



In the Matter of:

DAVID L. BUSHWAY,
COMPLAINANT,

ARB CASE NO. 01-018

ALJ CASE NO. 00-STA-52

v.

DATE: December 13, 2002

YELLOW FREIGHT, INC.,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD¹

Appearance:

For the Complainant:
David L. Bushway, Pro se, Colchester, Vermont

FINAL DECISION AND ORDER

David L. Bushway filed a complaint with the U. S. Department of Labor's Occupational Safety and Health Administration (OSHA)² alleging that Respondent Yellow Freight, Inc. (Yellow Freight) discharged him in violation of the employee protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997). OSHA investigated the matter and found no merit to the complaint. Bushway objected to that determination, and the matter was referred to a Department of Labor Administrative Law Judge (ALJ) for a hearing pursuant to 29 C.F.R. § 1978.105 (2002). The ALJ issued a Recommended Decision and Order Granting Respondent's Motion for Summary Decision (R. D. & O.) in which he concluded that the complaint should be dismissed in its entirety. R. D. & O. at 9.

The ALJ's decision is before the Board pursuant to 29 C.F.R. § 1978.109(c)(1)'s automatic review procedures. Pursuant to 29 C.F.R. § 1978.109(c)(2), the Board invited both parties to file briefs in support of, or in opposition to, the ALJ's R. D. & O. Yellow Freight did not file a brief. Bushway addressed a letter to the Chief Administrative Law Judge in which he indicated his desire to appeal the R. D. & O. The Chief Judge forwarded the letter to the Board, and we accept the letter as Bushway's brief

¹ This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

² OSHA is the agency within the Department charged with investigating complaints that an employer has violated the STAA's whistleblower protection provisions. 29 C.F.R. § 1978.102(c) (2002).

pursuant to 29 C.F.R. § 1978.109(c)(2). Having considered the applicable law, the record and Bushway's submission, we accept and affirm the ALJ's R. D. & O.

We review a grant of summary decision *de novo*. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 2 (ARB Nov. 30, 1999). Accordingly, the same standard the ALJ uses in reviewing a motion for summary decision governs our review. *Id.* The standard for summary judgment before a Labor Department ALJ is set forth at 29 C.F.R. 18.40(d). This section, which is modeled on Rule 56 of the Federal Rules of Civil Procedure, permits an ALJ to enter summary judgment for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." *Id.* Accordingly, viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law. *Id.*

Yellow Freight hired Bushway in 1986 as a full-time pick-up and delivery driver at its Williston, Vermont terminal. R. D. & O. at 2. Bushway, during the course of his employment, was involved in more than 29 accidents, and Yellow Freight disciplined him more than 60 times for various infractions. *Id.* On August 26, 1999, Yellow Freight assigned Bushway, for the first time, to drive a rented International tractor. *Id.* at 5. While making a delivery, Bushway damaged the landing gear on his trailer when he backed it up over a raised sidewalk. *Id.* The next day, Yellow Freight's Williston Terminal Manager, Ted Dunn, decided to attempt once again to terminate Bushway's employment.³ After obtaining approval of Yellow Freight's labor and human resources departments, Dunn issued an intention to terminate letter to Bushway on September 8, 1999. *Id.* This letter informed Bushway that "YOU ARE HEREBY DISCHARGED FOR THE INCIDENT OF AUGUST 26, 1999 WHEREBY YOU EXHIBITED UNSAFE DRIVING HABITS, AS WELL AS YOUR OVERALL WORK RECORD AND ACCIDENT FREQUENCY." *Id.* In accordance with the terms of the collective bargaining agreement, Bushway continued to work while a grievance over the discharge was processed. *Id.*

On October 22, 1999, Bushway wrote to Yellow Freight's former president concerning his proposed discharge. *Id.* He characterized the August 26th accident as a minor incident, and stated that he did not like driving the International rental tractors because "they are lighter, have smaller tires and softer suspensions [and] have lower profile fifth wheels than the company's regular tractors." *Id.* He also complained of mismanagement at the Williston terminal and that the terminal management "ha[d] personal animosity toward him." *Id.* On January 20, 2000, the arbitration committee upheld the discharge, and Yellow Freight officially terminated Bushway's employment on that date.

The STAA provides in relevant part:

(a) Prohibitions - (1) A person may not discharge an employee . . . or discriminate against an employee regarding pay, terms, or privileges of employment, because –

³ An arbitration committee reduced two prior attempts at termination to suspension. An additional termination attempt was reversed when it was determined that Yellow Freight had failed to pay Bushway for all of his accrued vacation time. R. D. & O. at 2-4.

(A) the employee . . . has filed a complaint . . . related to a violation of a commercial motor vehicle safety regulation, standard, or order . . .

49 U.S.C.A. § 31105(a)(1)(A). To prevail under the STAA, the complainant must prove that he made a protected complaint, that the employer was aware of the complaint, that the employer discharged, disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and that there was a causal connection between the protected activity and the adverse employment action. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d at 46; *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d at 1138; *Metheany v. Roadway Package Systems, Inc.*, ARB No. 00-063, ALJ No. 2000-STA-11, slip op. at 7 (ARB Sept. 30, 2002).

Bushway, in his complaint, alleged that “Yellow Freight had discriminatorily discharged him in violation of the STAA for complaining about the configuration (*i.e.*, a low profile fifth wheel, undersized tires and trailer landing gear without adequate ground clearance) of a tractor/trailer unit he was required to operate.” R. D. & O. at 1. Yellow Freight contended in its Motion for Summary Decision:

[Yellow Freight] is entitled to summary decision in its favor because Bushway has not established a *prima facie* case of discrimination prohibited by the STAA since his complaints about the International tractor are not protected by the STAA and in any event could not have been a motivating factor in the decision to terminate his employment as such complaints were not made until after the termination decision. . . . Yellow Freight further contends that even assuming that Bushway had established a *prima facie* case, his complaint nonetheless must be dismissed because he [cannot] rebut Yellow Freight's legitimate, non-discriminatory reasons for terminating his employment.

Id. at 7. Bushway did not respond to Yellow Freight's Motion for Summary Decision.

The ALJ, viewing the evidence in the light most favorable to Bushway, initially concluded that “I do have some doubt, albeit slight as to whether Yellow Freight has shown that [Bushway] did not engage in any protected activity” when he wrote to the former Yellow Freight president regarding his problems with the International tractor.⁴ R. D. & O. at 8. However, the ALJ concluded that even giving Bushway the benefit of the doubt on the protected activity element, his complaint must nevertheless fail because “it is undisputed that Bushway's complaints came after Yellow Freight's decision to terminate his employment. Thus, he [cannot] establish the existence of a causal link or nexus between his protected activity and his termination, a necessary element of a *prima facie* case.” *Id.* at 8-9.

⁴ Whether the individual to whom Bushway wrote was the president of Yellow Freight at the time he wrote to him is not clear from the ALJ's R. D. & O. Yellow Freight indicated in its Motion for Decision that “Complainant apparently did not realize that Myers [the president] had retired.” Motion to Dismiss at 15 n.18. The ALJ's R. D. & O. does not indicate that he considered the issue whether a letter to a former officer of an employer constitutes a valid complaint under the STAA. Because we need not resolve this question to decide this case, we take no position here on whether a letter to a retired president could be considered a complaint under the STAA.

Bushway's submission to the Board does not address the ALJ's finding that his complaints were made after the decision to terminate his employment. That finding is fatal not only to Bushway's ability to make a *prima facie* case, but to his ability to prevail ultimately under the STAA. The ALJ's finding is fully supported by the evidence of record⁵ and is in accordance with law. Accordingly, finding no reason to depart from the ALJ's cogent opinion, we adopt and attach it. *See, e.g., Kelley v. Heartland Express, Inc.*, ARB No. 00-049, ALJ No. 99-STA-29, slip op. at 3 (ARB Oct. 28, 2002). *See also Ondine Shipping Corp. v. Cataldo*, 24 F.3d 353, 355 (1st Cir. 1994) ("When a trial court produces a lucid, well-reasoned opinion that reaches an appropriate result, we do not believe that a reviewing court should write at length merely to put matters in its own words."). The ALJ's Decision and Order is **AFFIRMED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁵ This evidence includes: Affidavit of Ted Dunn at 3-4; Discharge letter from Ted Dunn to David Bushway dated September 8, 1999; Letter from David Bushway to Maury Myers dated October 22, 1999. Yellow Freight included these documents as attachments to its Motion for Summary Decision.