



In the Matter of:

RICHARD S. SCHULMAN,

ARB CASE NO. 99-015

COMPLAINANT,

ALJ CASE NO. 98-STA-24

v.

DATE: October 18, 1999

**CLEAN HARBORS ENVIRONMENTAL
SERVICES, INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

For the Complainant:

Richard S. Schulman, *Colchester, Connecticut, pro se*

For the Respondent:

Felix J. Springer, Esq., Sarah Moore Fass, Esq.
Day Berry & Howard LLP, Hartford, Connecticut

FINAL DECISION AND ORDER

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. §31105 (1994). Complainant, Richard S. Schulman (Schulman), alleges that Respondent Clean Harbors Environmental Services, Inc. (Clean Harbors) violated the STAA by firing him for citing safety problems with Clean Harbors' equipment and his refusal to operate such equipment.

Following a hearing on the merits, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which he found that Schulman had not proven by a preponderance of the evidence that Clean Harbors violated the employee protection provisions of Section 405 when it discharged him from employment as a truck driver. For the reasons set forth below, we agree with the ALJ's conclusion that Schulman's discharge did not violate the employee protection provision of the STAA.

PROCEDURAL HISTORY

On or about March 18, 1998, Schulman filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that Clean Harbors unlawfully

retaliated against him on February 24, 1998, when he was terminated from his position as a Class A Hazardous Waste Transporter. Complainant's Exhibits (CX) 5 and 6. Upon a determination by the OSHA Area Director that Schulman's complaint did not have merit, Schulman filed objections with the Office of Administrative Law Judges, requesting a hearing on his complaint. ALJ Exhibit 7. A hearing was subsequently held before an ALJ from September 8-10, 1998, in New London, Connecticut. The ALJ issued his R. D. & O. on December 7, 1998, and immediately forwarded the recommended decision to the Administrative Review Board for final disposition.

The Board has jurisdiction to determine this case pursuant to 49 U.S.C. §31105(b)(2)(C) and 29 C.F.R. §1978.109 (1998).

STANDARD OF REVIEW

Pursuant to the regulation implementing the STAA at 29 C.F.R. §1978.109(c)(3), if the factual findings rendered by the ALJ are supported by substantial evidence on the record considered as a whole, the Administrative Review Board is bound by those findings. *BSP Trans., Inc. v. United States Dept. of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991).

Pursuant to the Administrative Procedure Act, in reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C. §557(b), *quoted in Goldstein v. Ebasco Constructors, Inc.*, Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992 (applying analogous employee protection provision under the Energy Reorganization Act, 42 U.S.C. §5851); *see* 29 C.F.R. §1978.109(b). Accordingly, the Board reviews questions of law *de novo*. *See Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express*, 929 F.2d at 1063. *See generally Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-30 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body).

FACTUAL BACKGROUND

The facts underlying this case are set forth in considerable detail by the ALJ in the R. D. & O. at pages 3-12. Summarized in relevant part, they are as follows:

Schulman was hired by Clean Harbors on August 1, 1994, as a Class A Hazardous Waste Transporter. At the time of his employment, Schulman had been hauling chemicals for approximately seven and one-half years. Clean Harbors is an environmental services company that transports, stores and disposes of waste materials. Schulman's job required him to haul waste from Clean Harbors' customers' facilities to other sites for treatment and disposal. Schulman's job

description also required him to regularly inspect his vehicle and report any equipment defects to the company on a Vehicle Inspection Report (VIR).^{1/}

Relevant to the instant case are events that occurred during the early part of 1998, immediately prior to Schulman's discharge from employment, beginning with complaints raised by Schulman to Clean Harbors' District Logistics Coordinator, James Gager, about the length of time which Clean Harbors allowed drivers for Department of Transportation-mandated pre-trip inspections. R. D. & O. at 14. These complaints, the ALJ found, were raised sometime prior to January 26, 1998. *Id.*

Subsequent complaints were also raised by Schulman immediately preceding his discharge. Between February 19, when first informed that he would be getting a second warning for "trailer switching" (*see* discussion *infra*), and the date that he was informed of his termination (February 24), Schulman submitted three VIRs expressing safety-related concerns (*i.e.* broken and/or badly rusted trailer lift gate supports, and a broken back-up alarm). Gager testified that he reviewed Schulman's February 19 VIR some time on Friday, February 20; a VIR submitted by Schulman on February 20 was reviewed the following Monday, February 23; and a VIR submitted on February 23 was reviewed the next day, February 24. CX 11A-D, R. D. & O. at 7-9, 14.

All Clean Harbors' drivers received their daily driving assignments and tractor and trailer assignments from James Gager.^{2/} These assignments were posted on a board in the main office, identifying for each listed driver his destination and assigned truck and trailer. The afternoon of Friday, January 23, 1998, upon reviewing his work assignment for the following Monday, Schulman discovered that he was scheduled to take Trailer 622 to complete his runs on Monday. Schulman testified that he informed John Shambo, Clean Harbors' Customer Service Account Manager, of safety concerns with his assigned trailer, and asked if there was any reason why he could not take another trailer on Monday. Shambo testified to the contrary, denying that he had any conversation with Schulman about safety concerns. Rather, Shambo testified, when Schulman broached with him the matter of switching trailer assignments, Shambo sought to make it clear that Gager had left specific instructions before leaving for the day that Schulman was to take the trailer he had been assigned. Transcript (T.) 474-75.

Regardless of the nature and content of Schulman's conversation with Shambo, Schulman clearly understood that only Gager had the requisite authority to allow a driver to switch trucks

^{1/} Under Clean Harbors' Transportation Manual, drivers were responsible for completing a VIR before and after each trip. The purpose of a VIR is to apprise management of equipment defects. VIRs must be completed whether or not there are defects, and if there are defects noted, the driver is required immediately to inform an appropriate management official, who must ensure that the defect is repaired prior to the dispatch of the vehicle. CX 14B-C. A driver may use the previous day's VIR for the current day's work if no defects are noted on the report and the driver is satisfied that the vehicle is in safe operating condition. R. D. & O. at 12.

^{2/} Each day Gager reviewed the next work day's schedule for pick-ups and deliveries, and at that time assigned drivers, trips, trucks and trailers. T. 514-15.

and/or trailers. R. D. & O. at 15. Schulman left a note on Gager's desk Friday afternoon, which, he argued, indicated his intention to take an alternative trailer on Monday based upon his assessment of the condition of his assigned trailer. In fact, however, the note stated:

Loading trailer Monday morning, Taking 682 because I have ten stops, Give 622 to Kevin. [signed] Rick/Big Puff Daddy.

R. D. & O. at 4. *See* Respondent's Exhibit 1. Schulman admitted that he did not see Gager at Clean Harbors on that Friday afternoon. T. 137. The following Monday, Schulman switched trailers as he had indicated he would do in his note. Upon completion of his assigned runs for the day, he was issued a written warning for switching trailers without having first obtained the necessary authorization. R. D. & O. at 5.

According to Schulman, this was not the first time he had switched trailers without first obtaining prior approval. R. D. & O. at 5. It was not his last. On Tuesday, February 17, 1998, Schulman was again scheduled to use Trailer 622. R. D. & O. at 7. Prior to conducting his run that day, however, Schulman attended a morning, company-sponsored meeting where the drivers were expressly informed, both orally and in writing, that assigned equipment could not be switched without first obtaining supervisory approval.^{3/} Nevertheless, immediately following this meeting, and without making any safety complaint to management or obtaining Gager's approval, Schulman again took a trailer not assigned to him. During the course of the run, Gager e-mailed Schulman on the truck's computer, stating:

Rick. . . You were scheduled to take 622 today I guess the meeting really worked You took 682.

To which Schulman responded (by e-mail from his truck):

Must need glasses, Looked at the board before I left yesterday, Could've sworn it said 682!!!!

R. D. & O. at 7.

On Thursday, February 19, 1998, Gager informed Schulman that he would be receiving a second written warning, and that the two of them would meet the following morning. R. D. & O. at 8. That evening, Schulman called Gager at home. He raised concerns about Trailer 622, blamed Gager for log book violations, and threatened to take his concerns to the state Labor Board. The same evening, Schulman called the home of David Bujak, Clean Harbors' Northeastern Regional Logistics Manager, repeating much of what he had stated to Gager. R. D. & O. at 8. *See* CX 10B.

The next morning Gager presented Schulman with the second written warning, as promised. Schulman refused to sign it and, after what Schulman described as "badgering" by Gager, informed

^{3/} Gager testified that this was not the first time that the company's drivers had been informed of the company's policy with regard to trailer switching. T. 518.

Gager that he was “not signing (expletive).” R. D. & O. at 8. Shortly thereafter Gager telephoned Bujak, stated that he could no longer manage Schulman, and urged that his employment be terminated. *Id.* Bujak agreed, but indicated that he would need to obtain approval for the termination from the human resources department, which approval he subsequently obtained on Monday, February 23. R. D. & O. at 9. The next day, February 24, Schulman was terminated. The reason given by Clean Harbors for taking this action was “insubordination.” *Id.*

THE ALJ’S DECISION

A full hearing on the merits was held by the ALJ. In evaluating the evidence presented, the ALJ looked to whether Schulman had demonstrated by a preponderance of the evidence that he was discriminated against for engaging in STAA-protected activity. R. D. & O. at 12. The ALJ found that Schulman engaged in protected activities, but held that he failed to prove a causal link between those activities and his ultimate termination from employment. R. D. & O. at 18-20.

Specifically, the ALJ concluded that although Schulman failed to establish that he had engaged in activity protected by the STAA’s refusal to drive clause (§31105(a)(1)(B)), R. D. & O. at 15, Schulman did establish that he had engaged in activity protected under STAA’s complaint clause (§31105(a)(1)(A)). The ALJ cited Schulman’s phone calls to Gager and Bujak the evening of February 19, wherein Schulman communicated his concerns about Trailer 622, blamed Gager for log book violations, and threatened to report his concerns to the state Labor Board. R. D. & O. at 14. Also cited was Schulman’s complaint to Gager, prior to his termination, about the insufficient time allowed for pre-trip inspections, and Schulman’s VIRs submitted subsequent to the second trailer switching incident but prior to his termination. *Id.* However, the ALJ reasoned that because Clean Harbors proffered a legitimate business reason for terminating Schulman (*i.e.*, insubordination), which Schulman was unable to show was pretext, Schulman failed to prove that he was terminated for engaging in the protected activity, and thus recommended dismissal of Schulman’s claim.

ISSUES FOR DECISION

This case presents two issues for review:

- 1) Whether Clean Harbors violated the STAA’s complaint clause, 49 U.S.C. §31105(a)(1)(A), by discharging Schulman for making safety complaints;
- 2) Whether Clean Harbors violated the STAA’s refusal to drive clause, 49 U.S.C. §31105(a)(1)(B), by discharging Schulman for refusing to operate an unsafe vehicle.

DISCUSSION

I. Standard for Determining Claims Arising Under Section 405

Schulman claims that Clean Harbors terminated his employment in violation of the following provisions of STAA Section 405:

(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;

(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). Subsections (1)(A) and (1)(B) of the foregoing provision are referred to as the "complaint" clause and the "refusal to drive" clause, respectively. *See LaRosa v. Barcelo Plant Growers, Inc.*, ARB Case No. 96-089, ALJ Case No. 96-STA-10, Rem. Ord., Aug. 6, 1996, slip op. at 1-3.

In order to prevail on the merits of his claim, Schulman must prove that he engaged in activity protected by either or both of the foregoing provisions, and that he was terminated, at least in part, because of that protected activity. *Somerson v. Yellow Freight System*, ARB Case No. 99-004, ALJ Case No. 98-STA-9, Final Dec. and Ord., Feb. 18, 1999, slip op. at 8, *citing Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Byrd v. Consolidated Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, Final Dec. and Ord., May 5, 1998, slip op. at 4 n.2.

II. Analysis of Issues Presented

A. Whether Schulman engaged in protected activity under the "Complaint" Clause

It is well settled that STAA's complaint clause protects safety-related complaints "that are purely internal to the employer." *Clean Harbors*, 146 F.3d at 19; *Ake v. Ulrich Chemical Co., Inc.*, Case No. 93-STA-41, Sec. Final Dec. and Ord., March 21, 1994, slip op. at 5. Moreover, as the ALJ correctly noted, protection under the complaint clause is not dependent on actually proving a violation of a commercial vehicle safety regulation, standard or order; the complaint need only relate to such a violation. *R. D. & O.* at 13, *citing Byrd v. Consolidated Motor Freight, supra*, slip op. at 5.

We agree with the ALJ's finding that Schulman engaged in several forms of activity that qualify for protection under Section 405(a)(1)(A), including Schulman's pre-January 26 complaints regarding the length of time Clean Harbors allowed for Department of Transportation mandated pre-

trip inspections, 49 C.F.R. §392.7, and the VIRs Schulman filed on February 19, 20 and 23 expressing safety-related concerns covered by 49 C.F.R. §396.3(a)(1). We also find Schulman's February 19 evening phone complaint to Messrs. Gager and Bujak, raising concerns about log-book violations, to be protected under subsection (a)(1)(A). *See* 49 C.F.R. §395.8.

B. Whether Schulman engaged in protected activity under the “Refusal to Drive” Clause

The STAA's “refusal to drive” clause provides two categories of circumstances in which an employee's refusal to drive will be protected thereunder, referred to as the “actual violation” and “reasonable apprehension of serious injury” categories, found at 49 U.S.C. §31105(a)(1)(B)(i) and (B)(ii), respectively. The ALJ analyzed Schulman's claim that his switching of trailers constituted protected activity under both (B)(i) and (B)(ii), *see* R. D. & O. at 14-15, and so do we.

(1) *Schulman's claim of (B)(i) “actual violation” protection:*

“Under the ‘actual violation’ category, a refusal to drive is protected activity only if the record establishes that the employee's driving of the commercial motor vehicle would have been in violation of a pertinent motor vehicle standard.” *Ass't Sec'y and Freeze v. Consolidated Freightways*, ARB Case No. 99-030, ALJ Case No. 98-STA-26, Final Dec. and Ord., Apr. 22, 1999, slip op. at 7.

Schulman's argument that his switching of trailers on January 26 and again on February 17, 1998, constituted protected refusals to drive under (B)(i) fails for the simple reason that the evidence of record does not support a finding that if Schulman had driven his assigned trailer, doing so would have been, on either occasion, in violation of a pertinent motor vehicle standard.

In support of his first switching, Schulman argues that the message he left for Gager on Friday, January 26, was meant to convey to Gager that “it would be too time consuming to use Trailer 622 because of the [barn] doors. . . .”, T. 146, thus satisfying the requirement of an “actual violation” of a pertinent commercial motor vehicle safety regulation or standard.^{4/} However, we do not find this generalized assertion sufficient to establish an “actual violation.” *Cf. White v. Maverick Transportation, Inc.*, Case No. 94-STA-11, Sec. Final Dec. & Ord., Feb. 21, 1996 (employee's statement too vague to qualify as internal complaint protected under STAA Section 405(a)(1)(A)). Even if it were sufficient, the evidence of record, in the form of Schulman's own testimony, indicates that the barn doors on the back of a trailer actually helped expedite the runs rather than impede them. T. 149-150. *See* R. D. & O. at 15.

Similarly, we find no evidence of record that would establish that if Schulman had driven his assigned trailer on February 17, doing so would have violated any pertinent safety regulation or

^{4/} We construe Schulman's argument to suggest that he was concerned at the time of his assignment about violating the hours of service rules. The “hours of service” rules, codified at 49 C.F.R. §395.3, state that a driver may not drive more than 10 hours following 8 consecutive hours off duty or for any period after having been on duty 15 hours.

standard. Thus, we conclude that neither of Schulman's trailer switchings constituted protected activity under subsection (B)(i).

(2) *Schulman's claim of (B)(ii) "reasonable apprehension of serious injury" protection:*

In order for Schulman's refusal to drive to qualify as protected activity under subsection (1)(B)(ii) of Section 405(a), Schulman must establish that he refused to drive the assigned trailers because of a reasonable apprehension of serious injury to himself or to the public because of the vehicle's unsafe condition. Subsection (2) of Section 405(a) further qualifies when an employee can claim protection under (B)(ii), by defining what is meant by "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. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. §31105(a)(2).

Schulman fails to establish that his trailer switching "refusal to drive" was any more protected under subsection (B)(ii) than it was under (B)(i). As previously noted, Schulman's stated reasons at the time he switched trailers, both on January 26 and on February 17, made no mention of any unsafe vehicular condition. Schulman nevertheless argues that his note left for Gager on January 23 regarding his trailer assignment evidences his apprehension about his ability to complete his run on January 26 due to safety concerns. We find it impossible to read Schulman's note of January 23 as conveying to Gager any such safety apprehension. Yet, even if it did convey apprehension, Schulman's refusal to drive would not be protected under (B)(ii) because he never communicated his concerns to Gager prior to switching the equipment -- on either occasion. As noted above, for an employee's refusal to drive to qualify for protection under (B)(ii), the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. *Ass't Sec. and Freeze v. Consolidated Freightways, supra*, slip op. at 5, 7.

C. Failure of Schulman to prove causation

As previously discussed (*supra* pg. 7), we found that Schulman engaged in activities protected under Section 405(a)(1)(A) (the "complaint clause"). However, Schulman has nevertheless failed to prove by a preponderance of the evidence that his protected activities were the cause of his termination from employment.

As the ALJ noted (R. D. & O. at 15), Schulman relied heavily on the temporal proximity between his (a)(1)(A) protected activities and his subsequent discharge. On this we are no more persuaded than was the ALJ. Although the decision by Clean Harbors to terminate Schulman's employment was in close temporal proximity to Schulman's VIR submissions, the evidence of

record indicates that Clean Harbors made its decision to discharge Schulman prior to learning of the VIRs. Moreover, even if Clean Harbors had known of the VIRs prior to its termination decision, the concerns raised in Schulman's VIRs appear to have been no more significant than those generally raised (and required to be raised) in the past not only by Schulman, but by all of Clean Harbors' drivers, without retaliation.

Nor do we find that Clean Harbors was motivated to terminate Schulman's employment because of the concerns raised by Schulman in his phone conversation with Gager the evening of February 19. Notwithstanding Schulman's phone call, wherein Schulman raised issues about "log book violations" and threatened to report Clean Harbors, the next morning Gager's singular intent upon meeting with Schulman was to issue a warning for the unauthorized trailer switching -- as Gager had advised Schulman he would do the day before, and nothing more. *See* R. D. & O. at 8.

In this case, the temporal proximity between Schulman's protected activities and his termination from employment is insufficient to satisfy his burden of proof by a preponderance of the evidence, particularly in light of the evidence presented by Clean Harbors regarding its motivation for discharge.

Clean Harbors presented evidence that the reason for termination was Schulman's insubordination, R. D. & O. at 9, arguing that its action was thus based on legitimate, non-discriminatory reasons. Schulman argued that if insubordination were the sole basis for his termination, that he had been treated disparately, in violation of what he claimed was Clean Harbors' progressive disciplinary policy requiring four written warnings for insubordination before a driver could be terminated on such grounds. *See* R. D. & O. at 18. However, Clean Harbors' transportation manual (in which Schulman asserted this policy was set forth), was not found to contain any such requirement, only the statement that, "The company reserves the right to terminate an employee immediately when an employee's conduct warrants immediate termination." *Id.* Moreover, Clean Harbors presented un rebutted evidence that it had in the past similarly discharged other employees for insubordination. *Id.*; CX B-C, T. 720.

Based on the foregoing, we conclude that Schulman's termination was not for having engaged in activity protected under Section 405. We thus concur with the ALJ's final assessment that,

[i]n this case, the evidence established that the Complainant was terminated only after he had twice been insubordinate in refusing to follow the policy against switching equipment, the second instance of which immediately followed a meeting reiterating the policy, and only after he had made it clear to his immediate supervisor, by the use of foul language, that he would not be managed.

R. D. & O. at 18.

D. The ALJ's Dual Motive Analysis

The ALJ sought to analyze the instant case in the alternative, applying the “dual motive” test which is appropriate where the record supports a finding of both legitimate and unlawful reasons for an employer’s adverse action. R. D. & O. at 19. See *Spearman v. Roadway Express, Inc.*, Case No. 92-STA-1, Sec. Final Dec. & Ord., June 30, 1993, slip op. at 4, *aff’d sub nom. Roadway Express, Inc. v. Reich*, 34 F.3d 1068 (6th Cir. 1994). If the evidence of record were to support such an analysis, the burden of proof would shift to the respondent to prove, by a preponderance of the evidence, that it would nevertheless have taken the same adverse action even if the complainant had not engaged in protected activity. See *Clean Harbors*, 146 F.3d at 21-22; *Carroll v. United States Dep’t of Labor*, 78 F.3d 352, 357 (8th Cir. 1996) (concerning employee protection provisions of related Energy Reorganization Act, 42 U.S.C. §5851 (1992)); *Faust v. Chemical Leaman Tank Lines, Inc.*, Case No. 93-STA-15, Sec. Dec. & Rem. Ord., Apr. 2, 1996, slip op. at 9. In the instant case the evidence of record clearly does not support a finding of any unlawful motive on the part of Clean Harbors in dismissing Schulman. Thus the “dual motive” analysis is inappropriate to the case before us.

CONCLUSION

Based upon the foregoing, we conclude that Schulman failed to prove, by a preponderance of the evidence, that his termination from employment was the result of having engaged in STAA-protected activity. Accordingly, this case is **DISMISSED**.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

I concur in the result.

CYNTHIA L. ATTWOOD
Member