



In the Matter of:

**DONALD F. CORTES**

**ARB CASE NO. 98-019**

**COMPLAINANT,**

**ALJ CASE NO. 96-STA-30**

**v.**

**DATE: February 27, 1998**

**LUCKY STORES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (West 1996). Donald F. Cortes (Cortes) alleged that his employer, Lucky Stores, Inc. (Lucky) violated the STAA when it discharged him. In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) found that Cortes did not establish a STAA violation and recommended dismissal of the complaint. The ALJ's findings of fact, R. D. and O. at 4-11, are supported by substantial evidence on the record as a whole, and therefore are conclusive. 29 C.F.R. §1978.109(c)(3). We accept the ALJ's credibility determinations as well. Like the ALJ, we find that Cortes did not establish a STAA violation.

### **BACKGROUND**

Cortes is a truck driver for Lucky, a large chain of grocery stores. T. 80. In May 1996, Cortes's regular work shift was 5 p.m. to 1:30 a.m., Sunday through Thursday. T. 116, 118-119, 285. He had worked 38.3 hours in the four days preceding his reporting for work at 5 p.m. on Thursday, May 23, 1996. The 38.3 hours included a total of 6.3 hours of overtime accumulated in increments from one half to two hours over four days. T. 286.

Supervisor Tom Krug met with Cortes and the three other drivers at the start of their shift at 5 p.m. on May 23. T. 251. Krug advised that he needed some drivers to work on May 24 because of the upcoming Memorial Day holiday and various promotions that Lucky was running. T. 249-

251. Krug advised that the drivers could pick their start time, up to 7 p.m. on May 24, as long as they had eight hours' rest after finishing their May 23 work shift.<sup>1/</sup> T. 181, 253.

When Krug asked for volunteers to work the extra day, none came forward. T. 180, 251. Cortes said that he did not care to work on May 24. T. 180. Krug then advised all four drivers that they were being required to work on May 24 due to business necessity. T. 180-181, 251. The collective bargaining agreement provides that Lucky can require drivers to work overtime if necessary. CX 6 at Article 15(C). Cortes did not respond when Krug ordered the drivers to work on May 24. T. 181. Krug told the dispatcher to ask what time each driver would report the next day. T. 183, 154.

That night Cortes worked nine hours, until 2:30 a.m., for a total of 47.3 hours of work that week. T. 285. When he returned from his May 23 shift, Cortes informed the dispatcher that he would not work on May 24 because he was fatigued. T. 124, 192, 202, 255. Cortes punched out and drove home in his personal vehicle. T. 221.

Cortes worked his regular shift on Sunday, May 26. The next day, Transportation Manager Robert Kaib called Cortes and another driver, John Fatheree, to a meeting and asked why they had not reported for mandatory overtime on May 24. T. 205. Kaib questioned how Cortes could know, 14 hours prior to his usual start time, that he would be fatigued in the evening of May 24. T. 256. Cortes's only response was that "he knew his body and he knew he was going to be fatigued." *Id.* Kaib suspended Cortes and Fatheree pending further investigation and review. CX 1. Upon completion of the review, Kaib discharged Cortes, effective June 6, 1996, for insubordination and refusing to work. CX 2. Fatheree also was discharged. T. 256-257.

Cortes and Fatheree pursued a grievance to a binding arbitration hearing. At a preliminary Board of Adjustment's hearing on the grievance, Cortes gave no further explanation for why he believed that he would be fatigued on the evening of May 24. T. 257. Likewise, at a later arbitration hearing, Cortes swore that he did not recall anything that occurred on the night of May 23-24 to account for his expected fatigue, other than his age and the physical demands of his job. CX 3 at 135, 140-143, 168, 170; CX 5 at 10. He testified that it took him two days to rest at the end of his normal work week. CX 5 at 10.

The arbitrator ruled that termination was too severe a penalty for Cortes, who had lengthy service and no record of prior discipline. CX 5 at 10, 12. The arbitrator ordered reinstatement, back pay, and restoration of benefits for Cortes. CX 5 at 11. The arbitrator also recommended that Cortes undergo a physical examination by a company doctor to determine if his overtime hours should be limited. *Id.*

Cortes returned to work September 1, 1996. He received his back pay on September 25, 1996. T. 150; CX 11, 12.

---

<sup>1/</sup> The applicable Federal hours of service regulation provides that a driver shall not drive more than ten hours following eight consecutive hours off duty. 49 C.F.R. §395.3(a)(1).

At the hearing before the ALJ, Cortes for the first time stated that he was so tired he was falling asleep on his way back to Lucky's warehouse at the conclusion of his May 23 shift. T. 124, 186, 188-191. He testified that he had to use the air conditioning, roll down the windows, play the radio, and take all his breaks, including lunch and coffee, in order to stay awake. T. 124. Cortes stated that he was not worried about being too tired to drive home in his own vehicle because the half hour of physical activities in which he engaged back at the warehouse helped him "wake up a little bit." T. 225.

In this complaint, Cortes seeks one day's holiday pay, interest on the back pay paid under the arbitrator's decision and on payments to his 401K retirement plan, and compensatory damages. T. 152-154.

## DISCUSSION

Cortes claims that his discharge violated the "refusal to drive" provision of the STAA because he was too fatigued to operate a truck safely on the evening of May 24.<sup>2/</sup> Under a Federal motor carrier regulation:

No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

49 C.F.R. §392.3 (1996) ("the fatigue rule").

To establish a violation of the provision at Subsection (B)(i) of the STAA, a complainant "must show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive -- a mere good faith belief in a violation does not suffice." *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993). A violation of the fatigue rule is established where the driver's "ability or alertness was so impaired as to make vehicle operation unsafe." *Smith v. Specialized Transportation Services*, Case No. 91-STA-22, Sec. Final

---

<sup>2/</sup> The STAA provides in relevant part, at 49 U.S.C.A. §31105(a):

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--

\* \* \*

(B) the employee refuses to operate a vehicle because--

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

Dec. and Ord., Apr. 30, 1992, slip op. at 6; *see also Mace v. Ona Delivery Systems, Inc.*, Case No. 91-STA-10, Sec. Final Dec. and Ord., Jan. 27, 1992, slip op. at 5.

At approximately 2 a.m. on May 24, Cortes told his dispatcher that he was too fatigued to take a dispatch that would begin, at Cortes's option, some 15 to 16 hours later. In the interim, Cortes could have slept and relaxed according to his usual work week schedule. Cortes has cited no illness or medical condition that would cause him to be too fatigued to drive the next evening.

We agree with the ALJ that the evidence does not establish that an actual safety violation would occur because Cortes's ability or alertness would be so impaired some 15 or 16 hours later. *See R. D. and O.* at 12-13. In *Brandt v. United Parcel Service*, Case No. 95-STA-26, Sec. Fin. Dec. and Ord., Oct. 26, 1995, the Complainant refused on Saturday to take a different shift on Sunday, claiming that he expected to be fatigued because of the change in his usual schedule. The Secretary found that:

It would be impossible for Brandt to prove that the decision he made on Saturday night, not to drive on Sunday night because of expected fatigue, was based on an *actual* violation of the motor carrier safety regulations. (Emphasis in original).

*Brandt*, slip op. at 5. Accordingly, we find that Cortes has not established a violation of Subsection B(i).

The focus in Subsection B(ii) of the STAA is whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury. The ALJ discredited Cortes's testimony that he was falling asleep during his May 23-24 shift, and we agree. *See R. D. and O.* at 13. That leaves only Cortes's self-serving testimony that he needed two days off to rest after a regular work week. Cortes gave no reason why he could not rest and sleep during the day on May 24 so as to be refreshed for a shift that would begin between 5 p.m. and 7 p.m. that evening.

Under the hours of service regulation, a rest of eight hours was required before Cortes could drive again, and Cortes had some 15 to 16 hours to rest before reporting to work on the evening of May 24. Moreover, the additional hours he would have worked would not have brought Cortes close to the 70 hour work limit under the hours of service rule.<sup>3/</sup> A nine hour work shift on the evening of May 24 would have brought Cortes to a total of 56.3 on duty hours in the preceding eight days.

In *Brandt*, under facts very close to those in this case, the Secretary found that there was no violation of Subsection B(ii) of the STAA:

Further, Brandt's refusal to drive was not based upon a reasonable apprehension of serious injury to himself or the public under 49 U.S.C. §31105(a)(1)(B)(ii). Given that Brandt could have, if necessary, slept for the entire 24 hour period prior to his

---

<sup>3/</sup> The regulation governing maximum driving time provides that a driver shall not drive "after having been on duty 70 hours in any period of 8 consecutive days . . . ." 49 C.F.R. §395.3(b)(2).

run, it would have been unreasonable for him to be apprehensive on Saturday about his or the public's safety on Sunday.

*Brandt*, slip op. at 6. In this case, Cortes could have, if necessary, slept for some 14 hours prior to taking the shift on May 24. We find that a reasonable person in the same circumstance as Cortes would not conclude that his ability or alertness would be impaired such that a violation of the fatigue rule would have occurred. *Compare Paquin v. J.B. Hunt Transport, Inc.*, Case No. 93-STA-44, Sec. Dec. and Ord., July 19, 1994, slip op. at 6 (“Accepting as true that Paquin had more than 80 on-duty hours in the previous seven days, it was reasonable for him to feel fatigued when he refused the dispatch.”).

### CONCLUSION

Cortes did not establish that Lucky violated the STAA. The complaint is **DISMISSED**.

**SO ORDERED.**

**DAVID A. O'BRIEN**  
Chair

**KARL J. SANDSTROM**  
Member