**In the Matter of:**

**ROBERT MORE,** **ARB CASE NO. 01-044**

**COMPLAINANT,** **ALJ CASE NO 2000-STA-23**

**DATE: June 28, 2001**

**v.**

**R&L TRANSFER, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**[1/]

**Appearances**:

*For the Complainant*:
Robert J. More, *Pro Se, Chicago, Illinois*

*For the Respondent:*
Floyd Babbitt, Esq., Sheryl C. Allenson, Esq., Keith S. Brin, Esq., *FagalHaber, LLC, Chicago, Illinois*

## FINAL DECISION AND ORDER

Complainant Robert More filed this case under the employee protection ("whistleblower") provisions of the Surface Transportation Assistance Act ("STAA"), as amended and recodified, 49 U.S.C.A. §31105 (West 1994).[2/] Specifically implicated in this case

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[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

[2/] The STAA states, in relevant part:

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

(continued...)

are the Department of Transportation's "Hours of Service" regulations which provide, *inter alia*, that a commercial vehicle driver cannot be permitted or required to drive more than ten hours following eight consecutive hours off duty. 49 C.F.R. §395.3(a)(1) (1999).

The following facts are undisputed. Respondent, R&L Transfer, Inc., hired More as a truck driver on June 15, 1999, subject to the successful completion of a 90-day probationary period. He had no permanent route, but instead was assigned to runs as loads became available.

On July 21, 1999, More reported to work at 5:15 a.m. and worked until 1:09 p.m. After More had gone home for the day, Michael Smith, the terminal manager, telephoned More and informed him that he was discharged. However, when More pleaded for another chance, Smith relented and gave More his job back on the condition that he become a model employee. More understood that he was to report back to work later that evening for a 9:00 p.m. run.

More arrived at work shortly after 9:00 p.m., but by that time the load was already gone. He was told to report back at 10:00 p.m. Shortly thereafter, More took Frank Shelton, his immediate supervisor, aside and offered to pay him for the names and telephone numbers of truckers who had filed suits against their former employers. Shelton relayed this conversation to Smith. Viewing More's offer as a veiled threat, Smith summarily terminated More at approximately 9:45 p.m. because More had failed to improve his behavior.

More subsequently filed a complaint with the Labor Department's Occupational Safety and Health Administration ("OSHA")[3/] alleging that he was illegally terminated because he refused to be dispatched prior to the completion of his mandatory eight hour rest period under 49 C.F.R. §395.3(a)(1). After investigating the matter, OSHA found no merit to the complaint. More objected to that determination, and the matter was referred to an Administrative Law Judge ("ALJ") for a hearing, pursuant to 29 C.F.R. §1978.105.

By Order ("RD&O") dated February 1, 2001, the ALJ recommended that the complaint be dismissed, in part because More failed to produce any persuasive evidence that he engaged in a protected activity which could form the basis of a claim under the STAA. Specifically, the ALJ stated:

> It is clear instead that, while he may have initially been offered a dispatch at 9:00 p.m., the Respondent revoked that offer and

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[2/](...continued)

> (B) the employee refuses to operate a vehicle because –
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health[.]

49 U.S.C.A. §31105(a).

[3/] 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) (2000).

> rescheduled him for a 10:00 dispatch. The Complainant never refused the 9:00 p.m. load. His own testimony, that Mr Shelton refused to give him the load because he was a few minutes late, shows this . . . . Moreover, he did not refuse the 10:00 p.m. dispatch, as he was terminated before even having an opportunity to do so.

RD&O at 6.

## JURISDICTION

The decision of the ALJ is before the Board pursuant to the automatic review procedures under 29 C.F.R. §1978.109(c)(1).

## STANDARD OF REVIEW

Under the STAA implementing regulations, the Board is 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). The Board reviews the ALJ's conclusions of law *de novo*. *Johnson v. Roadway Express, Inc.*, ARB No. 99-011, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), citing *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

## PRELIMINARY MATTERS

Respondent has moved to strike More's initial briefs under F.R.C.P. 12(f)[4/] "because the Briefs amount to nothing more than an attack upon the character and integrity of Judge Holmes, R&L's counsel, and the administrative hearing process." Respondent's Motion to Strike Complainant's Briefs at 1.

F.R.C.P. 12(f) is a trial rule and, as such, is of dubious applicability in an appellate proceeding like the one before us. However, we have nevertheless recognized our inherent authority to demand that all litigants – including *pro se* litigants – comport themselves with a measure of civility and respect for the tribunals that hear their cases. *See Pickett v. TVA*, ARB No. 00-076, ALJ Nos. 99-CAA-25, 00-CAA-9 (ARB Nov. 2, 2000).

In this case, More's briefs contain a number of vituperative and sarcastic remarks directed at the ALJ and Respondent's counsel. Such language has no place in a brief and is wholly unwarranted. *Id*. Moreover, it is ultimately self-defeating because it detracts from a complainant's ability to make a sound legal argument. *Hasan v. Commonwealth Edison Co. and Washington Group Int'l, Inc.*, ARB No. 01-005, ALJ No. 2000-ERA-11 (ARB Apr. 23, 2001).

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[4/] F.R.C.P. 12(f) provides that the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

If More's briefs had been filed by an attorney, we would not hesitate to strike them as inconsistent with a lawyer's ethical obligation to demonstrate respect for the courts. *See Pickett, supra*. However, because More is a *pro se* litigant, we accord him more leeway than we would a member of the bar. Consequently, we decline to strike More's briefs and choose instead to simply disregard his intemperate language.

Respondent also asserts that More's briefs contain references to materials and issues without providing any citations to the transcript or otherwise identifying where in the record these materials and issues may be found. According to Respondent, More's Briefs "present impertinent material not at issue or not raised at the Hearing or in his Complaint . . . . On that basis his Briefs should be struck. . . . pursuant to F.R.C.P. 12(f)." Respondent's Motion to Strike Complainant's Briefs at 6-7. In Response, More filed a motion essentially asking whether he needs to supplement his briefs with citations to the record or whether he needs to submit any additional evidence and/or arguments. Complainant's Motion Requesting that the Administrative Review Board Provide Him Notice Indicating Whether or Not He Must Provide the ARB Documents Explaining the Foundation of the Complainant's Claim that the Causes of Each of the Several Adverse Employment Activities that has been & is Present in this Case has been Imputable to the Statutory Breaching Commitment, Policies & Practices of the Respondent in Order that the Complainant's Position in this Matter Prevail Over the Respondent's Entirely Untenable Position [sic], at 1 and 4.

We agree with Respondent that More's briefs are unaccompanied by adequate citations to the record. However, in the absence of a rule requiring such citations, we would be compelled to allow More to amend his briefs to include them. A second round of briefing would needlessly increase the cost of resolving what we believe is a straightforward case. We decline to take that course of action and, therefore, Respondent's request to strike the briefs on this ground is denied.

## DISCUSSION

To prevail on a claim under §31105(a), the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, that his or her employer was aware of the protected activity, and that the employer discharged, disciplined or discriminated against him or her because of that activity. *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc*., 836 F. 226, 228 (6th Cir. 1987).

Under the STAA provision invoked in this case – the "refusal to operate" provision – More could not have engaged in protected activity unless he refused to operate a vehicle. More argues that he arrived after 9:00 p.m. on the evening of July 21, 1999, *for the express purpose* of avoiding a violation of the eight-hour rule under 49 C.F.R. §395.3(a)(1) (1999). According to More, this was tantamount to a refusal to take the load and, therefore, was a protected activity under the STAA. Official Complainant's Brief Submitted for Administrative Review to the Administrative Review Board, at 12.

We think this is an untenable theory. However, assuming that the eight-hour rule under 49 C.F.R. §395.3(a)(1) (1999) is applicable, and that More's legal argument is something other than a *post hoc* rationalization for being tardy, More has still failed to establish a case of unlawful discrimination. Even if More were to prove that he engaged in protected activity, that fact is ultimately irrelevant unless he can also show a causal connection between the protected activity and the adverse action (*i.e.*, unless he can show a retaliatory intent). No such connection can be demonstrated unless More can first establish that Respondent had actual or constructive knowledge of his protected activity. More has never asserted, let alone proven, that Respondent had actual or constructive knowledge that he deliberately reported to work late in order to avoid violating 49 C.F.R. §395.3(a)(1). Therefore, we find that More failed to prove an essential element of his case and concur with the ALJ's recommendation that this complaint be dismissed.

**SO ORDERED.**

**CYNTHIA L. ATTWOOD**
Member

**RICHARD A. BEVERLY**
Alternate Member