



In the Matter of:

**DOUGLAS P. FRECHIN,**

**ARB CASE NO. 97-147**

**COMPLAINANT,**

**ALJ CASE NO. 96-STA-34**

**v.**

**DATE: January 13, 1998**

**YELLOW FREIGHT SYSTEMS, INC.,**

**RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

### **FINAL DECISION AND ORDER**

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (West 1996). Complainant, Douglas P. Frechin (Frechin), filed three complaints in 1996 alleging that his employer, Yellow Freight Systems, Inc. (Yellow Freight), took adverse action against him because he engaged in activities protected under the STAA.<sup>1/</sup> In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) found that Frechin did not establish a STAA violation and recommended dismissal of the complaint. The ALJ's findings of fact, R. D. and O. at 2-10, are supported by substantial evidence and therefore are conclusive. 29 C.F.R. §1978.109(c)(2). We also adopt the ALJ's assessments of the credibility of witnesses.

In a case fully tried on the merits, such as this, it is not particularly useful to analyze whether the complainant established a *prima facie* case. *Andreae v. Dry Ice, Inc.*, Case No. 95-ALJ-24, ARB Final Dec. and Ord., July 17, 1997, slip op. at 2 and cases there cited. There is no question that Yellow Freight's managers were aware of Frechin's protected activities of filing an earlier STAA complaint<sup>2/</sup> and making safety complaints about equipment.<sup>3/</sup> Yellow Freight

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<sup>1/</sup> The three complaints were combined for investigation by the Acting Regional Administrator of the Occupational Safety and Health Administration.

<sup>2/</sup> In *Frechin v. Yellow Freight System, Inc.*, Case No. 96-STA-9, Final Dec. and Order, Aug. (continued...)

clearly took adverse action when it issued disciplinary letters to, and discharged, Frechin for wasting company time. The critical inquiry is whether retaliatory animus motivated the adverse actions.

Yellow Freight articulated a legitimate reason for disciplining and discharging Frechin, that he wasted company time. Under the progressive discipline provision of the applicable collective bargaining agreement, the company issued various warning letters and notices of intent to suspend and discharge Frechin. He was allowed to remain on the job while he grieved the issuance of the notices. T. 141; *see* RX 1.

On the first occasion warranting discipline, Yellow Freight employee Dean Hazard saw Frechin sitting in his truck at the dock doing “absolutely nothing” for 15 minutes, from 9:15 a.m. to 9:30 a.m., prior to leaving the gate at 9:44 a.m. CX 13. Yellow Freight issued a warning letter for abuse of company time in response to this December 19, 1995 incident. *Id.*

A second written warning was issued concerning a February 28, 1996 incident, when dispatcher Mark Hayes saw Frechin taking time to sweep light dust off the trailer door and twice had to tell Frechin to get moving. CX 14. Frechin eventually left the yard at 9:40 a.m. *Id.*

Yellow Freight sent Frechin a letter of intent to suspend after an incident on March 14, 1996, in which Frechin received his assignment at 9:00 a.m., his trailer and tractor were pre-hooked (which saved time), and Frechin still had not departed at 9:32 a.m. CX 15. When Hayes asked Frechin if there was a problem, Frechin refused to answer unless a shop steward was present. T. 123-124. He left the yard at 9:33 a.m. CX 15.

On March 28, 1996, Yellow Freight issued Frechin a letter of intent to discharge because on that day, Frechin received his assignment at 9:00 a.m. and was the last driver to leave when he departed after 9:30 a.m. CX 16. Frechin received a second letter of intent to discharge concerning 16 minutes he listed for completing paperwork at the end of the work day on May 16, 1996. CX 17. Yellow Freight gave Frechin six more discharge letters of intent to discharge concerning late departures from the terminal, at 9:24 a.m. or later, between May 18 and July 25, 1996. CX 18 - 20. Concerning an incident on May 28, 1996, former Yellow Freight employee William Calvo watched Frechin and noted that he received his work assignment at 9:00 a.m., walked around the truck from 9:15 to 9:17, drove to the front of the terminal building and parked, walked into the break room, returned and spent the time from 9:24 to 9:30 just sitting

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<sup>2/</sup>(...continued)

9, 1996, the Board found that Yellow Freight assigned Frechin to a less desirable truck for legitimate business reasons and dismissed the complaint. RX 5.

<sup>3/</sup> In light of Frechin’s several undisputed protected activities, we need not examine whether he also engaged in protected activity when he refused to drive vehicles on the ground that they were unsafe or exceeded weight limitations. *Compare* R. D. and O. at 11-12.

in his unit prior to departing. RX 26. Yellow Freight discharged Frechin on January 6, 1997 for abusing company time.

Frechin contends that he always was working and that his pre-trip safety inspections caused him to depart later than others. T. 131, 152-153. He argues that the reason given by Yellow Freight is a pretext for discrimination because other drivers took nearly as long as he did to exit the terminal, but they were not disciplined or discharged. Complainant's Brief (Comp. Br.) at 6.

At first blush, the testimony of other witnesses seems to support Frechin's argument of pretext. Yellow Freight employee Kelly Burke and former employee Patrick McQuade testified that they took a similar amount of time to depart from the same terminals as Frechin, but they were not disciplined for wasting company time. T. 11-12, 18-19 (Burke, 20 to 25 minutes); T. 41 (McQuade, 20 to 30 minutes). Other evidence suggests, however, that McQuade and Burke misstated the amount of time they took prior to departure. An exhibit composed of Burke's manifests shows an average time of 12.4 minutes and a range of 3.4 to 21 minutes between receipt of manifest and time out of the gate. R. D. and O. at 6-7, discussing RX 45.<sup>4/</sup> The ALJ discredited McQuade's estimation of the time he took to leave the terminal because Yellow Freight had fired him for dishonesty for marking his timecard, and McQuade was engaged in litigation against the company. R. D. and O. at 15. For these reasons, the testimony of the other drivers has not convinced us that they routinely took as long to depart as did Frechin.

Frechin also points to other manifests that show a range of 28 to 34 minutes from receipt of manifest to departure from the gate. CX 12. As the ALJ pointed out, however, these manifests do not show if they were from the same terminals to which Frechin was assigned and do not show whether mechanical failure may have caused a delay. R. D. and O. at 16. We do not find the manifests of other drivers at unidentified terminals to be convincing evidence that Frechin unfairly was singled out for discipline because of wasting company time.

Frechin also contends that "wasting company time" was pretextual because Yellow Freight did not have a written policy requiring drivers to leave the terminal within 15 minutes of receiving their manifests. Comp. Br. at 4. All parties agree that the policy was not written, but that does not negate its existence, as the ALJ found. R. D. and O. at 14. We agree with the ALJ that the company informed drivers of the 15 minute policy through pre-shift meetings and a posted memorandum informing drivers of the need to reduce terminal time. *Id.* Moreover, Burke knew of the 15-minute policy, T.20, and Schwendeman testified that he was aware "that the company had expectations of getting us out of the gate in a timely fashion." T. 84.

We find that Yellow Freight disciplined and discharged Frechin for deliberately wasting time, and not because he performed thorough pre-trip examinations, made safety complaints, or

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<sup>4/</sup> Yellow Freight also introduced manifests of Frechin's coworker, Thomas Schwendeman, that showed a shorter time between receiving manifest and departure than Frechin's time. RX 46.

engaged in any other activity protected under the STAA. Accordingly, the complaint is **DISMISSED**.

**SO ORDERED.**

**DAVID A. O'BRIEN**

Chair

**KARL J. SANDSTROM**

Member