



In the Matter of:

STEVEN L. JACKSON,

ARB CASE NO. 96-194

COMPLAINANT,

(ALJ CASE NO. 95-STA-38)

v.

DATE: January 9, 1997

PROTEIN EXPRESS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND REMAND ORDER

Steven L. Jackson filed a complaint under the employee protection provision of the Surface Transportation Assistance Act of 1982, as amended (STAA), 49 U.S.C.A. § 31105 (West 1996), alleging he was discharged from his job as a truck driver for Protein Express for complaining about the unsafe condition of the tractor-trailer he drove and refusing to drive it because he feared for his safety and the safety of others. After a hearing, the Administrative Law Judge issued a Recommended Decision and Order that the complaint be dismissed. For the reasons discussed below, we reject the ALJ's recommendation and remand this case for calculation of back pay and attorney's fees.

Jackson complained to his employer Protein Express in late 1994 and early 1995 about safety problems on a tractor-trailer he regularly drove, including ineffective brakes and poor steering. Transcript of Hearing (T.) at 22. After completing his run on January 13, 1995, Jackson refused to drive the truck because it "had no brakes," T. 29, and he believed it was unsafe. T. 30. Jackson had taken the tractor and trailer to a repair shop that regularly performs repairs for Protein and problems with the brakes on both the tractor and the trailer were found.

^{1/} On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions.

Id. Respondent’s Exhibit (R) 2 and 3. The mechanic at the repair shop advised Jackson not to drive the truck because it was unsafe. T. 32.^{2/}

Jackson called the owner of Protein, Timothy Grove, on the evening of January 13 and informed him of the condition of the truck. T. 37. Jackson requested that the truck be repaired or that he be given a truck that was safe to operate, otherwise he would not drive. T. 40. Jackson denied that he quit his job or refused to work for Protein. *Id.* Grove was on his way out of town for a vacation, T. 108, and he told Jackson he would contact Perry Shelton, T. 41, another driver to whom he delegated some supervisory responsibilities when Grove was not available.^{3/} Jackson believed Shelton fired him during their conversation on January 14. T. 42. Jackson told Shelton he refused to drive the tractor-trailer because of defective brakes, but Shelton did not tell Jackson the truck would be repaired or offer another vehicle for him to drive. T. 43. Shelton removed Jackson’s belongings from the truck, T. 204, although Jackson told him not to because he wanted to come in to speak to Grove to confirm that he had been fired. T. 44.

Jackson made several attempts to contact Grove, leaving messages on his answering machine, leaving notes on his vehicle, knocking on the door of his house and visiting the “barn” where the trucks were kept, but Grove never responded. T. 45. Grove received at least one telephone message from Jackson saying “If I’m being fired, I want to hear it from you.” T. 184-85. Grove offered to reinstate Jackson in the spring of 1995 but Jackson refused. T. 109.

The ALJ found that Jackson engaged in protected activity when he complained about the safety of the tractor-trailer and we agree. R. D. & O. at 9; 49 U.S.C.A. § 31105(a)(1)(A); *see Reemsnyder v. Mayflower Transit, Inc.*, Case No. 93-STA-4, Sec’y. Dec. and Ord. on Reconsideration, May 19, 1994, slip op. at 9 (STAA protects internal safety complaints to managers). The ALJ’s decision does not clearly hold that Jackson’s refusal to drive the tractor-

^{2/} The Administrative Law Judge sustained an objection to the question eliciting this testimony and struck the answer, apparently on the grounds that the testimony was hearsay. T. 31-32. We find that the testimony should have been admitted, not to show that the tractor-trailer was in fact unsafe, but to show Jackson’s state of mind when he refused to drive the truck. Such a fact would be relevant to whether Jackson had “a reasonable apprehension of serious injury” 49 U.S.C.A. § 31105(a)(1)(B) (West 1996). We also note that the ALJ referred to the Surface Transportation Assistance Act at both its old and new United States Code citations; the correct current citation is 49 U.S.C.A. § 31105 (West 1996), Pub. L. 103-272, 108 Stat. 745, 990 (1994); before being recodified in 1994, the citation was 49 U.S.C. app. § 2305 (1988).

^{3/} Although the ALJ found that Shelton was not “a company manager,” R. D. & O. at 7, the record shows that in Grove’s absence he did have some supervisory authority: Grove testified that in his absence “[Shelton] does make decisions.” T. 122; Shelton would send a truck to the garage if a problem came up. T. 123; Shelton testified that “[i]f the drivers got a problem, they call me.” T. 212; Jackson believed Shelton was his supervisor because “he pretty much called the shots.” T. 41; and Shelton called Jackson the day after Jackson told Grove he would not drive the tractor-trailer with the brake problems because he “got left a message that [Jackson] was . . . no longer driving,” T. 213, and Shelton “had to line somebody else up to drive.” T. 203.

trailer was protected under the STAA, R. D. & O. at 9-10, but we find that it was. The Second Circuit affirmed the Secretary's interpretation of the STAA in *Yellow Freight Sys. v. Reich*, 38 F.3d 76, 82 (2d Cir. 1994), by finding that an employee need not prove the existence of an actual safety defect for his or her refusal to drive to receive protection. "[T]here may exist circumstances in which an analysis of the situation encountered by a driver at the time of [the] refusal to drive would compel the conclusion that the driver's perception of an unsafe condition was 'reasonable' . . . despite the fact that a subsequent mechanical inspection revealed no actual safety defect." *Id.* at 83.

When Jackson had trouble stopping the truck on January 13, he took it to a garage that regularly performed service work for Protein. The garage found problems with the brakes on both the tractor and the trailer: it found the tractor "needs brake shoes (sic) drums on both drive axles[,] also cam bushings;" the trailer "right rear brake [is] camming over . . . rear axle need[s] brakes." R-2 and 3. The garage mechanic told Jackson the truck was not safe to drive and advised him not to drive it. In addition, two other experienced truck drivers who had accompanied Jackson on trips in the tractor-trailer noticed "abnormal" difficulty stopping and became concerned about the "stopping distances" required, even when the trailer was empty. T. 84-85; 89. Given these facts at the time Jackson refused to drive the truck, we find he had a reasonable apprehension of serious injury. 49 U.S.C.A. § 31105(a)(1)(A)(2). The fact that Shelton inspected the truck thereafter and found no problem, and drove the truck for 10 days after January 13 without incident and without experiencing difficulty with the brakes, does not deprive Jackson's refusal to drive of protection under the Act, given the facts available to him at the time he refused. *Yellow Freight v. Reich*, 38 F.3d at 83. We also note that on January 23, only ten days after Jackson's refusal, the brakes on the trailer were repaired. R. D. and O. at 5. Nothing in the record indicates that Shelton or anyone else from Protein informed Jackson that the tractor-trailer was safe to drive on January 13 even though the brakes needed repair and, in fact, were repaired only ten days later.

We also find that Jackson met the requirement of the STAA that "[t]o qualify for protection [under the refusal to drive provision of the Act], 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)(2). Jackson called Tim Grove, the owner of Protein Express, on the evening of January 13, the day the repair shop informed Jackson of the unsafe condition of the brakes, and requested that the truck be repaired or that he be given another truck to drive. The next day when Jackson spoke to Shelton, who acted in the capacity of a foreman for Protein, he told Shelton he refused to drive the truck because of defective brakes, but Shelton did not tell him the truck had been inspected and found safe or offer another truck for him to drive. At no time thereafter did anyone from Protein tell Jackson the problem with the brakes had been investigated and either found safe or repaired. *See Pensyl v. Catalytic, Inc.*, Case No. 83-ERA-2, Sec'y. Dec. Jan. 13, 1984, slip op. at 7 (refusal to work not protected after investigation and explanation of safe condition to employee by management).

We do not agree with the ALJ that Jackson "abandoned his position" and no adverse employment action occurred. R. D. & O. at 10. When Jackson called Grove on January 13, he

requested that the tractor-trailer be repaired or that he be given another, safe, truck to drive. Grove himself testified that Jackson told him “I’m not driving [the truck] *until it’s fixed*,” T. 108 (emphasis added), not that he refused to drive for Protein at all. Grove also acknowledged receiving a telephone message from Jackson saying “[i]f I’m being fired, I want to hear it from you,” T. 184-85, but Grove never returned the call. T. 185. Jackson told Shelton on January 14 not to remove his belongings from the truck, T. 204, because Jackson wanted to speak to Grove in person about whether he had in fact been fired. T. 44. These actions show that, far from abandoning his job, Jackson was attempting to clarify his status; he indicated his intent to continue working for Protein by asking Grove for another truck to drive and by telling Shelton not to remove his belongings from the tractor-trailer with the defective brakes.

When no clear statements have been made by management establishing an employee’s status, “[t]he test of whether an employee has been discharged depends on the reasonable inferences that the *employee* could draw from the statements or conduct of the employer.’ *Pennypower Shopping News, Inc. v. N.L.R.B.*, 726 F.2d 626, 629 (10th Cir. 1984) (emphasis in original).” *N.L.R.B. v. Champ Corp.*, 933 F.2d 688, 692 (9th Cir. 1990), *cert. denied*, *Champ Corp. v. N.L.R.B.*, 502 U.S. 957 (1991). By failing to respond to Jackson’s request for another truck to drive and to his message asking for clarification of his status, and by removing his belongings from the truck against his wishes, Protein’s conduct indicated it had discharged Jackson. Finally we find that the same facts show that Protein violated the STAA when it discharged Jackson for refusing to drive a motor vehicle because he had a reasonable apprehension of serious injury to himself or the public because of the vehicle’s unsafe condition. However, because Protein made an unequivocal offer to reinstate Jackson which he rejected, we will not order reinstatement but we remand this case to the ALJ for calculation of back pay, compensatory damages, if any, and attorney’s fees.

SO ORDERED.

DAVID A. O’BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member