**In the Matter of:**

**CHARLES A. WILLIAMS, JR.,** **ARB CASE NO. 05-137**

**COMPLAINANT,** **ALJ CASE NO. 2005-STA-027**

**v.** **DATE: December 31, 2007**

**CAPITOL ENTERTAINMENT SERVICES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
**Charles A. Williams, Jr., *pro se*, New York, New York**

## FINAL DECISION AND ORDER AFFIRMING, IN PART, AND REMANDING, IN PART

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2007).[1] Section 31105 protects employees, who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules, from discrimination. The Administrative Review Board (Board or ARB) automatically reviews an Administrative Law Judge's (ALJ) recommended STAA

[1] The STAA has been amended since Williams filed his complaint. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide whether the amendments are applicable to this case, because even if they were applicable, they would not affect our decision because they are not relevant to the issues presented by this case.

decision pursuant to 29 C.F.R. § 1978.109(c)(1). On August 4, 2005, an ALJ recommended dismissing Williams's complaint. We affirm in part and remand in part.

## BACKGROUND

For convenience, we briefly restate certain background facts. More details are provided in the ALJ's Recommended Decision and Order (R. D. & O.).

John Best (Best), president of Capitol Entertainment Services (CES), hired Charles Williams on September 1, 2004, to serve as its "Director of Maintenance" in the District of Columbia. R. D. & O. at 3, 6. Williams's job responsibilities included serving as a mechanic and devising a repair and maintenance system and training schedule to assure compliance with federal and local regulations. R. D. & O. at 6.

Best subleased the CES facility from Marie Saint Thomas, owner and operator of a different commercial vehicle company, MCT Tours, Inc. R. D. & O. at 7. Best expected Williams to work only on vehicles CES authorized and not to complete side projects at the work site. *Id.*

Upon starting his employment, Williams observed that CES drivers did not maintain "defect books" that the Federal Motor Carrier Safety Administration (FMCSA) requires. R. D. & O. at 3. With Best's consent, Williams procured books for the drivers to record defects, but observed that the drivers were not correctly recording all occurrences. *Id.* Upon informing Best that the drivers were not properly recording defects, Best told Williams he "was coming on too strong," and that Williams should "back off" since the operation was still new. *Id.*

While working for CES, Williams observed and fixed numerous other problems with vehicle maintenance, including defective windshield wipers, low treads on tires, and a faulty exhaust that leaked emissions into the passenger cabin. R. D. & O. at 4. Williams requested that Best procure a computer, a software program, additional tires, and a forklift. R. D. & O. at 6-7. Best ordered the computer and software, but felt that the other requests were excessive and unnecessary. *Id.*

Williams was often absent from the work facility during work hours. R. D. & O. at 7. Thomas testified that Williams was often not on the premises. R. D. & O. at 4. She also testified that and that when he was at the facility, Williams spent a lot of time on the company computer. *Id.* Lowell Bolden, a CES bus driver, testified that he notified Williams of a defective windshield wiper, but Williams failed to replace it and Bolden had to fix the wiper himself. R. D. & O. at 5-6. Best did inform Williams that his performance was poor, but did so "cautiously." R. D. & O. at 7 (*quoting* Transcript (Tr.) at 261.)

On September 24, Williams contacted Best to inform him that a school bus on site should be grounded because its tires were bald. R. D. & O. at 4. Best told Williams to

measure the tread on the tires and then to wait for another company to come to the lot to change the tires. *Id.* Best also personally measured the tires, but did not notice any obvious defect in the tires. *Id.* Best did, however, contact CES's tire contractor for replacement parts. *Id.*

On September 27, Best terminated Williams's employment. R. D. & O. at 10.

On November 19, Williams filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that CES had discriminated against him because he engaged in whistle blowing activities under STAA. On March 9, 2005, OSHA dismissed Williams's claim, concluding that his discharge was not related to protected activity. Williams timely appealed OSHA's decision with a Department of Labor (DOL) ALJ. The ALJ held a hearing on April 28, 2005, and she issued a recommended decision dismissing Williams's claim on August 4, 2005.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part 1978.[2] We issued a Notice of Review and Briefing Schedule on August 10, 2005. Williams filed Complainant's Brief (CB) before the Administrative Review Board.

When reviewing STAA cases, the Board is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole.[3] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[4] We must uphold an ALJ's finding of fact that is supported by substantial evidence even if there is also substantial evidence for the other party's position, and even if we "would justifiably have made a different choice" had the matter been before us de novo.[5] We review the ALJ's conclusions of law de novo.[6]

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[2] Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[3] 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co*., ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

[4] *Universal Camera Corp*. v. *NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co*. v. *NLRB*, 305 U.S. 197, 229 (1938)).

[5] *See Universal Camera Corp*., 340 U.S. at 488; *McDede v. Old Dominion Freight Line, Inc*., ARB No. 03-107, ALJ No. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

[6] *See Olson v. Hi-Valley Constr. Co*., ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

## DISCUSSION

### I. 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.[7] 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."[8]

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.[9] Failure to establish any one of these elements requires dismissal of the complaint.

STAA coverage was undisputed, and accordingly the ALJ found that the parties were covered under STAA. R. D. & O. at 9. CES was subject to the act since it operated vehicles in excess of 10,000 pounds engaging in interstate commerce.[10] STAA specifically includes "a mechanic" as a covered employee.[11] Williams, as a mechanic, was employed in a manner that directly affected the safety of those vehicles and is covered under STAA.[12]

Williams suffered an adverse employment action when CES terminated his employment on September 27, 2004. Neither party contests this finding.

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7 49 U.S.C.A. § 31105(a)(1)(A).

8 49 U.S.C.A. § 31105(a)(1)(B).

9 *Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 4 (ARB June 30, 2005).

10 49 U.S.C.A. § 31101(3)(A); *See* 49 U.S.C.A. § 31101(1).

11 49 U.S.C.A. § 31101(2)(A).

12 *See* 29 C.F.R. § 1978.101(d)(1).

## II. September 24 Complaint of School Bus Safety

### A. Protected Activity

The ALJ found that Williams engaged in protected activity, since his "concerns about the safety of tires and an exhaust system were based upon a reasonable apprehension of serious injury to the public due to potentially unsafe conditions." R. D. & O. at 10. The ALJ concluded this since "the evidence clearly establishes that [Williams] refused to clear vehicles for service because of concerns that he had about the safety of buses." R. D. & O. at 9.

But in concluding that Williams engaged in activity protected by Section (B)(ii), the ALJ applied the wrong section. This section of STAA, 49 U.S.C.A. § 31105(a)(1)(B)(ii), states that an employer may not discharge an employee because "the employee refuses to operate a vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." Thus to establish that he engaged in protected activity under this section, Williams must show that he refused to operate a vehicle.[13] As a mechanic, Williams did not drive or operate any vehicles for CES. Therefore, his complaints concerning the safety of school buses do not constitute a refusal to drive.

Since Williams did not refuse to operate a vehicle, the ALJ's conclusion that he engaged in protected activity under (B)(ii) is not in accordance with law. Therefore, we cannot affirm that conclusion. However, the ALJ's error was harmless because Williams's complaint about the safety of the school bus falls under Subsection (A) of section 31105(a)(1), which 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.[14]

The ALJ found that Williams made internal complaints to Best, his manager, concerning "the safety of tires and an exhaust system." R. D. & O. at 10. Williams's complaints related to motor safety regulations regarding the safe operation of a school

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[13] 49 U.S.C.A. § 31105(a)(1)(B); *Krahn v. UPS,* ARB No. 04-097, ALJ No. 2003-STA-024, slip op. at 6 (ARB May 10, 2006); *Zurenda v. J & K Plumbing & Heating Co., Inc.*, ARB No. 98-088, ALJ No. 1997-STA-016, slip op. at 4 (ARB June 12, 1998); *Williams v. CMS Transp. Servs., Inc.*, 1994-STA-005, slip op. at 2 (Sec'y Oct. 25, 1995).

[14] *See Hilburn v. James Boone Trucking*, ARB No. 04-104, ALJ No. 2003-STA-045, slip op. at 3-4 (ARB Aug. 30, 2005); *Regan v. Nat'l Welders Supply,* ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 5 (ARB Sept. 30, 2004)(protected activity may result from "purely internal complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulations, or standard").

bus. *Id.* Therefore, these complaints, which the ALJ identified as a "refus[al] to clear vehicles . . . [,]" are instead protected activity under 49 U.S.C.A. § 31105(a)(1)(A).

### B. Causation

To establish causation, Williams must show that he suffered adverse action because of protected activity. The ALJ concluded that CES "had a legitimate reason to terminate [Williams's employment]. Despite the temporal relationship between one incident of protected activity, that is, [Williams's] expression of concern about tire tread, and his termination, [the ALJ] found no evidence that this activity contributed in any way to his termination." R. D. & O. at 11.

CES claimed that the parties developed a "sour relationship." R. D. & O. at 10. "[Williams's] work performance fell short of expectations. He showed no initiative." *Id.* Williams's conduct "while employed by CES was unacceptable at times" including "unauthorized use of the work site for personal reasons and . . . frequent absences during official duty hours." R. D. & O. at 11.

Further, the ALJ found that Williams "provided no evidence that [CES's] rationale for his termination [was] mere pretext." R. D. & O. at 10. To prevail before the Board, Williams must show that the ALJ erred in not finding pretext in CES's articulated rationale for terminating his employment.

Williams argues that the ALJ erred in finding he had poor job performance, claiming instead that he "never refused to perform any repair." CB at 3. In particular, Williams avers that a wiper blade, which witnesses say he refused to replace, was not purchased until after he was fired. *Id.* Bolden's testimony indicates that this was indeed the case, as Bolden was forced to purchase the necessary part himself. R. D. & O. at 6. But, the ALJ found that "although [Williams] asserted that he did not have proper equipment on site to do some repairs that languished for days, the record is clear that Mr. Best had agreements with sub contractors [sic] and that he would have authorized [Williams] to use, had [he] informed him of the need." R. D. & O. at 10-11. The testimony by Best and Bolden supports this interpretation, and the ALJ concluded that it was clear that Williams could have requested the part if necessary. *Id.* Thus, substantial evidence supports the ALJ's finding.

Further, even if Williams's depiction of the wiper blade incident is accurate, he does not address the accusation that a "bus was out of commission for days until another employee fixed the problem." R. D. & O. at 10. The wiper blade incident was not the sole instance of projects Williams did not complete. *Id.*

Moreover, this argument does not address the ALJ's finding that Williams's excessive absences from the workplace and his involvement on non-CES projects while working had a negative impact upon his job performance. Williams has failed to demonstrate that the ALJ erred in finding CES believed Williams to be a poor performer.

Williams also contests the ALJ finding that his job description and position were "in flux." CB at 4. He claims that instead his position was "heavily regulated" by the FMCSA and that it was "interference of [Best] into the proper operation of the maintenance department that prevented [Williams] from completing his job." *Id.* But, Williams misconstrues the ALJ's findings, which addressed the fact that "the job itself fell short of [Williams's] expectations. . . . [Williams] was frustrated and disappointed to find circumstances that did not fit his vision of supervising the maintenance of [CES]." R. D. & O. at 10. Williams's role as mechanic, under the FMCSA, was clearly defined, but his role as manager was still in flux in the fledgling company. In any event, Williams has failed to explain how his disagreement with the ALJ's characterization of the status of his job is relevant to the ALJ's pretext finding or would require us to reject this finding.

Williams does not demonstrate error in the ALJ's findings that he engaged in unacceptable conduct in the workplace, that he had frequent unexcused absences, and that the relationship between Williams and CES had soured. Substantial evidence supports the ALJ's determination that Williams's September 24, 2004 complaint about the unsafe condition of school bus tires did not contribute to CES's decision to terminate his employment.

## III. Requests for Inventory and Equipment

The ALJ also found that the concerns Williams raised about equipment and inventory were not protected activity because "the concerns [Williams] raised about adequate equipment and inventory . . . do not directly impact safety . . . as [CES] makes arrangements with other service providers to make repairs outside the ability of its shop." R. D. & O. at 9.

Citing *Jacobson v. Bever,* Williams contends that complaints "to OSHA about conditions in [a] school bus maintenance shop, including inadequate equipment for tire repair . . . , constitute[] protected activity 'relating to' a commercial motor vehicle safety standard."[15] But *Jacobson* is distinguishable because the complaints there were of a different nature than in the present case. First, Jacobson complained about a dangerous working area, in which exhaust fumes could "adversely affect his ability to operate his vehicle safely and to maintain vehicles correctly."[16] Williams's requests, in contrast, were for additional materials to complete the daily repair of vehicles in the ordinary course of business. The day to day requests for additional inventory are distinct from safety-related complaints protected under STAA in *Jacobson*.

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[15] CB at 2 (quoting *Jacobson v. Bever*, ALJ No. 1992-STA-017 (Sec'y Aug. 31, 1992).

[16] *Jacobson*, slip op. at 2.

Second, Jacobson complained about inadequate items available for necessary repairs.[17] However, since CES acquired the majority of its parts from outside vendors, Williams was required, in completing his job requirements, to request inventory from Best on a regular basis. The ALJ was correct in her assessment that Williams's request for parts did not directly affect safety. Williams's requests for additional inventory and equipment, other than the defect reports, were not protected activity.

## IV. Completion of "Defect Reports"

As Williams argued in his brief to the Board, the ALJ failed to address the question of whether the "administrative concerns relating to the FMSCA requirements to keep adequate driver defect reports [were] not related to safety." CB at 2.

The ALJ noted that Williams "observed there were no 'defect books' kept on [CES's] buses." R. D. & O. at 3. Williams's description of "defect books" seems to refer to the requirement for commercial drivers to keep a daily log.[18] DOT regulations require that drivers keep logs of their duty status for each 24-hour period.[19]

As the ALJ noted, Williams "secured books to be maintained by the drivers, but he observed that the drivers were not correctly recording defects. . . . [Williams] advised [CES's] owner, Mr. Best, of the problem. . . . [A]nd [Best] suggested that [Williams] back off since the operation was just getting going." R. D. & O. at 3. Best testified that Williams requested that he order defect books, and that Best did order them. *Id.* Best also testified that some of his drivers' logs were filled out improperly since the business was new and he "was kind of really going from the cuff the first couple of days." Tr. at 275- 277.

However, in evaluating Williams's protected activity, the ALJ did not address whether his complaints concerning the lack of, and subsequently the improper use of, defect logs were protected activities under STAA. The ALJ's evaluation of causation is not complete since the effect of this possible protected activity was not assessed. To properly evaluate whether protected activity contributed to CES's decision to terminate Williams's employment, all instances of protected activity must be thoroughly assessed.

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[17] *Id.*

[18] R. D. & O. at 3; s*ee* 49 C.F.R. § 395.8.

[19] 49 C.F.R. § 395.8(a); *see Carney v. Price Transp.*, ARB No. 04-157, ALJ No. 2003-STA-048, slip op. at 2 (ARB May 31, 2007) (Price Transport terminated Carney's employment due to a falsification of daily logs).

## CONCLUSION

Substantial evidence supports the ALJ's finding that the September 24, 2004 complaint about the safety of a school bus did not contribute to his termination. We therefore **AFFIRM** the ALJ's R. D. & O. in part.

Whether CES's termination of Williams's employment violated the STAA cannot be decided without first determining if Williams's involvement with the "defect reports" constituted protected activity. We therefore **REMAND** for further proceedings consistent with this decision.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**

**DAVID G. DYE**
**Administrative Appeals Judge**