U.S. Department of Labor

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

In the Matter of:

DANIEL S. SOMERSON **ARB CASE NO. 99-005**

COMPLAINANT, **ALJ CASE NO. 98-STA-9**

v.

YELLOW FREIGHT SYSTEM, INC.

RESPONDENT.

and

GARY C. BUHNERKEMPER, **ARB CASE NO. 99-036**

COMPLAINANT, **ALJ CASE NO. 98-STA-11**

v.

YELLOW FREIGHT SYSTEM, INC.

DATE: February 18, 1999

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:
Daniel S. Somerson, *Jacksonville, Florida*

For the Respondent:
Anderson B. Scott, Esq., *Fisher & Phillips LLP, Atlanta, Georgia*

FINAL DECISION AND ORDER

These cases arise under the employee protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. §31105 (West, 1996). In two separate complaints filed with the Labor Department, Complainants Daniel Somerson (Somerson) and Gary Buhnerkemper (Buhnerkemper) allege they were discriminated against under the STAA by Respondent Yellow Freight Systems, Inc. (Yellow Freight) because they complained about Yellow Freight's procedure

for assigning drivers for dispatch, and because they had filed previous STAA complaints related to safety. They allege that in retaliation for having raised these safety complaints, Yellow Freight sabotaged their tractor-trailers and failed to select them to become "regular drivers." Somerson also alleges that he refused many dispatches because of fatigue, and that Yellow Freight retaliated against him when it took his record of absences into account in failing to select him as a regular driver. Yellow Freight denies it sabotaged the equipment that Complainants were assigned to drive, and asserts that it chose other drivers for the limited number of regular driver positions because the other candidates were better qualified than Complainants.

Somerson and Buhnerkemper filed their complaints on October 8, 1996. Because the complaints arise out of related facts, the Administrative Law Judge (ALJ) consolidated the two cases both for hearing and for decision. In his Recommended Decision and Order (R. D. and O.), the ALJ found that Complainants did not carry their burden of proof and recommended dismissal of the complaints.

At its core, the judicial process is the application of the relevant body of law to the facts developed in a case. Complaints of discrimination under the STAA are assigned first to an Administrative Law Judge who develops the record in the case, usually by conducting an evidentiary hearing. The parties to a proceeding typically are given an opportunity to engage in limited discovery, and to introduce witnesses, testimony and other evidence at trial. 29 C.F.R. §1978.106; 29 C.F.R. Part 18. At some point, the record in the case is closed; and the ALJ analyzes the evidence, makes credibility determinations and findings of fact, and issues a recommended decision and order. 29 C.F.R. §1978.109. Recommended decisions issued by administrative law judges under the STAA are reviewed automatically by this Board.[1/] 29 C.F.R. §1978.109(a) (1996). However, under the regulations implementing the STAA, the scope of this Board's review is limited. Specifically, the regulations provide that "[t]he findings of the administrative law judge with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive." 29 C.F.R. §1978.109(c)(3).

We have reviewed the record and the parties' submissions in this matter in detail.[2/] As we discuss below, we find that the ALJ's fact findings are supported by substantial evidence in the record, and that the ALJ's legal analysis is sound. We therefore concur with the recommended decision and order, and dismiss the complaints.

In reaching this result, we observe that it is clear from the record that Somerson (who represented himself and Buhnerkemper) is zealous in his concern for driver fatigue and motor vehicle safety, and we question neither the sincerity of his concern nor the importance of these

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[1/] Board decisions are subject to appeal to a United States Court of Appeals. 49 U.S.C.A. §31105(c); 29 C.F.R. §1978.110(a).

[2/] On October 28, 1998, the Board issued a briefing order in this case, allowing Complainants and Respondents to file briefs up to 30 pages in length supporting their positions. Yellow Freight filed such a brief. Complainant Somerson, who has appeared in these proceedings *pro se* and on behalf of Complainant Buhnerkemper, filed several letters.

issues to public safety. However, success in a whistleblower complaint requires more than passionate argument. Even the most forceful argument will collapse if the complainant fails to develop strong factual underpinnings; assertion, conjecture and argument, by themselves, are insufficient. Although the Complainants have raised interesting and novel theories with regard to the issue of driver fatigue, it ultimately is their failure to introduce sufficient *facts* to prove their individual claims that compels us to reject their complaints.

BACKGROUND

I. Facts

The facts underlying this case are set forth in considerable detail in the R. D. and O. at 4-24. Summarized in relevant part, they are as follows: Somerson and Buhnerkemper worked for Yellow Freight as casual over-the-road drivers out of the Jacksonville, Florida, terminal. "Casual" drivers are workers who may be called for driving assignments after the list of regular bid drivers and extra-board drivers has been exhausted. Casual drivers are not covered by the collective bargaining agreement and do not receive fringe benefits. They are expected to be on call so that they may take dispatches at peak periods when no regular drivers are available. They are given assignments on an as-needed basis to supplement the regular workforce. T. (Transcript of hearing) 598.

DOT rules mandate that drivers cannot be on duty for more than 15 hours (and cannot drive for more than 10 hours) without having had at least eight consecutive hours for rest. Yellow Freight used a "call block" system to insure that casual drivers had an opportunity to rest before being called for another dispatch. Under this dispatch system, the day was divided into eight three-hour "call block" segments at 12:00, 3:00, 6:00, and 9:00 AM and PM. When drivers returned from a delivery, they would inform the dispatcher of their next available call block after eight hours rest time. T. 881. Casual drivers knew that they could be called during the next call block after their rest period. T. 882-85.[3/]

Under company procedures, a casual driver had a responsibility to be by the telephone and available to accept a dispatch during the first call block following his or her rest period. If a driver was unable to accept a dispatch during that call block because of fatigue or illness, it was the driver's responsibility to notify the dispatcher of his/her unavailability *before* the beginning of that call block. Yellow Freight required such prior notification to prevent drivers from "playing the board" in order to get a particular dispatch. R. D. and O. at 11-12; T. 882-891, 905.

[3/] For example, if a driver returned from a trip at 6 AM, having expended his on-duty hours, his rest period would last until 2 PM. He could not be called for a dispatch until the next call block, *i.e.*, 3 PM to 6 PM. In addition to the eight hour rest period, plus any additional time until the next call block period began, drivers were given two hours from the time of the call to report for dispatch. Therefore, our hypothetical driver, if called exactly at 3 PM (the beginning of his next available call block), would not have to arrive at the terminal until 5 PM, eleven hours after the end of his previous run. *See* T. 601-602; 882-85. If the next driver returned at 6:05 AM, his next call block also would be 3 PM, but he would be placed on the bottom of the dispatch board behind the first driver.

Although a Yellow Freight casual driver was required to be ready and available to accept an assignment during this first call block period, the policy with regard to subsequent call block periods was different. If a driver was not called during the first call block after the eight hour rest period, the driver was *not* obligated to answer the company's telephone call. Thus, the driver could engage in other activities during that time, such as shopping for groceries, napping, visiting with family and friends, etc. However, Yellow Freight policies mandated that if the dispatcher phoned the driver and the driver answered the call, the driver was obligated to accept the dispatch. *Id.* The requirement that drivers accept dispatch was tempered by the company's recognition of potential driver fatigue problems. John Olover, one of the line haul managers, testified that Yellow Freight never asked a driver to run if the driver was fatigued. T. 889.

Somerson and Buhnerkemper complained that Yellow Freight's system of assigning casual drivers often put them in the position of driving while fatigued because they could not maintain their regular sleep patterns. Somerson asserted that he frequently refused dispatch calls because he was fatigued or because he anticipated becoming fatigued during the dispatched run. T. 927-28. He also refused dispatches because he was ill, had medical or dental appointments or had car trouble. T. 889, 896. Somerson also complained about being required to make a trip called a "double Orlando," *i.e.*, driving back and forth from Jacksonville to Orlando, Florida twice. T. 200, 205. He claimed this assignment could not be accomplished within ten hours, the maximum continuous driving time permitted under the Federal Motor Carrier Safety Regulations. 49 C.F.R. §395.3.

Complainants alleged that Yellow Freight sabotaged their tractor trailers in retaliation for their protected activity. Somerson claimed that Yellow Freight deliberately overloaded a double trailer which he was pulling on February 10, 1996, causing it to flip over as he drove onto a highway entrance ramp. Both Complainants alleged that, on February 5, 1997, Yellow Freight sabotaged their tractor-trailers by cutting part way through the brake air lines, which caused the brakes to engage while on route when the brake air lines leaked.[4/] R. D. and O. at 6. In addition, Somerson alleged that Yellow Freight retaliated against him by assigning him to drive a double tractor-trailer with the pintle hook in the raised, unlocked position. *Id.* at 7.

Both Complainants also alleged that Yellow Freight retaliated against them by failing to select them for regular driver positions in the fall of 1996. R. D. and O. at 7. Complainants believed that Yellow Freight's normal policy was to make such selections from among the casual drivers based on seniority, and that the Complainants would have been selected for the open positions if seniority had controlled.

Yellow Freight introduced evidence to counter the allegations of sabotage. With regard to the method of selecting from among the candidates for regular driver positions, Yellow Freight's line haul manager testified that seniority was not a factor. T. 931. Rather, the manager relied on the

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[4/] In tractor-trailers, maintaining constant air pressure in the brake air line holds the brakes in the disengaged position; if pressure is reduced significantly or lost, the brakes will engage. T. 810-11.

driver's driving history, the recommendations of the dispatchers and coordinators, the driver's age,[5/] and the recommendations of the union when selecting regular drivers. T. 930-932.

[5/] The line haul manager found older drivers more mature and reliable.

II. Regulatory overview

The primary agency responsible for regulating trucking industry practices under the STAA is the Department of Transportation (DOT). *See* 49 U.S.C.A. §§31136, 31502. Several DOT trucking regulations are implicated in some manner in the complaints submitted by Somerson and Buhnerkemper. We review them briefly in order to provide an appropriate context for the issues presented in these complaints.

Part 392 of Title 49 of the Code of Federal Regulations, Driving of Commercial Motor Vehicles, includes diverse rules dealing generally with safety. One is the DOT's "fatigue" rule, which provides in pertinent part:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. §392.3 (1997). Other DOT safety regulations found in Part 392 mandate that a driver cannot be required to operate a commercial motor vehicle unless the driver is satisfied that the vehicle's brakes, steering, lights/reflectors, tires, horn, wipers, mirrors and coupling devices are in good working order. 49 C.F.R. §392.7. In addition, the DOT rules provide that truck cargo must be properly distributed in the equipment, and a driver is entitled to assure himself/herself that the load is properly distributed. 49 C.F.R. §392.9(a), (b)(1).

The Department of Transportation also regulates the maximum number of hours that drivers may work, under rules found at 49 C.F.R. Part 395, Hours of Service of Drivers. As a general rule, a driver can be "on duty" (*i.e.*, waiting to drive, inspecting the vehicle, loading/unloading, driving, waiting for vehicle repair, etc.) no more than 15 hours after an eight hour rest period, and may drive no more than 10 hours during the on duty period. 49 C.F.R. §395.3(a). In addition, depending on the type of motor vehicle carrier, a driver may not be on duty more than 60 hours in any seven consecutive days, or 70 hours in any eight consecutive days. 49 C.F.R. §395.3(b).

In contrast to the broad policy role assigned to the Secretary of Transportation under the STAA, the statute assigns a limited role to the Secretary of Labor by delegating enforcement authority of the STAA's employee protection provisions to her. These employee protection provisions of the STAA provide, in pertinent part:

> (a) Prohibitions. (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, or another person at the employee's request, 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). Thus, under the employee protection provisions of the STAA enforced by the Secretary of Labor, it is unlawful for an employer to impose an adverse action on an employee because the employee has complained or raised concerns about possible violations of these DOT regulations. 49 U.S.C.A. § 31105(a)(1)(A). *See, e.g. Reemsnyder v. Mayflower Transit, Inc.*, Case No. 93-STA-4, Dec. and Ord. on Recon., May 19, 1994, slip op. at 6-7 and cases there cited. Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to work because operating the vehicle violates DOT regulations or because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C.A. §31105(a)(1)(B). Employees who believe that their rights under the statute have been violated must file their complaints with the Labor Department within 180 days of the alleged violation. 49 U.S.C.A. §31105(b); 29 C.F.R. §1978.102.

III. The ALJ's Recommended Decision

Yellow Freight stipulated that Somerson and Buhnerkemper engaged in certain activities protected under the STAA (*i.e.*, by protesting that the on-call system often required casual drivers to drive when fatigued, and by filing previous STAA complaints), and also stipulated that it was aware of that protected activity. R. D. and O. at 25. Thus, the focus of the dispute before the ALJ was not whether the Complainants had engaged in protected activity, but (a) whether Yellow Freight had subjected Complainants to adverse action, and (b) if so, whether Yellow Freight was motivated to take such adverse action because of Complainants' protected activity.

The ALJ found that some of the instances of adverse action alleged by Somerson and Buhnerkemper had not been proven. The ALJ found there was no support in the record (other than Somerson's conjecture) that the February 1996 trailer tip-over accident was caused by overloading, deliberate or not. R. D. and O. at 26. Also, crediting the testimony of the independent mechanics who repaired the brake air lines stating that the leaks were caused by normal wear and tear, the ALJ found that those incidents were not the result of sabotage by Yellow Freight, and that no adverse action had occurred. R. D. and O. at 26.

In contrast, the ALJ found that leaving the pintle hook unlatched and failing to select Complainants for full time regular driver positions were adverse actions. He held that the proximity in time between these actions and the Complainants' protected activity was sufficient to raise an

inference of retaliation. R. D. and O. at 27-28. However, the ALJ concluded that Complainants did not carry their burden of proving that Yellow Freight's articulated reasons for these actions were pretextual. With regard to the pintle hook incident, the ALJ found there was no evidence that leaving the pintle hook unlatched was a deliberate attempt by Yellow Freight to sabotage Somerson's tractor-trailer. R. D. and O. at 30. In connection with the hiring of the three regular drivers, the ALJ found that Complainants were not selected for any of the three regular driver positions because the casual driver candidates whom Yellow Freight did select were better qualified than Somerson and Buhnerkemper. Based on the overall record before him, the ALJ held that seniority played no role in the selections. *Id.* at 30-31. The ALJ explicitly credited the testimony of the line haul manager over that of Buhnerkemper that the manager never told Buhnerkemper that seniority among the pool of casual drivers was the decisive factor in selections for regular driver positions. R. D. and O. at 32. The ALJ also held that, to the extent Somerson's record of absences was caused by fatigue, "which he attributes to the very nature of the job . . . ,"

> [i]n that sense, he is in essence asserting that implementation of the casual driver position constitutes a veritable *per se* violation of the STAA, a finding not previously made by the Secretary and unsupported by case law. The relationship between Mr. Somerson's fatigue and his failure to achieve regular driver status does not reflect the presence of a motive to discriminate on Respondent's part in this instance.

Id. at 32.

For all of the foregoing reasons, the ALJ recommended that the case be dismissed. R. D. and O. at 33.

DISCUSSION

We decide this case with two principles in mind. First, in order to prevail, Complainants must prove that they engaged in protected activity, and that they were subjected to adverse employment action because of that protected activity. *See Clean Harbors Environmental Services, Inc. v. Herman,* 1998 WL 293060, *9 (1st Cir. June 10, 1998). *See also, Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987). As we have held repeatedly, in analyzing the evidence presented in a case such as this that has been fully tried on the merits, it is not necessary to determine, as the ALJ did (*see* R. D. and O. at 25-32), whether Complainants established a *prima facie* case, and whether Respondents rebutted that showing. Once Respondent has produced evidence in an attempt to show that complainants were subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether complainants presented a *prima facie* case. Instead the relevant inquiry is whether complainants prevailed by a preponderance of the evidence on the ultimate question of liability. If they did not, it matters not at all whether they presented a *prima facie* case. If they did, whether they presented a *prima facie* case is irrelevant. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Final Dec. and Ord., Feb. 15, 1995, slip op. at 11 n.9, *aff'd sub nom. Carroll v. U.S. Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996); *see U.S.P.S. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 (1983).

Second, as noted above, the standard of review that we must follow, established in accordance with the STAA regulations, requires that we accept as conclusive the ALJ's findings of fact if they are "supported by substantial evidence on the record considered as a whole. . . ." 29 C.F.R. §1978.109(c)(3) (1998). With these standards in mind, we conclude that Complainants have not proven they were retaliated against in violation of the STAA.

I. Alleged retaliation for protected activities.

There is no dispute that Complainants engaged in protected activity when they complained that the system of assigning casual drivers required them to drive when fatigued, and when they filed previous STAA complaints. In addition, there is no dispute that Yellow Freight knew of this protected activity. R. D. and O. at 25.

Complainants alleged that Yellow Freight retaliated against them for this protected activity by: 1) tampering with or sabotaging their trucks in several ways; and 2) failing to select them for positions as regular over-the-road drivers. We must determine whether Somerson and Buhnerkemper have proven, by a preponderance of the evidence, that the alleged actions attributed to Yellow Freight were effected in retaliation for the protected activity. We discuss the alleged discriminatory acts in turn.

A) Alleged sabotage.

Complainant Somerson alleged three acts of sabotage: that he was assigned an overloaded truck to drive in 1996;[6/] that he was assigned to haul a double trailer with the pintle hook raised or unlatched; and that the brake air line was cut on another truck so that it would fail while he was driving, causing the brakes to lock. Buhnerkemper alleged at the hearing that the brake line on his truck also was cut.

In order to prevail on the sabotage claims Complainants had to prove, first, that Yellow Freight deliberately intended to cut the brake air lines, to overload Somerson's trailer, and/or to leave the pintle hook in an elevated position; and second, that Yellow Freight engaged in this sabotage in order to retaliate against the Complainants for engaging in protected activity under the STAA. However, other than Somerson's accusation and supposition, there simply is nothing in the record to show that anyone acting at Yellow Freight's direction deliberately overloaded his trailer, provided him with a truck with a raised pintle hook, or cut the air line on his or on Buhnerkemper's tractor-trailers. Thus, Complainants failed to establish the first principle; therefore they cannot have proven the second.

With regard to the tip-over accident, Somerson admitted at the hearing he had no proof that Respondent deliberately overloaded his trailer, causing the roll-over. *See* T. 94, 328, 417.

[6/] Yellow Freight argued before the ALJ and before us (Respondent Yellow Freight System, Inc.'s Brief to the Administrative Review Board in Support of Administrative Law Judge's Recommended Decision and Order (Resp. Br.) at 3 n.2) that this allegation had been the subject of a previous STAA complaint filed by Somerson. Yellow Freight argues that this allegation therefore is time barred. We agree. However, even assuming that this allegation were not time barred, or barred on grounds of estoppel, we would rule against Somerson on the merits.

Moreover, the accident report on the overturned trailer does not state that it was overloaded. Complainant's Exhibit (C)-3.[7/]

With regard to the pintle hook matter, Somerson's bare allegation that someone at Yellow Freight's direction left the hook unlatched is insufficient to prove that Yellow Freight deliberately tampered with the tractor-trailer in retaliation for Somerson's protected activity. As the ALJ found:

> The testimony of Messrs. Chadwick and Barbee support Respondent's position that if indeed the pindle [sic] hook was open when Mr. Somerson received the truck, it was the result of employee error. Their bases included their experience (Mr. Chadwick stated that such assemblies had been left in the upright position previously) and knowledge of driving procedure (the pre-trip inspection is required, and would have revealed the easily-discerned open assembly position, thereby making it an unlikely form of sabotage).

R. D. and O. at 29.

Evidence in support of the sabotaged brake line allegation also is lacking. Somerson admitted at the hearing he had no proof that Yellow Freight cut his or Buhnerkemper's brake air line. *See, e.g.,* T. 83-84, 101-102, 235. Both of the independent mechanics who repaired the defective air lines testified that the holes in the air lines appeared to have been caused by normal wear and tear. T. 1015-16; 1057. Finally, Yellow Freight also conducted an internal investigation of the leaks in the air lines and concluded they were caused by normal wear and tear. T. 638.

In order to draw an inference of tampering or sabotage on the record developed by the parties before the ALJ, we would be required to draw several improbable inferences. For example, we would be required to infer that Yellow Freight had no concern for injury to the public, for damage to the freight being carried or for delay in delivery. In the case of the allegedly cut air lines, we also would need to infer that Yellow Freight officials cut the air lines on the tractor-trailers assigned to Complainants on the day in question despite the fact that they had no way to predict when the air lines might fail, or who might be driving the trucks when the brakes failed. *See* T. 861-62. These inferences are implausible, and are not supported by any record evidence. Since Complainants have the burden of proving that retaliation was a motivating factor in Yellow Freight's actions, we agree with the ALJ that they have not carried their burden on the sabotage claims.

B) Failure to select as regular driver.

Complainants contended before the ALJ that Yellow Freight retaliated against them by failing to select them as regular drivers in 1996. Both Somerson and Buhnerkemper assert that Yellow Freight by-passed its normal criteria when selecting the regular drivers, and therefore failed to select them, in retaliation for their protected activity. In addition, Complainant Somerson alleges that Yellow Freight's failure to select him to become a regular driver was in retaliation for his

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[7/] The accident report indicated "possible weight shift of load in 2nd trailer" as a contributing cause. C-3.

general complaints about driver fatigue among the casual drivers because of the dispatch system, and his specific refusals to work when he was fatigued. We address each of these issues.

i. Selection criteria issue

In support of their contention that Yellow Freight by-passed its normal selection criteria to deny them selection as regular drivers, Somerson and Buhnerkemper testified that it was their understanding that it had been Yellow Freight's practice to use length of service with Yellow Freight as the chief criterion for selecting regular drivers from among the pool of casual drivers, and that they had more years of service as casual drivers with Yellow Freight than the three drivers selected by the company. The ALJ rejected this contention for several reasons. His finding is supported by substantial evidence in the record, and we concur.

First, there is conclusive evidence that Yellow Freight did not rely upon length of service in selecting regular drivers from among the pool of casuals. The ALJ credited the testimony of Charles Chadwick and John Olover, the line haul managers during the time Complainants worked for Yellow Freight, who both testified that seniority among the casual drivers was not a factor in the selection of regular drivers. T. 619-624, 931. Record evidence supports their testimony. See Respondent's Exhibit (R) -11. Although the line haul managers wanted to hire regular drivers who had worked as casual drivers for Yellow Freight for a period of time so that they would be familiar with them, *length of employment* with Yellow Freight among casual drivers played no role in the selection of regular drivers. T. 619-624, 931.

Second, the ALJ found, and the record supports, that Yellow Freight considered many factors in selecting regular drivers from among the casual driver pool, including the dispatchers' recommendations, union referrals,[8/] co-worker compatibility, age and driving history:

> Mr. Olover's testimony reflects uncontestedly that the dispatchers did not forward either driver's name for Mr. Olover's consideration. Moreover, each of those hired had approximately twenty-five, thirty-four and thirteen years of total professional driving experience, respectively, as compared to Mr. Somerson's total of eight and a half years and Mr. Buhnerkemper's eleven and one quarter years of such experience.[9/] . . . Mr. Wilson and Mr. Kennedy [two of the drivers selected] were each referred by the Teamsters Union, a criterion which was admitted by Mr. Somerson and an assertion which was uncontested by Complainants. . . . Further, Mr. Olover attested in uncontroverted fashion that Mr. Kelly was recommended by

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8/ The Teamsters Union would recommend drivers who had a significant number of years credited toward a Teamsters' pension and who had good driving records. Yellow Freight was not obligated to hire these workers, but often did. T. 625, 932-33. Consistent with this general practice, two of the three casual drivers hired as regular drivers in the fall of 1996 had a significant number of years credited toward a Teamsters' pension and were recommended by the union.

9/ As Yellow Freight has noted, however, Somerson had many gaps in his employment as a truck driver. Res. Br. at 9; see R-2.

> dispatchers of Yellow Freight, and that he was older than either complainant. . . . Additionally, Mr. Somerson's working relationship with Yellow employees did not appear positive, as demonstrated by his altercations with Mr. Huntsinger and Mr. Collins.[10/]

R. D. and O. at 31, citations omitted.

These factors, relied upon by Yellow Freight in selecting regular drivers, were not used to retaliate against the Complainants. The practice of selecting regular drivers from among casual drivers without regard to relative tenure with Yellow Freight had been in existence before Complainants began to work at the Jacksonville terminal. T. 621-22; R-11 (seniority list of regular and casual drivers). This procedure therefore could not have been instituted by Yellow Freight in order to prevent Somerson and Buhnerkemper from being selected.

ii. Driver fatigue issue.

Olover (whose testimony was credited by the ALJ) also testified that Somerson was not considered for a position as a regular driver because his attendance was poor. Somerson frequently was not available because of dental appointments, doctor appointments, car trouble, or fatigue. T. 896, 991, 994.

In opposition to the company's contention, Somerson appears to argue that the failure to select him because of his poor job attendance amounts to adverse action, taken because he (Somerson) complained about the on-call system and refused to drive when fatigued. *See, e.g.,* R. D. and O. at 30.

The Federal Motor Carrier Safety regulations prohibit operation of a vehicle when "the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle." 49 C.F.R. §392.3 (the "fatigue rule"). Driver fatigue is a serious issue. *See Smith v. Yellow Freight System, Inc.,* Case No. 91-STA-45, Sec. Dec. and Ord., March 10, 1993, slip op. at 14. That is the reason why DOT has regulated drivers' hours, 49 C.F.R. §395.3, and in addition has specifically prohibited motor carriers from requiring or permitting a driver whose ability or alertness is seriously impaired by fatigue to operate a motor vehicle. 49 C.F.R. §392.3. Driver fatigue has been addressed by the Secretary and the ARB in previous decisions.[11/]

[10/] Yellow Freight viewed Somerson as disruptive in the workplace. The record contains evidence regarding two disruptive incidents: a co-worker wrote to Yellow Freight complaining that Somerson had made threats against him and his family (R-21); and the terminal manager in Ft. Myers, Fla. reported to Olover an argument he had with Somerson. R-22. See also T. 1002.

[11/] The Secretary and the Board often have found in favor of a STAA complainant who was subject to retaliation for refusing to drive because of fatigue or illness: *Self v. Carolina Freight Carriers Corp.*, Case No. 89-STA-9, Sec. Dec. and Ord., January 12, 1990; *Earwood v. D.T.X.* (continued...)

The "fatigue rule" is implicated in Somerson's case in three ways. First, Somerson alleges that his *complaints* about Yellow Freight's dispatch system for the casual drivers, which he characterized as requiring the casual drivers to be on-call 24 hours a day, seven days a week, were one basis for his failure to be selected as a regular driver.[12/] Second, Somerson claims that he was

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[11/](...continued)
Corp., Case No. 88-STA-21, Sec. Dec. and Ord. of Remand, Mar. 8, 1991; *Asst. Sec. and Curless v. Thomas Sysco Food Service*, Case No. 91-STA-12, Sec. Final Dec. and Ord., Sept. 3, 1991, *rem. with instr. to vacate as moot sub nom. Thomas Sysco Food Services v. Martin*, 983 F.2d 60 (6th Cir. 1993); *Self v. Carolina Freight Carriers Corp.*, Case No. 91-STA-25, Sec. Final Dec. and Ord., Aug. 6, 1992; *Hornbuckle v. Yellow Freight System, Inc.*, Case No. 92-STA-9, Sec. Dec. and Ord., Dec. 23, 1992, *aff'd sub nom. Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980 (4th Cir. 1993); *Asst. Secretary of Labor and Killcrease v. S. & S. Sand and Gravel, Inc.*, Case No. 92-STA-30, Sec. Final Dec. and Ord., Feb. 2, 1993; *Smith v. Yellow Freight System, Inc.*, Case No. 91-STA-45, Sec. Dec. and Ord., Mar. 10, 1993, *aff'd sub nom. Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994); *Spearman v. Roadway Express, Inc.*, Case No. 92-STA-1, Sec. Final Dec. and Ord., June 30, 1993, *aff'd sub nom. Roadway Express, Inc. v. Reich,* No. 93-3787 (6th Cir. Aug. 22, 1994) (unpublished); *Turgeon v. Maine Beverage Container Services, Inc.*, Case No. 93-STA-11, Sec. Final Dec. and Ord., Nov. 30, 1993; *Polger v. Florida Stage Lines*, Case No. 94-STA-46, Sec. Final Dec. and Ord., Apr. 18, 1995, *aff'd sub nom. Florida State Lines v. Reich*, 100 F.3d 969 (table)(11th Cir. 1996)(unpublished); *Asst. Sec. and Ciotti v. Sysco Foods of Philadelphia*, ARB Case No. 98-103, ALJ Case No. 97-STA-30, ARB Final Dec. and Ord., July 8, 1998.

Most of the cases in which the Secretary or the Board has ruled against a complainant asserting a fatigue or illness retaliation claim have involved drivers who refused to work *in anticipation of becoming* fatigued, without evidence to support that anticipation. *See D'Agostino v. B&Q Distribution Service, Inc.*, Case. No. 88-STA-11, Sec. Final Dec. and Ord., May 10, 1989; *Brandt v. United Parcel Service*, Case No. 95-STA-26, Sec. Final Dec. and Ord., Oct. 26, 1995; *Cortes v. Lucky Stores., Inc.*, ARB Case No. 98-019, ALJ Case No. 96-STA-30, ARB Final Dec. and Ord., Feb. 27, 1998; *Byrd v. Consolidated Motor Freight*, ARB Case No. 98-064, ALJ Case. No. 97-STA-9, ARB Final Dec. and Ord., May 5, 1998, *appeal filed,* May 27, 1998 (11th Cir.).

The remainder of the fatigue cases turn on their particular facts. *See Brothers v. Liquid Transporters, Inc.*, Case No. 89-STA-1, Sec. Final Dec. and Ord., Feb. 27, 1990 (complainant's failure to follow order to start a sleeping break led to termination); *Palazzolo v. PST Vans., Inc.*, Case No. 92-STA-23, Sec. Dec. and Ord., Mar. 10, 1993 (complainant failed to prove that employer was aware that he had refused to drive in part due to pain and medication); *Asst. Sec. and Porter v. Greyhound Bus Lines*, ARB Case No. 98-116, ALJ Case No. 96-STA-23, ARB Final Dec. and Ord., June 12, 1998 (not reasonable that, after three days off, complainant would be too fatigued to drive safely).

[12/] Somerson's characterization of the on-call system is in error. As described above, under the rest time and call block system drivers were not literally on call 24 hours a day, seven days a week. They always were allowed their rest period after completing their on duty time, plus two hours time
(continued...)

not selected for a regular driver position because of his *refusal to accept dispatches* due to fatigue. The call block system, Somerson claims, interfered with his regular sleep patterns and frequently caused him to be fatigued when called for dispatch. Third, Somerson asserts that Yellow Freight's dispatch policy created a chronic fatigue problem for which he was denied a regular driver position. As the ALJ found:

> . . . Mr. Olover persuasively presented testimony that while Mr. Somerson's driving record and skills were not lacking . . . , he had a *consistent pattern* of poor attendance. . . . Mr. Somerson did not contest this characterization. . . . Rather, he merely asserted that his absences were due to fatigue; indeed he agreed that he had a history with the company of being fatigued when called. . . . Throughout the hearing he maintained the position that the casual driving position was inherently at odds with natural sleep patterns in general, and with his sleep patterns in particular.

R. D. and O. at 31-32, citations omitted, emphasis in original.

With regard to Somerson's first fatigue-related issue (*i.e.*, that Yellow Freight failed to select him as a regular driver because of his complaints about the dispatch system), there simply is no evidence in the record from which we could conclude that Yellow Freight took into account Somerson's complaints about the call block system when determining not to select him for a regular driver position. Where the record is devoid of evidence to support a charge of discrimination, the complainant has failed to meet his burden of proof and the charge fails.

Our analysis of Somerson's second and third asserted bases for retaliation, *i.e.* Yellow Freight's failure to select Somerson based, in part, on his poor record of availability -- which Somerson asserts was the result of his refusal to drive because of fatigue -- is more complicated.

A driver's refusal to work because of fatigue may be determined to be protected activity either under STAA Section 31105(a)(1)(B)(i) (operation violates a federal regulation, *e.g.* the fatigue regulation at 49 C.F.R. §392.3) or Section 31105(a)(1)(B)(ii) (employee has a reasonable apprehension of serious injury because of the unsafe condition of a vehicle).[13/] In order to prove a

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[12/](...continued)
to report after being called. *See* n. 3, *supra*. If a casual driver was ill or fatigued he or she could so inform the dispatcher before the first call block and the driver would be dropped to the bottom of the board. When this happened, the driver would not be called again until all other drivers ahead of him or her on the board had been dispatched. Moreover, casual drivers were required to be available only during the first call block after their rest period; if they were not dispatched by Yellow Freight during that limited period, the company did not require them to remain available continuously. *See* discussion at 4, *supra.*

[13/] In a line of cases beginning with *Robinson v. Duff Truck Line, Inc.,* the Secretary and the ARB have construed what is now subsection (ii) to apply to unsafe conditions such as bad weather and fatigue, as well as to unsafe vehicles. *Robinson v. Duff Truck Line, Inc*., Case No. 86-STA-3, (continued...)

fatigue related claim under subsection (i), a complainant must prove that operation of the vehicle would in fact violate the specific requirements of the fatigue rule. As we held in *Cortes v. Lucky Stores, Inc.*, slip op. at 4 (*quoting Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993)):

> To establish a violation of the provision at Subsection (B)(i) of the STAA, a complainant "must show that the operation [of a motor 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."

A violation of this provision is established where it is proven that the driver's "ability or alertness was so impaired as to make vehicle operation unsafe." *Smith v. Specialized Transportation Services*, Case No. 91-STA-22, Sec. Final Dec and Ord., Apr. 30, 1992, slip op. at 6.

The protections under subsection (ii), which are applicable whenever there is a serious safety issue, are considerably broader and are applicable even when the DOT safety regulations do not directly and specifically address the safety concern. However, in order to prove a fatigue related claim under subsection (ii), a complainant must prove that "a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he drove."[14/] *Byrd v. Consolidated Motor Freight,* ARB Case No. 98-064, ALJ Case. No. 97-STA-9, ARB Final Dec. and Ord., May 5, 1998, *appeal filed,* May 27, 1998 (11th Cir.).

Under this standard, a driver's claim of fatigue, standing in isolation and without context, is insufficient for protection under the STAA to attach. Instead, the Secretary, and now the Board, examines the facts surrounding each incident to determine if a reasonable person in the circumstances would have been justified in refusing an assignment due to fatigue. In practice, most drivers have found little difficulty meeting this standard when the circumstances of the driver's refusal to work point clearly to the immediate cause of the driver's fatigue concerns.

[13/](...continued)
Sec. Final Dec. and Ord., March 6, 1987, *aff'd on other grounds sub nom. Duff Truck Line, Inc. v. Brock*, 848 F.2d 189 (Table)(6th Cir. 1988)(bad weather). *See Self v. Carolina Freight Carriers Corp.,* Case No. 89-STA-9, Sec. Final Dec. and Ord., Jan. 12, 1990, slip op. at 9 (fatigue); *Byrd v. Consolidated Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, ARB Final Dec. and Ord., May 5, 1998 (fatigue).

[14/] The STAA defines reasonable apprehension:

> Under paragraph (1)(B)(ii) of this subsection, 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 unsafe condition establishes a real danger of accident, injury, or serious impairment to health.

49 U.S.C. 31105(a)(2).

For example, in *Polger v. Florida Stage Lines*, Case No. 94-STA-0046, Sec'y. Dec. Apr. 18, 1995, slip op. at 3-4, the Secretary held that Complainant's refusal to accept an assignment that would have caused him to exceed regulatory maximum driving hours per week supported a claim of fatigue. In *Hornbuckle v. Yellow Freight System, Inc.*, Case No. 92-STA-9, Sec. Dec. and Ord., Dec. 23, 1992, *aff'd sub nom. Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980 (4th Cir. 1993), Hornbuckle presented evidence regarding the specific circumstances that caused him to be late on a delivery because he took a nap. Those facts enabled the Secretary to conclude that Hornbuckle's nap was a protected refusal to drive, and therefore protected under the STAA.

Similarly, in *Turgeon v. Maine Beverage Container Services, Inc.*, Case No. 93-STA-11, Sec. Final Dec. and Ord., Nov. 30, 1993, the Complainant produced evidence which enabled the Secretary to reconstruct Turgeon's hours of work immediately proceeding his refusal to drive. Based upon this specific evidence, the Secretary held that Turgeon reasonably was fatigued at the time of his refusal. See also *Self v. Carolina Freight Carriers Corp.*, Case No. 91-STA-25, Sec. Final Dec. and Ord., Aug. 6, 1992; *Smith v. Yellow Freight System, Inc.*, Case No. 91-STA-45, Sec. Dec. and Ord., Mar. 10, 1993, *aff'd sub nom. Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994).

On the other hand, in *Porter v. Greyhound Bus Lines*, ARB Case No. 98-116, ALJ Case No. 96-STA-23, ARB Dec. Jun. 12, 1998, slip op. at 2-3 , the Board deferred to an arbitrator's decision that Greyhound did not violate the STAA when it discharged Porter for refusing a driving assignment after three days' rest. The Board rejected Porter's claim that telling the dispatcher he was "sleepy" when called at 2 AM was sufficient, by itself, to show either an actual violation of the fatigue rule or reasonable apprehension of serious injury due to fatigue. In *Cortes v. Lucky Stores., Inc.*, ARB Case No. 98-019, ALJ Case No. 96-STA-30, ARB Final Dec. and Ord., Feb. 27, 1998, the complainant announced, 14 hours prior to his usual start time that he would be fatigued, because "he knew his body and he knew he was going to be fatigued. . . ." In concluding that the complainant's fatigue claim was not protected, the Board looked to the fact that "Cortes could have, if necessary, slept for some 14 hours prior to taking" his assignment, as well as the fact that the assignment itself would not have caused him to exceed the total duty hours allowed for that eight day period. The Board found that a reasonable person in the same circumstances as Cortes would not conclude that there was a reasonable likelihood of serious injury if he were to drive. *Cortes*, slip op. at 4-5. *See also Byrd v. Consolidated Motor Freight*, ARB Case No. 98-064, ALJ Case. No. 97-STA-9, ARB Final Dec. and Ord., May 5, 1998, *appeal filed,* May 27, 1998 (11th Cir.).

Somerson's allegations here go beyond those of a typical fatigue case, however. We understand Somerson's argument to be that Yellow Freight's requirement that a casual driver be available for dispatch during the first call block after the completion of the eight hour mandated rest period *inevitably* resulted in a situation in which the driver was pressured to drive in a dangerously fatigued condition. Because Somerson refused dispatches when he felt himself to be too fatigued to drive safely, he unavoidably built a record of repeated refusals to drive -- which Yellow Freight then held against him when it was choosing regular drivers. Thus, Somerson argues that because his refusals were prompted by his assertions of fatigue, Yellow Freight violated the STAA when it took his frequent refusals to accept dispatches into account when failing to select him for the regular driver position.

The issue, as Somerson has cast it, is a complex and difficult one. However, even assuming the validity of Somerson's theory, he would still be required to prove that the work refusals which formed the basis of Yellow Freight's determination that he was unreliable, were, in fact, protected by the STAA. If they were not protected refusals to work, then clearly Yellow Freight would have been entitled to take into account Somerson's spotty availability when evaluating him for the regular driver position. As we discuss below, Somerson largely failed to prove that his previous work refusals were protected under the STAA.

There is evidence in the record regarding only four specific instances which even arguably involved an alleged refusal by Somerson to accept a dispatch because of fatigue. One such incident occurred on March 6, 1995. There is no dispute that Somerson refused a dispatch on that date. *See* R. D. and O. at 5, 12. However, there is direct conflict in the record regarding the reason for the refusal that Somerson gave to the dispatcher. Somerson testified that he had told the dispatcher that he was fatigued. R. D. and O. at 5; T. 60-64. However, Yellow Freight produced the original tape recording of the dispatcher's calls for that day.[15/] On that recording "Mr. Somerson was heard to decline a dispatch because he did not 'have any wheels' and believed he was not within the calling period." R. D. and O. at 22-23.[16/]

There is also evidence in the record involving incidents on March 11 and 14, 1995. On March 15, 1995, Yellow Freight notified Somerson that his services would no longer be needed because he had not answered his telephone during his call block on March 11 or March 14. R-3; R. D. and O. at 6, 25. Somerson filed a STAA complaint with the Labor Department, the matter ultimately was settled, and he was placed back on the casual board again. Somerson testified at the hearing that the March 11 call had not come to his home, and that he actually was driving for Yellow Fright on March 14. Somerson's own testimony does not suggest that his failure to take the dispatch on March 11 was prompted by claims of fatigue.

Somerson also testified about a fatigue related refusal which occurred on the day his brake air line broke. The break and resulting repair caused Somerson to be late arriving in Orlando. Because he was fatigued, he demanded that he be allowed to rest. After some delay, Yellow Freight granted his request. R. D. and O. at 6; TR 105.

Finally, there was testimony that on September 11,1995, Somerson marked his "T. card" "Fatigued - will call when rested" when he returned from a dispatch. R. D. and O. at 13; T. 927-929. Olover sent Somerson a letter addressing the incident, and describing Yellow Freight policy, but did not discipline him. R-23.

[15/] Yellow Freight recorded all dispatch calls to assure that dispatches were being given out and accepted according to Yellow Freight's policy and the collective bargaining agreement.

[16/] Somerson initially was told that he was being terminated for this incident. However, after he spoke to higher-level management, Somerson was placed back on the casual board the next day. R. D. and O. at 5.

These four occasions were the only instances specifically referred to by Somerson or Yellow Freight in the record of this case in which Somerson arguably refused to drive on account of fatigue. Evidence regarding all of them is woefully lacking. With regard to the September 11, 1995 incident, for example, there is no evidence, other than Somerson's bald statement on his T. card, from which a trier of fact could conclude that Somerson had a reasonable apprehension that his level of fatigue eight or ten hours hence would have resulted in serious injury. Credible evidence in the record leads to the conclusion that the March 6, 1995 incident was not even related to fatigue; and it is by no means clear what happened on March 11 and 14, 1995. In short, the only incident regarding which a trier of fact would have sufficient evidence to support a conclusion that Somerson had engaged in a fatigue based refusal to drive was Somerson's demand to rest in Orlando after his brakes locked and had to be repaired. Thus, Somerson has failed to prove that his refusals to drive were genuinely fatigue related. The burden of proof in whistleblower cases rests with the complainant; because the record does not provide sufficient facts to support Somerson's complaint, we cannot find that Yellow Freight violated the STAA by considering his work refusals when failing to select him as a regular driver.

Somerson's claim that Yellow Freight discriminated against him based on his chronic fatigue, which he asserts was the result of problems associated with Yellow Freight's on-call system for casual drivers, fails for lack of sufficient persuasive evidence documenting individual instances of fatigue-related work refusals by Somerson. We note, however, that both before the ALJ and this Board Somerson also appears to be arguing a broader concern: that the on-call system, with its uncertain work schedule, is *inherently* prone to create a "chronic fatigue" problem for casual drivers and therefore results in intense (and unlawful) pressure on drivers to work while dangerously tired.

As we noted at the outset of this decision, it is the Department of Transportation that has overall responsibility for establishing regulations governing the trucking industry under the STAA. The Labor Department's role -- important, though limited -- is to insure that drivers can raise questions or file complaints about safety concerns without fear of retaliation by their employer, or can refuse to work under certain situations where public safety is implicated.

Yellow Freight is obligated to comply with the DOT's Hours of Service regulations, which establish maximum hours and minimum rest times for drivers. 49 C.F.R. Part 395. On the record before us, there is no evidence that Yellow Freight's implementation of its dispatch system for casual drivers violates the specific requirements of these regulations; thus, based on the material available to us, the dispatch system appears to comply with applicable DOT standards.

To the extent that Somerson is arguing *generally* that Yellow Freight's casual driver dispatch system -- which complies with DOT Hours of Work regulations -- nonetheless is deficient because it inevitably results in a violation of a second DOT regulation -- the fatigue rule -- we believe that his challenge is addressed to the wrong forum. Although we do not here decide the question whether a dispatch system that meets DOT standards might nonetheless raise a viable whistleblower complaint as applied in a specific individual case, it is beyond our authority under the STAA to address the kind of wholesale challenge to a facially-lawful dispatch system urged upon us by Somerson. In essence, by raising a general challenge to the dispatch system as creating a problem with chronic driver fatigue, Somerson is arguing that the DOT Hours of Service regulation needs to

be modified to insure that drivers have predictable rest schedules. We express no opinion on the merits of Somerson's argument, but simply note that this Board has neither the authority nor the expertise to address this issue, which is entrusted by statute to the Department of Transportation.

iii. Dual motive analysis.

Even if we were to assume that Somerson's work refusals were protected by the STAA, and those refusals were a motivating factor in Yellow Freight's failure to consider him for a regular driver position, this would not end our analysis. When there are both legitimate and discriminatory reasons for an adverse action, the dual motive analysis applies. *Spearman v. Roadway Express, Inc.,* Case No. 92-STA-1, Sec. Final Dec. and Ord., Jun 30, 1993, slip op. at 4, *aff'd sub nom. Roadway Express, Inc. v. Reich,* 34 F.3d 1068 (6th Cir 1994). Under the dual motive analysis, when the complainant proves that retaliation was a motivating factor in the respondent's action, the burden shifts to the respondent to show that it would have taken the same action against the complainant even in the absence of protected activities. *Asst. Sec. and Chapman v. T. O. Haas Tire Co.,* Case No. 94- STA-2, Sec. Final Dec. and Ord., Aug. 3, 1994, slip op. at 4, *appeal dismissed,* No. 94-3334 (8th Cir. Nov. 1, 1994).

In this case, we would conclude that Yellow Freight would have taken the same action even if Somerson had not engaged in this protected activity. Even excepting the times Somerson refused assignments because of fatigue, he had a poor attendance record, often turning down assignments because he had medical or dental appointments or had car trouble. In addition, compatibility with co-workers was one of Yellow Freight's primary considerations in selecting regular drivers, and Yellow Freight had reason to believe that Somerson was disruptive in the workplace. Furthermore, as discussed above, the three casual drivers chosen to become regular drivers had more experience than Somerson. *See* R-27 (comparison of Complainants' driving experience with that of three drivers selected for regular driver positions). One of the selected drivers was recommended by the dispatchers, and the union requested that the other two be given consideration. For these reasons, we conclude that Yellow Freight has proven that the drivers chosen were better qualified than Somerson under the company's normal selection criteria, and would have been selected even if Somerson had not engaged in protected activity.

iv. Failure to select Buhnerkemper.

We also conclude that Buhnerkemper failed to prove that he was not selected as a regular driver because of protected activity. Buhnerkemper had less driving experience than the drivers selected in the fall of 1996. *See* R-27. Buhnerkemper claimed Chadwick, the line haul manager, told him seniority among casual drivers was the basis for selection as a regular driver. However, Chadwick testified he never made such a statement to Buhnerkemper or Somerson, and the ALJ explicitly found Chadwick's testimony more credible and persuasive than the Complainants'. T. 693-94; R. D. and O. at 32. We find no reason in the record to disturb this finding. *See Van Der Meer v. Western Kentucky Univ.*, ARB Case No.97-078, ALJ Case No.95-ERA-38, ARB Dec. Apr. 20, 1998, slip op. at 2, and cases cited therein (Board defers to credibility determinations of ALJ). As previously discussed, both line haul managers (Chadwick and Olover) testified consistently that length of service with Yellow Freight among casual drivers played no role in their selection as

regular drivers. *See* T. 623-24, 931; R-11. As noted above, the three selected drivers also had been recommended by the dispatchers or the union. We find that Yellow Freight did not violate the STAA when it failed to select Buhnerkemper for a regular driver position because the three drivers selected had greater overall experience and qualifications. Buhnerkemper has not shown that those reasons were pretextual or that retaliation was a motivating factor in the failure to select him.

II. Yellow Freight's alternative ground for dismissal.

Somerson appeared *pro se* in his own case and acted as Buhnerkemper's representative. Yellow Freight urges that the Board dismiss both complaints on the ground that Somerson repeatedly engaged in improper conduct during the hearing before the ALJ. Resp. Br. at 15. We decline to do so.

A review of the hearing transcript leaves little doubt that Somerson engaged in defiant and impertinent conduct that hindered his ability to present a coherent case, and would have resulted in disciplinary action in a federal district court. Several times Somerson refused to answer questions on cross examination and announced he would not permit certain lines of inquiry that clearly were appropriate. *See, e.g.,* T. 249-251. It is also plain that Somerson was loud and abusive toward Yellow Freight's counsel, witnesses, and the ALJ. As the ALJ noted in his opinion:

> At the hearing Mr. Somerson displayed mercurial mood swings, from extreme anger and agitation, to weeping during his questioning of Mrs. Buhnerkemper. Absent from his demeanor was any reasonable attempt to maintain any civility toward anyone who did not readily agree with what he had to say.

R. D. and O. at 2 n.1.

The Rules of Practice and Procedure for hearings before Department of Labor Administrative Law Judges, 29 C.F.R. Part 18 (1998), contain provisions regarding standards of conduct:

> (a) All persons appearing in proceedings before an administrative law judge are expected to act with integrity, and in an ethical manner.
>
> (b) The administrative law judge may exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards or orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications.

29 C.F.R. §18.36. The ALJ clearly would have been acting within his authority under this provision had he barred Somerson from the proceeding. Instead, the ALJ attempted to persuade Somerson to comply with standards of proper conduct and the ALJ's orders. Although the hearing was difficult at best, it is clear that the ALJ allowed the proceeding to continue in order to leave no doubt that the Complainants had their day in court. R. D. and O. at 2 n.1.

We deplore the manner in which Somerson disrupted the hearing, and abused the parties, witnesses, and ALJ in this case. However, we are not in a position to second guess the ALJ's decision regarding how to control his courtroom. Moreover, there is no regulation that would allow this Board to impose the sanction of dismissal for improper conduct, per Yellow Freight's motion. For these reasons we decline to dismiss these cases on the grounds of improper conduct before the ALJ.

CONCLUSION

For the reasons discussed above, the complaints in these cases are **DISMISSED.**

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Acting Member