



**In the Matter of:**

**GARY JOHNSON,**

**ARB CASE NO. 07-111**

**COMPLAINANT**

**ALJ CASE NO. 2007-STA-012**

**v.**

**DATE: February 23, 2009**

**ECONO STEEL, LLC**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD:**

**Appearances:**

***For the Complainant:***

**Gary Johnson, *pro se*, Birmingham, Alabama**

***For the Respondent:***

**Philip E. Gable, Esq., *Philip E. Gable, P.C.*, Hoover, Alabama**

**FINAL DECISION AND ORDER**

Gary Johnson complains that Econo Steel, LLC., violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA),<sup>1</sup> and its implementing regulations, when it terminated his employment because he raised concerns

---

<sup>1</sup> 49 U.S.C.A. § 31105 (West 2008), 29 C.F.R. Part 1978 (2007). The STAA has been amended since Johnson filed his complaint. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide whether the amendments apply to this case because even if they do apply, they would not affect our decision.

about violating hours of service safety regulations.<sup>2</sup> After an evidentiary hearing, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) concluding that Johnson failed to engage in activity that the STAA protects. We affirm.

## BACKGROUND

Gary Johnson began driving for Econo Steel, L.C.C., in August 2004, delivering loads of steel tubing and pipe to local and out-of-state customers from the company's Birmingham, Alabama facility.<sup>3</sup> Joel Knight was his supervisor.<sup>4</sup> On October 3, 2006, Johnson's rate of pay changed to mileage only, at 47 cents a mile.<sup>5</sup>

On Tuesday, October 17, 2006, Econo's plant manager, Woody Thompson, scheduled Johnson to make local deliveries on Wednesday and Thursday mornings and

---

<sup>2</sup> The hours of service regulations limit the number of hours a commercial truck driver may operate his or her vehicle during any given day and 7-day period. *See* CX 1. The regulations applicable in October 2006 provided:

(a) Except as provided in §§ 395.1(b)(1), 395.1(f), and 395.1(h), no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:

(1) More than 11 hours following 10 consecutive hours off duty; or

(2) For any period after having been on duty 14 hours following 10 consecutive hours off duty.

(b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. § 395.3 (West 2008).

<sup>3</sup> Complainant's Exhibit (CX) 18 at 10, 16, 24.

<sup>4</sup> Hearing Transcript, (TR) at 26.

<sup>5</sup> CX 6.

then drive a load from Birmingham to Honey Brook, Pennsylvania, about 860 miles away.<sup>6</sup>

Johnson testified that he had done this run previously and knew that he could not leave Birmingham at noon on Thursday, October 19, and arrive in Pennsylvania by 4:00 p.m. on Friday, October 20, 2006, without violating hours of service regulations. Johnson stated that he told Thompson about this problem on Tuesday, and Thompson said he would talk with Econo's owner and president, Stephen Gable.<sup>7</sup>

After returning from a local delivery at about 9:00 a.m. on Wednesday, October 18, 2006, Johnson stated that he asked Thompson if had talked with Gable. Thompson said he would take care of it that afternoon, but Johnson then sought out Gable in the terminal yard and told him that he could not do the Honey Brook run because it was "highly illegal and highly impossible." Gable then fired Johnson. According to Johnson, Gable told him, "If you can't do it, then let's call it quits."<sup>8</sup> Subsequently, Gable sent Johnson a handwritten letter stating he had fired him on October 18, 2006, because he "did not fit into our organization."<sup>9</sup>

Gable's version of his interaction with Johnson on that Wednesday morning was somewhat different. He testified that he decided on Tuesday, October 17, 2006, to fire Johnson after receiving a complaint from a customer that Johnson had been driving recklessly. He stated that when he told Johnson to meet with him the next morning (Wednesday) to talk about his continued employment, Johnson did not voice any concerns about the assigned trip to Honey Brook on Thursday.<sup>10</sup> On Wednesday morning, Gable added, Johnson said he wanted to talk about his assignment the next day, but Gable fired him before he could.<sup>11</sup>

Johnson's supervisor, Thompson, testified that Johnson wanted to change the Honey Brook assignment so that he could leave on Wednesday, October 18, and asked him on Tuesday to speak with Gable about it.<sup>12</sup> Thompson said he intended to do so on

---

<sup>6</sup> TR at 7.

<sup>7</sup> TR at 30-34, 72.

<sup>8</sup> TR at 33, 66.

<sup>9</sup> CX 9.

<sup>10</sup> TR at 99.

<sup>11</sup> TR at 99-100. The affidavit from the customer, Mark Hancock, states that he did not remember his complaint to Gable being about recklessness, but about Johnson's attitude. Respondent's Exhibit (RX) 15.

<sup>12</sup> TR at 121, 126.

Wednesday afternoon during his usual meeting with Gable, but the next thing he knew, Johnson was talking with Gable; so he (Thompson) did not have the chance.<sup>13</sup> Thompson added that Johnson did not voice any concerns to him on Tuesday or Wednesday about being over hours, but was concerned about driving on the weekend.<sup>14</sup>

Johnson filed a complaint with the Occupational Health and Safety Administration (OSHA) on November 1, 2006, alleging that Econo had fired him in reprisal for voicing concerns related to a potential violation of the hours of service regulations.<sup>15</sup> Johnson's complaint alleged that he was out of hours to drive the scheduled load to Honey Brook, but he later testified that he was not out of hours but could not drive the load within the requested time frame.<sup>16</sup> OSHA found after investigation that Econo did not violate the STAA. Johnson requested a hearing, which was held on June 12, 2007. The ALJ dismissed the complaint.

### JURISDICTION AND STANDARD OF REVIEW

This case is before the ARB pursuant to the automatic review regulation.<sup>17</sup> The Secretary of Labor has delegated her jurisdiction to decide this matter to the ARB.<sup>18</sup> Under the STAA, the ARB is bound by the ALJ's factual findings if substantial evidence in the record considered as a whole supports those findings.<sup>19</sup>

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>20</sup>

---

<sup>13</sup> TR at 126, 129.

<sup>14</sup> TR at 134-35.

<sup>15</sup> RX 1.

<sup>16</sup> *Id.*; TR at 60.

<sup>17</sup> See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). See also 29 C.F.R. § 1978.109(a).

<sup>18</sup> 49 U.S.C.A. § 31105(b)(2)(C).

<sup>19</sup> 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

<sup>20</sup> *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

Substantial evidence does not, however, require a degree of proof “that would foreclose the possibility of an alternate conclusion.”<sup>21</sup>

In reviewing the ALJ’s conclusions of law, the ARB, as the designee of the Secretary of Labor, acts with “all the powers [the Secretary] would have in making the initial decision . . . .”<sup>22</sup> Therefore, we review the ALJ’s conclusions of law de novo.<sup>23</sup>

## DISCUSSION

### The Legal Standard

The STAA 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 making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order . . . .”<sup>24</sup> Protection is also afforded under the STAA where an employee “refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health . . . .”<sup>25</sup>

To prevail on his STAA complaint, Johnson must prove by a preponderance of the evidence that he engaged in protected activity, that Econo management was aware of the protected activity, that he suffered an adverse employment action, and that Econo took the adverse action because of Johnson’s protected activity.<sup>26</sup> If Johnson does not prove one of these requisite elements, his entire claim fails.<sup>27</sup>

---

<sup>21</sup> *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, 088, ALJ No. 2005-STA-040, slip op. at 3 (ARB Nov. 7, 2007), citing *BSP Trans, Inc. v. United States Dep’t of Labor*, 160 F.3d 38, 45 (1st Cir. 1998).

<sup>22</sup> 5 U.S.C.A. § 557(b) (West 1996).

<sup>23</sup> *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).

<sup>24</sup> 49 U.S.C.A. § 31105(a)(1)(A).

<sup>25</sup> 49 U.S.C.A. § 31105(a)(1)(B)(i).

<sup>26</sup> *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, 59, ALJ No. 2005-STA-63, slip op. at 8 (ARB June 30, 2008).

<sup>27</sup> *West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

In proving protected activity, Johnson must show that his complaint concerned a potential or actual violation of a commercial motor vehicle safety regulation or that he had a reasonable belief of such violation.<sup>28</sup> Thus, protected activity has two elements: (1) the complaint itself must involve a purported violation of a regulation relating to commercial motor vehicle safety, and (2) the complainant's belief must be objectively reasonable.<sup>29</sup>

### **The ALJ's Analysis**

The ALJ discussed the 2007 amendments to the STAA,<sup>30</sup> but did not apply them; instead he concluded that Johnson failed to establish that he engaged in protected activity or that Econo knew of any protected activity.<sup>31</sup>

The ALJ stated that he was "not persuaded" that Johnson raised any concerns about the hours of service regulations under the Federal Motor Carrier Safety Act or the legality of the Honey Brook run with either Thompson or Gable. Rather, he found "it much more probable" that Johnson told them he needed to leave by Wednesday evening so that he would not have to drive over the weekend, as was his verbal agreement with the previous plant manager, Joel Knight.<sup>32</sup>

Further, the ALJ found that Johnson could easily have made the 15 to 16-hour run legally by leaving at noon on Thursday after his local runs, driving for 5 to 6 hours, laying over from 5 or 6 p.m. until 3 or 4 a.m. on Friday, with 10 to 11 hours left to drive to Honey Run, arriving between 1 and 2 p.m.<sup>33</sup> The ALJ found no credible reason for Johnson to believe he would not finish his local runs until 2.30 p.m. on Thursday because Thompson assured him that the truck bound for Honey Brook would be loaded and ready to go at noon. The ALJ also found no basis to conclude that Econo's managers were aware of any protected activity that Johnson alleged.<sup>34</sup>

---

<sup>28</sup> *Guay v. Burford's Tree Surgeons, Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045, slip op. at 7 (ARB Jun. 30, 2008).

<sup>29</sup> *Id.*

<sup>30</sup> The STAA has been amended since Johnson filed his complaint on October 18, 2006. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is unnecessary for us to determine whether the amendments, which added three additional categories of protected activity, apply to Johnson's complaint because they are not implicated by the issues presented and would thus not affect our decision.

<sup>31</sup> R. D. & O. at 10-12.

<sup>32</sup> R. D. & O. at 12.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

### **Johnson Did Not Engage in Protected Activity.**

In expressing his disbelief in Johnson's assertions, the ALJ credited the testimony of Gable and Thompson that Johnson voiced no concerns to them about a potential violation of the hours of service regulations in driving to Honey Brook, Pennsylvania. While the ALJ made no specific credibility determinations, substantial evidence supports his findings.

Gable testified that "Johnson never voiced any concerns, safety or otherwise, during the week of October 16 regarding his assigned trip to Honey Brook, Pennsylvania."<sup>35</sup> Gable reiterated that he never had any indication from either Johnson or Thompson about any problem with violating Department of Transportation regulations governing hours of service.<sup>36</sup>

Thompson testified, "At no time during any of my conversations with Johnson regarding this assignment to Honey Brook, Pennsylvania, did he ever state to me that he could not drive this load as he was out of hours."<sup>37</sup> Rather, Johnson "wanted me to try to get the load changed or fixed so that it would work to his agenda."<sup>38</sup> Thompson added that Johnson told him "he was not going to be gone, laid up, over the weekend," and wanted to leave on Wednesday evening for Honey Brook.<sup>39</sup>

Johnson asserted that he had made the trip dozens of times and knew that he could not leave Birmingham on Thursday and arrive at Honey Brook by 4:00 p.m. on Friday without violating the hours of service regulation.<sup>40</sup> But Johnson's own evidence undermines his assertion. The driver's daily log he submitted demonstrates that if he had left Birmingham at 2:30 p.m. on October 19, 2006, he would have arrived at Honey Brook at 5:30 p.m. on October 20.<sup>41</sup> Johnson admitted that Thompson told him he would

---

<sup>35</sup> TR at 100.

<sup>36</sup> TR at 102.

<sup>37</sup> TR at 135. Thompson stated in his affidavit that Johnson was told about the Honey Brook assignment on Tuesday and was actually assigned on Wednesday but did not voice any concerns about "being over hours when he received this assignment." RX 3 at 2.

<sup>38</sup> TR at 121.

<sup>39</sup> TR at 134. Johnson admitted that if he did not reach Honey Brook by 4:00 p.m. on Friday, he would have had to lay over the weekend and be unloaded on Monday. TR at 59-60.

<sup>40</sup> TR at 34.

<sup>41</sup> CX 5.

leave “around lunchtime Thursday afternoon.”<sup>42</sup> Logically, if Johnson had left at noon, as Thompson intended, he would have arrived at 3:00 p.m. on Friday, an hour before the deadline.

Johnson also submitted logs for a trip to Honey Brook that he made in 2004. These show him leaving Birmingham at 1:00 p.m. on a Sunday, driving for eleven hours, sleeping for ten hours, driving for four hours, and arriving in Honey Brook at 3:00 p.m. on Monday.<sup>43</sup> Both logs demonstrate that Johnson would have had enough time to meet the 4:00 p.m. delivery deadline in Honey Brook.

Further, Johnson’s own testimony supports the ALJ’s crediting of Thompson’s testimony that Johnson voiced no safety concerns to him but simply did not want to work over the weekend. First, Johnson stated that he told Thompson on both Tuesday and Wednesday that he could not make the run to Honey Brook without violating the hours of service regulation. Later, Johnson admitted that Thompson did not inform him of the 4:00 p.m. arrival date until Wednesday morning.<sup>44</sup> If Johnson did not know until Wednesday morning that Econo wanted him in Honey Brook by 4:00 p.m. on Friday, why would he have told Thompson on Tuesday that the trip would be illegal?

Second, Johnson himself admitted that the previous manager, Joel Knight, told him when he was hired in 2004 that there would be no weekend work. Also, Johnson stated that he did not normally work weekends—he was off the weekend of October 14-15—and that these loads to Pennsylvania usually went out on Mondays or Sundays.<sup>45</sup>

Substantial evidence also supports the ALJ’s conclusion that Johnson did not have a reasonable belief that he would violate the hours of service regulation if he made the run to Honey Brook. Again, Johnson’s own evidence shows that he had ample hours to make the trip. On Monday, October 16, Johnson worked 7.5 hours; on Tuesday, he worked 8 hours; on Wednesday, he worked 4.5 hours, a total of 20 hours, leaving 50 hours available for the week.<sup>46</sup> Even if Johnson had worked five hours on Thursday morning doing local runs, he still would have had six hours of driving time that day and a total of 45 hours in the 70-hour week to make the 30 to 32-hour round trip between Honey Brook and Birmingham.

---

<sup>42</sup> TR at 30.

<sup>43</sup> CX 8.

<sup>44</sup> TR at 30-31.

<sup>45</sup> TR at 57-59; RX 6 at 4.

<sup>46</sup> CX 4.



## **Johnson's Arguments on Appeal**

Johnson contends that the ALJ's legal conclusion regarding protected activity is erroneous.<sup>47</sup> Johnson asserts that he engaged in protected activity when he told Thompson on Tuesday that he wanted to speak to Gable about the load to Honey Brook and when he told the same thing to Gable on Wednesday just before he was fired.<sup>48</sup> But an employee who simply tells a manager that he wants to discuss his assignment is not the same as voicing a concern about a potential violation of the regulations.

Johnson also argues that he did not have to prove an actual violation of a DOT regulation, only that he had a reasonable belief, based on his experience, that he could not make it to Honey Brook by 4:00 p.m. on Friday after doing local runs on Thursday morning.<sup>49</sup> But the ALJ explicitly found that Johnson did not have such a reasonable belief, based on his crediting of Thompson's testimony that Johnson would be loaded for Pennsylvania by noon on Thursday.<sup>50</sup> As stated above, Johnson's own example log shows that if he had left at noon on Thursday as planned, he would have arrived in Honey Brook at 3:00 p.m. on Friday. Accordingly, we reject Johnson's arguments.

## **CONCLUSION**

We have reviewed the entire record herein. Substantial evidence in the record as a whole supports the ALJ's finding that Johnson did not prove by a preponderance of evidence that he engaged in activity the STAA protects. Because Johnson failed to demonstrate an essential element of his complaint, we accept the ALJ's recommendation and **DISMISS** Johnson's complaint.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

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

---

<sup>47</sup> Complainant's Brief at 3.

<sup>48</sup> Brief at 6-7.

<sup>49</sup> Brief at 22-23.

<sup>50</sup> R. D. & O. at 12.