



**In the Matter of:**

**LOUIS MURPHY,**

**ARB CASE NO. 05-055**

**Complainant,**

**ALJ CASE NO. 2004-STA-0036**

**v.**

**DATE: July 31, 2006**

**ATLAS MOTOR COACHES, INC.,**

**Respondent**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**FINAL DECISION AND ORDER**

Louis Murphy filed a whistleblower complaint with the U. S. Department of Labor alleging that his employer, Atlas Motor Coaches, Inc., violated the employee protection provisions of the Surface Transportation Assistance Act (STAA). The STAA prohibits certain employers from retaliating against employees who complain about or report violations of commercial motor vehicle safety requirements.<sup>1</sup> After a hearing, a Department of Labor Administrative Law Judge (ALJ) recommended that Murphy's complaint be dismissed. We automatically review an ALJ's recommended STAA decision.<sup>2</sup> Since substantial evidence supports the ALJ's recommendation, we deny Murphy's complaint.

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<sup>1</sup> "A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because . . . 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 . . ." 49 U.S.C.A. § 31105(a)(1)(A). (West 1997).

<sup>2</sup> 29 C.F.R. § 1978.109(a)(2005).

## BACKGROUND

Atlas is located in Orlando, Florida and at all relevant times was in the business of providing bus transportation for tourist groups. In April 2003 it hired Murphy to drive buses. Approximately one month later, Murphy began to notice that the speedometers on some of the Atlas buses he drove did not function correctly. He also found other mechanical problems and roach infestation. Up to the time he was fired, Murphy continuously noted these deficiencies on the vehicle inspection reports that he turned in to Atlas managers. Transcript (TR) 57-61, 124.

On July 21, 2003, Murphy informed Atlas's dispatcher that bus #11 had an oil leak. He also noted the leak on a vehicle inspection report that he handed to the dispatcher. Beginning the next day, Murphy was assigned bus 11 for a three day job shuttling tourists from the Miami Convention Center to local hotels. While performing his pre-trip inspection of bus 11, he found that the oil leak had not been fixed. He complained about the leak to two mechanics that were on duty. He also noted the problem on a vehicle inspection report. He left Orlando in bus 11 at three a.m. and headed for Miami. En route, Murphy called Keith Drake, Atlas's Operation Manager, and informed him of the oil leak. TR 62-73.

On the next day, July 23, Murphy was cleaning out bus 11 after finishing his driving. He found a cell phone. From the phone's menu he found a listing for "me casa" (my house) and, using the cell phone, dialed that number. According to Murphy, a woman answered. She told him that she was a deputy sheriff in Osceola County, near Orlando, and that she was relieved to hear that he had the phone. Murphy testified that the woman told him that her son, who was at the Busch Gardens summer camp in Orlando, had not called her on the cell phone for three or four days and this had scared her to death. Murphy testified that he told her that he was in Miami but gave her Atlas's address and phone number so that she could retrieve the phone once he got back to Orlando. Murphy testified that he only made that one call on the cell phone. Murphy said that on the same day that he found the phone, he used another phone to call the Atlas office in Orlando to report finding the cell phone. TR 92-95, 100, 154, 157.

Bus 11 broke down in Miami the next day, July 24. Murphy returned to Orlando on a bus driven by another Atlas driver. Upon arriving, Hugh Conner, an Atlas dispatcher, confronted Murphy and asked for the cell phone. Conner told Murphy that a woman had come to Atlas earlier to get her phone. He also questioned Murphy about making additional calls on the cell phone. Murphy gave the phone to Conner and left for a previously arranged three day vacation. TR 96.

Mr. Juan Perez, Atlas's owner and president, gave a different version of the cell phone incident. He testified that Murphy did not report finding the phone until just before he arrived back in Orlando from Miami on July 24. TR 170, 172. He testified further that a woman, later identified as Maria Diaz Curtis, had called the Atlas office

after she had spoken to Murphy. She asked that someone get in touch with Murphy in order to retrieve the phone. According to Perez, Curtis told Atlas that she had made numerous attempts to locate the lost cell phone, but when she dialed the phone number, she kept getting a busy signal. Then she got the call from Murphy. In a follow up letter she sent to Atlas, Curtis told Atlas that she was very upset. Her letter states that she did not believe Murphy's explanation to her that he had found the phone on July 23. TR 170-171: Respondent's Exhibit 1.

The record is unclear, but it appears that Curtis told Atlas that she thought that Murphy stole the phone. TR 169 (Perez testifying that he fired Murphy "due to an incident that happened with a stolen property as reported by an Orange County Sheriff's officer."). Perez testified that Curtis also reported her concerns about the cell phone incident to Busch Entertainment, Atlas's main client. Perez stated that Busch Entertainment subsequently informed him on or about July 27 that it did not want Murphy to drive on any routes for which it contracted with Atlas. Therefore, Perez decided to fire Murphy because he did not "condone people who actually take private property from someone else" and because his main client did not want Murphy to drive for Atlas anymore. TR 172-173, 187. Perez stated that he did not fire Murphy because of the safety deficiencies Murphy noted in the vehicle inspection reports. TR 179.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under the STAA and the implementing regulations at 29 C.F.R. Part § 1978.<sup>3</sup> Under the STAA, the Administrative Review Board (ARB) is bound by the ALJ's factual findings if substantial evidence on the record considered as a whole supports the findings.<sup>4</sup> 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."<sup>5</sup> We must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party and even if we "would justifiably have made a different choice had the matter been before us de novo."<sup>6</sup>

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<sup>3</sup> See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

<sup>4</sup> 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).

<sup>5</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. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

<sup>6</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

In reviewing the ALJ's legal conclusions, the ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." <sup>7</sup> Therefore, we review the ALJ's legal conclusions de novo. <sup>8</sup>

## DISCUSSION

As noted above, 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 activity. The protected activity includes filing a complaint or beginning a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order." <sup>9</sup> To prevail on this STAA claim, Murphy must prove by a preponderance of the evidence that he engaged in protected activity, that Atlas was aware of the protected activity, that Atlas took an adverse employment action against him, and that a causal connection exists between the protected activity and the adverse action. <sup>10</sup>

Both parties were *pro se* before the ALJ and both are *pro se* before us. Despite being invited to do so, neither party filed a brief. Murphy contended below that he was fired because he reported safety-related deficiencies concerning Atlas's buses. He also claims that Atlas blacklisted him. Atlas argued below that it fired Murphy because of the cell phone incident and because of the fact that its major client, Busch Entertainment, asked it not to let Murphy drive. Recommended Decision and Order (R. D. & O.) at 2.

The parties stipulated that the STAA applies to this case. Furthermore, they stipulated that Murphy engaged in protected activity when he made internal complaints relating to safety discrepancies and that Atlas was aware of this protected activity. They also stipulated that Atlas terminated Murphy on or about July 27, 2003. *Id.* Thus, the only issue before the ALJ was whether Murphy proved by a preponderance of the evidence that Atlas terminated and blacklisted him because of protected activity.

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<sup>7</sup> 5 U.S.C.A. § 557(b) (West 2004).

<sup>8</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>9</sup> 49 U.S.C.A. § 31105(a)(1)(A).

<sup>10</sup> *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *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); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

The ALJ found that Perez's testimony that he fired Murphy because of the circumstances surrounding the cell phone incident and Busch's request not to employ Murphy evidenced legitimate, nondiscriminatory reasons. R. D. & O. at 7. Therefore, Murphy had the burden of proving by a preponderance of the evidence that these reasons were false and that the protected activity was the real reason for the termination and blacklisting. But since Murphy offered no evidence whatsoever that Atlas's reasons were false or that his protected activity played any part in the decision to fire him, the ALJ concluded that Atlas did not retaliate because of protected activity. Furthermore, the ALJ found that Murphy adduced no evidence that Atlas blacklisted him. Therefore, he recommended that Murphy's complaint be dismissed. R. D. & O. at 7-8.

We have thoroughly reviewed this record. Substantial evidence supports the ALJ's finding that Murphy did not prove that Perez's reason for terminating him was a pretext. Murphy and Perez were the only witnesses at the hearing. Their versions of the cell phone incident differ and the ALJ did not make a credibility determination. According to Murphy, he did not steal the cell phone. When he found it on July 23, he called Curtis and she was happy to hear that he had found the phone. Murphy testified that he only used the phone one time, and that was to call Curtis. Furthermore, he testified that he informed Atlas on July 23 that he found the phone.

On the other hand, Perez testified that Curtis was angry because she believed that Murphy had found the phone and used it before calling her to tell her he had found it. And when Curtis told Busch Entertainment about the incident, and Busch then demanded that Murphy not work on its contract, Perez decided that he had to fire Murphy. The ALJ accepted Perez's version of the events surrounding the cell phone incident when Murphy could not demonstrate by a preponderance of the evidence, as he must, that the Perez version was false. Therefore, the Perez version constitutes substantial evidence, and we must uphold the ALJ's finding that Atlas fired Murphy for legitimate, non-discriminatory reasons.

As to Murphy's claim that Atlas blacklisted him, the ALJ found that Murphy adduced no evidence to support this claim. R. D. & O. at 8. We have already stated that, to succeed, Murphy must prove by a preponderance of the evidence that Atlas blacklisted him because he engaged in protected activity. Murphy testified that after leaving Atlas, he applied for a position at another company and talked to a person who also had formerly worked at Atlas. Murphy stated that when he told this person his name, he "kind of brushed me off." TR 120. Murphy had a "gut feeling" that Atlas was blacklisting him, but he had "no factual proof." TR 121.

This Board has defined the elements of a blacklisting claim:

Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. . . . In addition, blacklisting requires an objective action—there must be evidence that a specific act of blacklisting occurred. Subjective feelings on the part of a complainant

toward an employer's action are insufficient to establish that any actual blacklisting took place.<sup>11</sup>

Thus, since Murphy offered no specific act of blacklisting but only a "gut feeling" to support his blacklisting claim, the ALJ correctly concluded that Murphy did not prove that Atlas blacklisted him.

### CONCLUSION

We **DENY** Murphy's STAA complaint because substantial evidence supports the ALJ's finding that Atlas fired him for legitimate, non-discriminatory reasons, not for protected activity. Murphy's blacklisting claim fails because he did not adduce objective evidence that Atlas blacklisted him.

**SO ORDERED.**

**OLIVER TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

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<sup>11</sup> *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056, 02-059, ALJ No. 2001-CAA-18, slip op. at 8-9 (ARB Nov. 28, 2003).