



In the Matter of:

MICHAEL M. HILBURN,

ARB CASE NO. 04-104

COMPLAINANT,

ALJ CASE NO. 2003-STA-45

v.

DATE: August 30, 2005

JAMES BOONE TRUCKING,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael S. Odom, Esq., Kievit, Odom & Barlow, Pensacola, Florida

For the Respondent:

George R. Mead, II, Esq., Moore, Hill & Westmoreland, P. A., Pensacola, Florida

FINAL DECISION AND ORDER OF DISMISSAL

Michael H. Hilburn drove trucks for James Boone Trucking (Boone), located in Seminole, Alabama. Hilburn claims that Boone violated the employee protection provisions of the Surface Transportation Assistance Act (STAA)¹ when it fired him on March 18, 2002, after he refused a dispatch because he would have violated a motor vehicle safety regulation if he had made the trip. A U.S. Department of Labor Administrative Law Judge (ALJ) recommended that we dismiss Hilburn's complaint because Hilburn did not sufficiently prove an essential element of his case; namely, that he engaged in activity the STAA protects. We affirm the ALJ's Recommended Decision and Order of Dismissal (R. D. & O.).

¹ 49 U.S.C.A. § 31105 (West 2005).

BACKGROUND

On Friday, March 15, 2002, Laurel Shiflett, one of Boone's dispatchers, called Hilburn in Charlotte, North Carolina and told him to deliver a load of freight to Auburndale, Florida no later than 7:00 A.M. on Monday, the 18th. Hilburn testified that he told Shiflett that he would not deliver the freight to Auburndale because he was "over hours," that is, by driving to Auburndale, he would violate the U.S. Department of Transportation's maximum driving time rule that forbids driving after being on duty for 70 hours during the previous eight days.² Hilburn testified that he also told Shiflett earlier that day that he was over hours. In fact, Hilburn claimed that, beginning in February 2002, he spoke to Karen Campbell, Boone's safety director, and other dispatchers about the fact that the company was routinely requiring him to work over hours and thus violate the driving time rules. TR 31-32.

Boone's version of the March 15 events is quite different. According to Andy Walker, Boone's operations manager, when Hilburn told Shiflett that he refused to make the Auburndale run, she put him on hold and told Walker about this refusal. Walker testified that Shiflett did not indicate then or thereafter that Hilburn complained about being over hours.³ Walker told Shiflett to tell Hilburn to deliver the load to Auburndale, and she did so. TR 199-202. Hilburn did not drive to Auburndale but instead brought the load to the Seminole yard on Friday, the 15th.

On Monday, March 18, Hilburn came to the Seminole headquarters. He testified that he again spoke to Campbell about his over hours issues and then, in a meeting with Walker and Brian Young, Boone's general manager, he complained to them too about having to drive over hours. TR 90-91. But Walker and Young said that Hilburn never mentioned hours of service issues during the meeting. TR 203, 205, 170. Instead, they testified that when asked why he did not make the Auburndale trip, Hilburn complained that he would not work on weekends for the pittance they were paying him and angrily asked them, "What are you going to do about it?" TR 203, 136. Young then fired him. Young testified that he fired Hilburn because he had not delivered the freight to Auburndale. TR 164-65. Walker thought that Young fired Hilburn because he refused to drive on weekends and because of his angry, combative conduct during the meeting. TR 206.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge" in cases arising

² 49 C.F.R. § 395.3 (2005).

³ Shiflett did not testify.

under section 31105.⁴ Under the STAA, the ALJ's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole.⁵ In reviewing the ALJ's conclusions of law, the ARB, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision"⁶ Therefore, we review the ALJ's conclusions of law de novo.⁷

DISCUSSION

The Legal Standard

The STAA's employee protection provisions prohibit employment discrimination against employees who engage in protected activity. Protected activity includes filing a complaint or beginning a proceeding "related to" a violation of a commercial motor vehicle safety regulation, standard, or order or testifying or intending to testify in such a proceeding.⁸ Protected activity also includes a refusal to operate a commercial motor vehicle because "(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."⁹

To prevail on a STAA claim, the complainant must first prove by a preponderance of the evidence that he engaged in protected activity. He must then prove, again by a preponderance of the evidence, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that a causal connection exists between the protected activity and the adverse action.¹⁰ Failure to establish any one of these elements requires dismissal of the complaint.

⁴ 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 00-STA-50 (ARB Sept. 26, 2001).

⁵ 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004).

⁶ 5 U.S.C.A. § 557(b)

⁷ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

⁸ 49 U.S.C.A. § 31105(a)(1)(A).

⁹ 49 U.S.C.A. § 31105(a)(1)(B).

¹⁰ *Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36, slip op. at 4 (ARB June 30, 2005).

Hilburn Did Not Prove That He Made Protected Complaints Under § 31105 (a)(1)(A).

As noted, subsection (A) of section 31105 (a)(1) prohibits retaliation when an employee files a complaint about a violation of a commercial motor vehicle safety regulation. Internal complaints to management about safety regulation violations constitute protected activity under this subsection.¹¹

Though Hilburn's complaint did not allege a violation of subsection (A), the ALJ made findings pertaining to internal complaints that Hilburn testified he made. He weighed Hilburn's testimony that he complained to Karen Campbell in February 2002 and again on March 18, 2002, about his over hours driving with Campbell's testimony that Hilburn never raised over hours concerns with her. Likewise, he balanced Hilburn's testimony that he talked to Walker and Young at the March 18 meeting about his over hours driving concerns with their testimony that that Hilburn had not said anything about driving over hours. And since Hilburn did not provide any evidence corroborating his testimony, and since he found that Campbell, Walker, and Young were as credible as Hilburn, the ALJ determined that Hilburn had not proven by a preponderance of the evidence that he had made protected complaints to Campbell, Walker, and Young. Therefore, the ALJ concluded that Hilburn did not prove that Boone violated subsection (A).¹² Since the record fully supports the ALJ's findings and his conclusion that Boone did not violate subsection (A), we affirm those findings and that conclusion.¹³

Hilburn Did Not Prove That He Would Have Violated the 70-Hour/8-Day Driving Rule if He Had Driven to Auburndale.

Subsection (B)(i) of section 31105 (a)(1) prohibits an employer from retaliating because an employee refuses to drive when to do so would violate a commercial motor vehicle regulation. A refusal to drive is protected only if the record establishes that the driving actually would have violated the motor vehicle regulation at issue, here the 70

¹¹ See *Regan v. Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5 (ARB Sept. 30, 2004).

¹² R. D. & O. at 14.

¹³ Hilburn testified that he also complained to unnamed "dispatchers" (other than Shiflett and Walker) around February 2002 about having to drive over hours. TR 31-32. He also claims that during his first phone conversation with Shiflett on March 15, before he drove from McAdenville, North Carolina to Charlotte, he told Shiflett that he "was out of hours" or "running out of hours." TR 23-24, 52. If Hilburn did indeed make these complaints, they might constitute protected activity. Hilburn did not argue to the ALJ that these complaints were protected, and the ALJ did not address them. Therefore, we make no finding as to whether Hilburn made the complaints or whether they are protected.

hour/8-day driving rule. A good faith belief that a violation would occur does not suffice.¹⁴

Hilburn alleged that Boone fired him because he refused to drive to Auburndale on March 15th in violation of the 70-hour/8-day rule. To support his allegation, Hilburn offered documentary evidence consisting of copies of his official driver logs for March 10 through March 15 and shipping manifests from some of the pick-ups and deliveries he made that week. RX-C; CX 2, CX3, CX5, CX 16. And his testimony included estimates of the time he spent on duty and the miles he drove from March 10 until he refused the dispatch to Auburndale on March 15. TR 36-58; CX 4.

But the ALJ found Hilburn's evidence "too inexact" to prove that he would have violated the rule. The driver logs did not support Hilburn's claims. Indeed, Hilburn testified that he had falsified them specifically to underreport his actual on-duty time. Tr. 63-70, RX C; R. D. & O. at 17 n.8. And the ALJ did not consider Hilburn's estimates and recollections reliable because Hilburn gave his testimony one year and nine months after the fact. Moreover, on key points such as Hilburn's likely average rate of speed, Hilburn and Walker gave conflicting testimony. R. D. & O. at 15-17.

The ALJ calculated Hilburn's on-duty time for the period March 10 through March 15 using various combinations of Hilburn's driver log entries, Hilburn's testimonial estimates, and Walker's estimates of driving speed. Under some calculations, Hilburn would have exceeded allowable hours; under one of the calculations, he would not. Thus, concluded the ALJ, "The question of whether Mr. Hilburn would have actually exceeded 70 hours for either March 10th-17th or March 11th-18th is too close a calculation to determine based on approximation." R. D. & O. at 17, n.8. Therefore, he found that Hilburn failed to establish by a preponderance of the evidence that driving to Auburndale by 7:00 a.m. Monday morning would have violated the 70-hour/8-day regulation.

Substantial evidence supports this finding. As such, it must be affirmed.¹⁵ Therefore, Hilburn's refusal to drive to Auburndale is not a protected activity under section 31105(a)(1)(B), and his allegation that Boone violated this section of the STAA must fail.

CONCLUSION

We find that substantial evidence on the record as a whole supports the ALJ's findings that Hilburn did not prove by a preponderance of the evidence that he engaged in

¹⁴ *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 2000-STA-48, slip op. at 4 (ARB July 31, 2003).

¹⁵ *See* 29 C.F.R. § 1978.109(c)(3); *Lyninger*, slip op. at 2.

activity that is protected under either subsection (A) or (B) of 49 U.S.C.A. § 31105 (a)(1). Therefore, we **AFFIRM** the ALJ's recommended order and **DENY** Hilburn's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge