In the Matter of:

CRAIG CUMMINGS, **ARB CASE NO. 04-043**

COMPLAINANT, **ALJ CASE NO. 03-STA-47**

v. **DATE: April 26, 2005**

USA TRUCK, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Craig Cummings, *pro se, Walnut Shade, Missouri*

FINAL DECISION AND ORDER

This case arises from a complaint Craig Cummings ("Cummings") filed alleging that his employer, USA Truck, Incorporated, violated the employee protection ("whistleblower") provisions of the Surface Transportation Assistance Act ("STAA" or "Act") of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1994), when it terminated his employment. On January 9, 2004, a Department of Labor Administrative Law Judge ("ALJ") issued a Recommended Order of Dismissal ("R. O.") in which he determined that Cummings had not alleged that he engaged in activity protected by the STAA and, therefore, dismissed the complaint for failure to state a cause of action. We determine that Cummings failed to allege that he engaged in activity protected by the STAA and, therefore, adopt the ALJ's holding, attach and incorporate the ALJ's R. O., and dismiss Cummings' complaint.

JURISDICTION AND STANDARD OF REVIEW

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 (2004). Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).[1] Pursuant to 29 C.F.R. § 1978.109(c)(1), the Board is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision … ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

We construe complaints and papers filed by pro se complainants "liberally in deference to their lack of training in the law" and with a degree of adjudicative latitude. *Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), *citing Hughes v. Rowe*, 449 U.S. 5 (1980). At the same time we are charged with a duty to remain impartial; we must "refrain from becoming an advocate for the pro se litigant." *Id*.[2] We accordingly have scrutinized the ALJ's treatment of the parties, mindful of the balance properly maintained between accommodation and evenhanded administration. The ultimate question is whether the ALJ provided Cummings with a meaningful opportunity to present his complaint.

BACKGROUND

USA Truck employed Cummings as a driver. On October 17, 2002, he was scheduled to drive a load of cargo from Ohio to Virginia via the Washington, D.C., area. Because random sniper shootings were occurring in the Washington, D.C. area at that time, Cummings states that he refused to drive the cargo to Virginia as he feared for his

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[1] This regulation provides, "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."

[2] We recognize that while adjudicators must accord a pro se complainant "fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance." *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), *quoting Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983). Affording a pro se complainant undue assistance in developing a record would compromise the role of the adjudicator in the adversary system. *See Young*, slip op. at 9, *citing Jessica Case, Note: Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L. J. 701 (2002).

personal safety. USA Truck fired Cummings the same day for his refusal to drive the scheduled assignment.

Cummings contends that USA Truck impermissibly fired him in retaliation for his refusal to drive the scheduled assignment in violation of relevant motor vehicle safety regulations that prohibit carriers from requiring or permitting the operation of a motor vehicle in an unsafe condition, 49 C.F.R. § 396.7 (2004), or in hazardous conditions, 49 C.F.R. § 392.14 (2004), thereby violating the employee protection provisions of the STAA. Cummings also alleges that USA Truck had previously threatened him with employment action in June 2001 for failing to deliver another cargo shipment. Finally, Cummings alleges that since USA Truck fired him, USA Truck has effectively blacklisted his reputation and, consequently, has prevented any other motor carrier employer from hiring him.

PROCEDURAL HISTORY

After an initial investigation, the Regional Supervisor of the Occupational Health and Safety Administration dismissed Cummings' complaint on August 7, 2003. Cummings appealed and the case was forwarded to the Office of Administrative Law Judges for a hearing. Prior to the scheduled hearing, however, the ALJ issued a Show Cause Order on December 4, 2003, requiring Cummings to show why his complaint should not be dismissed for failure to state a cause of action. Ultimately, the ALJ issued his R. O., in which he determined that Cummings' allegation was not activity protected by the STAA and, therefore, dismissed the complaint for failure to state a cause of action.

DISCUSSION

The STAA provides in pertinent part:

> Prohibitions - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because –
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> (A) The employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because –
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> > (i) the operation violates a regulation, standard, or order of the United States related to the commercial motor vehicle safety or health; or

> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
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> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105.

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity, 2) his employer was aware of the protected activity, 3) the employer discharged him, or disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and 4) there is a causal connection between the protected activity and the adverse action. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Envt'l. Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (*quoting Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987). The complainant bears the burden of persuading the trier of fact that he was subjected to discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). Though Cummings was pro se before the ALJ, the burden of first establishing, and ultimately proving, the necessary elements of a whistleblower claim is no less for pro se litigants than it is for litigants represented by counsel. *Young*, slip op. at 10.

There is no allegation or evidence that Cummings filed any safety complaint or that Cummings initiated, or was involved with, any safety-related proceeding. 49 U.S.C.A. § 31105(1)(A). The ALJ further determined that Cummings did not refuse to operate his truck because the operation would violate a regulation or was based on any unsafe condition regarding the truck itself or Cummings' ability to drive the truck. 49 U.S.C.A. § 31105(1)(B); R. O. at 5. Thus, the ALJ concluded that Cummings' allegation was not protected activity under the STAA either in his complaint or in his response to the ALJ's Show Cause Order. Consequently, the ALJ dismissed the complaint for failure to state a cause of action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The rules governing hearings in whistleblower cases contain no specific provisions for dismissal of complaints for failure to state a claim upon which relief may be granted. *See* 29 C.F.R. Parts 18 and 24 (2004). The ALJ therefore properly applied Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims. 29 C.F.R. § 18.1 (a). Under Fed. R. Civ. P. 12(b)(6), all reasonable inferences are made in the non-moving party's favor. *Tyndall*

v.United States Envtl. Prot. Agency, 93-CAA-6, 95-CAA-5 (ARB June 14, 1996). Dismissal should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Studer v. Flowers Baking Co.*, 93-CAA-11 (Sec'y June 19, 1995), citing *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980).

Making all reasonable inferences in Cummings favor, the ALJ's R. O. thoroughly and fairly recites the relevant allegations and facts in this case. Having reviewed the entire record, we agree with the ALJ's determination.

Cummings alleged in his complaint that it was his prerogative as a driver to refuse to drive the scheduled assignment because of his safety concerns regarding driving in the Washington, D.C. area where sniper shootings were occurring at the time. To drive under such circumstances, he asserts, would constitute a violation of the prohibitions against carriers requiring or permitting the operation of a motor vehicle in hazardous conditions pursuant to 49 C.F.R. § 392.14 or the operation of a motor vehicle in an unsafe condition pursuant to 49 C.F.R. § 396.7. Section 392.14 provides, in pertinent part:

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust or smoke adversely affect visibility or traction. . . . If conditions become sufficiently dangerous, the operation of the commercial vehicle shall be discontinued and shall not be resumed until the *commercial motor vehicle can be safely operated*. . . .

49 C.F.R. § 392.14 (emphasis added). Section 396.7 prohibits the operation of a motor vehicle "in an unsafe condition." 49 C.F.R. § 396.7(a), (b).

To invoke protection under 49 U.S.C.A. § 31105(1)(B)(i), a complainant must allege and ultimately prove that an actual violation would have occurred. *Asst. Sec. & Vilanj v. Lee & Eastes Tank Lines, Inc.*, 1995- STA-36, slip op. at 13 (Sec'y Apr. 11, 1996); *Robinson v. Duff Truck Line, Inc.*, 1986-STA-3, slip op. at 12, n.7 (Sec'y Mar. 6, 1987), *affirmed sub nom. Duff Truck Line v. Brock*, No. 87-3324 (6th Cir. June 24, 1988). Contrary to Cummings' assertion, a reasonable and good faith belief by the driver alone that it is unsafe to drive is not enough. *Id.* The hazardous conditions described at Section 392.14 are only those conditions affecting visibility or traction which would make it unsafe to operate a commercial motor vehicle. As the ALJ determined, Cummings does not allege that his vehicle itself was unsafe to operate and other drivers (including, presumably, other commercial motor vehicle drivers) were able to drive in the

Washington, D.C. area at that time. R. O. at 6.[3] Thus, as the ALJ determined, Cummings did not allege a violation of the STAA as he had no reasonable apprehension that his vehicle was in an unsafe condition to operate under the applicable regulations.

Consequently, we adopt the ALJ's holding because the record clearly demonstrates that Cummings did not engage in protected activity under the STAA. Thus, we attach and incorporate the ALJ's Recommended Order and, accordingly, **DISMISS** Cummings' complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

[3] Although Cummings notes that an "[e]mergency" as defined under the applicable regulation at 49 C.F.R. § 390.5 (2004) includes a man-made occurrence, such an event is only considered an emergency if it results in an official declaration of an emergency. *See* 49 C.F.R. § 390.5. Cummings does not allege that there was an official declaration of an emergency regarding the sniper shootings in the Washington, D.C. area at that time, but only that public travel advisories were issued by the media. That other drivers were able to drive in the Washington, D.C. area at the time of the sniper shootings, as the ALJ noted, further underscores that there was no such "emergency" at that time.