



In the Matter of:

WILLIAM J. BETTNER,

ARB CASE NO. 06-013

COMPLAINANT,

ALJ CASE NO. 2004-STA-18

v.

DATE: May 24, 2007

CRETE CARRIER CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., *Truckers Justice Center*, Burnsville, Minnesota

For the Respondent:

Jane M. McFetridge, Esq., and Tanya L. Jachimiak, Esq., *Fisher & Phillips LLP*, Chicago, Illinois

FINAL DECISION AND ORDER

The Complainant, William J. Bettner, filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that the Respondent, Crete Carrier Corporation, violated the employee protection provisions of section 405 of the Surface Transportation Assistance Act (STAA)¹ and its implementing regulations²

¹ 49 U.S.C.A. § 31105 (West 2007).

² 29 C.F.R. Part 1978 (2006).

when Crete transferred him from the dedicated to the national fleet in retaliation for informing Crete that he could not meet the designated schedule of deliveries because to do so he would be required to violate Department of Transportation (DOT) hours-of-service regulations. A Department of Labor (DOL) Administrative Law Judge (ALJ) granted Crete's Motion for Summary Judgment, finding that Bettner failed to establish that there were any genuine issues of material fact relevant to his entitlement to relief under the STAA's employee protection provisions.³ Because we find that the ALJ correctly determined that Bettner failed to proffer any evidence that Crete's alleged non-discriminatory reason for discharging him was pretext for retaliation and failed to address this determination on appeal to us, we hold that the ALJ properly granted Crete's motion for summary judgment.

BACKGROUND

Statement of Facts

Crete operates an over-the-road trucking company in Illinois and throughout the United States.⁴ It provides long haul, regional and dedicated, dry van and temperature control transportation services.⁵ In August 2003, Jon Thompson, Crete's Fleet Manager at its Ottawa, Illinois terminal, contacted Bettner to determine whether he was interested in applying for a position as a truck driver.⁶

At that time, Crete operated a dedicated account for General Mills/Pillsbury that required Crete to guarantee a certain number of tractors, trailers, and drivers to be used exclusively on that account, i.e., the dedicated fleet.⁷ In exchange for dedicated equipment and timely pick-up and delivery, General Mills paid Crete a premium rate and allocated to it a specific percentage of its daily freight.⁸ General Mills provided Crete's dispatchers with multiple pick-up and delivery windows and the dispatchers scheduled dispatches that the drivers could complete within the Department of Transportation

³ Recommended Decision and Order Granting Respondent's Motion for Summary Decision (R. D. & O.) at 25.

⁴ *Id.* at 6.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Declaration of Jack Peetz, Executive Vice-President and Chief Operating Officer, Crete Carrier Corporation (Peetz Dec.) at 2, para. 10.

hours-of-service regulations.⁹ General Mills depended upon Crete's ability to guarantee pick-up and delivery of freight at specific times to maintain strict control of its inventory.¹⁰ Drivers assigned to the dedicated fleet were responsible for planning their trips so that they could comply with General Mills's schedule as well as the DOT hours of service regulations.¹¹ If the driver failed to pick up or deliver within the delivery window, a Service Failure Delivery Comment was placed on the order.

When Thompson contacted Bettner, Crete also operated a non-dedicated fleet, known as the national fleet.¹² Proper pre-planning and timely pick-up and delivery were not as critical for national fleet drivers.¹³

Crete hired Bettner on or about September 5, 2003, primarily to drive for the dedicated fleet, but he spent the first couple of weeks on the job driving for the national

⁹ *Id.* Hours-of-service regulations limit the number of hours a commercial truck driver may operate his or her vehicle during any given day and 7-day period. Peetz Dec. at 2, para. 57. The regulations applicable in October 2003 provided:

(a) Except as provided in §§ 395.1(b)(1), 395.1(f), and 395.1(h), no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:

(1) More than 10 hours following 8 consecutive hours off duty; or

(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

(b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. § 395.3 (2002). The regulations have subsequently been amended, effective January 4, 2004. 49 C.F.R. § 395.3 (2003).

¹⁰ Peetz Dec. at 1, para. 5.

¹¹ R. D. & O. at 6.

¹² *Id.*

¹³ Peetz Dec. at 2, para. 11.

fleet.¹⁴

On October 3, 2003, Chis Lingbloom, a dedicated fleet dispatcher, assigned Bettner a dispatch consisting of three separate pick-ups and deliveries:

Pick-up Location/Window	Delivery Location/Window
(1) Geneva, Illinois 10/03/03 5:00 p.m. – 11:59 p.m.	Atlanta, Georgia 10/06/03 12:01 a.m. – 12:00 p.m.
(2) Lavergne, Tennessee 10/06/03 8:30 a.m. – 5:00 p.m.	Geneva, Illinois 10/07/03 12:01 p.m. – 11:00 p.m.
(3) Kankakee, Illinois 10/07/03 3:00 p.m.	Joplin, Missouri 10/08/03 11:00 p.m. [¹⁵]

1. Geneva, Illinois to Atlanta, Georgia

Bettner picked up his first load in Geneva, Illinois on time and drove to his home in Rochelle, Illinois. He went off duty from 4:45 p.m. on October 3, 2003, until 1:00 a.m. on October 5th, a total of 32.25 hours. He then drove for four hours, rested for 8 hours and went off-duty for another 1.5 hours. He drove for 2.25 hours, stopped to fuel his truck for 45 minutes and then went off-duty for another 1.5 hours. At 7:00 p.m. he went on duty again for 4.5 hours and then went off-duty for the night.¹⁶

Bettner went on-duty again at 7:00 a.m. on October 6, 2007, performed a vehicle inspection, drove 30 minutes, and went off-duty for 45 minutes. After breakfast he resumed driving and arrived in Atlanta at 11:00 a.m. Although Bettner arrived in Atlanta one hour before the close of the delivery window, the trailer could not be unloaded until 12:45 p.m., forty-five minutes after the delivery window had closed.¹⁷ Bettner testified that it was not unusual to have to wait to unload in Atlanta and acknowledged that if he had gotten to Atlanta earlier it was possible that his truck could have been unloaded during the delivery window.¹⁸ Because the truck was not unloaded within the delivery

¹⁴ R. D. & O. at 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 8.

¹⁸ Bettner Deposition (Bettner Depo.) at 161, 164-165.

window, the load received a Service Failure Comment for untimely delivery.¹⁹

2. Lavergne, Tennessee to Geneva, Illinois

Bettner left Atlanta en route to Lavergne, Tennessee at 1:00 p.m. on October 6th. He drove approximately 30 minutes and stopped to fuel his truck for 15 minutes. He drove one 1 hour.²⁰ Bettner stated that he contacted the shipper in Lavergne and “[t]he person with whom I spoke told me that my load for Geneva would not be ready until later that night.”²¹ Bettner took a 2-hour break, resumed driving at 4:45 p.m. and arrived at Lavergne at 7:45 p.m., 2 hours and 45 minutes after his scheduled pick up time.²² Bettner did not indicate at what time the Lavergne dispatcher told him the truck would be ready.

Bettner waited for the paperwork to be completed from 7:45 p.m. until 8:45 p.m. and then drove across the street to a truck stop where he went off duty for 30 minutes.²³ He then drove 1 hour and 45 minutes to Oak Grove, Kentucky where he entered his sleeper berth for 10 hours. He exited his sleeper berth on October 7, 2003, at 8:00 a.m. and remained off duty for an additional 1 hour and 30 minutes. He went on-duty at 9:45 a.m. and drove for 4 hours and 15 minutes before stopping and taking a 1-hour break. After fueling his truck for 15 minutes, he drove to Gillman, Illinois.²⁴ During the drive to Gillman, Bettner sent Crete a Qualcomm message requesting the dispatcher to reschedule his pick-up time in Kankakee, Illinois. The dispatcher rescheduled the Kankakee pick-up for “first thing” the next morning.²⁵ When Bettner arrived in Gillman, he went off-duty for 1 hour.²⁶ He resumed driving at 6:30 p.m. and arrived in Geneva at 8:45 p.m., within the delivery window.²⁷ He dropped his trailer from 8:45 p.m. to about 9:15 p.m., but the trailer he was to pick up was not ready, so he went off duty from 9:15 p.m. to 10:15

¹⁹ R. D. & O. at 8.

²⁰ *Id.* at 8.

²¹ Bettner Declaration (Bettner Dec.) at 7, para. 34.

²² R. D. & O. at 8.

²³ Bettner Dec. at 7, para. 37.

²⁴ R. D. & O. at 8.

²⁵ Bettner Dec. at 9, para. 48.

²⁶ R. D. & O. at 8.

²⁷ *Id.*; Bettner Dec. at 9, para. 49.

p.m.²⁸

When he left Geneva, he had 1.25 hours of available driving time under the DOT hours-of-service regulations.²⁹ Kankakee is 70 miles from Geneva and he did not believe that he could reach it in 1.25 hours. He decided to drive to Morris, Illinois instead, where he went into his sleeper berth at 11:15 p.m.³⁰ At 1:52 a.m. on October 8, 2003, he sent a message to Crete stating, “WILL NOT BE ABLE TO BE @ SHIPPER @ 07:00, OUT OF HOURS.”³¹ In the trucking industry, “out of hours” is commonly understood to indicate that a driver can drive no longer without violating the DOT hours-of-service regulations.³²

Bettner completed his mandatory 8-hour break at 7:15 a.m. on October 8, 2003, and stayed in his sleeper berth until 7:30 a.m. He performed a vehicle inspection from 7:30 a.m. to 7:45 a.m. and from 7:45 a.m. to 9:00 a.m. he drove from Morris to Kankakee.³³ He arrived in Kankakee 18 hours late for the original delivery window.

Bettner went off-duty for two hours while his trailer was loaded. From 11:00 a.m. to 11:15 a.m., he went on-duty signing paperwork for the load and conducting an inspection.³⁴

3. Kankakee, Illinois to Joplin, Missouri

Bettner left Kankakee at 11:15 a.m. and drove for 30 minutes before taking a 45-minute break. He resumed driving at 12:30 p.m. and drove 2 hours and 15 minutes. From 2:45 p.m. to 3:30 p.m. he was off-duty and then he entered his sleeper berth.³⁵ At 3:45 p.m. Bettner sent a Qualcomm message to the Crete dispatcher stating, “WILL NOT BE ABLE TO GET TO RECEIVER BY END OF DAY, WILL BE OUT OF HOURS FOR ONE THING, WILL BE THERE FIRST THING IN MORNING, DROP AND

²⁸ Bettner Dec. at 10, para. 50.

²⁹ *Id.* at 11, para. 56.

³⁰ *Id.* at 11, para. 58.

³¹ R. D. & O. at 8.

³² Bettner Dec. at 12, para. 63.

³³ *Id.* at 12-13, paras. 64-65.

³⁴ *Id.* at 13, para. 68.

³⁵ R. D. & O. at 9.

HOOK RIGHT.”³⁶ The dispatcher rescheduled the Joplin delivery for 9:00 a.m.³⁷

Bettner remained in his sleeper berth for 3 hours between 3:30 p.m. and 6:30 p.m. He then drove for 1.5 hours, stopped and refueled his truck for 30 minutes and drove three more hours until 11:30 p.m., when he stopped for the night. At approximately 7:10 a.m. on October 9, 2003, Bettner sent Crete’s dispatcher another Qualcomm message stating, “I WOULD SAY IT IS ABOUT 3 2 4 HOURS FROM WHERE I AM AT MY 8 HOUR BREAK IS NOT UP FOR ANOTHER ½ HOUR.”³⁸ Bettner remained off-duty until 8:45 a.m., inspected his vehicle for 15 minutes, and resumed driving.³⁹ He did not reach Joplin “first thing in the morning” as he told the dispatcher he would on the previous afternoon.

Bettner drove for 1 hour from 9:00 a.m. to 10:00 a.m. and then he went off-duty for an hour. At approximately 11:00 a.m. he resumed driving and arrived in Joplin at 1:00 p.m., 14 hours after the original delivery window closed and 4 hours after the rescheduled delivery appointment.⁴⁰

After arriving in Joplin, Bettner entered his sleeper berth from 1:00 p.m. to 2:30 p.m. He then hooked up to a trailer with a load for Kalamazoo, Michigan, and inspected and refueled his truck and began driving again at 4:00 p.m.⁴¹

4. Bettner’s Assignment to the National Fleet

On October 10, 2003, Crete sent Bettner a Qualcomm message indicating that Crete was transferring him to the national fleet.⁴² Lingbloom explained the transfer in his declaration:

In September and October 2003, I informed Threna Greenfield, Assistant to the Fleet Manager of Crete’s Ottawa, Illinois Terminal that Bettner was not timely

³⁶ *Id.*; Bettner Dec. at 13, para. 70.

³⁷ R. D. & O. at 9.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

making pick ups or deliveries. Because of the importance of on-time pick-up and delivery on the General Mills/Pillsbury Dedicated Fleet, coupled with Crete's belief that Bettner was poorly planning his runs, Crete transferred Bettner to the National Fleet on or about October 8, 2003. The National Fleet seemed ideal for Bettner because failures to properly pre-plan and meet pick-up and delivery schedules are not as critical as in dedicated fleets.^[43]

On October 11, 2003, Bettner called the Ottawa Terminal and spoke to Greenfield. She explained to Bettner that that he was being transferred because he routinely failed to pick up and deliver his loads on time. She advised Bettner to speak with Thompson on October 13th when Thompson returned from a personal trip. Bettner delivered the load to Kalamazoo and drove to Battle Creek, Michigan to pick up another load that was scheduled to be delivered to Minnesota on October 14th.⁴⁴

On October 12th Bettner drove to Crete's terminal in Ottawa, Illinois to have the truck serviced as instructed by Crete's maintenance department. He dropped the trailer and went home. The mechanic told him the truck would be ready on Monday morning, October 13th.⁴⁵

On the morning of October 13th, Bettner called Crete's Ottawa terminal to speak to Thompson about the decision to transfer him to the national fleet. Thompson had not returned from his trip. Bettner told Greenfield that he would be arriving at the terminal shortly to pick up the Minnesota delivery. Greenfield told Bettner that the load had been reassigned to another driver. When Bettner asked her why the load had been reassigned, she informed him that "it had to be there." She asked Bettner for the location of the paper work on the load and he told her that he would bring it to the terminal.⁴⁶

When Bettner arrived at the terminal he could not find Thompson or Greenfield, so he left the paper work with another employee. He told this employee that because he had been transferred from the dedicated account and then was taken off the Minnesota dispatch that he thought that he "was probably fired." He told her that he was going to clean out his truck and asked her to request Thompson to call him when he returned.⁴⁷

⁴³ Declaration of Chris Lingbloom, Dispatcher for Crete Carrier Corporation (Lingbloom Dec.) at 2, para. 12.

⁴⁴ R. D. & O. at 10.

⁴⁵ Bettner Dec. at 19, para. 99.

⁴⁶ *Id.* at 19, para. 101.

⁴⁷ *Id.* at 19-20, para. 102.

Bettner removed his personal items from his truck and sent a Qualcomm message to Crete indicating that he had not quit, but had concluded that he was fired. Bettner acknowledged that neither Greenfield, nor anyone else at Crete ever told him that he was fired. On October 14th, Thompson returned to the Ottawa Terminal and he concluded that since he did not hear from Bettner and Bettner had cleaned out his truck that he had quit.⁴⁸

The following week, Bettner contacted Thompson and he invited Bettner to meet with Greenfield and him. Thompson offered Bettner a job on the national fleet at 39 cents per mile, subject to approval by Crete's corporate office. Bettner agreed.⁴⁹ He applied for re-employment on November 5, 2003.⁵⁰ Thompson subsequently informed Bettner that the offer was revoked and that he would be treated as a rehire at 36 cents per mile. Bettner stated that "[t]his was unacceptable to me because it was less than what the other National Account Drivers were being paid."⁵¹

On November 7th, Thompson called Bettner's home and left a message stating that he was again qualified to drive for Crete and that he should report to the Ottawa office between 9:00 a.m. and 10:00 a.m. Bettner neither contacted Thompson, nor reported for work. Thompson telephoned Bettner's home on or about November 11th and left a message asking Bettner to call him. Bettner did not respond. On or about November 12th, Thompson again called Bettner and left a message inquiring about his plans to return to work for Crete. Bettner did not respond.⁵² On November 26th, Peetz sent Bettner a letter informing him that the offer for reemployment had been rescinded.⁵³

Bettner stated that there is a significant difference in working conditions between the dedicated and national fleets. He averred that Thompson told him, that as a dedicated fleet driver, he would be home every week, but Bettner stated that national fleet drivers are away from home two to three weeks at a time. Bettner also stated that it would cost him more money to be away from home for longer periods because he would have to pay for meals at truck stops and pay to wash his clothes and to take a shower. He contended that dedicated accounts involved almost all drop and hook loads but national loads were

⁴⁸ R. D. & O. at 10.

⁴⁹ Bettner Dec. at 20, para. 105.

⁵⁰ Declaration of Jon Thompson, Fleet Manager, Crete Carrier Corporation, Ottawa, Illinois Terminal (Thompson Dec.) at 4, para. 20.

⁵¹ Bettner Dec. at 20, para.105.

⁵² Thompson Dec. at 4, paras. 21-24.

⁵³ R. D. & O. at 10.

live loads. He said that he would spend less time in the terminals and more time on the roads earning money with dedicated loads. He also said that some national fleet deliveries require the driver to load and unload and he was too old to take the physical toll of loading and unloading trailers. Finally he stated that as a driver on the national fleet he would be required to haul hazardous materials, which he does not like to do.⁵⁴

Statement of Procedure

Bettner filed a STAA complaint with the Occupational Health and Safety Administration (OSHA) alleging that Crete discriminated against him when it terminated his employment and transferred him from the dedicated to the national fleet after he informed a Crete dispatcher that to complete the delivery on time he would have to violate the DOT hours-of-service regulations. After an investigation, OSHA found that while Bettner had engaged in protected activity when he alerted the Crete dispatcher of the potential violation, he did not aver sufficient facts to establish that he had suffered an adverse action.⁵⁵

Bettner requested a hearing by a Department of Labor administrative law judge. In response to Respondent's Motion to Dismiss, the ALJ issued a decision recommending that Bettner's complaint be dismissed. The ALJ found that Bettner failed to establish that there were material facts in dispute regarding whether he engaged in protected activity when he alerted Crete to the fact that he could not deliver the load on time without violating the hours-of-service regulations because his inability to deliver on time was not due to fatigue or vehicle problems, but resulted from Bettner's failure to properly plan his trip itinerary and the numerous breaks he took.⁵⁶ The ALJ further determined that Bettner failed to establish a material fact question regarding the issue whether Bettner suffered an adverse action because Crete did not terminate Bettner's employment and the transfer from the dedicated to the national fleet did not materially change Bettner's primary duties, responsibilities, compensation, and benefits.⁵⁷ Finally, the ALJ found that Bettner failed to articulate a pretext argument in his reply brief. The ALJ wrote,

Not only did the Complainant fail to produce any evidence to suggest that Crete's reason for the transfer was pretextual [sic], he does not even address the issue. Since Complainant failed to submit an appropriate factual statement in opposition to Crete's Motion for Summary

⁵⁴ Bettner Dec. at 20-21, paras. 106-110.

⁵⁵ Exhibits to Respondent's Motion to Dismiss (R. X.) B.

⁵⁶ R. D. & O. at 13-19.

⁵⁷ *Id.* at 23.

Judgment, I will assume that the facts as claimed and supported by admissible evidence by Crete are admitted to exist without controversy.^[58]

According to the STAA's implementing regulations, this Board issues the final decision and order in STAA cases.⁵⁹ The Board issued a Notice of Review and Briefing Schedule apprising the parties of their right to submit briefs supporting or opposing the ALJ's recommended decision.⁶⁰ Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the STAA.⁶¹ We review a recommended decision granting summary decision de novo.⁶² The standard for granting summary decision in our cases is essentially the same standard governing summary judgment in the federal courts.⁶³ Accordingly summary decision is appropriate 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.⁶⁴ 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."⁶⁵

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

⁵⁸ *Id.* at 24.

⁵⁹ 29 C.F.R. § 1978.109(c)(2); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 00-STA-50 (ARB Sept. 26, 2001); *Cook v. Shaffer Trucking Inc.*, ARB No. 01-051, ALJ No. 00-STA-17 (ARB May 30, 2001).

⁶⁰ 29 C.F.R. § 1978.109(c)(2).

⁶¹ Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

⁶² *Hardy v. Mail Contractors of America*, ARB No. 03-07, 2002-STA-22, slip op. at 2 (ARB Jan. 30, 2004).

⁶³ Fed. R. Civ. P. 56.

⁶⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

⁶⁵ *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

correctly applied the relevant law.⁶⁶ “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.’”⁶⁷ Accordingly, a moving party may prevail by pointing to the “absence of evidence proffered by the nonmoving party.”⁶⁸ 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.”⁶⁹

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity,⁷⁰ 2) his employer

⁶⁶ *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 (ARB Dec. 13, 2002).

⁶⁷ *Bobreski*, at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

⁶⁸ *Bobreski*, at 73.

⁶⁹ 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).

⁷⁰ A person may not retaliate against an employee because:

(A) the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because –

(i) the operation violates a regulation, standard, or order of the United States related to the 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.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee’s apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105 (A), (B).

was aware of the protected activity, 3) the employer discharged him, or disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and 4) there is a causal connection between the protected activity and the adverse action.⁷¹ The complainant bears the burden of persuading the trier of fact that he was subjected to discrimination.⁷² In STAA cases the Board adopts the burdens of proof framework 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.⁷³ Under this burden-shifting framework, the complainant must first establish a prima facie case of discrimination. That is, the complainant must adduce evidence that he engaged in STAA-protected activity, that the respondent employer was aware of this activity, and that the employer took adverse action against the complainant because of the protected activity. Evidence of each of these elements raises an inference that the employer violated the STAA. Only if the complainant makes this prima facie showing does the burden shift to the employer respondent to articulate a legitimate, 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.⁷⁴ The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant.⁷⁵

In this case Crete articulated a legitimate nondiscriminatory reason for transferring Bettner from the dedicated to the national fleet, i.e., that on time delivery was

⁷¹ *BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Env't'l. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987).

⁷² *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

⁷³ *Feltner v. Century Trucking, Ltd.*, ARB No. 03-118, ALJ Nos. 03-STA-1, 03-STA-2, slip op. at 4-5 (ARB Oct. 27, 2004); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004). See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr.*, 509 U.S. at 513; *Texas Dep't of Cmty. 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).

⁷⁴ *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002).

⁷⁵ *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Densieski*, slip op. at 4; *Gale v. Ocean Imaging & Ocean Res., Inc.*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002); *Poll*, slip op. at 5.

crucial to fulfill Crete's obligation to General Mills/Pillsbury on the dedicated account, that Bettner had consistently demonstrated his inability to properly plan and execute his dispatches so that he could pick up and deliver his loads within designated windows and hours-of-service regulations, and on time pick up and delivery were not as crucial on the national accounts.⁷⁶ As we indicated above, to successfully oppose a motion for summary judgment, a party must make a showing on every element that is essential to his or her case and on which the party will bear the burden of persuasion at trial. Assuming that Bettner had adduced evidence sufficient to make a prima facie showing,⁷⁷ to defeat Crete's motion to dismiss it was incumbent upon Bettner to adduce facts that if proven would establish that Crete's averred legitimate nondiscriminatory reason for transferring him was a pretext for discrimination.

In *Burdine*, the Supreme Court described the plaintiff's burden to prove unlawful discrimination, "[The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."⁷⁸ Direct evidence of retaliation is "smoking gun" evidence; evidence that conclusively links the protected activity to the adverse action.⁷⁹ Such evidence must speak directly to the issue of discriminatory intent and may not rely on the drawing of inferences.⁸⁰ Direct evidence does not include "stray or random remarks in the workplace, statements by nondecisionmakers or statements by decisionmakers unrelated to the decisional process."⁸¹

In the absence of direct evidence of retaliation, a complainant may prove that the legitimate reasons the employer proffered were not the true reasons for its actions, but instead were a pretext for discrimination.⁸² To establish pretext, it is not sufficient for a

⁷⁶ Respondent's Motion to Dismiss at 18-20; Thompson Dec. at 3, para. 15.

⁷⁷ The ALJ found that Bettner failed to adduce a prima facie case because he neither established that he engaged in protected activity, nor that Crete took adverse action in response to any such activity. R. D. & O. at 14-23. Given our disposition of the case, we take no position on the propriety of these findings.

⁷⁸ 450 U.S. at 256.

⁷⁹ *Coxen v. UPS*, ARB No. 04-093, ALJ No. 03-STA-13, slip op. at 5 (ARB Feb. 28, 2006).

⁸⁰ *Smith v. Esicorp, Inc.*, No. 93-ERA-00016, slip op. at 15 (Sec'y Mar. 13, 1996).

⁸¹ *Talbert v. Washington Pub. Power Supply Sys.*, ARB No. 96-023, ALJ No. 93-ERA-35, slip op. at 5 (ARB Sept. 27, 1996).

⁸² *Jenkins v. U.S. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 18 (ARB Feb. 28, 2003). *Accord St. Mary's Honor Ctr.*, 530 U.S. at 507-508.

complainant to show that the action taken was not “just, or fair, or sensible . . . rather he must show that the explanation is a phony reason.”⁸³

In this case, Bettner failed to adduce any evidence, either direct or indirect, that Crete’s proffered reason for transferring him to the national fleet was untrue. As indicated above, the ALJ found that not only did Bettner fail to produce any evidence to suggest that the transfer was a pretext for discrimination, he did not even address the issue. Moreover, once alerted to this deficiency by the ALJ, Bettner made no attempt to rectify his omission or rebut the ALJ’s conclusion on appeal. While Bettner expended a large part of his appeal brief attempting to convince the Board that it was not his fault that he failed to timely deliver and pick up his loads, he made no attempt to show that Crete did not believe that his failure to timely pick up and deliver his loads was due to poor planning on his part. Bettner made no allegation that it was not possible for a driver to comply with both the delivery schedule and the DOT hours-of-service regulations if the driver properly planned the dispatch. Furthermore, Crete’s repeated attempts to return Bettner to work are consistent with its explanation that it was trying to employ Bettner where his skills could be used, rather than attempting to punish him for raising the hours-of-service regulations. Thus we agree with the ALJ that Bettner has failed to raise an issue of material fact relevant to the issue whether Crete’s articulated nondiscriminatory reason for transferring him to the national fleet was a pretext for discrimination.

⁸³ *Gale*, slip op. at 10 (citing *Kahn v. U.S. Sec’y of Labor*, 14 F.3d 342, 349 (7th Cir. 1994)). *Accord Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000) (“[t]his court does not sit as a super-personnel department and will not second-guess an employer’s decisions”); *Skouby v. The Prudential Ins. Co.*, 130 F.3d 794, 795 (7th Cir. 1997) (same); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-1508 (5th Cir. 1988) (discrimination statute “was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers;” statute cannot protect employees “from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated”).

CONCLUSION

Because Bettner failed to adduce evidence of pretext in response to Crete's motion for summary judgment, and thus failed to establish a material issue of fact in regard to an essential element of his case, we accept the ALJ's recommendation and we **DISMISS** Bettner's complaint.⁸⁴

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

⁸⁴ On December 16, 2006, Bettner filed a Motion to Allow Supplemental Briefs and to Expedite Proceeding. Bettner requested that he be permitted to address the significance of the Supreme Court's recent decision in *White v. Burlington N. & Santa Fe Ry.Co.*, 548 U.S. ____, No. 05-259 (2006) on the issue whether Crete subjected Bettner to an adverse employment action. Crete opposed Bettner's motion. Given our disposition of the case, Bettner's motion is **DENIED** as moot.