U.S. Department of Labor

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

In the Matter of:

WILLIAM ZURENDA, **ARB CASE NO. 98-088**

COMPLAINANT, **(ALJ CASE NO. 97-STA-16)**

v. **DATE: June 12, 1998**

J & K PLUMBING & HEATING CO., INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (West 1996). William Zurenda (Zurenda) alleged that J & K Plumbing & Heating Co., Inc. (J & K) discharged Zurenda in violation of STAA §31105(a)(1)(A)(protected safety complaint) and §31105(a)(1)(B)(protected work refusal). Following a hearing on the merits the Administrative Law Judge (ALJ) found that Zurenda had not established a STAA violation and recommended dismissal of the complaint. With some minor exceptions, which we note below, the ALJ's findings of fact (Recommended Decision and Order (R. D. and O.) at 11-18) are supported by substantial evidence on the record considered as a whole and therefore are conclusive. 29 C.F.R. §1978.109(c)(3). We also accept the ALJ's credibility determinations and recommendation to dismiss the complaint. We write this decision to clarify certain issues.

BACKGROUND

Zurenda was employed as a truck driver for J & K, located in Binghamton, New York, from 1994 until November 22, 1996. On that date Zurenda was laid off,[1/] following his refusal to comply with his supervisor's order that he drive a truck to Troy, New York, on November 25, use the truck at a J & K work site, and stay in Troy for three nights. Zurenda alleged that his refusal to drive to Troy was protected activity. J & K on the other hand argued that Zurenda refused to drive to Troy

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[1/] J & K evidently had a policy of laying off workers rather than firing them. Transcript (T.) 607 (Rea). For example, when one of their drivers was cited for drunk driving while driving a J & K vehicle and lost his driver's license, J & K laid him off. T. 18-20 (Edwards). Thus, there is no particular significance to the fact that J & K laid Zurenda off rather than firing him.

because he did not want to stay for three nights at the apartment J & K had rented for its employees who were working at the Troy project.

J & K had three trucks[2/] and, at the time of Zurenda's layoff, two truck drivers. Zurenda alleged that he engaged in protected activity under STAA when he made internal complaints about the vehicles he drove.

Zurenda also presented evidence regarding three instances in which he allegedly refused to drive either the Mack truck or the large Volvo: (1) On November 13 he complained about driving the Mack truck because it had a "sticking clutch, no dash lights, a slashed tire, no backup warning device, and no tarp." R. D. and O. at 14; (2) On November 21 he refused to drive the large Volvo truck because to do so would violate federal safety violations and he had a reasonable apprehension of serious injury to himself or the public; (3) On November 22 he refused to drive the Mack truck to Troy, New York on November 25, at least in part because of federal safety violations. Zurenda argued that these instances of protected activity were the cause of his layoff on November 22.

The ALJ found that Zurenda had engaged in protected activity under §31105(a)(1)(A) of STAA when he complained about defects on the trucks:

> Complainant went above his direct supervisor's head on several occasions to complain directly to the company president about the safety conditions of the trucks. . . . While Complainant also complained to his own supervisor, Mr. Kennedy, about safety problems, these do not rise to the level of protected activity, as the normal course of business was for Complainant to inform his supervisor as to any repairs that needed to be made. However, going above the established chain of command is activity which amounts to an internal safety complaint. A driver's reporting of defects in the vehicles he has driven is an activity protected under §31105(a)(1)(A). . . . His complaints related to motor vehicle safety standards as they addresse[d] the condition of the tires as well as other problems. . . . This is sufficient to establish that Complainant was engaging in protected activity as STAA complaints do not need to refer to a particular safety standard[] in order to be protected.

R. D. and O. at 15.

The ALJ concluded that Zurenda did not engage in protected activity on November 13 or November 21, when he allegedly refused to drive. With regard to the November 13 incident, the ALJ found:

> . . . Complainant alleges that he went to his supervisor, Dean Kennedy, and was told to drive the truck or be fired after he complained of a sticking clutch, no dash lights, a slashed tire, no backup warning device, and no tarp. However, Complainant's log

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[2/] J & K had a large and a small Volvo truck and a Mack truck. The significant facts of this case involve the Mack truck and the large Volvo.

> sheets only indicate there was no heater [or] defroster and these notations were not contained on the original form. The actual inspections report indicated that the vehicle was satisfactory and handwritten notes at the bottom indicated that the heater/defroster wasn't working, the blinker was not working, and the dash lights weren't working. The handwritten portion also appears to have been made at a later date as the writing is off-center, and trails off the page. It also appears to be darker. I do not find Complainant's allegations as to this specific date to be credible. He testified that he had an argument with Mr. Kennedy prior to adding these notations and despite the fact that he had an opportunity to change the log, the notations only note one defect, the lack of a heater or defroster. As noted above, there is no evidence that supports this contention. Therefore, Complainant did not engage in protected activity on November 13, 1996 under §31105(a)(1)(B)(i).

R. D. and O. at 14-15. With regard to the November 21 incident the ALJ found:

> Complainant's allegations are less [than] credible on the issue of his refusal to drive the Volvo on [November] 21, 1996 because he indicated that the vehicle was in satisfactory condition both on [November] 21, and on the following day. The defects that were later added to his inspection reports were not consistent as he noted the lack of dash lights on the 22nd but not on the 21st on the back of his log sheets but the driver's inspection reports indicated no dash lights on the 21st. As noted above, the dash lights and front end shimmy had been repaired on November 6, 1996. Accordingly, Complainant has not proven that there was any condition that violated a federal safety regulation on the large Volvo truck on November 21, 1996, the date he refused to drive the truck.
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> He has also failed to establish that a reasonable person would have a reasonable apprehension of serious injury. . . . Therefore, I find that Complainant did not engage in protected activity under § 31105(a)(1)(B) on November 21, 1996.

R. D. and O. at 13, footnote omitted.

The ALJ found that Zurenda did engage in protected activity when, on November 22, he refused to drive the Mack truck on November 25:

> [T]he backup alarm was not working along with the dashboard lights, as they had to be repaired on December 19th. Accordingly, I find that Complainant has established that operating the Mack truck on the dates in question would violate federal safety regulations. Therefore, Complainant engaged in protected activity under § 31105(a)(1)(B)(i) on November 22, 1996.

R. D. and O. at 14.

Thus, the ALJ found that Zurenda had engaged in certain instances of protected activity. Notwithstanding this finding, the ALJ ruled that there was no causal nexus between Zurenda's

protected activity and his layoff on November 22. R. D. and O. at 15-17. Therefore, the ALJ ruled that Zurenda had failed to establish that J & K had violated STAA.

DISCUSSION

The STAA provides in relevant part:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--
> (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> (B) 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 or health; or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C.A. §31105(a). We conclude that while Zurenda may have engaged in some protected activity, that protected activity played no part in his layoff. Rather, Zurenda was laid off because he refused to take an assignment in Troy for reasons that were unrelated to STAA's protections.

1) Protected Activity

The ALJ considered Zurenda's allegations of protected activity as complaints under STAA §31105(a)(1)(A) and as work refusals under STAA §31105(a)(1)(B). We disagree with certain of the ALJ's statements regarding both issues. However, to the extent that the ALJ made errors

they do not materially affect the outcome of the case. In the interest of clarity we will note the few areas where we disagree with the ALJ's analysis.

First, although the ALJ found that Zurenda had engaged in protected activity under STAA when he complained to higher level management about certain safety issues related to the trucks, the ALJ erroneously held that "[w]hile Complainant also complained to his own supervisor, Mr. Kennedy, about safety problems, these do not rise to the level of protected activity, as the normal course of business was for Complainant to inform his supervisor as to any repairs that needed to be made." R. D. and O. at 15. This holding is erroneous. Under STAA a safety related complaint to any supervisor, no matter where that supervisor falls in the chain of command, can be protected activity. *See, e.g., Hufstetler v. Roadway Express, Inc.*, Case No. 85-STA-8, Sec. Final Dec. and Ord., Aug. 21, 1986, slip op. at 12, *aff'd, Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987).

Second, the ALJ analyzed the November 13 and November 21 incidents as work refusals under §31105(a)(1)(B). Although Zurenda alleged that he complained about the condition of the trucks he was to drive on these dates, and "refused" to drive them, in fact he did drive the trucks in

question. Therefore, these incidents more appropriately fall within the complaint provision of the STAA. However, in light of the ALJ's amply supported determination that Zurenda's testimony regarding the November 13 and 21 incidents was incredible (R. D. and O. at 13-15), we need not inquire further on this issue.

Third, the ALJ erroneously concluded that Zurenda proved he had engaged in protected activity on November 22, 1996, when he refused to drive the Mack truck to Troy on November 25. The ALJ found that repair records on the Mack and Zurenda's testimony:

> . . . indicate that the sticking clutch was fixed prior to the refusal to drive, the tires were replaced and the defroster was actually working. . . . The driver who took the Mack truck to New York in Complainant's place testified that there were no mechanical defects with the truck. . . . However the backup alarm was not working along with the dashboard lights, as they had to be repaired on December 19th. Accordingly, I find that Complainant has established that operating the Mack truck on the dates in question would violate federal safety regulations. Therefore, Complainant engaged in protected activity under §31105(a)(1)(B)(i) on November 22, 1996.

R. D. and O. at 14, citations to the record omitted.

Assuming for the sake of argument that operating the Mack truck on November 25 "would violate federal safety regulations," that finding does not automatically mean that Zurenda engaged in protected activity. For, as the ALJ found, Zurenda did not refuse to drive the Mack truck on November 25 out of a concern for truck safety, but solely because he did not want to stay at the company apartment in Troy for three nights. Thus, the ALJ held that, "[i]n this case, Complainant's own testimony establishes that the reason he refused to go to Troy, New York was due to the living conditions at the company apartment and personality conflicts with workers there and this [led] to his termination. This was unrelated to truck safety issues. . . ."[3/] R. D. and O. at 14-16.

Based upon our reading of the ALJ's findings of fact we conclude that Zurenda did not engage in protected activity when, on November 22, he refused to drive the Mack truck to Troy New York on November 25.

[3/] The ALJ also registered serious suspicions regarding Zurenda's knowledge of the condition of the Mack on November 22:

> As Complainant did not drive the truck between November 13 and November 22, it is unclear how he was aware of the alleged problems with the hydraulic clutch, back up alarms, bad tire and dashboard lights, none of which he noted on the 13th. He did not inspect the Mack truck on the 22nd, as he was assigned to drive the Volvo on that date and was refusing to drive the Mack on the 25th.

R. D. and O. at 14, n. 6.

2. Causal Relationship between Protected Activity and Adverse Employment Action

The ALJ's findings that Zurenda failed to prove a causal relationship between his safety complaints and his layoff are supported by substantial evidence and are conclusive. 29 C.F.R. §1978.109(c)(3). The ALJ found that there was no credible evidence that J & K was upset by Zurenda's internal safety complaints.

> Rather, it appears that i[t] was Complainant's responsibility to keep the trucks he drove in satisfactory condition, and complaints were treated as requests for repairs. . . . The only person that Complainant asserts was upset by his raising of safety issues was his immediate supervisor, Mr. Kennedy. However, on the date of the termination, Mr. Kennedy appeared to be willing to give Complainant his job back if he would drive the truck [to Troy]. . . . This action shows a lack of a discriminatory motive.

R. D. and O. at 17. Moreover, the ALJ also found that Al Rea, who actually laid Zurenda off, was not even aware of Zurenda's protected activity:

> Complainant admitted in his closing argument that he did not discuss the conditions of the trucks with Mr. Rea. . . . Instead, he addressed the living conditions at the company apartment and his lack of a raise as the reasons why he was refusing to go to Troy, New York. . . . As Mr. Rea was the one who terminated Complainant, if he was unaware of any complaint regarding safety violations, his decision to terminate Complainant was based solely on Complainant's stated reasons for refusing to go.

R. D. and O. at 16, citations omitted.

In sum, we agree that Zurenda failed to establish that he was retaliated against for engaging in activity protected by the STAA. Accordingly, we accept the ALJ's findings and conclusions as modified and **DISMISS** the complaint.

SO ORDERED.

KARL J. SANDSTROM
Chair

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Acting Member