



In the Matter of:

THOMAS DUTKIEWICZ,

ARB CASE NO. 97-090

COMPLAINANT,

ALJ CASE NO. 95-STA-34

v.

DATE: August 8, 1997

**CLEAN HARBORS ENVIRONMENTAL
SERVICES, INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (1996). Complainant Thomas Dutkiewicz alleges that Respondent Clean Harbors Environmental Services, Inc. (Clean Harbors) violated the STAA when it discharged him because he made safety complaints protected under the STAA. In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) found that Dutkiewicz established a STAA violation, and ordered reinstatement, back pay, and compensatory damages. The Board denied Clean Harbors' request for a stay of reinstatement pending the issuance of this final decision.

The ALJ's findings of fact, R. D. and O. at 2-15, are supported by substantial evidence on the record as a whole and therefore are conclusive. 29 C.F.R. §1978.109(c)(3). We also adopt the ALJ's assessments of witness credibility. We affirm the ALJ's decision for the reasons discussed below.

BACKGROUND

Dutkiewicz was hired as a truck driver in July 1993 by Clean Harbors, a national company that treats, stores, recycles, transports, and disposes of hazardous materials. Transcript

(T.) 13; ALJX 1.^{1/} He was based at Clean Harbors' New Britain, Connecticut facility. As part of his training, Dutkiewicz received a copy of the Driver's Guide to Hazardous Materials, CX 27 (excerpts) and 44, which explained the Department of Transportation (DOT) regulations governing transportation of hazardous materials. Dutkiewicz regularly transported PCBs, carcinogens, corrosives, and poisonous gases. CX 1a at 3.

Clean Harbors implemented a new policy of imposing additional demurrage charges on its customers for extra time spent by the drivers correcting mistakes made in preparing the hazardous materials for transport. T. 85. In light of the additional charges, some customers complained that Dutkiewicz wasted time on their sites by checking and preparing tendered waste drums. T. 86. According to Dutkiewicz, his superiors at Clean Harbors pressed him not to take the time to fix drums according to the hazardous materials regulations. T. 89. Dutkiewicz disagreed because he did not want to violate the regulations concerning the proper condition and labeling of hazardous materials. *Id.*

To document the reasons for his taking extra time at customer sites, Dutkiewicz designed and used a form listing the problems he encountered and corrected. CX 9; T. 87, 412. Some of the completed forms showed leaking drums, waste on the outside of drums, surface rust on lids, and missing bung caps and labels. CX 9 (all); T. 99-104, 106, 109, 113-114. When customer Allied Signal complained about the extra time Dutkiewicz took, the General Manager of Clean Harbors' New Britain facility, Thor Cheyne (Cheyne), directed him in writing not to cause Allied Signal to incur extra demurrage charges "regardless of condition of drums." CX 11a; T. 121.

Account Manager Peter Ferrio sought business for Clean Harbors by placing sales calls and presenting information on the company to potential customers. T.605. Ferrio was not Dutkiewicz's supervisor, T. 662, was not present when Dutkiewicz picked up waste shipments, never loaded any shipments himself, and did not have responsibility for safety or compliance with hazardous waste regulations. T. 641, 674. Ferrio testified that in November or December 1993 customers began to complain about Dutkiewicz taking too much time at their sites. T. 612. Shortly thereafter, Dutkiewicz received a favorable performance evaluation and a salary raise. CX 7a; T. 94-98.

Dutkiewicz received both oral and written warnings about log book violations, RX 4b, 4e, and was warned orally and disciplined in writing for transporting loads without load locks and for double stacking drums. T. 446; *see* RX 4g. Although Cheyne mentioned the customer complaints to Dutkiewicz, the company did not give him any written warnings about the complaints. T. 216.

^{1/} Documentary evidence will be referred to as "CX," "RX," and "ALJX" for Complainant's, Respondent's, and ALJ's exhibits.

In a second six-month performance review dated September 1, 1994, Cheyne gave Dutkiewicz the overall rating of “meets expectations” and a salary raise. CX 7b. About two weeks later, Ferrio sent a memorandum informing Cheyne that customers had complained about Dutkiewicz’s poor customer relations, uncooperative attitude, taking too much time, and causing DOT violations. RX 5b; T. 633-634. Ferrio asked Cheyne either to reassign or replace Dutkiewicz. T. 634; RX 5b. Two days after Ferrio's notification, Cheyne discharged Dutkiewicz, stating that Dutkiewicz wasted too much time fixing waste drums and could not be sent to customers any more. T. 169.

Dutkiewicz promptly telephoned and wrote to the company's Vice President for Compliance, Health and Safety to complain that he was pressured to transport drums that were not properly labeled and prepared for shipment. CX 3a; T. 109. The company investigated the situation and upheld the discharge. T. 172-173. Dutkiewicz' wife next telephoned the Director of Transportation Compliance and threatened to inform the press and the Federal government if the discharge decision were not reversed. T. 174, 520-521. The Director of Human Resources notified Dutkiewicz that the company would again review the discharge and that Dutkiewicz would be paid for the next three weeks. T. 175.

After the review, Clean Harbors offered Dutkiewicz a new position as a driver based at Bristol, Connecticut, transporting waste between the company's facilities. T. 213. The offer placed conditions on rehire, including a requirement that Dutkiewicz direct any questions about his duties to John Caron (Caron), Transportation Coordinator, or if Caron was unavailable, to Brian Monahan, Director of Logistics. CX 21a; T. 215, 789-790.

Dutkiewicz accepted the employment offer and upon reporting to Bristol, he met with Caron and Monahan, who told Dutkiewicz that he was on a “short leash” and would be watched closely. T. 219-220, 788; RX 8. Monahan noted in a memorandum that any coaching or disciplinary actions taken would be documented and kept on file. RX 8; T. 788.

About three months after his return to work, Dutkiewicz was discharged without warning. T. 206, 217, 250-251. Dutkiewicz timely filed this complaint, alleging that both the rescinded and the final discharges violated the STAA.

DISCUSSION

The STAA prohibits discharging or otherwise discriminating against an employee because he “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. . . .” 49 U.S.C.A. §31105(a)(1)(A). An employee’s internal complaint to superiors conveying his reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA. *Stiles v. J. B. Hunt Transportation, Inc.*, Case No. 92-STA-34, Sec. Dec. and Ord., Sept. 24, 1993, slip op. at 3-4 and cases there cited; *see also* R. D. and O. at 16.

Clean Harbors proffered as a legitimate basis for initially discharging Dutkiewicz, the numerous customer complaints about Dutkiewicz. Clean Harbors contends that the ALJ did not adequately consider its evidence on this point and “incorrectly ruled that crucial testimony of customer complaints was hearsay and therefore not admissible to counter complainant’s assertions that he was discharged for engaging in protected conduct.” Resp. Br. at 17.

None of the complaining customers testified at the hearing. Rather, Account Manager Ferrio recounted complaints about Dutkiewicz that customers orally made to him. Hearsay is a “statement, other than one made by the declarant while testifying at the . . . hearing, offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801(c); *see also* 29 C.F.R. §18.801(c). Clean Harbors argues that the testimony of customer complaints was offered to show the state of mind of the listener and therefore the testimony was not hearsay. Resp. Br. at 17. Since the ALJ allowed the testimony of customer complaints and properly determined the weight it was due, *see Adams v. Coastal Production Operators, Inc.*, Case No. 89-ERA-3, Sec. Dec. and Remand Ord., Aug. 5, 1992, slip op. at 10, we find no error in the ALJ’s treatment of the evidence.

Customer complaints may constitute a valid reason to discharge an employee. *See R. D. and O.* at 17. According to Ferrio, many Clean Harbors customers complained that Dutkiewicz took too much time loading shipments, that his behavior was irritating and condescending, and that some of his work was inaccurate. *Id.*; T. at 615-616, 625. Clean Harbors therefore offered evidence of a legitimate reason for the first, rescinded discharge.

Under the applicable DOT regulations, the driver is responsible for checking the manifest for errors and missing information. 49 C.F.R. §172.200 *et seq.*; *see CX 27* at 2. The driver must recognize and identify the markings on containers to determine regulatory compliance for purposes of proper handling, loading, and emergencies. 49 C.F.R. §172.300 *et seq.*; *see CX 27* at 2. The regulations direct the driver not to accept damaged or leaking packages, incompatible materials, or improperly prepared shipments. *CX 27* at 4; T. 368-369. Clean Harbors’ policy requires drivers to comply with the DOT regulations governing handling of hazardous materials. T. 702, 705. In addition to work place discipline, failure to comply with these regulations can result in fines or jail. *CX 27* at 2.

When Clean Harbors personnel told Dutkiewicz that he had to load shipments faster, he replied that the regulations required him to check the waste shipment’s packaging and labeling and that is what took so much time. T. 124-126. The form he designed to document the problems he found with shipments revealed failure to label drums, waste on the outside of drums, leaking drums, surface rust on lids, and missing bung caps. *CX 9*. Dutkiewicz did not transport drums until they complied with the regulations.

Ferrio testified that customers complained about Dutkiewicz reexamining and changing the labels and packaging that the customers’ own compliance departments already had checked:

Mr. Macomber told me that Mr. Dutkiewicz took it upon himself to begin changing drum labels without Mr. Macomber's permission, that Mr. Dutkiewicz insisted on changing things that had been reviewed and audited by our entire compliance people and him and his entire compliance people.

T. 619; *see also* T. 614-615, 625. Therefore, Clean Harbors discharged Dutkiewicz the first time, at least in part, because he insisted on following the regulations despite customer complaints. The ALJ correctly noted that Dutkiewicz did not have to prove that the tendered waste drums actually violated the regulations; it was sufficient for him to show that he had a reasonable belief that there were such violations. R. D. and O. at 16. We agree with the ALJ that the documentary evidence, together with Dutkiewicz's testimony, shows that Dutkiewicz had a genuine, reasonable belief on many occasions that drums tendered to him for shipment did not comply with the DOT regulations. R. D. and O. at 16.

Where, as here, there are both legitimate and unlawful reasons for the discharge, the burden of proof is on the respondent to show that it would have discharged the complainant for the legitimate reasons alone even if the complainant had not engaged in any protected activities. *Harris v. Apaca Van Lines*, Case No. 91-STA-39, Sec. Fin. Dec. and Ord., Aug. 31, 1992, slip op. at 2. In such a case, the respondent bears the burden that the legitimate and the unlawful motives cannot be separated. *Id.* In the absence of testimony from any of the complaining customers, there is no basis for concluding that any customer complaints that were unrelated to Dutkiewicz's enforcement of the STAA and motor carrier regulations would have been sufficient to justify Clean Harbors' adverse action.

The documentary evidence supports the view that Clean Harbors was most alarmed with Dutkiewicz' insistence on verifying proper packaging and labeling since the only written direction Dutkiewicz received concerned the time issue. After Dutkiewicz provided his supervisor, Cheyne, with drum inspection forms documenting the deficiencies in shipments tendered by Allied Signal, CX 9b, 9e, Cheyne directed Dutkiewicz in writing "to get in and out of Allied [Signal's plant] regardless of condition of drums." CX 11a. We agree with the ALJ's interpretation that Cheyne ordered Dutkiewicz to transport Allied Signal's waste regardless of the condition of the drums. R. D. and O. at 17. Since Cheyne did not testify, there is no convincing evidence which would lead us to read the note differently.^{2/}

Clean Harbors has not met its burden of showing that it would have discharged Dutkiewicz even if he did not insist on proper packaging and labeling of hazardous materials

^{2/} A Clean Harbors witness admitted that Cheyne's note could be read to order Dutkiewicz to transport drums no matter what their condition. T. 731 (Cellucci). The ALJ rejected as unduly strained Clean Harbors' preferred interpretation, Resp. Br. at 8, that Cheyne's note directed Dutkiewicz to work quickly and leave behind any drums that did not comport with DOT regulations. R. D. and O. at 17. We agree.

tendered for shipment. Therefore, we agree with the ALJ that Dutkiewicz has prevailed on his complaint that the initial, rescinded discharge violated the STAA. *See* R. D. and O. at 18.

After changing its mind about the first discharge, Clean Harbors offered Dutkiewicz a driver position based at Bristol. The company's written offer of reemployment required Dutkiewicz to contact only Caron, "for any questions or concerns about your assignment or how you are to carry out your duties," and provided only one other person to contact if Caron was unavailable, Brian Monahan (Monahan). CX 21a.

Three months after being reemployed, Dutkiewicz was again discharged. Monahan cited three reasons for firing Dutkiewicz: a lengthy phone message to a company Vice President in which Dutkiewicz criticized a new procedure for tracking waste; an unauthorized request for a cellular telephone in a pickup truck he was assigned to drive; and a contact with the Massachusetts Department of Environmental Protection (DEP). T. 812-813. Monahan faulted Dutkiewicz for not asking Caron about either the new waste tracking procedure or the cellular telephone prior to contacting higher managers in the company. T. 798.

It is undisputed that Dutkiewicz received no oral or written warnings concerning any of the events cited as the basis for the second discharge. Monahan testified that the incidents occurred one after the other and there was no time to give a warning. T. 829-830.

The ALJ found that the second discharge was tainted by the first, unlawful discharge for several reasons. First, no one at Clean Harbors provided a copy of, or discussed, the written employment contract with Monahan, who made the second discharge decision. Second, the contract put Dutkiewicz on a "short leash" in which all his actions were scrutinized more closely than those of other new employees. Finally, contrary to the promise of providing written warnings, Clean Harbors did not warn Dutkiewicz about any of the incidents that led to the second discharge and did not tell him the specific reasons for the final discharge. R. D. and O. at 18.

The telephone call Dutkiewicz made to DEP concerned the lack of a current vehicle identification card in the rental truck he was assigned for a specific load. *See* RX 12. In this instance, Dutkiewicz first telephoned Caron, who had left for the day. Dutkiewicz next telephoned a 24-hour supervisor, who advised him to take a different truck on the run. After a shift change, a second 24-hour supervisor confirmed the earlier advice and told Dutkiewicz to take a different truck. Nevertheless, Dutkiewicz telephoned DEP to inquire about the lack of a vehicle identification card, and the contact with DEP was one of the stated reasons for the second discharge.

We are concerned any time that an employer faults an employee for seeking information from, or making a complaint to, a government agency such as DEP. *See, e.g., Adams*, slip op. at 13 (discharge for reporting oil spill to the Coast Guard violated analogous employee protection provision of the Clean Water Act). Here, even though Dutkiewicz received an acceptable response from Clean Harbors employees -- that he should drive a different truck

rather than the one that lacked a vehicle identification card -- he still had the right to speak with DEP concerning a safety issue within that agency's purview. We find therefore that one of the articulated reasons for the second discharge directly violated the STAA. *See Homen v. Nationwide Trucking, Inc.*, Case No. 95-STA-45, Sec. Dec. and Ord., Feb. 10, 1994, slip op. at 4 (driver reporting unsafe vehicles to California Highway Patrol constituted protected activity).

Monahan also faulted Dutkiewicz for bucking the agreed-upon chain of command when he left the voice mail message concerning a problem with the waste tracking system. The record does not reveal whether the problem Dutkiewicz raised was related to transporting waste consistent with the DOT regulations. We note that an adverse action taken because an employee circumvented the chain of command to raise a safety issue would violate the employee protection provision. *Pillow v. Bechtel Constr., Inc.*, Case No. 87-ERA-35, Sec. Dec. and Rem. Ord., July 13, 1993, slip op. at 22, *aff'd sub nom. Bechtel Constr. Co. v. Dep't of Labor*, 98 F.3d 1351 (11th Cir. 1996); *see also Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1290 (9th Cir. 1991) (superior's anger over employee's failure to follow chain of command in reporting a whistleblower complaint was pretext for anger over the making of the complaint).

Since there was at least one impermissible reason among those articulated for the second discharge, Clean Harbors had the burden of establishing that it would have discharged Dutkiewicz for legitimate reasons even if he had not engaged in any protected activities. There is no record evidence that the company discharged any other employees for bucking the chain of command to complain about a company procedure or system, or for asking for a benefit such as a cellular telephone.

Unlike other employees, Dutkiewicz had a written requirement not to bring issues to managers other than Caron or, in Caron's absence, Monahan. One reason for the special requirement for Dutkiewicz was his engaging in protected activities during his first employment with Clean Harbors. Therefore, we agree with the ALJ that the reasons for the first discharge tainted the potentially "legitimate" reasons articulated for the second discharge. Upon review of the record, we find that Clean Harbors did not show that it would have discharged Dutkiewicz the second time if he had never engaged in any protected activities during his employment with the company. Therefore, Dutkiewicz has prevailed on his complaint that the second discharge also violated the STAA.

REMEDIES

A successful complainant under the STAA is entitled to affirmative action to abate the violation, reinstatement to the former position with the same pay, terms, and privileges of employment, attorney fees and costs, and may also be awarded compensatory damages. 49 U.S.C. §31105(b)(3). Clean Harbors has reinstated Dutkiewicz to a driver position based in Bristol, at his former rate of pay and with the same employment benefits. *See* June 18, 1997 letter from Jonathan Black to Dutkiewicz and July 24, 1997 letter from Gary Matsko. Since reinstatement clearly was possible, the ALJ correctly denied the request for front pay. R. D. and

O. at 19. *See also Clifton v. United Parcel Svc.*, ARB Case No. 97-045, Final Dec. and Ord., May 14, 1997, slip op. at 1-2 (no front pay where reinstatement is an appropriate remedy).

We affirm the ALJ's back pay calculation. Dutkiewicz is entitled to back pay of \$1,100 per week from January 16, 1995 to June 1, 1995, after which he began a lower paying job. From June 2, 1995 until his layoff from the lower paying job effective June 13, 1997,^{3/} Dutkiewicz is entitled to \$500 per week in back pay.

Dutkiewicz claims that upon his reinstatement to Clean Harbors, he did not earn full pay during training and while awaiting the results of a DOT-required physical examination prior to being assigned to drive. Dutkiewicz letter of July 16, 1997. Dutkiewicz resumed driving for Clean Harbors on July 22, 1997. Gary Matsko letter of July 24, 1997. For the period beginning June 14, 1997, Clean Harbors shall pay Dutkiewicz the difference between \$1,100 per week and the amount he actually earned from his reemployment with Clean Harbors, until such time as Dutkiewicz worked a full week at full pay.^{4/}

We agree with the ALJ's ruling that unemployment compensation Dutkiewicz received is not deducted from the amount of back pay owed. Clean Harbors shall pay interest on the back pay calculated according to 26 U.S.C. §6621.

The ALJ found that unrefuted testimony of Dutkiewicz and his wife established that he suffered severe emotional distress because of his relocation to a different state to take a lower paying job, his concerns for his family's survival, difficulties with his marriage, and ongoing peptic ulcer disease, all of which were proximately caused by his discharge. We affirm the ALJ's award of \$30,000 in compensatory damages.

Dutkiewicz is not entitled to an attorney fee award because he appeared *pro se*. Since he did not document the costs of bringing this complaint, Dutkiewicz is not entitled to an award of costs.

As abatement of the violation, Clean Harbors shall expunge from its files any reference to the adverse actions taken against Dutkiewicz, and shall post notice of its STAA obligations at its Bristol, Connecticut facility.^{5/}

^{3/} According to his letter of June 17, 1997, Dutkiewicz was laid off effective June 13, 1997.

^{4/} Dutkiewicz also states that upon reemployment, for the first time he will be assigned to drive to Chicago and other destinations that require a week away from home. Dutkiewicz letter of July 16, 1997. Clean Harbors adequately explained the reason for the new type of assignments as necessary to give Dutkiewicz a sufficient number of driving hours for full time work. Gary Matsko letter of July 24, 1997.

^{5/} The ALJ also ordered posting at the company's New Britain facility. Clean Harbors recently
(continued...)

ORDER

Respondent shall:

1. Pay to Complainant back pay of \$1,100 per week for the period from January 16, 1995 to June 1, 1995 and of \$500 per week for the period from June 2, 1995 to June 13, 1997. For the period starting June 14, 1997, Respondent shall pay the difference between \$1,100 and the amount Complainant has earned through reemployment, until the time that Complainant has worked a full week at full pay. Respondent also shall pay Complainant interest on the back pay calculated in accordance with 26 U.S.C. § 6621.
2. Pay complainant \$30,000 in compensatory damages.
3. Expunge from all its files any references to the adverse actions against Complainant.
4. Post notice of its STAA obligations at its Bristol, Connecticut facility.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

^{5/}(...continued)

closed that facility, however. Respondent's Reply to Complainant's Response to Order, p. 3.