



**In the Matter of:**

**DAVID L. BLACKANN**

**ARB CASE NO. 02-115**

**COMPLAINANT,**

**ALJ CASE NO. 00-STA-38**

**v.**

**DATE: June 30, 2004**

**ROADWAY EXPRESS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

*Paul O. Taylor, Esq., Truckers Justice Center, Burnsville, Minnesota*

*For the Respondent:*

*Barbara J. Leukart, Esq., Robert C. Pivonka, Esq., Jones, Day, Reavis & Pogue, Cleveland, Ohio*

*Thomas M. Beck, Esq., Jones, Day, Reavis & Pogue, Washington, D.C.*

### **FINAL DECISION AND ORDER**

The Complainant David L. Blackann contends that Respondent Roadway Express, Inc., violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2003). With some elaboration, we affirm the Administrative Law Judge's Recommended Decisions and Orders issued on April 17, 2001 and September 9, 2002 that Roadway did not commit violations of the STAA.

## BACKGROUND

Roadway hired Blackann as a commercial motor vehicle driver on October 5, 1990, suspended him for 30 days on April 29, 1998, and ultimately terminated his employment on September 15, 1998, based upon an accumulated work record that included repeated failures to meet scheduled times for trips and unexcused absences.

Blackann filed a complaint with the Secretary of Labor on October 2, 1998, alleging that Roadway discriminated against him for violating § 31105. He claimed that Roadway had terminated his employment because he refused to drive while fatigued, a protected activity under the STAA. On May 9, 2000, the Department of Labor dismissed the complaint.

The Complainant appealed to an Administrative Law Judge. The ALJ issued two decisions. In the first, Order Denying Respondent's Motion for Deferral and in Part Granting and in Part Denying Respondent's Motion for Summary Decision (Summary Decision), issued on April 17, 2001, the ALJ denied Roadway's motion to defer to the outcome of a hearing before the Ohio Joint State Committee, which upheld his discharge. Summary Decision at 3. However, the ALJ granted Roadway's motion for summary decision as to four warning letters for failing to meet his running time, an act of insubordination, appearing late for work after an additional eight hour fatigue break, and logging over 70 hours in eight days in violation of the Department of Transportation's (DOT) rules on hours of service. The ALJ found that disputed issues of material fact required an evidentiary hearing on the remaining issues. Summary Decision at 6.

The ALJ held a hearing in Akron, Ohio, on July 30-31, 2001. In a September 9, 2002 Recommended Decision and Order (R. D. & O.), the ALJ found in favor of Roadway on issues that remained after the summary decision: recording break time as on-duty, a prolonged unexcused absence, and another failure to meet his assigned running time. R. D. & O. at 15-21. The issues raised in the Summary Decision and R. D. & O. are now before us on automatic review. 29 C.F.R. § 1978.109(a).

## DISCUSSION

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). We are bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. §1978.109(c)(3); *BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). However, the Board reviews questions of law de novo. See *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express*, 929 F.2d at 1063.

The STAA, 49 U.S.C.A. § 31105(a)(1), 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 activity. The protected activity includes making a complaint of a “violation of a commercial motor vehicle safety regulation, standard, or order,” § 31105(a)(1)(A), or refusing to drive because “the operation [would] violate[ ] a regulation, standard, or order of the United States related to commercial motor vehicle safety or health,” or the employee had “a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.” § 31105(a)(1)(B)(i)-(ii). Subsections (1)(A) and (1)(B) are referred to as the “complaint” clause and the “refusal to drive” clause, respectively. See *LaRosa v. Barcelo Plant Growers, Inc.*, ARB No. 96-089, ALJ No. 96-STA-10, slip op. at 1-3 (ARB Aug. 6, 1996). Primarily at issue here is subsection (1)(B)(i), since Blackann asserts that his driving while fatigued would have violated a DOT regulation, 49 C.F.R. § 392.3 (2003), which prohibits a driver from operating and a carrier from requiring operation “while the driver’s ability or alertness is so impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.”

Before us, Roadway has not briefed the ALJ’s denial of Roadway’s motion to defer to the decision of the Ohio Joint State Committee upholding Blackann’s discharge, but both parties have briefed, and consequently we address, the remainder of the ALJ’s summary decision and recommended order, denying Blackann’s complaint.

### **Summary decision of April 17, 2001**

The ALJ granted the Respondent’s motion for summary decision as to seven of eleven disciplinary actions against Blackann. Under 29 C.F.R. § 18.40(d) (2003), an ALJ may enter summary decision if “the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”

Roadway disciplined Blackann for failing to complete trips on time on August 19, 20, 21, and 25, 1998. The Complainant claimed fatigue, but admitted that it was due to his own difficulty sleeping during the day when he was required to drive at night. E.g., Respondent’s Motion for Summary Decision, Exhibit (RE) 18 at 34; Affidavit of Blackann in Opposition to Summary Judgment, especially ¶¶ 128, 136. The ALJ found that Roadway’s dispatch procedures gave Blackann adequate time to rest and be available for work. He ruled that the dispatch system did not violate any DOT regulation. See *Somerson v. Yellow Freight*, ARB No. 99-005, ALJ No. 98-STA-9, slip op. at 14 (ARB Feb. 18, 1999) (holding that it is beyond ARB authority to consider wholesale challenge to casual driver dispatch system that complies with Department of Transportation hours of work regulation on ground that it results in fatigue rule violations). The ALJ cited *Ass’t Sec’y & Porter v. Greyhound Bus Lines*, ARB No. 98-116, ALJ No. 96-STA-23 (ARB June 12, 1998), for the proposition that a driver is not protected under the STAA if he was unavailable for work because he did not take advantage of his time off to become rested and was fatigued through no fault of his employer. The ALJ concluded as a matter

of law that Blackann was not engaged in protected activity on those four days in August 1998 when he failed to meet established running times. Summary Decision at 5-6.

We agree with the ALJ's conclusion that summary decision for Roadway was appropriate, but with a modification of the analysis. Our cases finding for the respondents have turned on their particular facts. See *Somerson, supra*, slip op. at 10. However, we have held in individual situations that it does not violate the STAA to take employment action against a driver who is unable to meet the physical demands of the job on a sustained basis. For example, *Schwartz v. Youth Commercial Transfer*, ARB No. 02-122, ALJ No. 01-STA-33 (ARB Oct. 31, 2003), involved an agricultural transport driver (fresh tomatoes) who was legally required to work 12-hour, successive shifts. We held that the employer did not violate the STAA when it discharged him for the legitimate business reasons that he could not perform the job. *Schwartz*, slip op. at 12. Similarly, in *Sosknoskie v. Emery, Inc.*, ARB No. 02-010, ALJ 2002-STA-21 (ARB Aug. 28, 2003), the complainant was hired as a long haul driver of household goods. He had suffered a prior back injury and was inflexible about driving at night. We affirmed the ALJ's conclusion that the complainant was terminated because he was physically unable to perform his assigned duties, not because he was retaliated against under the fatigue rule. *Sosknoskie*, slip op. at 3-4.

It is undisputed that it took Blackann 7.73 hours to complete a 5-hour trip on August 19, 1998; 8.45 hours on August 20; 7.68 hours on August 21; and 8.53 hours on August 25. R. D. & O. at 2. See also Summary Decision at 5. Blackann's duties as an extra board driver frequently required him to drive at night and consequently to prepare for work by sleeping during the day. However, he admitted that he slept better at night, was unable to prepare for work by sleeping during the day, and sometimes became very sleepy between 1:00 a.m. and 6:00 a.m., when his job required him to drive. See generally Affidavit of Blackann in Opposition to Summary Judgment, especially ¶¶ 128, 136. He has cited a study that humans are normally more sleepy at night because of their "circadian rhythms." Complainant's Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment, at 27-30. Taking the facts in the light most favorable to the Complainant, he was unable to adapt to a physical requirement of his employment, namely that drive at night and prepare for work by sleeping during the daytime. Accordingly, we do not believe that Roadway violated the STAA in issuing warning letters for Blackann's failure to meet established running times on four nearly successive nights, and so hold. *Schwartz; Sosknoskie; Yellow Freight v. Reich*, 8 F.3d 980, 987-88 (4th Cir. 1993) ("An employer obviously remains free to sanction an employee for chronically tardy conduct or indeed for any action not protected by the STAA. The STAA protects only a driver who may unexpectedly encounter fatigue on the course of a journey . . .").

The ALJ also granted the Respondent's motion for summary decision as to three other disciplinary actions. On December 5 and 6, Blackann logged 70 hours in an eight-day period in violation of a DOT regulation. 49 C.F.R. § 395.3(b)(2) (2003). On August 6, 1998, he cursed a supervisor which was written up as an act of insubordination. And on September 8, 1998, he arrived for work late after taking an additional eight hours off

due to fatigue. Summary Decision at 6. We adopt the ALJ's rulings on those disciplinary actions. Based upon undisputed facts, Blackann failed to demonstrate that he engaged in protected activity, an essential element of his claim, and therefore Roadway was entitled to prevail as a matter of law. We thus turn to the remaining disciplinary actions on which he did not award summary decision.

### **Recommended Decision and Order of September 9, 2002**

The ALJ's R. D. & O discusses one disciplinary action that did not lead to the Complainant's discharge and three that did. We review them briefly in order.

On December 23, 1998, Roadway gave Blackann a warning letter for an unexcused absence from December 12, 1997 to December 15, 1997. Blackann claimed that he was medically unable to drive on those days and that he should not have been disciplined for not driving. Roadway's position was that Blackann had failed to comply with company policy on obtaining a proper medical excuse. Blackann's supervisor testified that the incident was not considered in the decision to discharge Blackann because he had already been disciplined for it when he was suspended in April 1998. Therefore, the ALJ reached no decision on the merits of Blackann's complaint. R. D. & O. at 16.

On January 20, 1998, Roadway warned Blackann for recording break time as on-duty time on January 12, 1998. The ALJ ruled that the warning was not issued because Blackann complained of fatigue, but because he made an improper entry in the Roadway log book. Since the incident was a dispute over company policy, the Complainant failed to show protected activity. R. D. & O. at 18. We note that Federal guidance provides that "[i]t is the employer's choice whether the driver shall record stops made during a tour of duty as off-duty time." 62 Fed. Reg. 16370, 16422 (Apr. 4, 1977).

On April 1, Roadway issued another warning letter to Blackann for an unexcused absence. The parties agreed that Blackann was excused from January 30, 1998 to March 18, 1998, but he asserted that he was unfairly disciplined for failing to drive from March 18, 1998 to April 24, 1998 due to illness. The Respondent's position was that, in contravention of company policy, Blackann failed to provide a medical excuse showing the days and type of disability. The ALJ held that the Complainant was unable to demonstrate that he was disciplined for engaging in protected activity. R. D. & O. at 19.

Another warning letter contributing to the Complainant's discharge was on July 20, 1998, for again failing to meet his schedule. Blackann claimed that the poor condition of the truck caused him to be fatigued and that the fatigue rule, 49 C.F.R. § 392.3, protected him. However, the ALJ determined that Blackann did not sustain his burden, because, for example, required logs did not record any defects in the truck's condition. R. D. & O. at 20-21.

There being no other claims or causes of action, Blackann's complaint failed to establish a violation of the STAA.

## **CONCLUSION**

We hold that substantial evidence in the record supports the ALJ's findings of fact and that, except as modified, he correctly applied the law. Accordingly, we **ADOPT** and attach the ALJ's Summary Decision and R. D. & O. and **DENY** Blackann's complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**