



**In the Matter of:**

**DENNIS L. KELLEY,**

**ARB CASE NO. 00-049**

**COMPLAINANT,**

**ALJ CASE NO. 99-STA-29**

**v.**

**DATE: October 28, 2002**

**HEARTLAND EXPRESS, INC. OF IOWA,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

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

*For the Respondent:*

Douglas R. Richmond, Esq., Michael L. Matula, Esq., *Armstrong Teasdale LLP, Kansas City, Missouri*

**FINAL DECISION AND ORDER OF DISMISSAL**

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 1997), and implementing regulations at 29 C.F.R. Part 1978 (2001).

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) dismissed Dennis L. Kelley's complaint and he requested a hearing before an Administrative Law Judge (ALJ). The ALJ's March 24, 2000 Recommended Decision and Order (R.D. & O.) held, *inter alia*, that the fundamental elements of procedural due process – notice and an opportunity to be heard – would be compromised if the ALJ considered Complainant's new theories of liability involving additional alleged protected activities on October 22 and 28, 1998, first raised in his post-hearing brief. R.D. & O. at 2-3. The ALJ also determined that these additional issues had not been raised and litigated by the implied consent of the parties. *Id.* at 3.

Accordingly, the ALJ concluded that the only issue for resolution was whether the Complainant engaged in protected activity on October 31, 1998, and whether such activity resulted in the unlawful termination of his employment under the STAA. R.D. & O. at 4. The ALJ then found that the decision to discharge Complainant was predicated on legitimate, non-prohibited

considerations and not in retaliation for his protected activity. *Id.* at 8-10.

Under the STAA implementing regulations at 29 C.F.R. § 1978.109(c)(3), this Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. The Board reviews the ALJ's conclusions of law *de novo*. *Metheany v. Roadway Package Systems, Inc.*, ARB No. 00-063, ALJ No. 2000-STA-11, slip op. at 5 (ARB Sept. 30, 2002); *Madonia v. Dominick's Finer Food, Inc.*, ARB No. 00-003, ALJ No. 98-STA-2, slip op. at 4-5. (ARB July 26, 2002); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 2 (ARB June 28, 2002); *Tucker v. Connecticut Winpump Co.*, ARB No. 02-005, ALJ No. 2001-STA-53, slip op. at 2-3 (ARB Mar. 15, 2002).

The ALJ's refusal to consider Complainant's new theories of liability after trial is consistent with applicable law. *See Douglas v. Owens*, 50 F.3d 1226, 1235-37 (3d Cir. 1995)(introduction of evidence without objection on one theory of liability did not show trial by consent or fair notice of new theory of recovery); *Carlisle Equipment Co. v. U.S. Secretary of Labor*, 24 F.3d 790, 794-95 (6th Cir. 1994)(due process violation where introduction of evidence did not fairly serve notice that new safety violation was entering case); *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357-59 (6th Cir. 1992)(STAA defendant deprived of due process when Secretary's decision based on theory that was not included in notice to carrier or tried by implied consent of parties).

Complainant would have had ample opportunity to advance his additional theories if he had amended his pleadings prior to the hearing below. 29 C.F.R. § 1978.106(a) and 29 C.F.R. § 18.5(e) (2002). The ALJ held that Kelley failed to do so at his peril. R.D. & O. at 4. We decline to provide Complainant an unwarranted second bite at the apple by remanding his case to the ALJ for a hearing on his new theories, as requested in his brief to this Board.

We also agree with the ALJ that Complainant's employment was not terminated for his protected activity of October 31, 1998. R.D. & O. at 9-10.

We therefore adopt and attach the ALJ's R.D. & O. *See, e.g., Forrest v. Transwood Logistics, Inc.*, ARB No. 01-090, ALJ No. 01-STA-43, slip op. at 3 (ARB Jan. 25, 2002); *Mitchell v. Link Trucking, Inc.*, ARB No. 01-059, ALJ No. 00-STA-39, slip op. at 2 (ARB Sept. 28, 2001). *See also Ondine Shipping Corp. v. Cataldo*, 24 F.3d 353, 355 (1st Cir. 1994) ("When a trial court produces a lucid, well-reasoned opinion that reaches an appropriate result, we do not believe that a reviewing court should write at length merely to put matters in its own words."). Accordingly, Kelley's complaint is **DISMISSED**.

**SO ORDERED.**

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

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

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