



**In the Matter of:**

**ALLEN R. MASON,**

**COMPLAINANT,**

**v.**

**CB CONCRETE COMPANY,**

**RESPONDENT.**

**ARB CASE NO. 04-026**

**ALJ CASE NO. 03-STA-21**

**DATE: January 31, 2005**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

***John G. Platt, Esq., Hangtown Legal, Placerville, California.***

***For the Respondent:***

***Mark S. Sertic, Esq., and Robert S. Larsen, Esq., Story & Sertic, Reno, Nevada.***

**FINAL DECISION AND ORDER DISMISSING COMPLAINT**

Allen R. Mason filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004), alleging that his employer, CB Concrete Company (CB), violated the STAA when it terminated his employment on August 7, 2001. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) dismissing Mason's complaint. We conclude that CB did not violate the STAA and therefore affirm.

## BACKGROUND

Mason started working for CB in May 1995 delivering ready-mix concrete to customers in the area around Reno, Nevada. TR at 142-44.<sup>1</sup> Starting in April 1999, CB issued Mason a series of disciplinary letters and verbal warnings for various infractions of its work rules, including the following: using profane language over his radio, CX 2, RX 9; wasting five cubic yards of concrete, CX 3, RX 10; allowing build-up of concrete on his truck,<sup>2</sup> RX 3-6; damaging the plant's loading chute, CX 5, RX 11; taking too long to wash his truck, CX 6, RX 12; charging excess time on his time sheet, CX 7-8, RX 14-15; refusing to complete his delivery, CX 9, RX 16-17; neglecting to call in sick or report for work, CX 10, RX 18; and failing to attend a driver safety meeting, CX 12, RX 19. CB suspended Mason on August 2, 2001, and fired him on August 7, 2001, for abuse of equipment,<sup>3</sup> a major infraction under the collective bargaining agreement.<sup>4</sup> RX 1, 47.

Mason filed a complaint of retaliatory discharge with DOL's Occupational Safety and Health Administration (OSHA), alleging that CB fired him because he complained about being too tired to work. RX 49. OSHA dismissed the complaint as without merit. RX 50. Following a hearing, the ALJ found that Mason had engaged in protected activity when he reported missing or malfunctioning equipment, inadequate time to conduct the required pre-trip and post-trip inspections of his vehicle, and unsafe delivery conditions. R. D. & O. at 18. But the ALJ also concluded that CB had ample justification for warning, suspending, and discharging Mason and that there was no causal nexus between these adverse actions and Mason's protected activities. R. D. & O. at 19.

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<sup>1</sup> The following abbreviations shall be used: Complainant's exhibit, CX; Respondent's exhibit, RX; hearing transcript, TR.

<sup>2</sup> CB instructs its drivers to wash down their trucks after loading and unloading to ensure that concrete does not build up and harden on the exterior. RX 46. Concrete buildup is a safety issue since chunks of dried concrete could fly off the truck into the path of other vehicles on the road. TR at 175, 184-85.

<sup>3</sup> The August 7, 2001 letter to Mason stated that his truck had "been abused to the point that it has become a safety hazard not only to you, but also to the general public." RX 1.

<sup>4</sup> The Teamsters Transit Mix Agreement, in effect from November 15, 1997, until November 15, 2003, listed 13 major infractions for which an employee will be suspended or discharged without further notice, including abuse of equipment. RX 47.

## ISSUE

We address Mason's complaint that CB violated section 31105 of the STAA when it fired Mason in retaliation for raising internal safety complaints and refusing to drive.

## JURISDICTION AND STANDARD OF REVIEW

By authority of 49 U.S.C.A. § 31105(b)(2)(C), the Secretary of Labor has delegated her jurisdiction to decide this matter to the Administrative Review Board (ARB). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c)(2004).

Under the STAA, the ARB is bound by the ALJ's factual findings if substantial evidence on the record considered as a whole supports those findings. 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 "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 of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C.A. § 557(b) (West 2004). 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. These protected activities include: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," § 31105(a)(1)(A); "refus[ing] 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," § 31105(a)(1)(B)(i); or "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition," § 31105(a)(1)(B)(ii).

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 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); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *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 reviewed the record and conclude that substantial evidence supports the ALJ's findings of fact outlined in his decision. R. D. & O. at 4-17. We agree with the ALJ that Mason engaged in protected activity because his reporting actions concerned violations of motor safety regulations.<sup>5</sup> 49 U.S.C.A. § 31105(a)(1)(A). See *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5 (Sept. 30, 2004)(protected activity may result from "purely internal complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulations, or standard").

There is no dispute that CB managers were aware of Mason's complaints, that the disciplinary letters, suspension, and discharge were adverse actions, and that CB submitted evidence showing that it terminated Mason's employment pursuant to the union contract. Therefore, Mason had the burden of proof to demonstrate that CB's reason for firing him was pretext and that the company intentionally discriminated against him because of his protected activity. *Calmat Co. v. United States Dep't of Labor*, 364 F.3d 1117, 1122 (9th Cir. 2004); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 095, ALJ No. 02-STA-35, slip op. at 15-16 (ARB Aug. 6, 2004).

The ALJ concluded that CB discharged Mason for a legitimate reason — allowing the build-up of excess concrete on his truck in violation of CB's rules.<sup>6</sup> R. D. & O. at 19; RX 1, 7-8, 46. Mason argues that this reason was pretext because CB issued only warnings to other drivers who had concrete build-up and committed other, more serious infractions. See R. D. & O. at 14-17 (chart outlining what discipline was imposed against other drivers for rules infractions and accidents). Therefore, Mason argues, CB's reason

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<sup>5</sup> We also agree with the ALJ for the reasons stated in his decision that Mason did not engage in protected activity under section 31105(a)(1)(B) of the STAA when he refused to drive on April 28, 1999, after a verbal exchange with a customer, refused to carry a tank of chemical in his cab on November 22, 2000, and claimed that he was "too tired" to drive in June 2001. R. D. & O. at 18.

<sup>6</sup> Manager Tom Watters testified that Mason's entire work performance had been reviewed prior to the termination. TR at 461-68, 480. CB submitted pictures of Mason's truck, showing the concrete build-up, and of another truck that had been properly washed. RX 7-8.

for firing him was pretext, and the actual motivation for his termination from employment was his protected activity. Complainant's Opposition Brief at 7-8.

The fact that another driver was given only a warning for concrete build-up instead of being discharged, CX 107, is insufficient to establish that Mason was fired because of protected activity. First, the November 14, 2001 warning to that other driver, Paul Howard, followed Mason's discharge by more than three months. Therefore, that disciplinary action cannot be compared with Mason's.

Second, even if relevant, the warning letter threatened Howard with suspension and termination of employment if he did not clean his truck properly. By contrast, Mason had previously received only a verbal warning about concrete build-up, and was simply asked to be more careful. RX 3-6. Therefore, Mason was not initially treated more harshly than Howard.

Finally, Mason's supervisor, Sharmon Layton, testified that the concrete build-up on Howard's truck was far less significant than the heavy accumulation on Mason's truck, TR at 153-57, and pictures taken on June 24, 2001, by CB show that the build-up obscured a rear light, hindered moving machinery, and encrusted the springs. RX 7. Therefore, CB had a legitimate reason to fire Mason for abuse of equipment.

The ALJ rejected Mason's argument, R. D. & O. at 17, and found that none of the discipline imposed on Mason "had anything to do with protected activity." We agree. Other than the temporal proximity between the discharge on August 7, 2001, and Mason's internal complaints in June 2001, there is no evidence in the record to connect Mason's discharge or CB's other disciplinary actions with any of his protected activity. See R. D. & O. at 10-13. See *Hogquist v. Greyhound Lines, Inc.*, ARB No. 03-152, ALJ No. 03-STA-31, slip op. at 5 (ARB Nov. 30, 2004)(back-up driver fired for failure to comply with company rules on logging time and seeking payment for trips).

#### **CONCLUSION**

We have reviewed the record and find that substantial evidence on the record as a whole supports the ALJ's finding that CB terminated Mason for a legitimate, non-discriminatory reason and not because of his protected activity. Therefore, this finding is conclusive. 29 C.F.R. § 1978.109(c)(3). Thus, we **DENY** Mason's complaint.

**SO ORDERED.**

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

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