



In the Matter of:

MICHAEL HARRISON,

ARB CASE NO. 00-048

COMPLAINANT,

ALJ CASE NO. 99-STA-37

v.

DATE: December 31, 2002

ROADWAY EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., *Truckers Justice Center, Eagan, Minnesota*

For the Respondent:

Paul M. Sansoucy, Esq., Prashanth Jayachandran, Esq., *Bond, Schoeneck & King, LLP, Syracuse, New York*

FINAL DECISION AND ORDER

Michael Harrison claims that one of the reasons his employer, Roadway Express, Inc., discharged him was because he complained that Roadway's trailers were unsafe. Harrison alleges that his termination violates the employee protection provisions of the Surface Transportation Assistance Act ("STAA" or "Act"), 49 U.S.C.A. § 31105 (West 1997). The Administrative Law Judge ("ALJ") agreed with Harrison and recommended that we order Roadway to reinstate Harrison and award him all of the remedies to which he is entitled. However, because we find that Harrison did not engage in activity protected by the Act, we reverse the ALJ and deny Harrison's complaint. We also address several additional issues.

BACKGROUND

Roadway operates commercial motor vehicles in interstate commerce. It hired Michael Harrison in 1989, and in 1997 he became a "switcher" at Roadway's West Seneca (Buffalo), New York terminal. Switchers operate "yard horses," tractor-like vehicles used to shuttle trailers to and from the various loading docks and other areas on

the terminal grounds. Part of Harrison's work was to release ("drop") the trailers attached to the arriving inbound tractor trucks and move them to other parts of the terminal. He also "hooked" trailers onto outbound tractor trucks. While performing his "drop and hook" duties, Harrison was required to perform a thorough inspection of the trailers. When shuttling the trailers throughout the terminal, he was only to visually check the trailers for obvious defects.

To identify this unsafe equipment, Roadway employed a process called "red tagging." Between July 9, 1997, and August 7, 1997, Roadway utilized three different red tagging policies. The red tagging policy that became effective on August 7 required switchers, prior to placing a red tag on unsafe equipment, to obtain approval to do so from their supervisors in "Relay," the department responsible for the logistics and movement of the tractor-pulled trailers traveling from the mid-west to the east coast. Roadway disciplined Harrison six times between August 5, 1997, and January 14, 1998, for red tagging equipment without approval. The discipline included a written counseling, two written warnings, and three suspensions ranging from one to five days.

And the discipline continued. Three Occupational Safety and Health Administration (OSHA) representatives visited the terminal on June 19, 1998, and inspected the yard horses. They were there to investigate a complaint Harrison had made a week before about the safety of the yard horses. Later that day, Roadway suspended Harrison for ten days for failing to follow instructions to put a trailer behind the garage and his overall work record. On July 2, 1998, Roadway terminated Harrison's employment because he failed to follow instructions concerning an inspection of a yard horse and his overall work record. He filed grievances for both the suspension and the termination.

Soon thereafter, on July 27, Harrison went to the Bowmansville OSHA office to complain about the disciplinary actions but was informed he would have to wait until the grievances were resolved to file a discrimination complaint. When the grievances were resolved in Roadway's favor, Harrison filed a discrimination complaint with OSHA.¹

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board ("ARB" or "Board") has jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(2002). *See also* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

¹ Roadway also disciplined Harrison for his inspection and red tagging of yard horses, and those matters were also part of his complaint to OSHA. Because the activities involving the yard horses are not covered by the STAA, we do not describe the disciplinary activities pertaining to them in any detail.

When reviewing STAA cases the ARB is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

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.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law *de novo*. See *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

ISSUES TO BE DECIDED

1. Did Harrison's oral complaint to the OSHA employee concerning his suspension and termination constitute a valid discrimination complaint? If so, was the complaint filed within 180 days of the violation?
2. Did “red tagging” Roadway's trailers constitute “filing a complaint” and thus protected activity?
3. Did Roadway discipline Harrison for red tagging its trailers?
4. Was Harrison's conduct reasonable?

DISCUSSION

1. Harrison's Complaint and the Statute of Limitations

The ALJ found in his December 16, 1999 Preliminary Determination, the following relevant facts pertaining to the validity and timeliness of Harrison's OSHA complaint. These findings are supported by substantial evidence and are therefore conclusive.

First, Harrison was suspended for ten days on June 19, 1998, for failing to put a trailer behind the garage, as he had been instructed, and for his overall work record. Then, on July 2, 1998, his employment was terminated for performing an unauthorized inspection of a yard horse and for his overall work record. He filed a grievance with Teamsters Local Union No. 375 regarding both disciplinary actions. On July 27, 1998, while still employed at Roadway pending the resolution of his grievances, Harrison went to the OSHA office in Bowmansville, New York and met with an OSHA employee. He “brought up” the suspension and termination and indicated that he felt Roadway had taken both actions because he made safety complaints concerning Roadway's equipment

and policy. The OSHA representative told Harrison that because he had filed the grievances, she “would not take a complaint” until he had exhausted his grievance arbitration rights. The arbitration process ran its course, and on January 25, 1999, Harrison’s termination was upheld. He returned to the OSHA office on February 1, 1999, and filed a formal, written complaint alleging that Roadway had terminated his employment because he filed safety complaints with OSHA. *See* ALJ’s Preliminary Determination That The Complaint Was Timely at 1-2; Transcript (TR) 296-97.

Roadway argues that Harrison’s conversation with the OSHA employee on July 27, 1998, does not constitute filing a discrimination complaint as set out in 29 C.F.R. § 1978.102. It asserts that the OSHA employee did not comply with the requirements set out in its procedure manual for taking and following up on a complaint. Roadway also claims that the log entry, purportedly recording that the meeting occurred, is vague and did not put it on sufficient notice that Harrison was alleging discrimination. Therefore, says Roadway, Harrison did not file a complaint with OSHA on July 27, 1998. Instead, February 1, 1999, marks the date of filing, and because that date was more than 180 days after the July 2, 1998 termination, Harrison is time barred from proceeding further. *See* 49 U.S.C.A. § 31105 (b) (“An employee alleging discharge . . . in violation of subsection (a) . . . may file a complaint . . . no later than 180 days after the alleged violation occurred.”). Respondent’s Brief at 10-15.

The ALJ concluded that Harrison filed a valid and timely complaint on July 27, 1998. Preliminary Determination at 5. He reasoned that, although the OSHA representative did not follow the procedure manual’s requirements for filing a complaint, the manual is neither a regulation nor a statute. Nor do the STAA regulations pertaining to filing a complaint mandate procedure, form, or content. *See* 29 C.F.R. § 1978.102 (b) (“No particular form of complaint is required.”). Furthermore, the ALJ found that the notes the OSHA representative made on July 27, along with other records at the office, sufficiently identified the “essential nature of the complaint and the identity of the parties.” Finally, the ALJ found that Roadway had adequate and sufficient notice to prepare for the August 31, 1999 hearing. Preliminary Determination at 3-4.

We agree with the ALJ’s reasoning and determine that there is substantial evidence for his findings. We therefore conclude that Harrison filed a valid and timely complaint with OSHA on July 27, 1998.²

² In the alternative, Roadway argues that Harrison’s complaint is time barred by the 180-day rule even under the ALJ’s (and our) finding that a valid complaint was filed on July 27, 1998. Roadway argued to the ALJ that because Harrison’s protected activity – red tagging trailers between August 5, 1997, and January 14, 1998, – occurred more than 180 days before the July 27, 1998 complaint, this matter must be dismissed. The ALJ rejected that argument and held that the 180-day rule does not begin to run until the date Roadway took adverse action against Harrison. Recommended Decision & Order (R.D. & O.) at 8.

Roadway points out in its Brief to the Board, that it suspended Harrison for 5 days on January 14, 1998, for, among other reasons, red tagging without authorization. It argues that Harrison’s STAA claim is time-barred because the suspension was “an adverse action of sufficient magnitude to trigger the filing requirement [of STAA § 31105 (b)]” and more than 180 days had elapsed between the date of that adverse action (January 14, 1998) and the filing of the complaint with OSHA (July 27, 1998). Respondent’s Brief

2. “Filing a Complaint,” “Red Tagging,” and Protected Activity

Harrison asserts that he engaged in protected activity by red tagging yard horses and trailers. He also claims that his June 12, 1998 complaint to OSHA regarding the safety of yard horses and his inspection of a yard horse on July 2, 1998, are protected by the Act. The ALJ, however, found that because the yard horses are used wholly within Roadway’s terminal, they are not commercial motor vehicles according to the Federal Highway Administrator’s regulations, and that, therefore, Harrison’s “actions involving yard horses – viz., red-tagging of yard horses, inspection of a yard horse on July 2, 1998, and the complaint to OSHA on June 12, 1998 regarding the safety of yard horses – are not covered by the FMCSR [Federal Motor Carrier Safety Regulations] and, thus, cannot constitute protected activity under the Act. Complainant’s red-tagging of trailers remains the only activity that could be protected under the Act.” R. D. & O. at 8. See 49 C.F.R. § 390.5 (definition of “commercial motor vehicle” as “any self-propelled or towed motor vehicle *used on a highway in interstate commerce* to transport passengers or property”) (emphasis supplied). We agree with this finding and conclusion because they are fully supported by the record.

Therefore, for our purposes, the relevant activity of the Complainant is his red tagging of trailers. The section of the employee protection provision of the Act on which Harrison bases his complaint is:

- (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 . . . has filed a complaint . . . related to a violation of a commercial motor vehicle safety regulation, standard, or order

49 U.S.C.A. § 31105 (a)(1)(A).

Our task is first to determine what constitutes “filing a complaint” and then decide whether “red tagging” falls within that definition.

What is “filing a complaint”?

Congress intended that the STAA afford whistleblowers the ability to report safety concerns in the commercial transportation industry. “Section [31105] was enacted

at 10-11. Given our ultimate conclusion that Roadway did not terminate Harrison’s employment because he engaged in protected activity, it is not necessary for us to determine whether Roadway’s termination of Harrison’s employment, at least in part “based on his disciplinary record,” Respondent’s brief at 7, triggered a new limitations period for filing a complaint based on his red tagging activity.

in 1983 to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles.” *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987). Employers sought to narrow the scope of the STAA’s complaint clause,

arguing that to be protected, an employee had to file a formal complaint with a court or government agency. *See, e.g., Stiles v. J.B. Hunt Transp., Inc.*, 92-STA-34 (Sec’y Sept. 24, 1993). The Secretary of Labor, the ARB, and federal courts, however, have agreed that an “internal complaint to superiors conveying [an employee’s] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA.” *Dutkiewicz v. Clean Harbors Env’tl. Servs., Inc.*, ARB No. 97-090, ALJ No. 95-STA-34, slip op. at 3-4 (ARB Aug. 8, 1997), cited with approval in *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12, 19 (1st Cir. 1998); *Stiles*, slip op. at 4.

Internal complaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial. They must, however, be communicated to management.³ *Env’tl. Servs., Inc. v. Herman*, 146 F.3d at 20, citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 228-29 (6th Cir. 1987) (STAA complainant’s oral complaints to his supervisor and to a company Vice President were protected); *Yellow Freight Systems, Inc. v. Martin*, 983 F.2d 1195, 1198 (2d Cir. 1993) (court implies written complaint “to the company” and later letter “to company officials” protected under STAA § 31105); *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (oral complaint to an immediate supervisor protected by STAA). *See also Passaic Valley Sewerage Comm’rs v. United States Dep’t of Labor*, 992 F.2d 474, 476, 478 (3d Cir. 1993) cited in *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d at 20 (intracorporate written complaint to “supervisors” protected under § 507 of Clean Air Act); *E.E.O.C. v Romeo Community Schools*, 976 F.2d 985, 986 (6th Cir. 1992) (temporary custodian at school orally informing school’s Assistant Superintendent about wage disparity engages in protected activity under § 215 (a)(3) of Fair Labor Standard Act).

Therefore, the “filed a complaint” language of STAA § 31105 (a)(1)(A) protects from discrimination an employee who communicates a violation of a commercial motor vehicle regulation, standard or order to any supervisory personnel. *See Zurenda v. J & R Plumbing & Heating Co., Inc.*, ARB No. 98-088, ALJ No. 97-STA-16, slip op. at 5 (ARB

³ We are aware that in *Donovan v. Diplomat Envelope Corporation*, 587 F. Supp. 1417, 1424 (E.D.N.Y. 1984), the court held that “an allegation that an employee was discharged for reporting an alleged health hazard to his union states a claim for which relief can be granted under 29 U.S.C. Section 660c(1).” (Emphasis supplied). We distinguish *Diplomat* primarily because it arose under the OSHA statute, 29 U.S.C.A. § 651 *et seq.* (West 1999). We also note that although the complaint was not made to management, it was directed to a specific recipient under circumstances in which one may infer that, as a result of the communication, the unsafe condition would be reported to management. *Cf. Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1574-76 (11th Cir. 1997) (under Energy Reorganization Act, 42 U.S.C.A. § 5851(a) (West 1995), expressing safety concerns to fellow workers was protected communication since, in the particular circumstances and context presented, “as a practical matter . . . [Complainant’s] statement [to his fellow workers] at the meeting served as another notice to the employer.”). (Emphasis supplied).

June 12, 1998) (“Under STAA a safety complaint to any supervisor, no matter where that supervisor falls in the chain of command, can be protected activity.”).

What is “red tagging”?

Because we agree with the ALJ that red tagging trailers is the only activity upon which Harrison may rely as being protected, we have carefully examined the record and the briefs to determine exactly what red tagging is. Neither source has been completely helpful. We begin with red tagging according to Harrison.

Harrison argues that the ALJ correctly determined that red tagging trailers constituted internal complaints related to the safety of commercial motor vehicles. Complainant’s Brief at 11. However, Harrison’s testimony reveals that *before* he placed a red tag on Roadway trailers or equipment that he deemed defective he *always* “notified people in management” about his safety concerns by means of a hand held radio or via a computer built into the yard horse he drove. TR 69, 73-75, 316. The “management” personnel to whom Harrison communicated his safety concerns about the trailers were Alex Glanville, a “yard controller” who testified that he was Harrison’s supervisor, and Ray Tangent, Rick Manning, and Tom Ryan, all of whom were supervisors in Roadway’s Relay Department. TR 162-63, 443-460, 69-70.⁴ According to Harrison, red tagging, that is, actually attaching the red tag to the equipment, was to “communicate to others defective and/or suspicious equipment.” TR 70. However, by red tagging Harrison also intended to place the defective vehicle “out of service.” TR 341-367, 309-10; Complainant’s Exhibit (“CX”) 33. And whereas his initial, pre-red tagging reports about the condition of the trailers had been made to supervisors, his red tagging communications were intended for and made “to others,” that is, “other switchers, mechanic[s], the driver[s], and other personnel that might come into contact with that piece of equipment.” TR 80, 162, 339-40.

Roadway’s version of red tagging is different than Harrison’s. Roadway argues that “red-tagging was a procedure used to place defective equipment out of service and did not serve as an internal complaint mechanism.” Respondent’s Brief at 17. The record, however, does not contain a clear, precise description of what the red tagging process is, although it does offer some clues.

The tag itself appears to have distinct top and bottom portions. CX 17; TR 160. The top of the red tag contains a bold print label: **ROADWAY-OUT OF SERVICE**. Below, but still on the top part of the tag, are lines for indicating the date, the unit number, and the reason. This top area also has a signature line, another line for the date and a third line entitled “tagged at.” The lower half of Roadway’s red tag also contains lines for date, unit number, reason, “tagged at,” signature and a line entitled TO:
_____.

⁴ Ray Tangent, the Relay Manager, and Glanville’s supervisor, testified that Glanville was not a supervisor, but a “clerk.” TR 582-83.

An exhibit provides some further information about the tag. CX 7, dated August 6, 1997, is a memo from Rick Manning, one of Roadway's Relay Coordinators and one of Harrison's second level supervisors. The memo is addressed to switchers, relay dispatchers and dock supervisors. The subject of the memo is "Red Tags." The memo reads:

Beginning on Thursday, August 7, at 00:01, all equipment requiring RED TAGS must be approved by Relay [the supervisory personnel in Roadway's Relay Department]. The bottom copy of the red tag must be turned in to Relay at the end of every shift. When trailers are moved to and from the dock and have a need for a red tag, you must note the problem with the relay dispatcher and the dock supervisor. The goal of these efforts is to improve operational safety and reduce avoidable driver waiting costs.

We read this memo as an instruction to Harrison, among others, to first notify the relay dispatcher and the dock supervisor about any safety problems he finds with a trailer, then obtain approval for red tagging from Relay, fill out the tag, affix the tag onto the unsafe trailer, move the trailer to or from the dock, and, at the end of the shift, turn the bottom half of each tag into the Relay Department. Although Harrison admittedly red tagged without approval, we infer that he did nevertheless turn in the bottom part of the tags to Relay at the end of his shifts. TR 76.

Therefore, we find that beginning on August 7, 1997, until July 2, 1998,⁵ the red tagging process at Roadway's Buffalo terminal, in practice, consisted of filling out the tag, placing it onto the equipment deemed unsafe, with or without prior approval from the Relay Department, and turning in the bottom of the tag to Relay at shift's end. Prior to red tagging, however, Harrison always notified a supervisor about what he believed to be defective equipment that, if used, might constitute a violation of a commercial motor vehicle safety regulation, standard or order. TR 550 (Harrison was not "nit picking" or complaining about things he should not have); TR 520 (Larson, a fellow switcher, made verbal complaints to management or a mechanic concerning equipment but often did not also red tag to "avoid confrontational situations" with management); TR 309-11 (Harrison reported defects, then red tagged them; "I complained and also red tagged."); TR 316 (Harrison: "When I would verbally report an equipment defect, and while I was writing out the red tag, I'd write down on another piece of paper . . . [the date, trailer number, defect, etc. for his own records – *see* CX 33].)

⁵ Though the new red tagging policy became effective on August 7, Harrison was "counseled" on August 5, in part, for red tagging without authorization on August 4. CX 16.

Red Tagging and Protected Activity: Discussion and Conclusion

We conclude that Harrison's red tagging trailers after August 6, 1997, was not protected activity under the STAA because it did not constitute filing a complaint. Filling out the tag and affixing it to a defective trailer so that "others," *i.e.*, non-supervisory personnel, might be made aware of his safety concerns is not a communication to a supervisor about a violation of a commercial motor vehicle regulation, standard or order. Furthermore, turning in the bottom of the tag to management at the end of a shift was only a confirmation of Harrison's earlier oral, or computer generated, notification to his supervisors that he had found unsafe equipment.

The ALJ concluded that Harrison's red tagging activities pertaining to trailers were internal complaints related to the safety of commercial motor vehicles and, therefore, they were protected by the Act. R. D. & O. at 9. In making this determination, the judge relied upon the Board's decision in *Schulman v. Clean Harbors Env'tl. Servs., Inc.*, ARB No. 99-015, ALJ No. 98-STA-24 (ARB Oct. 18, 1999). Reliance on *Schulman* was misplaced. Relevant here is the ARB's conclusion in *Schulman* that the complainant's filing of three Vehicle Inspection Reports (VIRs) constituted protected activity. *Schulman*, slip op. at 7. VIRs were four-part forms that drivers completed before and after each trip. Their purpose was to apprise management of equipment defects. The driver was also required to immediately inform an appropriate management official of defects. Schulman's first line supervisor, James Gager, received and reviewed the VIRs daily. Gager received and reviewed Schulman's three VIRs. *Shulman*, slip op. at 3, n.1; *Shulman v. Clean Harbors Env'tl. Servs., Inc.*, ALJ No. 98-STA-24, slip op. at 3, n.16 (ALJ Dec. 7, 1998).

In the case before us the ALJ reasoned by analogy. He found that red-tagging trailers enabled Roadway to determine what repairs, if any, would be required. He noted that the Schulman VIRs enabled the employer to determine whether or not there was a safety violation or defect that would require putting the vehicle out of service. Therefore, the ALJ concluded, since "red tagging accomplishes the same purpose as the vehicle inspection reports," and since the VIRs were found to be protected complaints in *Schulman*, red tagging trailers constitutes a STAA complaint and is protected activity. R. D. & O. at 9. Nevertheless, this conclusion must fail because it is not supported by substantial evidence on the record taken as a whole. As discussed above, the record demonstrates that red tagging trailers did not constitute filing a complaint because it was not a communication to a supervisor concerning commercial motor vehicle safety. To analogize red tagging to the *Schulman* VIR process, which clearly was communication to an immediate supervisor, was error.

Therefore, we conclude that since red tagging does not constitute filing a complaint for purposes of the Act, Harrison did not engage in protected activity when he red tagged. Since red tagging trailers is the only activity upon which Harrison may rely to assert his claim, his complaint is denied.

3. Roadway's Motivation: Discriminatory or Legitimate?

Although we have found that red tagging trailers did not constitute the filing of a STAA complaint, and therefore have concluded that Harrison's complaint must be denied, further examination and discussion of the ALJ's R. D. & O. is necessary. For instance, Roadway asserts that it terminated Harrison, in part, for failing to follow its rules pertaining to red tagging, not red tagging per se. However, the ALJ found that Harrison was "disciplined for his protected activity of red tagging." R. D. & O. at 10. We disagree with his finding, and for purposes of this extended discussion, we will assume that red tagging was protected activity, that is, it was a communication to a supervisor concerning the safety of commercial motor vehicles and not merely a confirmation of an earlier safety complaint.

The Self Case

To support his finding that Harrison was disciplined for protected activity, the ALJ again reasoned by analogy, this time relying upon *Self v. Carolina Freight Carrier Corp.*, 91-STA-25 (Sec'y Aug. 6, 1992). Bill Self was an experienced truck driver with a good work history. He operated between North and South Carolina. He worked irregularly, on an "on call basis." Carolina suspended Self for three days after he refused to report for work due to fatigue. He refused although he had been available to work. A Carolina driver was "available" for work ten hours after he had clocked out from work. Carolina Freight's "availability" policy required its drivers, before becoming available, to call the dispatcher to refuse an assignment due to illness or fatigue. If an available driver refused to work because of illness or fatigue after being called to report, he faced discipline. *Self*, slip op. at 1-2. The STAA protects employees who refuse to drive because of fatigue. *See* 49 U.S.C.A. § 31105 (a)(1)(B); 49 C.F.R. § 392.3.

Self asserted that he had been suspended for protected activity, his refusal to drive because of fatigue. Carolina argued that it legitimately suspended Self, not for his refusal, but for noncompliance with its availability policy. *Self*, slip op. at 2-4.

The Secretary closely examined Carolina's availability policy. Though the policy appears to enable a driver to avoid discipline by merely adhering to the "fundamental duty to obtain rest during his time off," the Secretary found that fatigue "typically results when a driver has been on call for a lengthy period of time." *Id.* at 6. Thus, while an available driver awaits the dispatcher's call, his time for calling in ill or fatigued, and thereby avoiding discipline, passes. Therefore, noted the Secretary, though Carolina's policy was "facially-neutral," in reality it operated in such a manner so as to deny a driver any "real measure of protection." *Id.*

The Secretary found Carolina had suspended Self for his protected activity. *Id.* at 6, 8. Furthermore, to the extent that this policy reflected Carolina's legitimate business interest in arranging employee work schedules and verifying claims of illness or fatigue,

it clashed with the STAA's intent in "promoting highway safety and protecting employees from retaliatory discharge." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987). According to the Secretary the record did not show that Self's refusal "interfered materially with Respondent's [Carolina's] scheduling interests." *Id.* at 11. She found that allowing Carolina to assert its availability policy as a legitimate, non-discriminatory reason in rebuttal to Self's discrimination complaint "would permit the employer to accomplish what the law prohibits." *Id.* at 7.

Roadway's Argument

Roadway, like Carolina, relies upon a company policy as a legitimate, nondiscriminatory reason for disciplining Harrison. In early 1997 the company's Buffalo terminal operation significantly expanded, and it adopted new procedures for controlling its "yard" activities, *i.e.*, the movement of equipment in, out, and around the terminal. Roadway also began to revise its maintenance and repair functions. Suddenly there "was a huge amount of activity." One of the consequences was that garage mechanics were beginning to complain that they were seeing a "lot of equipment" with red tags that was not defective. The mechanics were "just getting wiped out with work that didn't need to be done when they had work that did need to be done." Roadway officials determined that a more effective approach was needed to identify unsafe equipment in order to avoid the cost and disruption caused by the improperly and unnecessarily red tagged equipment. TR 585.

Management decided that yard personnel, such as switchers, would first notify supervisors about suspected defects. The matter would then be referred to a mechanic who, if necessary, would take the equipment out of service by red tagging it. *See* CX 5. The new red tagging process was "tweaked" several times thereafter as the managers got feedback from yard personnel and mechanics about the effectiveness of the new red tagging policy. *See* CX 6, 7; TR 581-86, 677-78.

The red tagging policy that became effective on August 7, 1997, permitted switchers like Harrison to red tag but only with prior approval from Relay Department supervisors. CX 7. Roadway argues that this policy was necessary. Otherwise, as had begun to happen in July 1997, persons unqualified to determine whether trailers or other equipment should be placed out of service could severely disrupt its workplace. R. D. & O. at 10. And, according to Roadway, precisely what it sought to avoid occurred. It alleges that on three occasions Harrison red tagged nine trailers without authorization from Relay. The company claims that later inspection revealed that either these trailers had no defects or were "within guidelines" and that the unauthorized and unnecessary red tagging caused Roadway "avoidable costs." CX 18-20.

The ALJ's Error

As we indicated above, the ALJ erred when he found that Harrison was disciplined for red tagging trailers. In effect he found that communicating safety concerns about the trailers was protected activity and that red tagging was the method of

that communication and that the two were so inextricably linked that discipline for the method was, accordingly, discipline for the protected communication. He found that “had the Complainant not red-tagged, he would not have been disciplined.” R. D. & O. at 10. He relied upon the rationale in *Self* in which the Secretary reasoned that “Respondent would not have issued Self a suspension had he not refused to drive when fatigued. Consequently, Respondent disciplined Self ‘for’ his protected activity.” *Self*, slip op. at 8.

But the nature of the protected activity and its relation to the employer’s policy are critically different here than in *Self*. A Carolina Freight driver faced a difficult choice: either report to work fatigued because of being on call long after becoming available, and thereby violate a federal motor carrier safety regulation, *e.g.*, 49 C.F.R. § 392.3 (prohibiting driving while fatigued or ill); or, call the dispatcher long after becoming available, admit to fatigue and refuse to report, and thus run afoul of Carolina’s availability policy and face discipline. Harrison did not face such a dilemma. Adherence to Roadway’s red tagging policy did not require Harrison to violate federal safety regulations. The red tagging policy did not inhibit, restrict, or otherwise limit his ability to make a safety-related complaint about the trailers. Indeed, the record clearly demonstrates that Harrison freely made safety complaints about trailers and other Roadway equipment. He engaged in protected activity freely and often. *See* CX 33; TR 341-66. “Every time” before Harrison red tagged Roadway equipment he notified “people in management” about the safety issue that concerned him. TR 73.

Carolina drivers, like *Self*, did not have this uninhibited freedom. For them, engaging in protected activity triggered discipline: refusing to drive when fatigued violated the availability policy. For Harrison and his fellow switchers, red tagging after supervisory approval did not inhibit their voicing of safety concerns about trailers; it merely restricted their ability to take the trailers out of service. We hold that the ALJ’s refusal to allow Roadway to assert its red tagging policy as a legitimate nondiscriminatory reason for disciplining Harrison and his subsequent finding that Roadway disciplined Harrison for red tagging constitute error.

A Balancing Test

We return to the *Self* case. After finding that Carolina disciplined *Self* for protected activity, the Secretary examined the legitimacy of its articulated reason for suspending *Self*. *Self*, slip op. at 8. She found Carolina’s legitimate business reasons for its availability policy were in scheduling its shipments and managing and disciplining its employees. *Id.* at 10. The Secretary then determined that the governmental interest underlying the employee protection portion of the Act was

to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for

cooperating with law enforcement agencies, they need express protection against retaliation for reporting these violations.

Self, slip op. at 10, citing *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

The Secretary noted that not only was *Self* a twenty-year, reliable employee of Carolina with a good work history, but that the record demonstrated that *Self* was fatigued on the occasion for which he was suspended. Also, the record there did not demonstrate that *Self*'s failure to call in fatigued prior to being available "interfered materially with Respondent's scheduling interests." *Self*, slip op. at 11. In essence, the Secretary concluded that the protected activity afforded to *Self* by the Act outweighed its impact on Carolina's business interests. Therefore, Carolina could not assert its policy as a legitimate, nondiscriminatory reason to rebut *Self*'s discrimination claim.

Following the Secretary's lead in *Self*, the ALJ here began to apply the same analysis for determining the legitimacy of Roadway's reason for disciplining Harrison. He found that "Respondent's interest [in the red tagging policy] lies in preventing delays in its operation when employees place equipment out of service when the equipment does not have a defect." R. D. & O. at 11. On the other side of the scale, the ALJ noted that the Act must be interpreted to "promote the Congressional intent to promote the safety of commercial motor vehicles on the nation's highways." *Id.* We do not quarrel with either of these findings.

However, the ALJ did not proceed to determine, as prescribed by *Self*, which of these policies was entitled to greater weight "in the particular circumstances of this case" before he subsequently found that "Respondent's legitimate interest in preventing delays is entitled to less weight than Complainant's legitimate concern about safety defects he discovered in the course of performing his duties." *Id.* at 11-12. The particular circumstances of this case, of course, are that Harrison was free to communicate his safety concerns without removing equipment from service. Unlike the situation in *Self*, where the underlying rationale of STAA protections and Carolina's availability policy clashed, no such conflict exists here. Thus, even had the ALJ properly taken these circumstances into account, weighing the policies against each other was unnecessary. Therefore, finding that Harrison's interests outweighed Roadway's was error. And to the extent that finding supported the ALJ's determination that Roadway discriminated against Harrison for engaging in protected behavior, it was also error.

4. Harrison's Conduct

The ALJ made another finding which also involved weighing competing interests. He analyzed Harrison's motivation and behavior. Harrison, who the ALJ found to be credible, testified that he noticed that equipment which he had red tagged a day or two before had not been repaired. He also testified that he often saw red tags he had filled out lying on the ground. The ALJ credited Harrison's testimony that he eventually stopped

complying with the policy of red tagging only with approval because Roadway management was ignoring his safety concerns.

He cited the following language from *Kenneway v. Matlack, Inc.*, 88-STA-20 (Sec’y June 15, 1989) just as the Secretary had done in *Self*:

[The] right to engage in statutorily-protected behavior permits some leeway for impulsive behavior, which is balanced against employer’s right to maintain order and respect in its business by correcting insubordinate acts; [the] key inquiry is whether [the] employee has upset the balance that must be maintained between protected activity and shop discipline . . .

R. D. & O. at 10, citing *Self*, slip op. at 9, citing *Kenneway*, slip op. at 6, citing *NLRB v. Leece-Neville Co.*, 396 F.2d 773, 774 (5th Cir. 1968). The ALJ weighed Harrison’s conduct against Roadway’s interest in “preventing delays in its operation by employees placing equipment out of service when the equipment does not have a defect,” a very real interest in that Roadway contends that Harrison had unnecessarily red tagged at least nine of its trailers. R. D. & O. at 11; CX 18-20.

The ALJ then found that Harrison’s “acts of red-tagging without approval from the relay department was [sic] reasonable conduct in light of his good faith belief that his safety concerns were not being addressed by Respondent.” R. D. & O. at 11. We disagree.

The ALJ inappropriately applied the labor relations standard cited in *Kenneway* to determine whether Harrison was entitled to the protection offered by § 31105(a)(1)(A), the “filed a complaint” section of the Act. *Kenneway* arose under § 2305(b) (now § 31105(a)(1)(B)), the “refusing to operate a vehicle” section. That decision and other “leeway for impulsive behavior” cases must be distinguished from the facts here. In *Kenneway*, the Secretary cited *NLRB v. Leece-Neville Co.*, 396 F.2d 773 (5th Cir. 1968) and emphasized that labor relations precedent is “useful” in analyzing STAA “refusal to operate” cases because adversarial activities like union organizing, grievances hearings, and collective bargaining offer “similar potentials for confrontation.” *Kenneway*, slip op. at 6.

Leece-Neville involved an employee making an “angry advance” upon a company manager who had just completed a speech opposing the union. The employee made several pro-union remarks and then pounded the desk in front of the manager with his fists and shook his finger in the manager’s face. The court, characterizing this conduct as “nothing more than a rather heated response between protagonists in the heat of a union campaign,” found that the employee was engaging in activity protected by § 8(a) of the National Labor Relations Act and that discharging him for insubordination was an unfair labor practice. *Leece-Neville*, at 774.

National Labor Relations Board precedent like *Leece-Neville* was valuable in deciding cases like *Kenneway*. There the complainant, Bruce Kenneway, maintained that he was discharged from Matlack, Inc. because he refused a driving assignment that would have caused him to violate the federal motor carrier safety regulation pertaining to maximum driving hours. See 49 C.F.R. § 395.3. Matlack asserted that it fired Kenneway because of vulgar and abusive language (“cuss words” including the “F” word and other “hard language”) directed at the company dispatcher. The Secretary relied almost exclusively upon appellate federal labor relations cases in formulating the “leeway for impulsive behavior” versus the “right to maintain order” standard cited above. Therefore, she balanced Kenneway’s protected refusal against Matlack’s right to maintain shop discipline. She held that Matlack’s proffered reason for firing Kenneway was not legally sufficient to rebut Kenneway’s prima facie case.

Kenneway and other Secretary and Board decisions applying the labor relations precedents are very different than what is before us. See, e.g., *Korolev v. Rocor International*, ARB No. 00-006, ALJ No. 98-STA-27 (ARB Nov. 26, 2002); *Martin v. Dep’t of the Army*, 93-SDW-1 (Sec’y July 13, 1995); *Moravec v. H C & M Transp., Inc.*, 90-STA-44 (Sec’y Jan. 6, 1992). These cases involve impulsive conduct incidental to the protected activity where the complainant is emotionally motivated. The conduct is temporary and uncalculated.

Conversely, Harrison’s conduct was unemotional, sustained and deliberate. It was continuing and reasoned. The fact that Harrison red tagged, not on a spur of the moment basis, but approximately 200 times between August 7, 1997, and July 2, 1998, indicates that he was not acting impulsively. See CX 33. Therefore, we find that applying the *Kenneway* standard to evaluate Harrison’s conduct was error.

CONCLUSION

Harrison filed a valid and timely discrimination complaint with OSHA on July 27, 1998. Red tagging Roadway’s trailers is the only activity Harrison may rely upon to assert his discrimination claim. However, since red tagging the trailers does not constitute “filing a complaint,” Harrison did not engage in protected activity. Therefore, his complaint is **DENIED**. Furthermore, even assuming red tagging trailers is protected activity, Roadway did not terminate Harrison, in part, for red tagging the trailers. Finally, we also hold that finding Harrison’s conduct reasonable according to the labor relations standard applied in *Kenneway* was error.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge