



In the Matter of:

GEORGE HERRICK, III,

ARB CASE NO. 05-082

COMPLAINANT,

ALJ CASE NO. 2004-STA-56

v.

DATE: June 29, 2007

**SWIFT TRANSPORTATION COMPANY,
INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

George D. Herrick, III, *pro se*, Medford, Oregon

For the Respondent:

**Frank A. Moscato, Esq., Andrea M. Davis, Esq., *Harrang Long Gary
Rudnick P.C.*, Portland, Oregon**

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 2006). George D. Herrick, III filed a complaint alleging that his former employer, Swift Transportation Company, Inc., violated the STAA by terminating his employment. After a hearing on the complaint, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which she concluded that Swift did not violate the STAA. The R. D. & O. is now before the Administrative Review Board (ARB) pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2006).

STANDARD OF REVIEW

Under the STAA, the ARB is bound by the factual findings of the ALJ if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). 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.” *Clean Harbors Envtl. 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. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ’s conclusions of law, the ARB, as the designee of the Secretary, acts with “all the powers [the Secretary] would have in making the initial decision . . .” 5 U.S.C.A. § 557(b) (West 1996). Therefore, we review the ALJ’s conclusions of law de novo. *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).

DISCUSSION

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 certain protected activities.¹ These protected activities include making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order.”²

To prevail on a claim under the STAA, 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 there is a causal connection between the protected activity and the adverse action. *BSP Trans, Inc. v. U.S. 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); *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

We have carefully reviewed the record and find that it supports the ALJ’s recitation of the facts at pages 2-10 of the R. D. & O. We summarize briefly. Swift is a motor carrier whose services include providing trucking services for other corporations.

¹ 49 U.S.C.A. § 31105(a)(1).

² 49 U.S.C.A. § 31105(a)(1)(A).

On December 19, 2003, Herrick, a driver for Swift, accepted an assignment from Swift to deliver loads for Wal-Mart. Herrick contends that he agreed to drive for Wal-Mart “for a couple of days.” Transcript (Tr.) at 20. Swift contends that Herrick accepted an assignment that required him to drive for Wal-Mart for five days, from December 19, 2003 through December 23, 2003. Respondent’s Exhibit 117.

On December 21, 2003, a Wal-Mart dispatcher directed Herrick to deliver a load to Redwood City, California. ALJ Exhibit 1. Herrick testified that he told the Wal-Mart dispatcher that he had agreed to drive for two days. Tr. 23. He then proceeded to his truck to contact Swift. *Id.* Herrick sent messages to Swift’s dispatcher contending that “the agreement was for a couple days” and that he needed “some time off.” Respondent’s Exhibit 118 at 1, 8; R. D. & O. at 5-6. The Swift dispatcher instructed Herrick to complete his assignment. Herrick refused to drive to Redwood City and instead drove to his home in Medford, Oregon. Tr. 79. Swift contends that it fired Herrick for “insubordination, his quitting while under a load, and his conduct in making an unauthorized bobtail to his home in direct violation of [Swift’s] rules and policies.” Respondent’s Brief at 3.

The ALJ conducted a hearing on Herrick’s complaint and issued the R. D. & O. on March 31, 2005. The ALJ found that, by requesting time off, Herrick “did not alert management that he was either too tired to drive safely, or that he was out of hours permitted under the DOT regulations.” *Id.* at 12. The ALJ concluded that Herrick did not engage in STAA-protected activity, a necessary element of his case, when he informed Swift of his refusal to complete his assignment. *Id.*

We have reviewed the record and find that substantial evidence on the record as a whole supports the ALJ’s findings. His findings are therefore conclusive. 29 C.F.R. § 1978.109(c)(3). In his thorough, well-reasoned discussion, the ALJ applied the correct legal standard to his findings. Therefore, we adopt the ALJ’s decision,³ attach and incorporate the R. D. & O., and **DENY** Herrick’s complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

³ We interpret the ALJ’s recommendation at page 13 of the R. D. & O. (“Based upon the foregoing Findings of Fact and Conclusions of Law, and upon the entire record, I recommend the following Order: *Complainant shall take nothing.*”) as a recommendation that we deny the complaint.