



In the Matter of:

JERRY A. METHEANY,

ARB CASE NO. 00-063

COMPLAINANT,

ALJ CASE NO. 2000-STA-11

v.

DATE: September 30, 2002

ROADWAY PACKAGE SYSTEMS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jerry A. Metheany, pro se, Elk Grove, California

For the Respondent:

Gary D. Dunbar, Esq., FedEx Ground Package System, Inc., Moon Township, Pennsylvania

FINAL DECISION AND ORDER OF DISMISSAL

This case arises under the Surface Transportation Assistance Act of 1982, as amended (STAA), 49 U.S.C.A. § 31105 (West 1997), and implementing regulations at 29 C.F.R. Part 1978 (2001). We affirm the June 20, 2000 Recommended Decision and Order (R. D. & O.) of the Administrative Law Judge (ALJ), who held that the Complainant was acting as an independent contractor who was not covered by the employee protection provisions of the STAA and that, even if he was covered, the Respondent did not retaliate against the Complainant for engaging in alleged protected activity. Accordingly, we dismiss the complaint.

BACKGROUND

I. Statement of Facts

Jerry A. Metheany was a sole proprietor operating as W. & P. Trucking, Elk Grove, California. Metheany owned four tractors and hired drivers to operate them, although he occasionally drove himself. Hearing Transcript (T.) 74, 115, 152; R. D. & O. at 4. Respondent Roadway Package System, Inc. (RPS, later FedEx Ground Package System, Inc.) operated an interstate package delivery service, using independent contractors such as the Complainant, to

provide local pickup and delivery services and over-the-road (linehaul) transportation between terminals and hubs. R. D. & O. at 2-3.

In 1992, RPS first contracted with Metheany to provide linehaul services as an independent contractor. Respondent's Exhibit (RX) 118 at 295; R. D. & O. at 3, 5. The contract was renewed for three years, commencing on December 27, 1994. R. D. & O. at 6. After expiration of the initial term, the agreement provided for successive renewal terms of one year each, subject to notice of nonrenewal thirty days prior to expiration of its term. On November 19, 1998, RPS gave notice of its intention not to renew the agreement upon its December 27, 1998 expiration. RX 118, RX 104.

Between 1994 and 1998, the Complainant sent numerous letters to RPS concerning how the operation of the company affected him as a business owner. R. D. & O. at 3. These included complaints and criticisms about: holding Metheany responsible for the errors of his employee drivers (RX 10, 48, 66); distribution of miles run by various line haul contractors (RX 20); the distribution of "runs" to individual contractors (RX 22, 26, 28, 30); perceived communications and operational problems (RX 25, 34, 35, 43, 44, 52, 99, 110); the proposed "triples" operation (attaching three trailers, rather than the customary two trailers, to tractors) (RX 41, 42, 72, 76); driver uniform policy (RX 60); accident policy towards its contractors (RX 61); fuel card policy (RX 62); policies leading to driver turnover (RX 63); Metheany's fourth tractor not being given enough work (RX 67, 68, 70, 71); and constructive termination of his contract (RX 73, 74). The Complainant also frequently made telephone complaints to RPS' Contractor Relations Department. T. 177. None of his issues related to commercial motor vehicle safety.

On May 22, 1998, Metheany complained that another contractor's tractor had run over a curb in an RPS yard and damaged the running board and that RPS would not file an accident report as required with the contractor's insurance company. Metheany's brief to ALJ at 7, citing RX 75, an RPS file memorandum regarding the call; Metheany's brief to ARB at 5. RPS treated the issue as one between the contractor and the contractor's insurance company, and not a safety violation. R. D. & O. at 2-3. The Complainant later charged that his call contributed to the non-extension of his contract.

By May 1998, the Respondent had decided that it would not renew Metheany's contract. The Respondent's Director of Contractor Relations announced in an internal memorandum of May 27, 1998, captioned "Jerry Metheany Letters" that Metheany's letters were becoming longer and more frequent, full of half truths and self-serving statements without a basis in fact, and that "[i]n any case it is our intention not to renew his contract when it comes up for renewal in December 1998." RX 78. See also RX 85 (memorandum of June 15, 1998, reiterating that RPS did not intend to renew his contract); T. 180 (testimony of Timothy Edmonds, RPS Contractor Relations Department, that RPS did not revisit or rethink its decision not to renew the contract subsequent to its May 27, 1998 memorandum).

On June 12, 1998, RPS' Sacramento, California linehaul manager sent a notice that additional "triples" operations would begin in June or July, with driving classes scheduled for the last week of June and the first week of July. On June 23, 1998, the Complainant faxed a request for approval of a triples run, and on June 30, 1998, he faxed the results of his new driver's physical. Complainant's Exhibit (CX) 58, 62, 63, 65; R. D. & O. at 7.

The Complainant claims the Respondent withdrew the offer of the triples run because of subsequent events. T. 120; R. D. & O. at 7. On July 2, 1998, when two of the Complainant's drivers reached Holbrook, Arizona, on a round trip from Sacramento, the brakes on a front trailer locked up. RPS' linehaul manager directed those drivers to have the brakes disabled and to haul the brakeless trailer behind the trailer with working brakes for the 800-mile return trip to Sacramento ("Holbrook incident"). T. 36; R. D. & O. at 3. Hauling the brakeless trailer was an unsafe practice that violated RPS company policy and Department of Transportation (DOT) regulations issued by the Federal Highway Administration (FHA). T. 46; R. D. & O. at 3.

The Complainant asserted that he complained to the linehaul manager on July 2 that his drivers were required to drive the unsafe vehicle with disabled brakes and that the "triples" offer was withdrawn that day as a reprisal. However, the ALJ found that the "triples" offer was revoked on July 2 before Metheany found out and complained about the Holbrook incident. R. D. & O. at 7-8. His drivers testified, and Metheany admitted in a July 5 letter of complaint to the FHA, that he did not learn of the Holbrook incident until July 3. Metheany directed letters to RPS on July 2 and July 7 about withdrawal of the "triples" operation, but did not complain that it was in response to his complaints about the Holbrook incident. RX 68, 69; R. D. & O. at 7-8.

On November 16, 1998, Metheany wrote the RPS linehaul manager complaining that its "triples" operation was being operated contrary to RPS policy through the submission of fraudulent logs. He also asserted that another contractor's driver was driving from Sacramento to Portland, Oregon and back without taking the prescribed rest. T. 123; CX 91; R. D. & O. at 9.

On November 19, 1998, Metheany received official notice that his contract, which was scheduled for possible renewal on December 27, 1998, would not be renewed. CX 80; R. D. & O. at 9.

II. Procedural History

On November 19, 1998, Metheany complained to the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) that RPS had discriminated against him in violation of 41 U.S.C.A. § 31105(a)(1)(A) when it refused to renew its linehaul operating agreement. He attributed the non-renewal to his complaints to the Respondent and the U. S. Department of Transportation regarding the improper order of RPS' Sacramento linehaul manager for his drivers to proceed with a brakeless trailer in violation of FHA regulations.

On December 2, 1999, the OSHA Regional Administrator found that Metheany was both a contractor and a covered employee for purposes of STAA whistleblower protection, but dismissed the complaint because he found that RPS' decision not to renew the contract was based on legitimate business reasons made prior to his protected activities involving the Holbrook incident. As the Regional Administrator explained:

The evidence demonstrates that the Respondent was becoming frustrated with [his] continued challenging of Respondent's decisions and methods regarding its operations of the business On May 27, 19 [98], officials of the Respondent determined that they would not renew [his] contract. At that time the protected activities which [he] alleges formed the basis for Respondent's decision to not renew the contract had not yet occurred, therefore the allegation leading to the subject complaint is not substantiated.

OSHA findings at 4.

The Complainant then requested a hearing before an ALJ. Pursuant to this request, the ALJ held a hearing on February 10-11, 2000. At the hearing, Metheany contended that he was subjected to various adverse actions in reprisal for his safety complaints involving the Holbrook incident and other perceived safety violations. In particular, the claimed adverse actions involved: (1) RPS' July 2, 1998 withdrawal of a "triples run" pulling three RPS trailers from Reno to Salt Lake City; (2) RPS' July 31, 1998, disqualification of his two drivers from further work for participating in the Holbrook incident; and (3) RPS' decision not to enter into a new line-haul agreement with him in December, 1998. T. 6-8, 20-22; Metheany's brief to ALJ at 2-5; R. D. & O. at 4, 7.

RPS argued that Metheany was an independent contractor/employer who was therefore not a covered employee subject to STAA protection, but even if he were so covered, that there was no causal connection between the alleged adverse actions and Metheany's alleged protected activity. T. 134-35; RPS's brief to ALJ at 2-3, 11-12; R.D. & O. at 4-7.

The ALJ's June 20, 2000 recommended decision found for RPS. The ALJ held that Metheany, as an independent contractor/employer, was not a covered employee for purposes of STAA protection, except when he was personally operating a commercial vehicle. R. D. & O. at 4-6. He also determined that, even assuming *arguendo* that Metheany was a covered employee, he failed to show that RPS' business decisions were in retaliation for his various alleged protected activities. *Id.* at 6-11.

QUESTIONS PRESENTED

On appeal to the ARB, we consider:

1. Whether the ALJ correctly held that the Complainant was an independent contractor/employer who was not covered by the employee protection provisions of the STAA, except while driving a commercial vehicle.
2. Whether, even assuming the Complainant was covered, the ALJ correctly held that he had not been retaliated against for engaging in protected activity.

STANDARD OF REVIEW

Under the STAA implementing regulations at 29 C.F.R. § 1978.109(c)(3), this Board is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. The Board reviews the ALJ's conclusions of law *de novo*. *Madonia v. Dominick's Finer Food, Inc.*, ARB No. 00-003, ALJ No. 98-STA-2, slip op. at 4-5 (ARB July 26, 2002); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 2 (ARB June 28, 2002); *Tucker v. Connecticut Winpump Co.*, ARB No. 02-005, ALJ No. 2001-STA-53, slip op. at 2-3 (ARB Mar. 15, 2002), and cases cited.

DISCUSSION

I. Metheany Not Protected Employee

The ALJ correctly concluded that the Complainant was acting as an independent contractor of RPS, rather than as an employee, when he engaged in the alleged protected activity, and that, therefore, the STAA did not extend to him. R. D. & O. at 5-6.

The STAA protects employees, not employers. The STAA, 49 U.S.C.A. § 31105(a)(1), provides in pertinent part that a “person may not discharge an *employee*, or discipline or discriminate against an *employee* . . . 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. § 31101(2) defines an “employee” as “a driver of a commercial motor vehicle (*including an independent contractor when personally operating a commercial motor vehicle*), a mechanic, a freight handler, *or an individual not an employer* . . .” (emphasis added). See also 29 C.F.R. § 1978.101(d). 49 U.S.C.A. § 31101(3)(A) then defines an “employer” as “a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, *or assigns an employee to operate the vehicle in commerce* . . .” (emphasis added). Thus, an independent contractor who is an employer of other drivers is not an employee for STAA purposes, unless he is personally operating a vehicle.

The Board rules that there is substantial evidence for the ALJ's factual findings and adopts the ALJ's conclusion that the Complainant was an independent contractor acting as an employer at the time of his complaints to RPS and was consequently not covered by the STAA. Metheany's contract with RPS characterized him as an independent contractor. RX 118 at 295; R. D. & O. at 5. The relationship between Metheany as a sole proprietor and RPS had the indicia of an independent contractor rather than employee-employer relationship. R. D. & O. at 5-6. As an employer who assigned his four drivers to operate his commercial vehicles in commerce, he was not a mechanic, freight handler, or an individual who was not an employer. R. D. & O. at 4-6. Metheany expressed his concerns to RPS as a business owner, not as a truck driver. His letters and calls to RPS between 1994 and 1998, the withdrawal of the "triples" run, the disqualification of his two drivers for participating in the Holbrook incident, and RPS' decision not to enter into a new linehaul agreement were matters that concerned his economic interests as an employer, and not his personal safety as a driver. Hence, Metheany was not an employee and STAA did not apply.

Our decision, affirming the ALJ's holding that the Complainant was not entitled to STAA whistleblower protection under the facts and circumstances of this case, is consistent with the Secretary's decision in *Reemsnyder v. Mayflower Transit Inc.*, No. 93-STA-4, slip op. at 1-2, n.1, 6-7 (Sec'y May 19, 1994), *aff'd sub nom. Reemsnyder v. Occupational Safety & Health Administration, U.S. Dep't of Labor*, 56 F.3d 65 (6th Cir. 1995) (table), 1995 WL 325727 (full text). In *Reemsnyder*, the Secretary viewed Mayflower's termination of Reemsnyder's owner-operator contract as an adverse action against a covered employee because Reemsnyder's safety complaints involved matters arising while he was personally driving his tractor for Mayflower. He complained that Mayflower violated the hours of service regulations when it ordered him to go "off duty" while hired laborers unloaded. In contrast to *Reemsnyder*, Metheany did not raise safety concerns arising as a result of his own operation of a vehicle while under contract with RPS. We therefore affirm the ALJ's conclusion that the Complainant was not a protected "employee" under 49 U.S.C.A. § 31105, as defined in 49 U.S.C.A. § 31101.

II. Metheany Not Retaliated Against

Moreover, even if Metheany could have been considered an employee under the STAA and therefore subject to its protections, there is substantial evidence for the ALJ's factual findings that RPS did not discriminate against him for making complaints to RPS. We, therefore, affirm the ALJ's conclusion that RPS did not violate the STAA.

As quoted *supra*, the STAA prohibits any person from discharging, disciplining or discriminating against an employee with respect to pay, terms or privileges of employment because the employee has, *inter alia*, filed a complaint related to a violation of a commercial motor carrier safety regulation, standard or order. 49 U.S.C.A. § 31105(a)(1)(A). To prevail under the STAA, the complainant must prove that he made a protected complaint, that the

employer was aware of the complaint, that the employer discharged, disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and that there was a causal connection between the protected activity and the adverse employment action. *BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Mason v. Potters Express, Inc.*, ARB No. 00-004, ALJ No. 99-STA-27, slip op. at 3 (ARB Nov. 27, 2000); R. D. & O. at 6.

In STAA cases, the Board applies the framework of burdens developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws, such as the Age Discrimination in Employment Act. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5-6 (ARB June 28, 2002); R. D. & O. at 6 (citing *Shannon v. Consolidated Freightways*, ARB No. 98-051, ALJ No. 96-STA-15, slip op. at 5-6 (ARB Apr. 15, 1998)).

Under the burden-shifting framework of these cases, the complainant must establish a *prima facie* case of discrimination. The burden then shifts to the respondent to articulate a nondiscriminatory reason for the adverse action. At that stage, the burden is one of production, not persuasion. If the respondent carries this burden, the complainant then must prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. The fact finder may consider the credibility of the parties' evidence establishing the complainant's *prima facie* case and inferences properly drawn therefrom in deciding that the respondent's explanation is pretextual. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 146. The ultimate burden of persuasion that the respondent intentionally discriminated remains at all times with the complainant. *St. Mary's Honor Center*, 509 U.S. at 502; *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, slip op. at 5; *Gale v. Ocean Imaging and Ocean Resources, Inc.*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002).

In this case, the ALJ properly analyzed the record under this framework. There is substantial evidence to support his findings that the Complainant had not established by a preponderance of the evidence a causal link between his complaints and RPS' business decisions, or that he had not overcome RPS' proffer of legitimate, non-pretextual reasons for taking those actions. R. D. & O. at 11. Accordingly, the ALJ correctly held that RPS did not discriminate against the Complainant and, therefore, did not violate the STAA. We briefly summarize our review of this evidence.

A. May 22, 1998 accident report. As noted, Metheany attempted to prove a causal connection between his May 22 1998 complaint that RPS failed to file an accident report about damage to another contractor's tractor that occurred in an RPS yard and RPS' May 27, 1998

decision not to renew Metheany's contract in December 1998. Metheany's brief to ALJ at 7; Metheany's brief to ARB at 5. The Complainant did not demonstrate under 49 U.S.C.A. § 31105(a) that his call "related to a violation of a commercial motor vehicle safety regulation, standard, or order" by RPS. Instead, his complaint concerned the purely business issue of whether RPS would assist in notifying the contractor's insurance provider of the damage. *See Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, slip op. at 6. Even assuming the complaint was cognizable under the STAA, Metheany did not show by a preponderance of the evidence that his May 22 call played a role in the non-renewal of his contract.

B. Withdrawal of the triples operation offer. The ALJ correctly determined that RPS' Sacramento linehaul manager did not withdraw the "triples" run on July 2, 1998, in retaliation for Metheany's verbal complaint regarding the linehaul manager's improper directive to Metheany's drivers in Holbrook. Substantial evidence supports the ALJ's finding that Metheany failed to establish a causal connection between his safety complaint and the withdrawal of the "triples" operation offer. Metheany did not learn of the linehaul manager's order to Metheany's drivers until July 3, which was after the withdrawal of the offer. R. D. & O. at 7-8. Notwithstanding Metheany's contention that he learned of the incident on July 2, the preponderance of the evidence showed that Metheany found out on July 3. His drivers testified that they informed him of the Holbrook incident on July 3, and Metheany himself admitted in a July 5 letter of complaint to the FHA that he learned about the incident on July 3. Metheany wrote letters to RPS on July 2 and July 7 about withdrawal of the "triples" operation, but did not argue at that time that his complaints about the Holbrook incident caused termination of the "triples" offer. His reprisal claim thus fails in an essential element, causation.

C. Disqualification of Metheany's drivers. We next consider Respondent's decision to disqualify from further work the two Metheany drivers who hauled the brakeless trailer 800 miles from Holbrook to Sacramento. RPS subsequently terminated the Sacramento linehaul manager who gave the improper order. The ALJ noted that careless operation of a commercial motor vehicle violated the operating agreement between RPS and Metheany's sole proprietorship. R. D. & O. at 8. Further, transporting a trailer with disabled brakes violated a DOT regulation. *Id.* RPS made the decision to disqualify those drivers from further driving of RPS trailers because they violated safety requirements, and not because of Metheany's protests to the company or his July 5 complaint to the FHA. Because RPS acted for legitimate, non-discriminatory business reasons, the ALJ properly concluded that the Complainant did not sustain his burden of demonstrating that the action followed from Metheany's alleged protected activity. R. D. & O. at 8-9.

D. RPS' decision not to renew Metheany's contract. Finally, we consider whether the ALJ erred in holding that RPS' decision not to renew its agreement with Metheany did not result from his safety complaints under STAA. As we have noted, the Complainant's letters and calls from 1994 through 1998 pertained to his economic interests as a business owner, and not concerns over his safety as a driver. Metheany offered no proof that linked his May 22, 1998

inquiry about the failure of RPS to file an accident report with its internal decision of May 27, 1998, not to renew his contract. See RX 78 (internal memorandum of May 27, 1998, announcing an “intention not to renew his contract”); RX 85 (memorandum of June 15, 1998, reiterating that RPS did not intend to renew his contract); T. 180 (testimony of Timothy Edmonds, RPS Contractor Relations Department). Likewise, because the non-renewal decision was made before the Holbook events of July 2, 1998, those events could not have played a role in the decision. The Respondent persuaded the ALJ, and in turn this Board, that sound business reasons, and not a retaliatory motive, caused the company to take corrective action by disqualifying the drivers after the incident.

Lastly, the Complainant has failed to prove that his correspondence with the FHA on July 5 or his complaint to RPS on unrelated violations on November 16, caused RPS to issue the formal notification of the cancellation of the contract on November 19. While it is evident that the Complainant’s persistent and annoying carping at RPS’ business decisions figured prominently in its determination to sever its relationship with the Complainant (see T. 164, 180, 196; RX 75, 78, 85), that is a reason that the STAA does not prohibit. We scrutinize the Respondent’s actions only for *impermissible* motivation, namely retaliation for the Complainant engaging in protected activity regarding commercial motor vehicle safety regulations, standards or orders. RPS acted for legitimate, non-discriminatory business reasons. We affirm the ALJ’s decision that Metheany failed to establish the requisite causal connection between his alleged protected activity and RPS’ decisions, and so his complaint fails.

CONCLUSION

The complaint of unlawful discrimination is **DISMISSED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge