.S.C.A. § 31105(b)(1); see 49 U.S.C.A. § 42121 (Thomson Reuters 2016).

activity was a contributing factor in the unfavorable personnel action.²⁴ 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.²⁵

The ALJ's findings on protected activity

The ALJ noted that Newell “continuously over-reached in the *pro se* presentation of his case” but otherwise found his testimony credible, stating that when Newell “was simply testifying as to the facts of what happened and what he heard, saw, and did while working for [Airgas], I found him to be candid and relatively credible.”²⁶

Based on Newell’s testimony, the ALJ found that Newell engaged in STAA-protected activity on numerous occasions after he began working for Airgas in October 2011, beginning with his complaint to managers at the Shreveport facility that it was unlawful to require him to respond to a call-out for a delivery without clocking in for additional driving after he had worked 12 hours and clocked out for the day. Even though this never occurred while he was at Shreveport, the ALJ concluded that Newell’s complaint constituted protected activity even though no violation by Airgas occurred.²⁷

The ALJ also found that Newell proved that he engaged in protected activity on various occasions from February 2012 up until August of 2013 by complaining to managers about Airgas’s grid-log policy and procedures. The ALJ credited Newell’s testimony, corroborated by a co-worker, Tommy Barmore, that managers regularly instructed them to submit only exempt driving logs and not grid logs, in violation of the rule governing drivers who operate within a 100-mile radius of the work location.²⁸

²⁴ 49 U.S.C.A. § 42121(b)(2)(B)(iii). In his D. & O., the ALJ stated: “At the evidentiary hearing stage before an Administrative Law Judge, the Complainant is required to prove the four prima facie elements by a preponderance of the evidence . . . and not merely allege circumstances sufficient to establish the four elements.” D. & O. at 15. A prima facie analysis has no place in an evidentiary hearing. *Luckie v. United Parcel Serv.*, ARB No. 05-026, 2003-STA-039, slip op. at 7 (ARB June 29, 2007) (after a hearing on the merits, an ALJ need not determine whether a prima facie showing has been established).

²⁵ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

²⁶ D. & O. at 23.

²⁷ *Id.* at 24.

²⁸ Title 49 of the Code of Federal Regulations, section 395.3, sets out 11-hour, 14-hour, and 70-hour rules regulating the maximum number of hours a truck driver can drive within certain specified periods of time. 49 C.F.R. § 395.1. A grid log is required if the driver works between 12 and 14 hours a day, and Newell testified that his managers regularly told him not to complete a grid log if he went over 12 hours, which happened at least once a week. TR at 32-35. Airgas did not require grid logs in 2012 and half of 2013, but reversed its policy in August 2013.

The ALJ credited Newell's testimony that in July 2013 he worked 12 days in a row and "complained vehemently" because he was denied the mandated 34-hour period of rest between work periods.²⁹ In the absence of evidence to the contrary, the ALJ found that the facts Newell asserted established protected activity.³⁰

Finally, the ALJ found that Newell engaged in protected activity on two successive Tuesdays in March 2014 (March 18 and March 25) when Newell refused to drive because doing so would extend his drive-time beyond 12 hours if he undertook the requested trips. The ALJ found that Newell reasonably believed that taking the longer trips would have violated the hours-of-service rules and, in the absence of credible evidence to the contrary, concluded that Newell engaged in protected activity by refusing to drive.³¹

But the ALJ rejected Newell's claim that he engaged in protected activity on October 25, 2013, and March 21, 2014, when he had clocked out for the day but subsequently was asked to make emergency deliveries. Even though Newell testified that he complained about undertaking the deliveries because on both dates he had already logged 12 hours of driving, the ALJ found that Newell did not engage in protected activity because he did not specifically mention that making the deliveries would constitute hours-of-service violations.

Curiously, the ALJ rejected Newell's claim of protected activities on the two dates even though he found Newell's actions "were consistent with his testimony that he knew he was going to be told" to make the deliveries "so he just went ahead."³² Newell argued that he did not have to mention specific hours-of-service violations expressly because Ary, his manager at that time, knew his schedule and the rules. The ALJ found, however, that while it seemed unlikely that Ary would be unaware of basic hours-of-service rules, Airgas's subsequent suspension of Ary demonstrated that Ary had no basis from which to infer that Newell's reluctance to make the deliveries indicated his concern about hours of service. The ALJ determined that even if Ary had known the rules, the evidence was insufficient to establish that Newell communicated any objection or concerns about the deliveries; that "it does not constitute a protected activity until Complainant complains about it."³³

The ALJ's findings on contributing factor causation

The ALJ found that Airgas's termination of Newell's employment was a clear adverse action and that Newell needed only to show that his protected activity contributed to that termination. The ALJ focused on the knowledge, or lack of knowledge, of the Airgas officials

²⁹ 49 U.S.C.A § 395.3(c).

³⁰ D. & O. at 26.

³¹ *Id.* at 27.

³² *Id.* at 26.

³³ *Id.* at 25-26.

who terminated Newell’s employment on March 28, 2014, stating, “Implicit in establishing that contribution is showing that the person making the decision to terminate was aware of the protected activity or relied on the advice or recommendations from someone who [was].”³⁴

The ALJ placed considerable weight on Susan Durbin’s testimony that the first she heard about Newell’s hours-of-service violation was when Ary called her on March 24, 2014, and asked how to write up the grid log for Newell’s Friday-Saturday delivery the previous weekend. Durbin informed upper management of the call, which ultimately resulted in the March 28 conference call. Durbin testified that she was an “observer” on that call and did not participate in the decision to discharge Newell because Airgas’s managers—Sprunger, Bobstein, Gibbs, and Thomas—dismissed her, Newell, and Dahlum from the call.³⁵

The ALJ found “very little other evidence in the record related to whether or not the person (or persons) who had a part in making the decision” to fire Newell “were aware of any of his protected activities.” The ALJ noted that while Newell told the managers that he was doing exactly what he had been made to do since starting work, he did not testify that he told Thomas and the other managers during the conference call about his protected activities and that he had previously complained about Airgas management’s policy and practice regarding hours-of-service requirements.³⁶

Furthermore, the ALJ found that while temporal nexus often offered probative circumstantial evidence of the decision-maker’s knowledge of protected activity, Newell’s grid-log complaints were too far removed in time, and the March 28, 2014 conference call appeared to have focused solely on the March 21/22 events that resulted in Ary’s call on March 24 to Durbin that, in turn, resulted in the conference call later that week.³⁷ The ALJ also discussed other circumstantial evidence of nexus such as pretext, animus toward Newell, and Airgas’s attitude toward compliance with the DOT rules. Interestingly, the ALJ concluded that the record did not rule out the possibility that the managers knew of any of Newell’s protected activities, but placed the burden on Newell to prove “not that it is possible that they knew, but that it was more likely than not that they did.”³⁸ The ALJ particularly relied on Durbin’s testimony as

³⁴ *Id.* at 28. The ARB has held that an employer’s knowledge of protected activity is not a separate element, but instead forms part of the causation analysis. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13, 16 (ARB June 29, 2011) (*Bobreski I*) (The issue of knowledge is a necessary part of the single question of causation and similarly requires that the evidence be considered as a whole.). *See also Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (citing three elements for a whistleblower claim under the STAA).

³⁵ Ary testified that he remained on the conference call but was not involved in the managers’ decision to fire Newell. D. & O. at 15, TR at 114.

³⁶ D. & O. at 28.

³⁷ *Id.*

³⁸ *Id.* at 29.

outweighing Newell's evidence and concluded that it was more likely than not that the managers responsible for firing Newell did not know anything about his protected activity."³⁹

The ALJ must reconsider Newell's protected activity and contributing factor causation

The ALJ's dismissal of Newell's complaint is based on material legal and factual missteps regarding protected activity and contributing factor causation, thus requiring remand. After considering all the arguments and the record as a whole, we must remand this case for two independent reasons. First, the ALJ too narrowly defined protected activity with regard to Newell's complaints about driving on October 25, 2013, and March 21, 2014, to require express mention of hours-of-service violation, particularly when considered within the context of his prior repeated complaints about hours-of-service violations. Second, the ALJ failed to consider whether Newell's statements to Airgas management on March 28, 2014, constituted protected activity in light of the circumstantial evidence of record, *when considered as a whole*.

A. Newell's complaints of October 25, 2013, and March 21-22, 2014

On appeal, Newell argued that being fired for something he was ordered to do, but about which he had previously complained to no avail, "not just once but many times," cannot possibly be lawful. He added that the "evidence to prove the decision-makers knew of my protected activities does not exist" because Airgas routinely covered up any hours-of-service violations by paying for those hours on another day.⁴⁰

The ALJ initially noted Newell's allegations that he engaged in multiple protected activities—including complaints about the company's hours-of-service violations—the entire time he worked in the West Monroe store. "Some were a continuing course of complaints and some were individual instances," the ALJ stated."⁴¹ But the ALJ found that on the above dates Newell did not specifically complain to Ary that he would violate the hours-of-service limitation if he made the call-out deliveries. The ALJ concluded that Newell had not established protected activity on those dates because he reasoned that even if Airgas had been skirting the hours-of-service rules at West Monroe, an employer's knowledge of a violation does not establish that the employee complained to the employer about the violation. The ALJ determined that even if Ary had known the rules, the evidence was insufficient to establish that Newell communicated any

³⁹ *Id.* In reaching this conclusion, the ALJ noted the irony of Newell's termination for violating hours of service given his complaints about being repeatedly asked to violate those rules, faulting Newell's failure to explain clearly his objections to Ary who claimed he did not understand the rules. "His often vague complaints and subsequent acquiescence meant that no one who had a hand in his termination was aware of any protected activity. More vocal objections may have allowed Respondent's senior managers to discover they had an incompetently trained manager in Ary." *Id.* n.41.

⁴⁰ Newell's petition for review and supporting briefs are un-numbered.

⁴¹ D. & O. at 23.

objection or concerns about the deliveries because “it does not constitute a protected activity until Complainant complains about it.”⁴²

We find that the ALJ erred in requiring Newell to articulate a specific hours-of-service violation (1) to Ary on October 13, 2013, and March 21-22, 2014, and (2) to the managers on the conference call on March 28. The Board has held that a complainant alleging protected activity need not expressly describe an actual violation of law.⁴³ Rather, a complainant need only demonstrate that he or she had a reasonable belief that the conduct complained of violated pertinent law or regulations. This standard requires both a subjective belief and an objective belief. Thus, Newell must show that he actually believed that making the mandated call-out deliveries violated the hours-of-service regulations and that a reasonable person with his training and experience would know that making those deliveries was a violation.⁴⁴

Further, Newell need not show that he “actually conveyed his reasonable belief to management.” While Newell must show that his belief was reasonable, “it does not follow that he must have necessarily conveyed a notion to have reasonably believed it . . .” to his supervisors.⁴⁵ Consequently, the ALJ erred in finding the evidence “insufficient to establish” that Newell communicated any objection about hours-of-service violations.

Given these legal errors, the ALJ on remand should reconsider the evidence of Newell’s protected activities throughout his employment with Airgas in light of the following factors:

- (1) At the hearing Newell testified extensively about his trucking experience and his knowledge of the hours-of-service regulations, including the requirements for grid and exempt logs, the 34-hour rule, and mandated rest periods;⁴⁶
- (2) Newell had been complaining about hours-of-service violations ever since starting at West Monroe, and the ALJ acknowledged that Newell’s actions “were consistent with his testimony that he knew he was going to be told” to make the deliveries “so he just went ahead” and did them;⁴⁷

⁴² *Id.* at 25-26.

⁴³ *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-018, slip op. at 8 (ARB May 24, 2011) (ALJ erred in requiring complainant to mention “fraud” in establishing protected activity). *See also Sylvester v. Paraxel Int’l, LLC*, ARB No. 07-123, ALJ No. 2007-SOX-039, -042, slip op. at 15 (ARB May 25, 2011).

⁴⁴ *Zinn v. Am. Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 6-7 (ARB Mar. 28, 2012).

⁴⁵ *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006).

⁴⁶ TR at 32-46.

⁴⁷ D. & O. at 26.

- (3) Airgas expected its drivers to respond to emergency call-outs as needed and Ary testified that a driver's excess hours would be recorded the next day and paid as "bereavement" pay;
- (4) Ary was aware that Newell would clock in again on Friday and exceed his hours limit because Newell told Ary he would do that, and Ary saw the resultant grid log on Monday; and
- (5) Ary called Durbin on Monday morning specifically to find out how to submit Newell's grid log for the call-out on March 21-22 despite having addressed Newell's almost identical hours-of-service violation on October 25, 2013, by clocking the hours on a different day to disguise the violation.

The ALJ did credit Newell's testimony that he made the delivery on March 21-22, driving more than 14 hours to do so, "because I knew if I didn't, I'd be fired." Newell explained that:

The phone call that I made to JT [Ary] is in and of itself a discussion of the hours of service. He and I are not buddies. We do not hang out together. I do not call him on Friday night to hang out. The only thing I could possibly be calling for is for him to tell me, 'Make a delivery, don't make a delivery,' and he said, 'Make the delivery.' He did not say, 'Don't make the delivery.' He would have fired me for insubordination or something if I had [not]^[48]

On remand, the ALJ should reconsider, first, whether Newell's complaints about driving excessive hours on October 25, 2013, and/or March 21-22, 2014, constituted protected activity notwithstanding that he did not expressly mention that the additional driving would be an hours-of-service violation and within the context of his repeated past hours-of-service complaints and his reasonable belief that Airgas expected him to make call-out deliveries and would possibly fire him if he refused.

B. Airgas's knowledge and causation analysis

In finding that the Airgas managers who fired Newell were unaware of his protected activities, the ALJ disregarded both Newell's explanation at the March 28, 2014 meeting of why he had violated the hours-of-service rules on March 21-22, and more importantly, Vice-President Mike Thomas's response to Newell's statement. As the ALJ noted, Newell told the managers on the conference call that when he broke the hours-of-service rule on March 21-22, he was doing exactly what his supervisors had told him to do since starting work for Airgas. He specifically mentioned his first boss, a Mike Pate. Thomas was not at all surprised by Newell's explanation because Thomas had fired Pate for doing what Newell said he was repeatedly told to do, *i.e.* ignore and/or violate hours-of-service requirements or risk being terminated if he complained or otherwise refused.

⁴⁸

TR at 46-47.

Newell’s explanation by itself would not appear to make the Airgas managers aware of his protected activity. Indeed, citing Newell’s explanation, the ALJ determined that Newell “did not testify that he told Thomas and the others about his protected activities and that he had complained about the things that were going on.”⁴⁹ But as we explained above, Newell is not required to show that he communicated his reasonable belief to his managers to prove that his conduct was protected. Further, in *Bobreski I*, the ARB pointed out that when an employee presents a whistleblower complaint based on indirect or circumstantial evidence,⁵⁰ each piece of evidence should be examined with all the other evidence to determine if it supports or detracts from the employee’s claim that his protected activity was a contributing factor. “Fragmenting circumstantial evidence can distort the greater context. . . . In the end, the ALJ must look at all of the circumstantial evidence as a whole.”⁵¹

In this case, the key to considering the circumstantial evidence as a whole to determine whether Airgas managers were aware or should have been aware of Newell’s protected activities is Thomas’s response to Newell’s explanation on the March 28 conference call. Thomas’s response, in turn, begs consideration of the multiple occasions throughout his employment when Newell complained about hours-of-service violations, which resulted in repeated reminders from his supervisors and/or Airgas management that such complaints could result in termination of his employment.

The ARB has repeatedly ruled that under certain circumstances, events that are “inextricably intertwined” may substantiate a finding of causation.⁵² In this case, Airgas claims it fired Newell because of the violation of the hours-of-service rules on March 21-22. But Newell alleges he complained about the impropriety of that very incident and would have been fired had he refused to make the delivery. Certainly, the ALJ’s finding that Newell repeatedly complained about hours-of-service violations lends credence to this testimony. And if on remand the ALJ credits Newell’s October 13 and March 21-22 complaints as protected activity, these incidents and the subsequent discipline for the very conduct to which he objected become inextricably intertwined. In other words,⁵³ inextricably intertwined with the hours-of-service

⁴⁹ D. & O. at 28.

⁵⁰ Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence. *Bobreski I*, ARB No. 09-057, slip op. at 13.

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⁵¹ *Id.* at 14. ALJ orders must be issued “on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C.A. § 556 (d). The ALJ also has a duty under applicable regulations to make his or her decision based on the record as a whole. See 29 C.F.R. § 18.57(b)(2016).

⁵² *Maddin v. Tramsam Trucking, Inc.*, ARB No. 13-031, ALJ No. 2010-STA-020, slip op. at 10 (ARB Nov. 24, 2014) (citations omitted).

⁵³ And of course if the ALJ finds protected activity on March 21, causation may be inferred from the temporal proximity between Newell’s protected activity and his termination shortly thereafter.

violations are Newell's repeated refusals to drive when he knew he would exceed permissible hours and the 100-mile limit and his repeated complaints about making call-out deliveries in violation of the hours-of-service rules. On remand, the ALJ should consider whether the connected nature of Newell's protected activities was a contributing factor in his discharge.

The second reason for remanding this case for further consideration of contributing factor causation is that the ALJ focused too much on the decision-makers' supposed lack of knowledge and Ary's seeming lack of understanding of the basic hours-of-service rules, instead of determining the "cumulative effect of the circumstantial evidence."⁵⁴

To demonstrate causation, complainant need only prove, by a preponderance of the evidence, that his protected activity "alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision." For example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity."⁵⁵ The focus is whether the protected activity contributed in any way—even as a necessary link in a chain of events leading to adverse action. A finding that a complainant's protected activity was a contributing factor in the adverse employment action at issue may be found irrespective of its co-existence with lawful reasons for that action.⁵⁶

Further, the ARB has held that employer knowledge is not a separate element that a complainant must prove but instead forms part of the causation analysis.⁵⁷ The ARB has noted that a respondent's knowledge of the protected activity need not be specific, and a complainant need not prove that a respondent knew that the complaint involved an express violation.⁵⁸ Finally, proof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone, but may also be established by evidence demonstrating

⁵⁴ *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 18, n. 63 (ARB Aug. 29, 2014)(*Bobreski II*).

⁵⁵ *Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-005, slip op. at 14 (ARB Mar. 15, 2013).

⁵⁶ *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 7, n.17 (ARB Sept. 26, 2012).

⁵⁷ *See Bobreski I*, ARB No. 09-057, slip op. at 13. *See also Moon v. Transp. Drivers, Inc.*, 836 F.2d at 229 (citing three elements for a whistleblower claim under the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105).

⁵⁸ *Occhione v. PSA Airlines, Inc.*, ARB No. 15-090, ALJ No. 2011-AIR-012, slip op. at 4 (ARB July, 26, 2017) (ALJ erred legally in his determination that a finding of knowledge of protected activity requires "specific knowledge . . . and whether the complaints involved protected activity").

“that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee’s protected activity.”⁵⁹

Here, Durbin testified that Ary called her on Monday, March 24 and wanted to know how to write up Newell’s grid since he had recorded his hours after the usual closing time and into Saturday morning. She told Ary to “keep both drivers” off the road and “shut down truck operations immediately.” She then telephoned Thomas and explained the “obvious” hours-of-service violation to him because “we needed to handle it correctly.” He instructed her to “sit tight” and consulted Airgas safety director Bobstein. Thomas then told Durbin to provide training materials to Ary and follow up to ensure that Ary “had a clear understanding” of DOT rules and regulations regarding hours of service and restarts. Ary testified that after talking with Dahlum he held a training meeting with Newell and the other driver and had them sign a policy statement on hours-of-service regulations.⁶⁰

In finding no causation, the ALJ narrowly relied on Ary’s supposed lack of knowledge about the hours-of-service rules and Newell’s failure to state specifically to Ary and other managers that he was complaining about violating those rules when he made call-out deliveries. Ary, who started as Newell’s supervisor in August 2013 after finishing a “driver-based training” course on how to complete the required paperwork, testified that he knew that drivers called out for extra deliveries were guaranteed four hours’ pay. And he knew in August 2013 that driving more than 12 hours required a grid because Airgas had changed its previous policy. On October 25, 2013, he recorded Newell’s driving time for the callout on the following Saturday as “bereavement pay” to ensure Newell was paid.⁶¹ Yet, on March 24, 2014, he called Durbin for advice about recording Newell’s call-out on March 21-22 because Newell had recorded his hours on a grid log, unlike the October 2013 call-out when Newell did not record his hours and Ary had submitted a request for bereavement pay to cover the additional driving.

When Newell asked Ary at the hearing why he did not follow the same procedure for the March 2014 call-out as he had for the October 2013 one, Ary answered that he was “trying to ensure that the grid log was handled properly.” Newell and Ary had the following exchange:

Q. Okay, if you did it back in October, why didn’t you just falsify it again?

A. Because during the time frame, we were much more thoroughly trained on grid logs and their preparation and DOT paperwork errors and we were trying to eliminate those issues so

⁵⁹ *Bobreski I*, ARB No. 09-057, slip op. at 14. *Accord Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006), (requiring ALJ on remand to determine “whether knowledge held by other company employees should be imputed to the decision-maker”).

⁶⁰ TR at 112, 138-40.

⁶¹ TR at 107-09.

we were attempting to make sure that the grid log was handled properly.

Q. Then my question would be why did you tell me to go make that delivery at that point in time?

A. I agreed for you to go make the delivery. I never stated you'd have to go do this.

Q. Was your answer an affirmative or a negative?

A. I was never asked the question.

Q. Okay. Did you tell me not to make the delivery?

A. No, I did not.

Q. Did you tell me it was okay to make the delivery?

A. Yes, I did.^[62]

In light of Newell's repeated complaints about hours-of-service violations, the managers' responses to his submission of a proper grid log documenting the March 21-22 violation, and the fact that Ary and managers Durbin, Thomas, and Bobstein knew of that hours-of-service violation the preceding weekend, the ALJ should reconsider whether Newell's protected activity contributed in any way to his firing. Considering the above factors and the evidence as a whole, the ALJ should also make specific credibility findings regarding the testimony of Ary and managers Durbin and Thomas that they had no knowledge of Newell's complaints about hours' regulations.⁶³

If on remand, the ALJ finds that Newell engaged in protected activity on October 25, 2013, and/or March 21-22, 2014, then he should reconsider the evidence of contributory factor as a whole and collectively weigh all of Newell's evidence against all of Airgas's countervailing evidence to determine whether Newell's protected activity contributed to his discharge.

⁶² *Id.* at 118-19. This testimony begs the question of why Ary remained ignorant of hours-of-service rules if Airgas had changed its policy and had been trying to improve the accuracy of its grid logs. Ary must have known Newell's grid log on Saturday revealed something wrong or why would he call Durbin to ask how to fix it?

⁶³ The ALJ found Newell's testimony to be "candid and relatively credible," but noted that that it "is remarkable" that Airgas would have a manager who was "essentially clueless" about fundamental operational rules. The ALJ also appears to blame Newell for not making "more vocal objections" to Ary so that Airgas's senior managers would recognize that Ary was "incompetently trained." D. & O. at 29 n.39, 41. We note that "credibility findings based on internal inconsistency, inherent improbability, important discrepancies, impeachment, or witness self-interest are entitled to the weight which 'in reason and in the light of judicial experience they deserve.'" *Nevarez v. Werner Enter.*, ARB No. 14-010, ALJ No. 2013-STA-012, slip op. at 7 (ARB Oct. 30, 2015), (quoting *Universal Camera Corp.*, 340 U.S. 474, 496 (1951)).

CONCLUSION

Accordingly, the Board **VACATES** the ALJ's decision and **REMANDS** this case for further proceedings before the ALJ in accord with this Decision and Order of Remand.⁶⁴

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge

⁶⁴ The ARB may set aside a decision if “we ‘cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes.’” *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 7 (ARB Sept. 24, 2009) (quoting *Universal Camera*, 340 U.S. at 477-478).