U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

CRAIG MASON, **ARB CASE NO. 00-004**

COMPLAINANT, **ALJ CASE NO. 99-STA-27**

v. **DATE: November 21, 2000**

POTTERS EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant
Paul O. Taylor, Esq., *Truckers Justice Center, Eagan, Minnesota*

For the Respondent
Brian S. Kremer, Esq., *Goldberger & Goldberger, Albany, New York*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act ("STAA"), as amended and recodified, 49 U.S.C. §31105 (1994). Respondent hired Craig Mason as a truck driver on or about October 6, 1998, and fired him less than four months later, on January 24, 1999. The relevant facts leading up to his termination are as follows.

As a truck driver for Respondent, Mason was responsible for the delivery and pickup of freight at locations for both residential and commercial customers. (Tr. 31). Mason soon became the subject of several customer complaints regarding his attitude. (Tr. 159). George Hunt, Respondent's owner, discussed these complaints with Mason on at least three occasions just prior to January 18, 1999. (Tr. 80-81).

On January 22, 1999, Respondent received another customer complaint about Mason's attitude. (Tr. 90-91). That same day, Respondent's Dispatcher, Robert Ludwig, asked Mason

to "bobtail" approximately twenty-five to thirty miles to pick up a trailer. (Tr. 39-40).[1/] Mason refused on the grounds that bobtailing in inclement weather was too dangerous.[2/] (Tr. 42). Inasmuch as there was no other work for Mason to do, Ludwig told Mason "go home . . . you're done." (Tr. 43). According to Mason, Ludwig's tone was so harsh that he believed that Ludwig was firing him. (Tr. 43). Mason left work immediately without disconnecting the trailer from his tractor or even turning off the engine. (Tr. 94). Ludwig did not discover that the tractor was still running until he happened to look out the window twenty minutes later. (Tr. 222).

Although Mason initially claimed that Ludwig fired him on January 22nd, Mason also knew that only Hunt had the authority to actually terminate him. (Tr. 62, 100). Therefore, on January 23rd, Mason confronted Hunt in an attempt to explain why he refused to bobtail. At that time, Hunt told Mason that he didn't have a problem with his refusal to bobtail, but was concerned instead with his decision to walk off the job on the 22nd without completing his duties. (Tr. 125, 167). Mason then complained that the real problem was Ludwig. (Tr. 170). Hunt told Mason that he would give him a final decision concerning his job status the following day. (Tr. 102). Unbeknownst to Hunt, Mason taped the entire conversation. (Tr. 100).

On January 24th, Hunt telephoned Mason and requested that he come into the office so that they could sit down with Ludwig and discuss not only Mason's job performance, but also Mason's complaints against Ludwig. (Tr. 170-171). Mason stated that he would not be able to attend the meeting. (Tr. 104). According to Hunt, he was offended by the surly manner in which Mason talked to him, especially in light of the fact that he was trying to save Mason's job. (Tr. 176). Nevertheless, Hunt told Mason that he had decided to place him on a call-in status, rather than terminate his employment.[3/] (Tr. 104, 177). Mason responded:

> I can't work part-time. I can't afford it. I said you either want me to work for you full-time or not. And make up your mind, are you going to fire me or not. (Tr. 104). At this point, Hunt said "its been nice knowing you Craig" and hung up. (Tr. 178).

Mason interpreted Hunt's statement to mean that he had been terminated and subsequently filed a complaint with the Secretary of Labor alleging that Respondent fired him because he refused to "bobtail" his vehicle in inclement weather. In view of the allegedly retaliatory nature of his termination, Mason argued that Respondent violated the employee protection provisions of the STAA which state, in relevant part:

[1/] Bobtailing is driving a tractor without a trailer. Tr. 40.

[2/] The parties do not agree as to the condition of the roads at the time Mason was asked to bobtail.

[3/] A call-in status is part-time in nature meaning that the company would only employ Mason on an as needed basis. (Tr. 177).

> (a) Prohibitions – (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, privileges or 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 . . . .

49 U.S.C. §31105(a).

Ultimately, this matter was referred to an Administrative Law Judge ("ALJ") who held an evidentiary hearing. Respondent took the position that Hunt's statement to Mason on January 24th was not intended to terminate him and, consequently, Mason's loss of employment is due to the fact that he quit. The ALJ rejected Respondent's argument finding that, under the circumstances of this case, Hunt's statement effectively terminated Mason's employment on January 24th. (Tr. 273, RD). The ALJ also found that Mason's refusal to bobtail his vehicle constituted protected activity under the STAA. However, the ALJ went on to find that Respondent's decision to terminate Mason was based on legitimate, non-discriminatory reasons. Therefore, by Recommended Decision and Order ("RD&O") dated November 1, 1999, the ALJ recommended that Mason's complaint be dismissed.

The decision of the ALJ is now before the Board pursuant to the automatic review procedures under 29 C.F.R. §1978.109(c)(1) (1999). To prevail on a claim under §31105(a), the complainant must prove that he or she engaged in protected activity as defined in §31105(a)(1)(A) or §31105(a)(1)(B)(i) or (ii); that his or her employer was aware of the protected activity; that the employer discharged, disciplined or discriminated against him or her; and that there is a causal connection between the protected activity and the adverse employment action. *BSP Trans., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987). Mason argues that the Board should not adopt the ALJ's decision, in part, because:

> The ALJ overlooked the fact that, although Complainant was the subject of customer complaints and was alleged to have violated company policy, these were never the reasons that were articulated by the Respondent as forming the basis for terminating the Complainant. In a letter to the New York State Unemployment Insurance Appeal Board, Veronica Hunt claimed that the Complainant "walked off the job." (CX6) Mr. George Hunt, the President of the Respondent, claims that Mr. Mason quit and has

> not articulate (sic) any reason for firing Mr. Mason because, he claims he did not fire Mr. Mason.

The ALJ did not view this issue as one of decisional significance, nor do we. Mason has not cited, nor are we aware of, any general rule that prohibits a party from offering alternative theories in a case simply because it may have relied on only one theory in another proceeding before a different administrative agency applying different laws. Thus, Respondent can properly assert that it did not terminate Mason and alternatively argue that, even if such a termination occurred, the discharge was for a legitimate, non-discriminatory reason.

Mason next cites the following testimony by Hunt:

> In the real world, we bobtail. Your bobtailing expert, I'd like him here today. I read the report and I read the, you know, at best it's ridiculous some parts of it. I can be a self-proclaimed expert. I've been in this business all my life. In the real world we bobtail . . . Well, the train of thought was on bobtailing, right, and if there was any problem with bobtailing that day. There was no problems (sic) with bobtailing that day. As I said, in the real world, when you come to me as a certified CDLA New York State driver, capable and licensed to drive a tractor trailer, I expect you to drive the tractor trailer. If it's terrible road conditions, we're not going to make you drive the tractor-trailer, nor did we. We're not going to make you bobtail, nor did we. But in the real world, as the fellow who sat here before me, he didn't stay in Glenn Falls that night, he drove. So it's part of the business. The expert, I would like to have asked the bobtailing expert if his drivers bobtail because it's the evil of the beast. It's – maybe people don't like to bobtail, it's part of the business. It's like having teeth. We don't like to go to the dentist, but if you want to have teeth you go to the dentist. Okay. And bobtailing is similar, it's part of the business.

In light of this testimony, Mason contends that the ALJ erred in finding that his refusal to bobtail was not the real reason for his discharge.

This testimony is, at best, ambiguous. Hunt gave this testimony in response to a written statement from Mason's expert (introduced as Mason's exhibit CX7) who asserted that a trucker should never bobtail on icy or snowy roads. Although Hunt's testimony could mean that Hunt expects all of his truckers to drive in inclement weather, it could also mean that Hunt is leaving the matter entirely to the discretion of the trucker. In any event, as the ALJ pointed out in his decision, "[t]here is no necessity, in logic, to extend [Hunt's] disputation to conclude that if

Hunt's truckers refused to "bobtail", they would be fired!"[4/] Given the ambiguous nature of Hunt's testimony, we are not compelled to reach a contrary conclusion.

The remainder of Mason's brief is essentially a challenge to the ALJ's conclusion that Respondent had legitimate, non-discriminatory reasons for terminating him. In the RD&O, the ALJ articulated the reasons for his decision. Specifically, the ALJ stated:

> First, Complainant, in his relatively short tenure at Respondent, had been the subject of violations of company policy and numerous customer complaints relative to poor job performance and customer relations (Tr. 149-161; 229-231). And, Hunt had continually discussed these problems with Complainant (156-7). Indeed, just prior to Complainant's discharge, there were several instances of customer complaints and discussions thereof between Hunt and Complainant (Tr. 61; 80-1; 85-8), with Hunt warning Complainant and encouraging him to correct his behavior, ending in Hunt's disillusioned realization that, on the heels of these discussions, a still further complaint was forthcoming (Tr. 159-60).
>
> Second, after his normal run and refusal to "bobtail" on the afternoon of January 22, 1999 (Tr. 38-42), Complainant left his tractor-trailer, still running, unparked in the yard, contrary to company procedure known to Complainant (Tr. 91-94; 221-22).
>
> Finally, Complainant refused to attend a meeting on January 24, 1999 with Hunt and Ludwig, arranged by Hunt to discuss the issues in contention surrounding Complainant's employment and to finalize Complainant's status, as promised Complainant the previous day (Tr. 101-3; 172-178).
>
> Hunt and Ludwig credibly and convincingly testified as to the above events and circumstances. The January 23, 1999 conversation between Complainant and Hunt, secretly recorded by Complainant (CX 13), totally corroborates Hunt's state of mind and motivation in discharging Complainant, and includes Hunt's consistently repeated disclaimer that complainant's refusal to "bobtail" had any bearing upon Hunt's then concern with Complainant's work performance, nor, inferentially, upon the later reached (intended but aborted) decision of a one-day suspension, nor, inferentially, upon the ultimate discharge.

[4/] RD&O at 5.

> I find that Respondent discharged Complainant for the legitimate, non-discriminatory reasons set forth above, and Complainant has entirely failed to prove otherwise.

RD&O at 4-5.

We find substantial evidence in the record to support the ALJ's findings. See 29 C.F.R. §1978.109(c)(3) (2000). Accordingly, we find that Mason has failed to establish that his termination violated the employee protection provisions of the STAA and concur with the ALJ's recommendation that the complaint should be dismissed.

SO ORDERED .

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member