



In the Matter of:

ROBERT MICHAUD,

ARB CASE NO. 96-198

COMPLAINANT,

ALJ CASE NO. 95-STA-29

and

DATE: January 6, 1997

**ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY AND HEALTH,**

INTERVENOR,

v.

BSP TRANSPORT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND REMAND ORDER

In this case arising under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (West 1994), Complainant Robert Michaud alleged that Respondent, BSP Transport, Inc. (BSP) discriminated against him by discharging him because he made safety complaints. In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) found that Michaud did not establish that safety complaints motivated the discharge and recommended dismissal. Following a thorough review of the record, including the R. D. and O., we disagree with the recommendation that the complaint be dismissed and remand to the ALJ for a supplemental recommended decision on the remedy.

If the ALJ's factual findings are supported by substantial evidence in the record, they are conclusive. 29 C.F.R. § 1978.109(c)(3). As noted below, however, some of the ALJ's factual findings are not supported by the record evidence and consequently we make corrected findings concerning those facts.

BACKGROUND

When Michaud began work as a truck driver for BSP in July 1993, a BSP dispatcher told him that he did not have to keep a driver's log because he was only driving locally. T. 70. Michaud soon began driving a route between a terminal in Westport, Maine and Boston's Logan Airport and routinely worked from 4 or 5 p.m. until 2 or 3 a.m. T. 73. That September, BSP had Michaud sign and back date documents, including a "Record of Time Worked" that referred to the United States Department of Transportation's (DOT) hours of service regulations. T. 74-75; CX 2, last page.^{1/} As a result, Michaud became concerned that the regulations prohibited him from working more than 12 hours at a time. T. 79-84.^{2/}

^{1/} As relevant to this case, the DOT regulation provides:

§ 395.1 Exemption from requirements of § 398.8 [keeping driver log]:

(e) 100 air-mile radius driver. A driver is exempt from the requirements of § 395.8 if:

- 1) The driver operates within a 100 air-mile radius of the normal work reporting location;
- (2) The driver . . . returns to the work reporting location and is released from work within 12 consecutive hours;
- (3) At least 8 consecutive hours off duty separate each 12 hours on duty;
- (4) The driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty; and
- (5) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing [the time the driver reports to and is released from work and the total number of hours on duty].

^{2/} The record contradicts the ALJ's finding, R. D and O. at 13, that "[Michaud] testified that he first became concerned about the "hours of service" rules after his 90 day evaluation in October 1993, when he signed certain documents advising of those rules [T. 74]." Michaud testified that he signed the document concerning the DOT hours of service regulations "around the end of September to October." T. 75. This was prior to his mid-October performance evaluation, when he told his supervisor, Glenn Osterberg, that working additional hours beyond 60 per week would be illegal. *See* T. 92-93, 449-451 (Michaud signed his performance review on October 21, 1993, about a week after he received it).

After filling out the forms, Michaud asked a state trooper about the DOT regulations, and the trooper opined that Michaud's hours violated them. T. 85-86.^{3/} The trooper suggested that Michaud copy relevant materials to document his hours and talk to someone at DOT to confirm the applicability of the regulations. T. 87. Michaud telephoned a DOT employee who explained the regulations. T. 88-89. From these conversations, Michaud knew that BSP regularly violated the hours of service regulations. T. 90. Indeed, at the hearing BSP conceded that it violated those regulations. T. 785; RX 11. Michaud photocopied a time card dated October 30, 1993 to document one such violation. T. 116-117.^{4/}

Upon receiving his performance evaluation in mid-October, Michaud asked why his "satisfactory" rating for quantity of work was not any higher. T. 92. When Osterberg replied that other drivers performed extra runs on Saturday, Michaud stated that while he would welcome the extra income, any additional work would be illegal because he already was working 60 hours per week. *Id.* Osterberg told Michaud that the DOT regulations did not apply because BSP was covered by the Railroad Act of New Hampshire. T. 92. Although Michaud disagreed, he did not argue with Osterberg because he was his boss. T. 92-93. The next day Kasny asked Michaud why he had not signed the performance review. T. 93. Michaud explained that he disagreed with the evaluation of his quantity of work because he could not work additional hours under the DOT regulations. *Id.* According to Michaud, Kasny said that the DOT regulations did not apply to BSP. T. 93-95.

Michaud complained to safety director Ed Paul in November 1993 about a scheduling problem (or "vicious cycle") that caused Michaud to leave late on his second shift run and forced him either to exceed the speed limit or exceed the hours of service limitation. T. 95-96, 100. Michaud told Paul that sometimes he went over the 60 hour weekly limit. T. 97. Michaud also complained to company owner Jack Law that it was illegal to work more than 60 hours per week. T. 102, 104.

When Michaud spoke with manager Dave Andrews about the scheduling problem, Andrews agreed that the first shift trucks should be brought in earlier to avoid the problem of second shift drivers, such as Michaud, leaving late and having to speed or violate service hours. T. 105-106. Soon after that conversation, Alex Kasny asked Michaud and another second shift driver to start two hours earlier in the afternoon to drive local runs. T. 107-109. According to Michaud, when he objected that additional hours would be illegal, T. 108, Kasny insisted that the DOT rule did not apply to BSP and told Michaud to "get it out of your thick skull about ... illegal hours." T. 109.

^{3/} The record clearly indicates that Michaud spoke to the state trooper prior to telling Osterberg, during the performance evaluation, that working more than 60 hours per week was unlawful. T. 88.

^{4/} Thus, we disagree with the ALJ's finding, R. D. and O. at 14, that Michaud began copying other drivers' time cards on December 23, 1993, which was the very day he was fired. *See* CX 7, first page (time card of driver Morrison dated October 30, 1993). *See also* T. 107 (Michaud's testimony concerning November 1993: "At that time, I was already photostat [sic] copying . . .") and T. 189 (Michaud stopped photocopying for a time when Kasny worked night shift because he did not want to be caught making copies).

Kasny denied that Michaud ever mentioned the hours of service regulations to him. T. 448-449, 459, 481-482.

On December 23, 1993, a co-worker saw Michaud copying another driver's time card and reported it to his superior. T. 671-674; CX 15. Michaud, who was gathering evidence to support a complaint to DOT, tried to do the copying in secret because he feared being fired if he were caught. T. 188-190.

Upon learning of the photocopying, Kasny telephoned Greany to report it. T. 735. Greany then consulted with Law. In a second telephone conversation, Greany told Kasny to ask Michaud exactly what documents he had been photocopying. T. 740. Upon Michaud's arrival later that day, Kasny asked whether he had been copying time cards and manifests. T. 133, 508. Michaud admittedly was evasive because he feared being fired. T. 133-135, 189-192. Ultimately Michaud admitted copying his own manifests and time cards and also another driver's time card. T. 133, 509. At that point, Kasny fired Michaud. T. 509. In a subsequent, third telephone conversation, Greany told Kasny that Michaud should be let go. T. 742.

DISCUSSION

In a case such as this, where the Respondent has articulated a legitimate reason for its adverse action, the question whether the complainant previously established a *prima facie* case becomes irrelevant. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Final Dec. and Ord., Feb. 15, 1995, slip op. at 11, *aff'd*, *Carroll v. United States Dept. of Labor*, 78 F.2d 352, 356 (8th Cir. 1996). "The [trier of fact] has before it all the evidence it needs to determine whether 'the defendant intentionally discriminated against the plaintiff.'" *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

The question in this case is whether Michaud established by a preponderance of the evidence that BSP fired him because he engaged in protected conduct. See *Carroll*, 78 F.3d at 356. BSP admittedly fired Michaud for photocopying both his own and other drivers' time cards and his own manifest. Drivers routinely photocopied their own time cards and manifests without being fired, however. T. 131, 159, 633, 802, 835. At the time Michaud was seen copying the time cards both Kasny and Greany knew that Michaud had raised the issue of a "vicious cycle," R. D. and O. at 21, that caused second shift drivers to depart late on their airport runs and forced them either to speed or to violate the hours of service. Copying a different driver's time card would not be useful to Michaud except to document hours of service. We therefore find that at the time of the discharge, BSP suspected that Michaud was about to file a complaint to a government entity such as DOT.

The ALJ believed that Michaud's statements about the vicious cycle "centered primarily on his extra job assignments and concern with making more money, rather than on perceived safety or hours violations." R. D. and O. at 21. Greany testified, however, that he believed Michaud mentioned the late departure of second shift drivers out of concern for the *company's* money: T. 728: "So Bob was talking about how he didn't think it was -- that it was a waste of money that we had these guys coming in, couldn't we bring the daytime guys -- bring the day [pick up and delivery] drivers, get them back earlier, so we could get to the -- get the freight onto their trucks, they could

make the cutoffs down at Logan, get back in time for the third shift to strip the trucks, load the [pick up and delivery] trucks to get them out on time.” Greany did not attribute Michaud’s raising the issue to a concern with earning more money himself.

In addition, if Michaud only wanted to earn more money and did not have safety concerns, he would have agreed to make extra runs on Saturday -- which was Osterberg’s explanation for why other drivers were rated higher than “satisfactory” on the “quantity of work” element of the performance review. We find that Michaud’s stated unwillingness to exceed the hours of service limitation is the real reason why he declined to work extra runs. *See* T. 92. For these reasons, we find that Michaud’s complaints to his managers about the “vicious cycle” sufficiently stated a safety concern that they also constituted engaging in a protected activity under the STAA.^{5/}

Even if we were to conclude that Michaud’s internal complaints did not constitute protected activity, there is no doubt that Michaud engaged in protected activity when he copied time cards and his own manifest as evidence of hours of service violations. Gathering evidence to be used to support a protected complaint is itself protected under whistleblower provisions. *See, e.g., Mosbaugh v. Georgia Power Co.*, Case Nos. 91-ERA-1 and 91-ERA-11, Sec. Dec. and Rem. Ord., Nov. 20, 1995, slip op. at 7-8 (tape recording); *Adams v. Coastal Production Operators, Inc.*, Case No. 89-ERA-3, Sec. Dec. and Rem. Ord., Aug. 5, 1992, slip op. at 9 and n.4 (photographing oil spill); *Haney v. North American Car Corp.*, Case No. 81-SDWA-1, Sec. Dec., June 30, 1982, slip op. at 4 (tape recording) (all under analogous employee protection provisions of other statutes).

The ALJ found that Michaud’s not mentioning to BSP his conversations with a DOT employee and a state trooper “suggests that he either did not make those contacts at all or that he was not really seriously concerned about management making a change.” R. D. and O. at 21. According to Michaud, when he raised the issue informally with Osterberg and Kasny, they flatly denied that the DOT regulations applied. In light of BSP’s failure to take corrective action when the violation was brought to its attention, it is very plausible Michaud would pursue other avenues. The fact that Michaud was gathering evidence to document hours of service violations for a complaint underscores the seriousness with which he considered the problem. Common sense dictates that Michaud would want to have documentary evidence of a violation before filing a complaint and would not want his employer to know about the complaint until it was filed.

BSP contends that it cannot be found liable under the STAA because the sole person responsible for the firing, Michael Greany, was unaware of Michaud’s protected activities, Resp. Br. at 10-12, and the ALJ agreed. R. D. and O. at 25. We disagree for two reasons: the record shows that Kasny was instrumental in the firing and also that Greany knew about Michaud’s copying of the time cards.

The ALJ stated that “[i]t is undisputed that the person who made the decision, and the only person with authority to make the decision to discharge Mr. Michaud was Michael Greany.” R. D.

^{5/} Consistent with prior decisions of the Secretary of Labor and with the ALJ’s decision in this case, we find that internal complaints to managers are protected. *See* R. D. and O. at 15, 20 and cases there cited.

and O. 25. But Greany is not even mentioned in Kasny's and Osterberg's contemporaneous memoranda concerning the discharge, both of which state simply that Kasny fired Michaud. CX 14, 16.

Also, there is a conflict in the testimony of BSP's two key witnesses on the firing. Kasny testified that he had two telephone conversations with Greany, questioned Michaud, fired him, and then telephoned Greany again to "let him know of the conversation that I had, and that Mr. Michaud was -- was, indeed, dismissed from employment." T. 509. Greany testified that he authorized the discharge only during his third telephone conversation with Kasny. T. 742. We find that Kasny first fired Michaud and Greany thereafter affirmed that Michaud should be let go.

Kasny's responsibility for the discharge is telling because he had strong reason to suspect that Michaud was gathering evidence of hours of service violations. Kasny was fully aware of the requirements of the DOT regulations, T. 560, and also would know that Michaud had no use for a copy of a different driver's time card except to document a complaint concerning hours of service violations. Nowhere is it suggested that copies of time cards would provided a competitor with an advantage.

Even if Greany were considered solely responsible for the firing, he too had actual knowledge of Michaud's complaint about the "vicious cycle" and in light of that knowledge he also knew that copies of the time cards could substantiate Michaud's suspicion of time in service violations. T. 728. On the basis of substantial record evidence, we find then that both Greany and Kasny suspected that Michaud was preparing to file a complaint to a government agency.

BSP contends that firing Michaud for photocopying documents was legitimate because manifests were confidential. But, the documents copied by Michaud contained no proprietary information. There were no written policies or verbal instructions against copying manifests, T. 798 (Greany), and drivers routinely copied their own and other drivers' manifests without being fired. T. 131 (Michaud), 159 (Labrecque), 633 (Andrews), 802 (Greany), 835 (Taylor). Nor were the manifests labeled confidential. See CX 7. Finally, manifests were posted and left in and around the docks where a driver from another company who was working on the docks could see them. T. 132 (Michaud), 158-160 (Labrecque), 593-594 (Kasny).

Kasny testified that manifests might disclose BSP's rate structure to a competitor, T. 607, but the manifests do not contain any price information, T. 583, 802-803, and Greany conceded that an astute sales representative already knows what his competitors are charging. T. 806. Greany hypothesized that a manifest might tell a competitor that one of his "exclusive" customers was cheating by using BSP as well. T. 761. But whereas that information might lead the competitor to cancel any discount it gave in exchange for the customer's promise of exclusive use, it would not give the other company a competitive advantage over BSP. The reasons given for BSP considering manifests to be confidential simply do not ring true. Nor is any reason offered why Michaud would be copying time cards. The only apparent use of the time cards would be to establish time in service violations which BSP had good reason to fear. It is this legitimate fear of the revelation of violations of DOT regulations that best accounts for BSP's actions in this case.

We find that the stated “legitimate” reason for firing Michaud is not credible because the company did not treat the manifests as confidential and the information on manifests would reveal little to a competitor. We further find that Michaud established by a preponderance of the evidence that BSP discharged him for engaging in the protected activity of gathering evidence that BSP suspected would be used to support a complaint about hours of service violations.

REMEDIES

Under the STAA, Michaud is entitled to an order requiring BSP to take affirmative action to abate the violation, reinstate him to his former position with the same pay and terms and privileges of employment, and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A). The Board also may assess against BSP the costs, including attorney’s fees, reasonably incurred in bringing the complaint. 49 U.S.C. § 31105(b)(3)(B).

Since the ALJ recommended dismissal, there were no recommended findings on remedies. Accordingly, we will remand the complaint to the ALJ for any further proceedings she deems necessary and a supplemental recommended decision on the full complement of remedies to which Michaud is entitled.

Although the parties stipulated to the amount of back pay, see R. D. and O. at 3-4 and ALJX 35,^{6/} other issues remain, as the ALJ noted. See R. D. and O. at 6.

On the advice of his physician, Michaud declined BSP’s May 1995 offer of reinstatement. T. 169, 170, 273, 371, 376, 378, 380. See RX 12. The Supreme Court has held that “absent special circumstances, the rejection of an employer’s unconditional job offer ends the accrual of potential back pay liability.” *Ford Motor Co. v. EEOC*, 458 U.S. 219, 241 (1982). BSP contends that Michaud’s rejection of its reinstatement offer tolled the accrual of back pay liability and eliminates the availability of front pay as a replacement for reinstatement.

On the other hand, Michaud contends that his diagnosed major depression is a special circumstance that permitted him to decline reinstatement without terminating BSP’s back pay liability and without forgoing front pay. A plaintiff’s refusal to accept an offer of reinstatement is measured by an objective, reasonable person standard. *Morris v. American Nat’l Can Corp.*, 952 F.2d 200, 203 (8th Cir. 1991); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982).

BSP disputes whether Michaud’s discharge was the proximate cause of his depression and related injuries. On remand, the ALJ shall make a finding on this issue and the amount of compensatory damages, if any.

^{6/} We ask the parties to address on remand why they stipulated to paying time and half to Michaud after 45 hours per week instead of the usual 40.

The ALJ also shall afford Michaud the opportunity to submit a detailed petition for costs and attorney's fees, shall afford BSP the opportunity to respond, and shall make a recommendation on the amount of costs and fees which Michaud reasonably incurred in bringing the complaint.

CONCLUSION

Consistent with this decision, the complaint is remanded to the ALJ for further proceedings and a supplemental recommended decision on remedies.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member