



In the Matter of:

STEPHEN C. CARTER,

ARB CASE NO. 06-154

COMPLAINANT,

ALJ CASE NO. 2006-STA-022

v.

DATE: April 28, 2008

BARCLAY, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:

David P. Martin, Esq., *Rose Law Firm*, Little Rock, Arkansas

FINAL DECISION AND ORDER

Stephen C. Carter filed a complaint with the United States Department of Labor alleging that his former employer, Barclay, Inc., discharged him after he refused to drive an unsafe vehicle. This, he claims, violated the employee protection section of the Surface Transportation Assistance Act (STAA).¹ After an evidentiary hearing, a Department of Labor Administrative Law Judge (ALJ) denied Carter's complaint.² This

¹ 49 U.S.C.A. § 31105 (West 2008). Regulations that implement the STAA are found at 29 C.F.R. Part 978 (2007). Congress has amended the STAA since Carter filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary for us to determine whether the amendments are applicable to this case because even if they were, they would not affect our decision since they are not applicable to the issues presented for our review.

² *Carter v. Barclay, Inc.*, 2006-STA-022 (ALJ Sept. 22, 2006).

case is before this Board pursuant to the STAA's automatic review provisions.³ We are bound by the ALJ's findings of fact if those findings are supported by substantial evidence on the record considered as a whole.⁴ For the following reasons, we accept the ALJ's recommended decision and deny Carter's complaint.

BACKGROUND

Barclay is a company that transports mail for the United States Postal Service. Carter drove Barclay's Memphis to Knoxville and back to Memphis route. He drove a tractor, which was attached to a trailer loaded with mail.

On August 11, 2005, Carter drove from Memphis to Knoxville, as usual. The next morning, Carter was about to drive a load of mail back to Memphis but discovered that the air bag under the driver's seat of the tractor he would be driving was deflated. According to Carter, the device attached to the air bag, which enabled the driver to raise or lower the seat, was broken. Carter testified that because of this problem, he sat too low in the cab and would not be able to properly see the road ahead. Nor would he be able to see properly through the rear view mirrors or shift gears.⁵

Carter called Sheila Allen, Barclay's dispatcher in Memphis, reported the problem, and said that the tractor was unsafe to drive. Allen put Carter on hold, and called Billy Porter, Barclay's Memphis manager. Porter told Allen to tell Carter that he could use an extra tractor that was available in Knoxville to drive the mail to Memphis. Allen relayed this information to Carter.⁶

³ "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee." 29 C.F.R. § 1978.109(a). The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under the STAA and its implementing regulations. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. Part § 1978 (2004).

⁴ 29 C.F.R. § 1978.109(c)(3). The Board reviews questions of law de novo. *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).

⁵ Transcript (T.) 15-17.

⁶ *Id.* at 122, 138.

Carter then called Porter.⁷ Porter testified that though he wondered aloud why other drivers had not complained about the driver's seat, he again gave Carter permission to use the spare tractor to bring the mail to Memphis. But Carter testified that Porter told him to drive the defective tractor back to Memphis because it was under warranty and could only be repaired in Memphis. And if he did not do so, he was fired. "So, I told him, I said, 'Well, I'm not going to drive it because it's unsafe' and I hung up with him. Well, the dispatcher had already given me permission to drive the other tractor so knowing I was fired anyway, I just bobtailed [drove the tractor with out a trailer attached to it] back to Memphis."⁸

When Carter arrived back in Memphis, Porter asked him to turn in his badge and keys. Carter ignored Porter. According to Carter, Porter became very angry and banged on Carter's personal truck as he was driving away. Porter denied this. On August 15, 2005, Duane Wilbanks, Porter's supervisor, notified Carter by certified mail that he was terminated because he abandoned a load of United States mail in Knoxville.⁹

DISCUSSION

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities. These protected activities include: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" and "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."¹⁰

To prevail on his STAA claim, Carter must prove by a preponderance of the evidence that he engaged in protected activity; that Barclay was aware of the protected activity; that Barclay discharged, disciplined, or discriminated against him; and that the

⁷ Carter gave three different explanations for his call to Porter. He testified that Allen told him to do so. T. 18. He later testified that he did not remember why he called Porter. T. 80. Earlier he told Labor Department investigators that he called Porter because Allen had "said something" about Porter when he called her. Respondent's Exhibit 10, at 59.

⁸ T. 18-19.

⁹ Respondent's Exhibit 1.

¹⁰ 49 U.S.C.A. § 31105 (a).

protected activity was the reason for the adverse action. If Carter does not prove one of these requisite elements, his entire claim fails.¹¹

The ALJ did not make a finding whether Carter's refusal to drive the tractor with the deflated seat constituted protected activity. Barclay argues to us that Carter did not engage in protected activity under either of the refusal to drive sections of the STAA. The company notes that, below, Carter did not identify a "regulation, standard, or order of the United States related to commercial motor vehicle safety or health" that he would have violated had he driven the tractor with the deflated driver's seat. Therefore, it asserts, Carter cannot rely upon this portion of the statute.¹² We agree. To be protected under this refusal to drive provision, a driver must prove that an actual violation of a regulation, standard, or order would have occurred.¹³ Carter has not done so.

Moreover, Barclay also correctly argues that Carter cannot avail himself of the protection afforded under the "reasonable apprehension of serious injury" clause. This argument has merit because to "qualify for protection under this clause, an employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition."¹⁴ The record is clear that after Carter notified Allen, the Barclay dispatcher, about the problematic tractor, she and Porter corrected the problem when they authorized Carter to use the other tractor. Therefore, we find that Carter did not engage in activity that the "reasonable apprehension" clause protects.¹⁵

The ALJ did not believe Carter's testimony that Porter ordered him to drive the defective tractor back to Memphis or be fired because only a few minutes earlier, Allen, per Porter's instructions, told Carter to use the extra tractor that was available at the Knoxville terminal. Substantial evidence supports the ALJ's finding that Carter's testimony about what Porter said lacks credibility.¹⁶ And substantial evidence also

¹¹ See *West v. Kasbar, Inc./Mail Contractors of America*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

¹² Respondent's Brief at 15-16. Carter did not file a brief.

¹³ See *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 10 (ARB Oct. 31, 2007).

¹⁴ 49 U.S.C.A. § 31105 (a) (2).

¹⁵ See, e.g., *Bates v. Kasbar, Inc.*, 1985-STA-011 (Sec'y May 29, 1986) (adopting ALJ's finding that when driver was offered another truck after attempts to repair his defective truck were unsuccessful, driver did not prove that employer refused to correct an unsafe condition).

¹⁶ See n.7.

supports the ALJ's finding that Barclay fired Carter for abandoning the mail in Knoxville, not for refusing to drive the defective tractor.

Thus, Carter did not prove by a preponderance of the evidence that that he engaged in activity that the STAA protects. And even if he had, the record amply demonstrates that Barclay fired him because he abandoned the mail in Knoxville, not because he refused to drive the defective tractor. Therefore, we accept the ALJ's recommendation and **DENY** this complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge