



**In the Matter of:**

**ROBERT J. BAUGHMAN,**  
**COMPLAINANT,**

**ARB CASE NO. 05-105**

**ALJ CASE NO. 2005-STA-005**

**v.**

**DATE: September 28, 2007**

**J.P. DONMOYER, INC.,**  
**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Thomas L. Wenger, Esq., *Wix, Wenger & Weidner*, Harrisburg, Pennsylvania**

***For the Respondent:***

**Adam R. Long, Esq., *McNees, Wallace & Nurick LLC*, Harrisburg, Pennsylvania**

**FINAL DECISION AND ORDER**

Robert J. Baughman filed a complaint with the United States Department of Labor in which he alleged that his former employer, J. P. Donmoyer, Inc., violated the employee protection section of the Surface Transportation Assistance Act (STAA or the Act)<sup>1</sup> when it terminated his employment. After a hearing, a Labor Department Administrative Law Judge (ALJ) concluded that Donmoyer did not violate the Act. Baughman appealed. We affirm.

---

<sup>1</sup> 49 U.S.C.A. § 31105 (a) (West 1997). The STAA has been amended since Baughman filed his complaint. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

## BACKGROUND

Donmoyer is a company that transports limestone and limestone products. Donmoyer hired Baughman in January 2002 to drive trucks to which trailers are attached.<sup>2</sup>

Baughman was dispatched on Thursday, March 20, 2003, to the Hanover Quarry in Pennsylvania at approximately 7:00 or 7:30 a.m. to pick up a load of pebble rock. While it only took Baughman one hour to get to Hanover, he had to wait until 3 or 4 p.m. before the pebble rock was loaded. As Baughman was pulling out of the quarry, he noticed a loose strap through his mirror and thought that if the strap was not tight he could “lose that skid or the load.”<sup>3</sup> Baughman testified that he began to pull off the road, going about 4 or 5 miles per hour, when the road “gave way.” One side of the truck and part of the trailer went into a ditch.

Baughman contacted Chris Eckman, the Donmoyer daytime dispatcher, at approximately 4:30 p.m. to notify him of the incident. Baughman testified that he stayed in contact with Donmoyer throughout the ordeal, with the last contact occurring at approximately 10:30 p.m. According to Baughman, he returned to Donmoyer’s terminal at about 2 a.m. on Friday, March 21. Baughman checked his mailbox and retrieved a dispatch for a 3-stop run to Brooklyn, New York. Baughman thought that he had to begin this trip immediately.<sup>4</sup> He testified that he told Stephen Copp, the night dispatcher, “I’m tired, and I ain’t got the hours to work” and that he could not take the trip to New York.<sup>5</sup> But Copp testified that Baughman told him he could not take the New York trip because he was “not in the mood.”<sup>6</sup> After speaking with Copp, Baughman left the terminal and called Copp at 2:14 a.m. from his personal vehicle to verify that he had been taken off duty.<sup>7</sup> At this time, according to Baughman, he also informed Copp that he was sick.

---

<sup>2</sup> Donmoyer Brief at 4, 6-7.

<sup>3</sup> Tr. at 21.

<sup>4</sup> Tr. at 32.

<sup>5</sup> Tr. at 33.

<sup>6</sup> Tr. at 127.

<sup>7</sup> Tr. at 33; RX 3 at 1 (Copp’s log).

Later that morning, the Donmoyer Safety Committee met and decided to terminate Baughman for having three accidents in thirty days.<sup>8</sup> The Safety Committee consisted of Greg Myers, Frank Costanza, Jim Kretz, Mike Eggbert, and Joyce Houser.<sup>9</sup> Later that day, Baughman called to check on his next assignment. Eckman told him to come in on Monday, March 24th, between 8 and 9 a.m.

When Baughman arrived on the 24th, Stephen Fields, Baughman's supervisor and Donmoyer's Operations Manager, motioned him into Myers's office, where Fields told him that it was in his own and the company's best interest for his employment to be terminated.<sup>10</sup> Baughman testified that when he asked why, Fields informed him that it was because he refused to take the New York trip.<sup>11</sup> Myers testified that neither he nor Fields told Baughman that he was being discharged for refusing the New York trip.<sup>12</sup>

Baughman filed a STAA complaint with the United States Department of Labor on September 19, 2003. The Labor Department's Occupational Safety and Health Administration investigated and found that the complaint had no merit. Baughman requested a hearing. The ALJ concluded that Donmoyer did not violate the Act. Baughman appealed.

#### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part 1978 (2007).<sup>13</sup> This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).

When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole.<sup>14</sup> Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a

---

<sup>8</sup> Baughman admitted to having two other traffic accidents. Tr. at 39. The first accident occurred in Worchester, Connecticut, on February 27, 2003. The second accident occurred on March 17, 2003.

<sup>9</sup> R. D. & O. at 6.

<sup>10</sup> Tr. at 35-36.

<sup>11</sup> Tr. at 36.

<sup>12</sup> Tr. at 158.

<sup>13</sup> Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

<sup>14</sup> 29 C.F.R. § 1978.109(c)(3) (2006); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

conclusion.”<sup>15</sup> We must uphold an ALJ’s finding of fact 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>16</sup>

## DISCUSSION

The STAA protects employees who engage in protected activity from discharge, discipline, and discrimination. STAA protected activity occurs when the employee files a complaint or begins a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or when an employee testifies or will testify in such a proceeding. 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. An employee who refuses to drive because of a reasonable apprehension of serious injury to himself or the public because of the vehicle’s unsafe condition is also protected.<sup>17</sup>

To prevail on his STAA complaint, Baughman must prove by a preponderance of the evidence that he engaged in protected activity, that Donmoyer was aware of the protected activity, that he suffered an adverse action, and that Donmoyer took the adverse action because of his protected activity.<sup>18</sup>

### Protected Activity

When Baughman returned to the terminal at 2:00 a.m. on March 21 and found out about his new assignment, he had been on duty since 7:30 a.m. the previous morning, approximately 18 hours. The ALJ found that had Baughman taken the New York trip, he would have violated the United States Department of Transportation (DOT) hours of service regulation. In 2003, that regulation prohibited a driver from driving for any period after having been on duty for 15 hours.<sup>19</sup> Despite Baughman’s testimony that he told Copp that he would not take the New York trip because he was tired and out of hours, the ALJ found that Baughman told Copp that he was

---

<sup>15</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>16</sup> *See Universal Camera Corp.*, 340 U.S. at 488; *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

<sup>17</sup> *See* 49 U.S.C.A. § 31105 (a).

<sup>18</sup> *Ridgley v. C. J. Dannemiller*, ARB No. 05-063, ALJ No. 04-STA-053, slip op. at 5 (ARB May 24, 2007).

<sup>19</sup> 49 C.F.R. § 395.3(a)(2) (2002).

refusing the trip because he was “not in the mood.” Therefore, the ALJ concluded that Baughman did not engage in STAA protected activity.<sup>20</sup>

In so concluding, the ALJ credited Copp’s testimony because of phone log entries Copp made in the early hours of March 21. Copp made contemporaneous entries when a driver called or came to the dispatch window. Thus, Copp recorded a driver calling just after midnight on the 21st who told him that he did not have enough hours. Copp’s log indicates that he called around and found a replacement to take the driver’s assignment.<sup>21</sup> The next log entry for March 21 indicates that Copp talked to Baughman at the dispatcher’s window at 1:45 a.m. and that Baughman told him he was not going to work that day because “[h]e is not in the mood.” Copp’s entry also says that Baughman told him that he “will just get in [his] truck and call off sick.”<sup>22</sup>

The ALJ reasoned that had Baughman claimed to be out of hours as a reason for refusing the load, Copp would have recorded Copp’s proffered reason in the log just as he had done an hour earlier with the other driver. Baughman argues that the ALJ erred because he did not make credibility determinations.<sup>23</sup> We agree that credibility findings as to Baughman and Copp would have been helpful in determining whether Baughman told Copp that he was refusing the New York trip because he was tired and out of hours. Even so, we accept the ALJ’s finding that Baughman did not inform Copp about his lack of hours because substantial evidence supports that finding.

Furthermore, even if the ALJ erred in not determining whether Copp was credible, Baughman nevertheless engaged in STAA protected activity. Baughman argues that after he left the terminal on the 21st, he called Copp from his truck and informed him that he was refusing the New York assignment because he was sick. Baughman claims that this constitutes protected activity because DOT regulations forbid driving while sick, ill or fatigued.<sup>24</sup>

The record supports Baughman’s argument that he informed Copp that he was sick. Copp’s own log verifies that Baughman told him that he was going to call in sick.<sup>25</sup> Therefore,

---

<sup>20</sup> R. D. & O. at 13, 14 n.11.

<sup>21</sup> RX 3 at 1.

<sup>22</sup> RX 3 at 1.

<sup>23</sup> Brief at 6-8.

<sup>24</sup> Brief at 16-19. A driver shall not operate, and a carrier shall not require or permit a driver to operate, a commercial motor vehicle while the driver’s ability or alertness is impaired through “fatigue, illness, or any other cause, as to make it unsafe.” 49 C.F.R. § 392.3 (2002).

<sup>25</sup> See RX 3 at 1 (At 1:45 a.m. Baughman told Copp that “He will just get in the truck and call off sick from the truck.”).

we find that Baughman informed Copp that he refused the New York assignment because to do so would violate the DOT prohibition against driving when sick. Thus, we conclude that Baughman engaged in STAA-related protected activity.

### **Employer Knowledge**

To succeed on his STAA complaint, Baughman must also prove by a preponderance of the evidence that the Donmoyer officials who decided to terminate his employment knew that he refused to take the New York trip. The ALJ found that the Safety Committee did not know that Baughman refused to take that trip. Substantial evidence supports this finding.

Baughman argues that the Safety Committee must have known that he refused the trip because, according to Copp's log, Fields called Copp "for updates" at 6:05 a.m. on Friday, March 21. Therefore, Baughman argues, in updating Fields, Copp would have told him that Baughman refused the New York trip and Fields, in turn, would have relayed this information to Houser, a Safety Committee member.<sup>26</sup> But Copp's contemporaneous log indicates that when Fields called him for updates, Copp discussed a separate incident that involved another driver whose truck had partially submerged into a sink hole.<sup>27</sup>

The record contains no evidence that Copp communicated Baughman's refusal to Fields or that Fields communicated the refusal to the Safety Committee. Both Houser and Myers testified that they did not know about Baughman's refusal, that his refusal was not discussed in the Safety Committee meeting, and that the refusal did not play a role in Baughman's termination. Therefore, Baughman's argument that the Safety Committee knew about his refusing the New York trip is only speculation. Thus, Baughman did not prove by a preponderance of the evidence that the Donmoyer officials who decided to terminate him knew about his refusal to take the New York assignment.

### **Baughman's Other Arguments**

#### Exhibits

Baughman argues that the ALJ "disregarded" or "set aside" certain exhibits; to wit, Claimant's Exhibits (CX) 7, 8, 11, 12, and 14.<sup>28</sup> Baughman, however, offers no evidence to support this argument. The ALJ admitted sixteen exhibits into evidence.<sup>29</sup> After examining the

---

<sup>26</sup> Brief at 15; RX 11 (Fields's Dep.) at 24-25.

<sup>27</sup> RX 3 at 2 ("6:05: S Fields called for updates. Told him of Butler Situation and what I did with Taylor. He said the Butler customer really needed it today, because of him renting a crane.").

<sup>28</sup> Brief at 5, 21, 23.

<sup>29</sup> R. D. & O. at 1. n.2.

exhibits, the ALJ decided that CX 11, 12, and CX 14 were not helpful and that CX 7 and CX 8 were relevant only for damages.<sup>30</sup> Thus, the ALJ did not “disregard” these exhibits.

*The Pennsylvania Unemployment Compensation Determination*

Baughman filed an unemployment compensation claim shortly after Donmoyer terminated his employment. Donmoyer did not oppose this claim. On or about April 4, 2003, the Pennsylvania Department of Labor determined that Donmoyer discharged Baughman for insubordination in refusing to take the New York trip. According to the Notice of Determination, Baughman showed that he had good cause for refusing the trip and was therefore entitled to unemployment benefits.<sup>31</sup> Baughman contends that the ALJ erred because he did not defer to that decision and accord it probative weight.<sup>32</sup>

STAA regulations, which Baughman did not cite, permit an ALJ to defer to the outcome of other proceedings in limited circumstances.<sup>33</sup> But Baughman did not argue this point to the ALJ. In his post-hearing brief, Baughman argued only that the ALJ should find that he filed the unemployment claim, was granted benefits, and that Donmoyer did not oppose the decision to grant benefits. Baughman did not refer to the STAA regulations permitting an ALJ to defer to the outcome of the unemployment proceedings. In fact, he did not argue that the ALJ should defer.<sup>34</sup> Under our well-established precedent, we decline to consider an argument that a party raises for the first time on appeal and therefore will not consider Baughman’s argument concerning deference.<sup>35</sup>

---

<sup>30</sup> R. D. & O. at 10 n.7.

<sup>31</sup> CX 7.

<sup>32</sup> Brief at 21-22.

<sup>33</sup> See 29 C.F.R. § 1978.112 (c); *Peters v. Hal Indus.*, ARB No. 02-045, ALJ No. 2002-STA-002, slip op. at 4-5 (ARB July 30, 2003).

<sup>34</sup> Complainant’s Suggested Findings of Fact and Conclusions of Law at 3.

<sup>35</sup> See *Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Apr. 3, 2007 (corrected)); *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-023, slip op. at 7 (ARB Sept. 29, 2006).

## **CONCLUSION**

Baughman did not prove by a preponderance of the evidence, as he must, that the Donmoyer officials who decided to terminate his employment knew about his protected activity in refusing to take the New York trip because he was ill. Therefore, we must **DENY** this complaint.

**SO ORDERED.**

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

**DAVID G. DYE**  
**Administrative Appeals Judge**