

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 September 2006

In the Matter of

STEPHEN C. CARTER
Complainant

v.

BARCLAY, INC.
Respondent

Case No. 2006-STA-00022

Stephen C. Carter, *pro se*

David Martin, Esq.
Little Rock, AR
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case concerns a claim brought under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105 (“STAA”), and the applicable regulations at 29 C.F.R. Part 1978. A formal hearing was held in Memphis, Tennessee on May 31, 2006. Complainant contends he was fired by the respondent because he refused to drive a tractor with a defective seat which he believed made the vehicle unsafe to drive. Respondent contends he was fired because he abandoned his cargo.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

Background

The complainant is a 49 year old resident of Marion, Arkansas who has been a truck driver for most of his working life (TR 12). He started working for Barclay, a subsidiary of Pat Salmon Companies, on July 4, 2005. Barclay contracted with the United States Postal Service to

¹ Citations to the record of this proceeding will be abbreviated as follows: RX – Respondent’s Exhibit; TR – Hearing Transcript.

transport mail; that was its only business. Complainant's route was from Memphis to Knoxville and back to Memphis. The trip took about eight hours each way. Complainant would drive a trailer of mail to Pat Salmon's terminal outside of Knoxville. He would rest the mandatory 10 hours there, then drive another load of mail back to Memphis.

On August 11, 2005, complainant drove his usual route from Memphis to Knoxville. At about 6:30 a.m. (EDT)² on August 12th, he was preparing to take a trailer of mail back to Memphis. He had put his lock on the trailer³ but then discovered that the driver's seat of the tractor attached to the trailer, which bore the number 120577, was deflated, and he could not get it to inflate. Complainant stated that because the seat was deflated he was too low in the cab to see well or to operate the gear shift. He also contended that because the seat was low the mirrors were not adjusted correctly. He believed that the deflated seat made the vehicle unsafe for him to drive.

Complainant then used his cell phone to call Barclay's dispatcher, Sheila Allen, to report the problem with the tractor's seat. There was an extra tractor available at the Knoxville terminal, tractor number 110151, and Ms. Allen stated she would check with Billy Porter, Barclay's manager in Memphis, to make sure it was alright for complainant to take it. So with complainant holding on, she called Mr. Porter at home, and he said complainant could take tractor 110151. She got back on the line with complainant and informed him that Mr. Porter had approved his changing tractors. *See* TR 138. Complainant does not dispute that the dispatcher gave him permission to change tractors (TR 18; RX 10, at 60-61). So all complainant had to do was unhook tractor 120577 from the trailer, hook up tractor 110151 to the trailer, and leave for Memphis.

Despite the fact that he had received permission to drive another tractor back to Memphis, complainant telephoned Mr. Porter. Complainant has given several explanations for calling Mr. Porter. He testified first that the dispatcher told him to call Mr. Porter (TR 18). Later, he testified that he did not remember why he called Mr. Porter, but he thought it might have been to inform him that the problem with the tractor was not serious and could be repaired quickly (TR 80). A third version, in his statement to OSHA, is that the dispatcher "said something about Mr. Porter so I called him at home." (RX 10, at 59). That Ms. Allen told the complainant to call Mr. Porter despite the fact that complainant's concern had been easily resolved makes no sense; and neither Ms. Allen nor Mr. Porter indicated that complainant was asked to call Mr. Porter. Nevertheless, the complainant did call Mr. Porter, and during that conversation Mr. Porter told the complainant that he could not understand why he could not drive tractor 120577 when none of the other drivers voiced a concern about it (TR 123). But he said the complainant was adamant, and Mr. Porter again gave him permission to take the other tractor instead (TR 124). Complainant testified that during this phone call, Mr. Porter told him that tractor 120577 was under warranty and had to be repaired back in Memphis, so he had to

² Knoxville is on Eastern time, whereas Memphis is on Central time.

³ Each driver has his own lock to lock up the trailer he or she is driving. When one driver takes over a trailer from another driver, the first driver removes his or her lock and the next driver puts his or her lock on.

drive it back to Memphis (TR 18). If he did not drive it back to Memphis, he would be fired (*id.*). Mr. Porter denies threatening to fire the complainant if he did not drive tractor 120577 back to Memphis (TR 124); and Mr. Porter does not have the authority to hire and fire. It is Mr. Porter's supervisor, Duane Wilbanks, the manager of the Memphis Terminal for all of Pat Salmon's companies, who has that authority (TR 87). Complainant stated that he told Mr. Porter he would not drive tractor 120577 because it was unsafe, and therefore he assumed he was fired (*e.g.*, TR 18-19). So he took tractor 110151 and drove it back to Memphis without the trailer of mail,⁴ which he left in the Knoxville terminal.

When he arrived in Memphis, complainant just left the tractor and got in his own truck. Mr. Porter went over and asked him where the trailer was. He did not answer him. Mr. Porter then asked complainant for his postal ID badge, but complainant ignored him and drove away. Mr. Porter then informed Mr. Wilbanks of complainant's actions, and Mr. Wilbanks made the determination to fire the complainant (TR 89). On August 15, 2005, Mr. Wilbanks sent the complainant a letter confirming his termination on August 12th for abandoning a load of mail (RX 1).

Complainant testified that he was out of work for about five months after he was fired by Barclay. He has since obtained employment as a truck driver for another company, and he is currently employed there. He has worked there for about 90 days.

Discussion

The STAA prohibits an employer from discharging, disciplining or discriminating against an employee because the employee refused to operate a vehicle in violation of a "regulation, standard, or order of the United States related to commercial motor vehicle safety or health" or because he reasonably believed operating the vehicle would be unsafe. 49 U.S.C. §31105(a)(1)(B)(i)-(ii). To establish a claim under the STAA, Complainant must prove by a preponderance of the evidence that: (1) he engaged in an activity protected under the STAA; (2) his employer was aware of the protected activity; (3) he was subject to an adverse employment action as a result of this activity; and (4) that the protected activity was the cause, all or in part, of the adverse employment action. *See, e.g., West v. Kasbar, Inc./Mail Contractors of America, Inc.*, ARB Case No. 04-155, OALJ Case No. 2004-STA-34 (Nov. 30, 2005).

Claimant alleges that tractor 120577 was unsafe to drive because the driver's seat could not be inflated, and that refusing to drive it was protected activity under the STAA. Respondent contends that despite the problem with the seat, the vehicle was still safe to drive, and it was unreasonable for the complainant to have refused to drive it. Accordingly, respondent argues that the complainant did not engage in protected activity. It makes no difference however, whether refusing to drive tractor 120577 was protected activity because, rather than discriminating against him, respondent remedied the problem by providing complainant with another tractor to drive.

⁴ Driving a tractor without a trailer is called bob-tailing.

It is clear from the record that the complainant was fired not for refusing to drive tractor 120577, but because he abandoned a load of mail in Knoxville when he bob-tailed back to Memphis with tractor 110151. Leaving the mail back in Knoxville while he drove a properly functioning tractor back to Memphis definitely is not a protected activity under the STAA. Complainant's testimony that he was ordered by Mr. Porter to drive tractor 120577 back to Memphis only minutes after Mr. Porter had given him permission to change to another tractor lacks credibility. If complainant could provide a comprehensible reason for calling Mr. Porter after being told by the dispatcher that Mr. Porter said he could change tractors, then perhaps his version of the events of August 12, 2005 might be believable. But even he cannot explain why he called Mr. Porter, or why Mr. Porter would have changed his mind only a few minutes after giving complainant permission to change tractors.

Therefore, regardless of whether complainant engaged in protected activity by refusing to drive a tractor with a deflated driver's seat, he did not suffer an adverse action due to his protected activity. Rather, respondent, despite doubts over whether complainant's fears were justified, did not hesitate in giving the complainant permission to take another vehicle to haul the load of mail to Memphis. It was only when complainant showed up in Memphis without the mail that he was fired.

Since complainant did not suffer an adverse action due to the alleged protected activity, his claim must be denied.

RECOMMENDED ORDER

IT IS ORDERED that the complaint of Stephen Carter under the Surface Transportation Assistance Act is denied.

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JEFFREY TURECK
Administrative Law Judge

NOTICE OF REVIEW: The *Recommended Decision and Order*, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, and 200 Constitution Avenue, N.W., Washington, DC 20210. See 29 C.F.R. §1978.109(a); Secretary's Order 1-2002, ¶4.C. (35), 67 Fed. Reg. 64272 (2002).

Within 30 days of the date of issuance of the *Recommended Decision and Order*, the parties may file briefs with the Board in support of, or in opposition to the decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. §1978.109(c)(2). All further inquires and correspondence in this matter should be directed to the Board.