In the Matter of:

THOMAS J BEVERIDGE, **ARB CASE NO. 97-137**

COMPLAINANT, **ALJ CASE NO. 97-STA-15**

v. **DATE: December 23, 1997**

WASTE STREAM ENVIRONMENTAL, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER OF DISMISSAL

This case arises under an employee protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105(a)(1)(B)(i) (1994), prohibiting the discharge of an employee for refusing to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health."[2/]

BACKGROUND

Complainant Thomas J. Beveridge (Beveridge) was fired by Respondent Waste Stream Environmental, Inc. (Waste Stream), Weedsport, New York, on January 10, 1997 for shorting his loads without permission on January 2 and 3, 1997. T. 14, 38-40, 59, 92; RX 1. As the Administrative Law Judge (ALJ) explained in the Recommended Decision and Order (R. D. and

---

[1/] There is now a vacancy on the three-member Board. However, Sections 5 and 7 of Secretary of Labor's Order No. 2-96, 61 Fed. Reg. 19,979, May 3, 1996, authorize the two remaining Members to render a decision on the basis of majority vote.

[2/] Beveridge's case is predicated solely on this provision. T. 19-26, 35-38; Beveridge's Brief to the Administrative Law Judge, final argument, separately numbered at 1. *See Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357-59 (6th Cir. 1992) (due process precludes decision on STAA provisions not actually tried); *Cook v. Kidimula International, Inc.*, Case No. 95-STA-44, Sec. Fin. Dec. and Ord. of Dism., Mar. 12, 1996, slip op. at 2 n.2 (since case concerned only the STAA at 49 U.S.C. §31105(a)(1)(B)(i), ALJ's rulings under other STAA employee protection provisions were irrelevant).

O.) rejecting Beveridge's claim, which we accept, the factual situation was as follows:

> [U]pon [Beveridge's] arrival at work on January 2, 1997, he discovered that the vehicle he was assigned to transport did not have a valid [New York] State registration sticker. . . . Accordingly, [Beveridge] instructed the individual responsible for scaling his load to reduce the load down to 6,000 gallons from the 8,500 gallons originally assigned for transport by him. This load reduction took place on January 2nd and 3rd, 1997, and [Beveridge] drove these reduced loads on both these days. On January 10, 1997, [Beveridge] was terminated for his action, *i.e.* short loading, as above described. [Beveridge] denied ever being instructed by management that he needed to secure its permission prior to short loading. [Beveridge] also admitted that he received, on January 6, 1997, a copy of a State registration permit for the vehicle he drove on January 2nd and 3rd, 1997, renewed as of December 24, 1996 and valid through December 31, 1997.

R. D. and O. at 2-3 (citations and footnote omitted).[3/]

The record in this case has been thoroughly reviewed. The ALJ's findings of fact are supported by substantial evidence on the record as a whole and therefore are conclusive pursuant to 29 C.F.R. §1978(c)(3) (1996). *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44-46 (2nd Cir. 1995); *Andreae v. Dry Ice, Inc.*, ARB Case No. 97-087, ALJ Case No. 95-STA-24, ARB Fin. Dec. and Ord., July 17, 1997, slip op. at 1-2; *Shute v. Silver Eagle Co.*, ARB Case No. 97-060, ALJ Case No. 96-STA-19, ARB Fin. Dec. and Ord., June 11, 1997, slip op. at 1.

[3/] Beveridge had previously shorted his loads on March 26 and 27, 1996, T. 9-10, 26, and Waste Stream docked his pay as a result, T. 27, 30, 106-07. According to Thomas Jarrard, General Manager of Operations, Beveridge was advised that "in the event that a situation did occur where he felt that he needed to lower the weights, he needed to contact [Transportation Manager] Pam [Trevett] . . . so that the issue could be discussed." T. 84. Although in this instance his tractor registration had actually expired, Waste Stream had contacted the New York State Department of Transportation and was told to continue to operate the vehicle because the agency was having an administrative backlog problem and vehicle registrations had not been sent to various trucking companies. T. 87-88.

DISCUSSION

Although we agree with the ALJ's conclusion, we do not agree with the ALJ's legal analysis.[4/] The ALJ draws a distinction under 49 U.S.C. §§3110(a)(1)(B)(i) between the *inaction* of an employee, which, pursuant to the ALJ's reasoning, would be covered, and the *action* of an employee, which would not be covered. R. D. and O. at 3. Under the ALJ's reasoning, a refusal to drive an overweight vehicle would not be covered if the load was reduced by the employee to a legally acceptable level and then delivered. We do not agree. An employee who refuses to drive illegally does not lose his STAA protection by correcting the illegality and then proceeding to drive.

Here, the critical distinction precluding Beveridge's recovery is not that he ultimately drove the vehicle, but that the trailer he initially refused to drive was legally loaded and properly registered. To be meritorious under 49 U.S.C. §31105(a)(1)(B)(i), "a driver must show that the operation [of a vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive - a mere good-faith belief in a violation does not suffice." *Yellow Freight System, Inc. v. Martin*, 983 F.2d 1195, 1199 (2nd Cir. 1993); *Cook v. Kidimula International, Inc.*, Sec. Fin. Dec. and Ord. of Dism., Mar. 12, 1996, slip op. at 4 and cases cited. Beveridge has not demonstrated such a "genuine violation."

Beveridge's claim involves the applicability of New York motor vehicle law. T. 35-38; CX 4 and 5.[5/] 49 U.S.C. §31105(a)(1)(B)(i) protects a refusal to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." Federal Highway Administration, Department of Transportation regulation 49 C.F.R. §392.2 (1996) provides, in pertinent part, that every commercial motor vehicle "must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated."[6/] Hence, because Beveridge was driving in the State

---

[4/] Since this case was fully tried on the merits, whether Beveridge made a *prima facie* showing, R. D. and O. at 3, is irrelevant. *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 715 (1983); *Andreae v. Dry Ice, Inc.*, ARB Fin. Dec. and Ord., July 17, 1997, slip op. at 2; *Logan v. United Parcel Service*, ARB Case No. 96-190, ALJ Case No. 96-STA-2, ARB Fin. Dec. and Ord. of Dism., Dec. 19, 1996, slip op. at 3. n. 4.

[5/] Although the ALJ did not clearly articulate the nexus between the STAA and state motor vehicle law, R. D. and O. at 3-5, the correlation of the two is implicitly shown at R. D. and O. at 4.

[6/] The full regulation states:

> Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Highway Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Highway Administration regulation

of New York, New York motor vehicle law was subsumed and incorporated within 49 U.S.C. §31105(a)(1)(B)(i) as a "regulation" or "standard" of the United States by reason of 49 C.F.R. §392.2. Similarly, in *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 255 (1987), the Supreme Court stated that the STAA protects employees "from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations . . . ."

Beveridge short loaded his trailer because the validation sticker attesting to the vehicle's registration was not affixed thereto. He assumed that the registration was not renewed and, accordingly, that he was not permitted to drive his assigned loads of 8,500 gallons under his current overweight permit, RX 3 at 1, valid through May 12, 1997. T. 30-32, 38-39, 74-75, 109; RX 4 (driver's log notation). In summing up his case, he stated:

> ADMINISTRATIVE LAW JUDGE:
>
> > So, you had possession of the weight permit. What you didn't have was this registration on the trailer.
>
> MR. BEVERIDGE:
>
> > Yes, Sir.
>
> ADMINISTRATIVE LAW JUDGE:
>
> > Why was it important for you to have this registration?
>
> MR. BEVERIDGE:
>
> > Because without it, the overweight permit's invalid.

T. 110-11. In fact, the registration sticker and registration were issued on December 24, 1996 and were valid through December 31, 1997. RX 3 at 2; R. D. and O. at 2-3.

Beveridge testified that "[b]y not seeing [the sticker] on the vehicle . . . I had no actual proof that the registration was renewed. And to me, getting a verbal [sic] on the phone that

---

> must be complied with.

49 C.F.R. §392.2.

yes, it's renewed, means nothing . . . . You can produce [the registration] at a later date, but not that sticker. That's got to be on the vehicle." T. 44-45.[7/]

Beveridge's reliance on New York law is misplaced and inapposite. Vehicle and Traffic Law §401(4) (1996) states, in part:

> If a vehicle does not have affixed a validating sticker which indicates the plate number, the vehicle identification number and the expiration date of the registration, the failure to produce the certificate of registration, or a photostatic copy of such certificate, shall be presumptive evidence of operating a motor vehicle or trailer which is not registered as required by this article.

This section does not require that a vehicle's registration must be carried at all times. It merely states that the failure to produce the certificate of registration or a copy when requested by a law enforcement officer is presumptive evidence that the vehicle is not registered as required by law. If Beveridge had been pulled over without a proper sticker and ticketed because the registration was not produced, Waste Stream[8/] could have rebutted the presumption and avoided conviction for illegal operation by subsequently providing its valid registration certificate or a copy. *See People v. Palter*, 66 N.Y.S.2d 388, 389 (App. Div. 1946). Therefore, at the time of Beveridge's short loading, his tractor trailer was lawfully registered, RX 3 at 2, permitting him to haul the assigned loads authorized by the overweight load permit in his possession, RX 3 at 1. Hence, his refusal to drive was not protected under 49 U.S.C. §31105(a)(1)(B)(i) of the STAA because Beveridge did not show an actual violation of a safety regulation. *See* R. D. and O. at 4.

[7/] It is unclear when Waste Stream received the registration from the State, T. 100, but General Manager Jarrard speculated that it would have been received by December 30, T. 106. In any event, if Beveridge had contacted Waste Stream, it could have verified the status of the registration for him.

[8/] Under Vehicle and Traffic Law §401(19-a), the ticket or summons is issued to the registrant of the vehicle.

ORDER

In sum, we conclude that Beveridge's complaint must be DISMISSED because he did not demonstrate by a preponderance of the evidence that operating his trailer at the assigned weight would have been unlawful under New York law as incorporated in 49 U.S.C. §31105(a)(1)(B)(i).

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member