In the Matter of:

WILL R. HARDY, **ARB CASE NO. 03-007**

COMPLAINANT, **ALJ CASE NO. 02-STA-22**

v. **DATE: January 30, 2004**

MAIL CONTRACTORS OF AMERICA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, Esq., ***Truckers Justice Center, Eagan, Minnesota***

For the Respondent:
Khayyam M. Eddings, Esq., ***Friday, Eldredge & Clark, Little Rock, Arkansas***

FINAL DECISION AND ORDER OF DISMISSAL

On April 3, 2001, the Complainant, Will R. Hardy, filed a complaint with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor. He alleged that the Respondent, Mail Contractors of America, Inc., had discharged him on March 30, 2001, for refusing to falsify his driver log books in contravention of the Surface Transportation Assistance Act of 1982, as amended (STAA), at 49 U.S.C.A. § 31105(a)(l)(B)(i) (West 1997), prohibiting the discharge of an employee for "refus[ing] to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health."

Following the January 25, 2002 dismissal of his complaint by the OSHA Regional Administrator, the Complainant requested a hearing before an Administrative Law Judge (ALJ) pursuant to STAA implementing regulations at 29 C.F.R. § 1978.106 (2001). On

October 4, 2002, the ALJ issued a Recommended Decision and Order (R. D. & O.) granting summary judgment to the Respondent under 29 C.F.R. § 18.40 (2001)[1] and denying the complaint. R. D. & O. at 1, 10.

The Complainant challenges his discharge for remaining on-duty during his employer–mandated off-duty break periods on February 25, 2001, during his Clinton, Tennessee mail run and also during his Birmingham, Alabama run on March 26-27, 2001. Federal guidance provides that "[i]t is the employer's choice whether the driver shall record stops made during a tour of duty as off-duty time." 62 Fed. Reg. 16370, 16422 (Apr. 4, 1997). The Respondent determined that all breaks over twenty minutes would be recorded as off-duty and informed its drivers, including the Complainant, that during off-duty breaks, the drivers were not responsible for the truck and its contents. R. D. & O. at 8-9.

On March 21, 2001, the Respondent notified the Complainant, and ten other drivers that they were incorrectly logging breaks as on-duty time, when in fact they should have been logged as off-duty time. *Id.* at 4. The Respondent cautioned the Complainant that his failure to log off-duty breaks correctly had caused him to exceed company guidelines for his bid runs. *Id.* Of the ten drivers so notified, only the Complainant refused to adhere to the Respondent's directions. *Id*. The Complainant received a Final Warning in Lieu of Suspension notice for claiming on-duty time while waiting for a substitute tractor to arrive from Atlanta to replace his disabled vehicle on the Clinton run. Pursuant to the Respondent's system of progressive discipline, the Complainant was subsequently discharged for remaining on-duty during scheduled off-duty breaks on the Birmingham run. R. D. & O. at 2-5.

We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies, which is prescribed in 29 C.F.R. § 18.40 (2002), also governs our review. The standard for granting summary decision under § 18.40 is essentially the same as that found in Fed R. Civ. P. 56, the rule governing summary judgment in the federal courts. Summary decision is appropriate under § 18.40(d) if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact is one, the resolution of which, "could establish an element of a claim or defense and, therefore, affect the outcome of the action". *Bobreski v. United States EPA*, 284 F. Supp. 2d 67, 72-73, (D.D.C. 2003).

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[1] Under these ALJ procedural regulations, "[w]hen a motion for summary decision is made . . ., a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that this is a genuine issue of fact for the hearing. The [ALJ] may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(c), (d).

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law. *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002- STA-25, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 00-STA-52, slip op. at 2 (Dec. 13, 2002). "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'" *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party." *Id.*

Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co.*, No. 93-ERA-42, slip op. at 4-6 (Sec'y July 17, 1995).

We agree with the ALJ that the Complainant has failed to demonstrate that there are any issues of material fact in dispute and that as a matter of law the Complainant has not shown that his discharge for claiming on-duty time during the aforementioned mail runs violated regulations for computing on-duty time for drivers under the federal motor carrier hours of service regulations at 49 C.F.R. § 395.2 (2001). Accordingly, he was not fired in contravention of 49 U.S.C.A. § 31105(a)(l)(B)(i).

As the ALJ explained with regard to the Clinton run, the Complainant was specifically told that he was relieved from duty and was not responsible for the truck trailer or its contents until a replacement truck arrived. He was not required to remain with his truck and was free to walk to nearby restaurants or spend time at the postal facility break room. He knew that it would take at least four hours for the replacement truck to arrive, and he was free to spend his off-duty time in any way that he chose. R. D. & O. at 7-8.

Similarly, we agree with the ALJ that the Complainant's refusal to take his off-duty break during the Birmingham run did not comport with the definition of on-duty time at 49 C.F.R. § 395.2 because he knew that he was supposed to take the off-duty break and it was for a finite period of time. He had been told that he was not responsible for the truck during the break and he was free to leave the premises and spend the break time elsewhere. R. D. & O. at 8-9.

Thus, we concur in the ALJ's finding that as a matter of law, the Respondent's off-duty logging policy did not violate "a regulation, standard, or order of the United States related to commercial motor vehicle safety or health" and that accordingly, the Complainant was not engaged in protected activity when he refused to comply with the Respondent's clearly articulated policy concerning the logging of off-duty time. Because the Respondent has shown that the Complainant has failed to establish the existence of an

element essential to his case, i.e., that he engaged in protected activity, the ALJ properly granted summary judgment. We find the ALJ's decision to be thorough, well-reasoned and fully supported by the record. Accordingly, we adopt the attached ALJ's R. D. & O. *Accord Hasan v. Stone and Webster Engineers and Constructors, Inc.*, ARB No. 03-058, ALJ No. 00-ERA-10, slip op. at 2 (ARB June 27, 2003); *Williams v. Baltimore City Public Schools System*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 3 (ARB May 30, 2003).

Therefore, we **AFFIRM** the ALJ's recommended grant of summary judgment to Respondent and **DISMISS** the complaint. *Chapman v. AI Transport*, 229 F.3d 1021 (11th Cir. 2000); *Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 13-14 (1st Cir. 1997).

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge