



In the Matter of:

GREGORY SOSNOSKIE,

ARB CASE NO. 02-010

COMPLAINANT,

ALJ CASE NO. 2002-STA-21

v.

DATE: August 28, 2003

EMERY, INC., WORLDWIDE MOVING,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Respondent:

Brian L. McCoy, Esq., *Law Offices of Brian L. McCoy & Associates, Inc., P.S., Puyallup, Washington*

FINAL DECISION AND ORDER

The Complainant Gregory Sosnoskie contends that Respondent Emery, Inc., Worldwide Moving, violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2002). For reasons stated herein, we adopt the Administrative Law Judge's Recommended Decision and Order (R. D. & O.) issued on April 24, 2002 that Emery did not commit a violation of the STAA.

BACKGROUND

Sosnoskie was a tractor-trailer driver who had suffered a disabling back injury in 1997. R. D. & O. at 3; Transcript (Tr.) at 14. Emery was a moving company that performed household moves for members of the military. R. D. & O. at 3. Emery hired Sosnoskie in August 2001 as a long haul driver and this case involves his first trip for the

company. “This is the first time I worked in over three-and-a-half years after my back surgery, [and I was concerned] how it was going to hold up.” Tr. 21.

On August 20, 2001, Sosnoskie left Auburn, Washington with a load of military household goods en route to Fort Lewis in Lakewood, New Jersey. R. D. & O. at 3; Tr. at 19-20; Complainant’s Exhibit (CX) 2. From Fort Lewis, he went to Cape Charles, Virginia with an empty trailer, and then on August 29, 2001 from Portsmouth, Virginia to Newport News, Virginia with no trailer at all (a practice that is called “bobtailing”). R. D. & O. at 3-4; Tr. at 23-25; CX 2. He drove the tractor, still without a trailer, to Salisbury, North Carolina, arriving on August 30, 2001. R. D. & O. at 4; Tr. at 26-30. Sosnoskie obtained a trailer in Salisbury and Emery arranged for him to haul household goods located in Hamilton, Ohio back to Washington State. R. D. & O. at 4; Tr. at 30-31.

Sosnoskie did not make the Hamilton trip, because his back was sore after bobtailing and he was too fatigued to drive through the night. R. D. & O. at 4; Tr. at 31. When he returned to Auburn on September 5, 2001, Emery terminated his employment. R. D. & O. at 4; Tr. at 43.

ISSUE

We consider whether the ALJ correctly held that Sosnoskie had failed to sustain his burden of establishing that Respondent discharged him because of activity protected under the STAA.

DISCUSSION

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a). We are 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 Transp., Inc. v. United States Dep’t of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). However, 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.

The STAA, 49 U.S.C.A. § 31105(a), provides that an employer may not “discharge”, “discipline” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” when the employee refused to drive because “the operation [would] violate[] a regulation, standard, or order of the United States related to commercial motor vehicle safety or health.” 49 U.S.C.A. § 31105(a)(B)(i).

The Complainant asserted that he was fired in violation of the STAA for refusing to violate Department of Transportation (DOT) regulations prohibiting a motor carrier from requiring a driver to drive more than ten hours after eight consecutive hours off duty, 49 C.F.R. § 395.3, and requiring a driver to drive while fatigued, 49 C.F.R. § 392.3. R. D. & O. at 2, 6-7; Tr. at 65. However, the Respondent claimed that Sosnoskie's employment was terminated because he was physically unable to perform his assigned duties, in which case there was no STAA violation. R. D. & O. at 2, 6-7; Tr. at 65-67.

Substantial evidence supports the ALJ's findings that Emery did not violate the STAA. The record establishes that Emery did not require Sosnoskie to drive in excess of ten hours and did not require him to drive while fatigued. R. D. & O. at 5-6; Tr. at 76-77. Instead of laying over in Salisbury, Sosnoskie could have driven four more hours, rested for eight, and arrived in Hamilton, Ohio the next day in time to pick up the load of household goods. R. D. & O. at 5-6; Tr. at 76-77. Sosnoskie admitted that Emery told him to rest his back in Salisbury, and Emery offered to fly him back to Washington. R. D. & O. at 5-6; Tr. at 38, 44, 66, 76-77.

There is also substantial record support for the ALJ's conclusion that Sosnoskie was discharged because he was unable to perform the physical demands of his job. To prevail on a STAA complaint, the complainant must prove that adverse action was taken because of his protected activity, and not because of some legitimate, non-discriminatory reason. *Metheany v. Roadway Package Systems, Inc.*, ARB No. 00-063, ALJ No. 2000-STA-11, slip op. at 7-8 (ARB Sept. 30, 2002); *BSP Transp., Inc.* 160 F.3d at 46; *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).

The ALJ found that "[b]ecause of back pain," the Complainant was "physically incapable of the type of driving required" by Emery. R. D. & O. at 6. His "rigid sleep schedule," under which he would not drive between 9:00 p.m. and 5:00 a.m., see Tr. at 15, 31, although not prohibited under DOT regulations, added to his inability to perform his duties. R. D. & O. at 6. There is ample evidence for these findings. Sosnoskie had a prior, seriously disabling back injury, which was aggravated on this, his first trip for Emery. Tr. at 14, 31-32. His back hurt throughout the time he drove for the Respondent. Tr. at 47. In Salisbury, he was not ordered to drive to Hamilton, Ohio; on the contrary, he was told to return to his hotel and rest. Tr. at 51 (testimony of Mary Clark), 73, 77 (testimony of Sosnoskie).

After returning to Washington, Sosnoskie admitted to Emery employees that "I guess I really can't do this [long haul driving] anymore." Tr. at 63, 66 (testimony of Clark). Emery's Mary Clark explained that military shipments required specific pick up and delivery times, which would be difficult to schedule because of Sosnoskie's physical condition. Tr. at 51-52, 66. "We were giving a person a chance to try to drive again. . . . Unfortunately, . . . his back condition will not let him be a truck driver." Tr. at 67 (testimony of Clark).

Accordingly, substantial evidence supports the finding that Emery terminated Sosnoskie's employment for a legitimate, non-discriminatory reason and the ruling that Emery did not violate the STAA. We therefore **ADOPT** and attach the ALJ's Recommended Decision and Order and **DENY** Sosnoskie's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge