In the Matter of:

JACK D. HARRIS, JR., **ARB CASE NO. 05-146**

COMPLAINANT, **ALJ CASE NO. 2004-STA-17**

v. **DATE: December 29, 2005**

ALLSTATES FREIGHT SYSTEMS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:
Paul O. Taylor, Esq., ***Truckers Justice Center, Burnsville, Minnesota***

FINAL DECISION AND ORDER

The Complainant Jack D. Harris, Jr. contends that Respondent Allstate Freight Systems 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 (2005), when it discharged him on July 14, 2003. We affirm the Administrative Law Judge's Recommended Decision and Order (R. D. & O.) issued on July 25, 2005, that Allstate did not violate the STAA.

BACKGROUND

The material facts are simple and undisputed. Harris was an employee and Allstate was an employer subject to the STAA. *See* Harris Deposition (Depo.) at 7. On July 14, 2003, Allstate's dispatcher assigned Harris a shipment from Twinsburg, Ohio to

Boston, Massachusetts. Affidavit of Julie Ward-Giesse, Summary Judgment Exhibit (Ex.) 3. Without specifying a reason, Harris requested a different load. Depo. at 22. Allstate's president then terminated Harris's employment. Affidavit of John Ward, Ex. 4.

After his discharge, Harris claimed he refused the load because his sister-in-law was ill and his uncle had passed away (Depo. at 22); because he did not like the pay for the load (*Id.* at 10, 22); and then finally because it would have violated a Department of Transportation (DOT) regulation, 49 C.F.R. § 395.3(1) (2005), that prohibits driving more than 11 cumulative hours following 10 consecutive hours off duty. Ex. 1. However, in the past, Harris had completed the Twinsburg to Boston run without violating the regulation. Depo. at 99.

In September 2003, Harris complained to the Occupational Safety and Health Administration (OSHA) that he was discharged for a reason the STAA protects, namely that he refused to accept a dispatch that he asserted would have violated the hours of service regulation. (Ex. 1). Following an investigation, OSHA denied Harris's claim on the basis that he failed to give Allstate a protected reason for declining the run. *Id.*

On December 20, 2003, Harris objected to OSHA's denial of his complaint and requested that an ALJ review it. Ex. 2. On June 30, 2005, Allstate filed a Motion for Summary Judgment. Harris filed a timely response, and the ALJ granted Allstate's motion. "[Harris] admitted that [the president of Allstate] discharged him before he was able to express any concerns about violating the hours of service regulation, and therefore [Allstate] was unaware of any protected activity [Harris] may have engaged in." R. D. & O. at 2. Therefore, Harris failed to show a required element of his whistleblower claim, the employer's knowledge of the employee's protected activity. *Id.*

DISCUSSION

The R. D. & O. is now before us under the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). Pursuant to 29 C.F.R. § 18.40(d) (2005), an ALJ may enter summary decision (summary judgment) 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." Whether a party is entitled to summary decision is a legal conclusion that the Board reviews de novo. *See Blackann v. Roadway Express, Inc.*, ARB No. 02-115, ALJ No. 00-STA-38 (ARB June 30, 2004).

We consider whether the ALJ correctly granted summary decision for Allstate. Harris filed a brief. Allstate did not.

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," § 31105(a)(1)(B)(i). Subsections (1)(A) and (1)(B)(i) 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). Since Harris asserts that accepting the load from Twinsburg to Boston would have violated the DOT hours of service regulation, subsection (1)(B)(i) is primarily at issue here.

To prevail on a STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Eash v. Roadway Express*, ARB No. 04-036, ALJ. No. 1998-STA-28, slip op. at 5 (ARB Sept. 30, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004). Failure to prove any one of these elements results in dismissal of a claim. *Eash*, slip op. at 5.

In this case, when Allstate's dispatcher assigned Harris the shipment from Twinsburg to Boston, he requested a different load. Harris admits that he did not at the time of the telephone conversation provide any reason for declining the assignment, let alone complain that, in completing it, he would violate the hours of service regulation. On these undisputed facts, Harris fails to demonstrate that he made Allstate aware of a protected complaint. Consequently, his STAA whistleblower complaint fails as a matter of law.

In his brief to us, Harris argues that, even if he did not make a protected complaint to Allstate on the day of his termination, he had made hours of service and similar complaints in the past. Because that protected activity could have factored into Allstate's decision to discharge him, the ALJ should have denied summary decision. Complainant's Brief in Opposition to the Administrative Law Judge's Recommended Decision and Order. However, Harris did not raise that argument below, *see* Complainant's Response Opposing Respondent's Motion for Summary Judgment, at 6-11, and we will not address an issue raised for the first time on appeal. *Farmer v. Alaska Dep't of Transp. & Pub. Facilities*, ARB No. 04-002, ALJ No. 2003-ERA-11, slip op. at 6 (ARB Dec. 17, 2004).

CONCLUSION

Since Harris did not show that Allstate was aware of his alleged protected activity, the ALJ properly granted summary decision for Allstate. We affirm and **DISMISS** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge