



DAN S. GAGE,

COMPLAINANT,

v.

SCARSELLA BROTHERS, INC.,

RESPONDENTS.

ARB CASE NO. 05-095

ALJ CASE NO. 05-STA-21

DATE: August 31, 2006

FINAL DECISION AND ORDER

BACKGROUND

Dan S. Gage began driving a truck for Scarsella Brothers, Inc. in September 2004. On November 4, 2004, the Scarsella truck Gage was driving became stuck in mud at a runway construction site at the Sea-Tac airport in the Seattle-Tacoma area in Washington. While a bulldozer pushed the truck out of the mud, the right front bumper sustained minor damage.

Gage noted on his November 4, 2004 "Driver Inspection Report," concerning the truck in question, that "Right side bumper bent." Scarsella Brothers March 14, 2005 Pre-Hearing Statement, page 9. Even so, Scarsella fired Gage on November 4 because he violated company policy in not immediately telling a supervisor about the damage. Transcript (TR) 38-39.

Shortly thereafter, Gage filed a complaint with the United States Department of Labor alleging that when Scarsella fired him, it violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982.¹ The Occupational Safety and Health Administration investigated Gage's complaint and found that it had no merit. Gage then requested that a Department of Labor Administrative Law Judge (ALJ) hear his case. The ALJ conducted a hearing on March 18, 2005. In a subsequent Recommended Decision and Order (R. D. & O.), the ALJ dismissed Gage's

¹ 49 U.S.C.A. § 31105 (West 1997).

complaint. We automatically review an ALJ's recommendations in STAA cases.²

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to decide this matter.³ Under the STAA, the Administrative Review Board is bound by the ALJ's factual findings if substantial evidence on the record considered as a whole supports those findings.⁴ Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵ 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"⁶ Therefore, the Board reviews the ALJ's conclusions of law de novo.⁷

DISCUSSION

The STAA protects employees who engage in certain activities from adverse employment actions. The Act 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"⁸ The STAA also protects employees who refuse to drive because to do so would violate a "regulation, standard, or order of the United States related to commercial motor vehicle safety or health"⁹ Also protected are employees who refuse to drive because of a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."¹⁰

² See 29 C.F.R. § 1978.109(c)(1) (2005).

³ See 49 U.S.C.A. § 31105(b)(2)(C); 29 C.F.R. § 1978.109(c)(1).

⁴ 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); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995).

⁵ *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

⁶ 5 U.S.C.A. § 557(b) (West 1996). See also 29 C.F.R. § 1978.109(b).

⁷ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

⁸ 49 U.S.C.A. § 31105(a)(1)(A).

⁹ 49 U.S.C.A. § 31105 (a)(1)(B)(i).

To prevail on his claim, Gage must prove by a preponderance of the evidence that he engaged in protected activity, that Scarsella was aware of the protected activity, that Scarsella discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action.¹¹ If the employee fails to prove any one of these elements, the claim must be dismissed.¹²

The ALJ found that Gage did not prove by a preponderance of the evidence that he engaged in the type of activity that the STAA protects. This record contains substantial evidence to support the ALJ's finding. Gage adduced no evidence that he complained to Scarsella about a violation of a commercial motor vehicle safety regulation, standard, or order. In fact, he admitted that the damaged fender did not present a safety issue. TR 43. Furthermore, Gage also testified that he never refused to drive. TR 47. Therefore, like the ALJ, we **DISMISS** Gage's complaint because he did not prove that he engaged in STAA-related protected activity.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

¹⁰ 49 U.S.C.A. § 31105(a)(1)(B)(ii).

¹¹ *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. LaCorte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004).

¹² *Eash*, slip op. at 5.