



In the Matter of:

DALE A. BECKER,

ARB CASE NO. 01-032

COMPLAINANT,

ALJ CASE NO. 00-STA-4

v.

DATE: February 27, 2003

WEST SIDE TRANSPORT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

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

For the Respondent:

Chris J. Scheldrup, Esq., Ronald D. Fadness, Esq., *Moyer & Bergman P.L.C., Cedar Rapids, Iowa*

FINAL DECISION AND ORDER

This case arises under the employee protection ("whistleblower") provision of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C. ' 31105 (1994). Complainant Dale A. Becker filed a complaint alleging that Respondent West Side Transport, Inc. (West Side) retaliated against him for engaging in activities protected by the STAA. Following a hearing on the merits, the ALJ held that West Side did not violate the STAA and recommended dismissal of the case. Becker has appealed the ALJ=s recommended order to the Board.

The record supports the ALJ's conclusions that Becker quit his position with West Side, that West Side treated Becker as having quit based on Becker's statements and related conduct, not his protected activity, and that West Side did not violate the STAA by refusing to rehire Becker. The record also indicates that West Side did not violate the STAA by providing a negative comment about Becker's work record to an employment history-reporting bureau.

BACKGROUND

Becker was hired by West Side, a commercial motor carrier based in Cedar Rapids, Iowa, on August 3, 1998. Becker completed a number of long-distance trips during the months he was employed by West Side, and during his employment he made a number of complaints to management, including comments regarding West Side's methods of trip scheduling and planning. He testified as to several instances in which he drove for West Side while fatigued:

- Between September 23 and 25, 1998, Becker drove a route from Indiana to Virginia that included three separate stops. Toward the end of that route he was assigned an additional load but complained that he was too tired to complete the assignment. Despite his fatigue Becker took the assignment when the dispatcher informed him that he was hauling hurricane relief supplies.
- At 9:30 a.m. on October 13, 1998, Becker arrived in Lufkin, Texas to pick up a load. He did not commence driving that load until 1:30 a.m. on October 14, 1998. Becker testified that the long wait affected his sleep pattern, resulting in his driving while fatigued.
- Between November 4 and 5, 1998, Becker drove through Texas, Arkansas, and Missouri. He testified that during that period he drove while fatigued because he felt pressured to complete his assignments.
- Between November 14 and 16, 1998, he drove between Iowa and Pennsylvania. At one point he had to wait for a load that was not ready, which resulted in his driving despite feeling fatigued.

On November 19, 1998, Becker was in Pennsylvania when he contacted Ted Leslie, his dispatcher, who testified that Becker "told me he's had it. I was f'ing nuts, that he was going to, he wanted to come in and quit, run him back to C[edar] R[apids]." Transcript Volume Two (2T) 37. Brian Cruise, West Side's Operations Manager, testified that Becker told him "I had enough of this shit. I've got an app in at GSTC,¹ you route me in so I can turn my truck in." Transcript Volume One (T.) 234. Cruise gave Leslie instructions to "route Dale in that he was quitting." 2T 37. Leslie proceeded to dispatch Becker to a load that was being routed back to Cedar Rapids. 2T 38.

Becker returned to Cedar Rapids on November 20, 1998. He spoke to Leslie and met with Cruise and Terry Golson. Cruise testified that their meeting was "basically what he was upset about and why he was quitting." T. 229. Cruise testified that he told Becker "maybe your resigning is for the best. Maybe, you know, maybe this isn't the right business for you." T. 230. Becker replied: "[w]e'll see what Mr. and Mrs. Vogt think about that" and proceeded to walk out of the meeting. T. 230.

¹ GSTC is a trucking company based in Walford, Iowa.

That same day Becker met with Andie Vogt, West Side's Vice-President of Human Resources. Following the meeting Vogt drafted a letter to Becker dated November 20, 1998, (the Vogt letter) that stated: "Many times when drivers quit West Side they don't give us the opportunity for an exit interview; although I am sorry you decided to take that action, I appreciate your taking the time to discuss your decision and give us your comments." Joint Exhibit (JX) 5. Becker then left West Side's premises. Leslie testified that no actions were taken to terminate Becker's employment. 2T 42.

On November 21, 1998, Becker drafted and submitted a letter addressed to West Side management recounting various complaints about West Side's operations. The letter describes situations during which his driving ability was impaired.² The letter also references his meeting with Cruise and Golson. See JX 4 ("I walked out and told [Cruise] I would talk to the owner of the company . . . I suggest you find a way to stop Drivers from walking out, as we all know the expense of hiring new ones.") The letter does not recount the events surrounding his request to be routed back to Cedar Rapids on November 19, 1998.

On November 23, 1998, Becker called Leslie. Leslie told him that his truck had been given to another driver, and he needed to contact another individual to collect his belongings. T. 115-16. Becker then contacted Tony Rowe requesting reinstatement. On November 24, 1998, Becker again called Rowe who informed him that management had decided not to rehire him. T. 117, Respondent's Brief at 6.

On November 27, 1998, West Side forwarded information about Becker's work performance to DAC Services, a company that maintains employment histories of commercial drivers. This information is contained in a document entitled "Employment History." Respondent's Exhibit F. In the category "Reason for Leaving," the report states "Resigned/Quit (or Driver Terminated Lease)." In the category "Work Record," the report contains the words "Excessive Complaints." *Id.*

PROCEDURAL HISTORY AND THE ALJ'S DECISION

Becker filed his complaint with OSHA on May 18, 1999. OSHA concluded that West Side did not violate the STAA. Becker appealed OSHA's determination to an Administrative Law Judge (ALJ), and a hearing was conducted on March 28 and 29, 2000.

² See JX 4 ("I have made a lot of Complaints the last 6 weeks on the Road . . . I have complained that we are not given enough time to Drive and Relax on our trips . . . as I only had a couple of hours sleep that nite waiting for load, I had a terrible time fighting to stay awake . . . By this time of (day ?) I could hardly stay awake, I was very tired. I was ready to take a nap as soon as the truck was empty . . . I headed down the road very tired . . . I could have had a nap in Mt. Pleasant and something to eat and not risk my life and equipment driving half asleep to Greenville, TX.")

The ALJ issued a Recommended Decision and Order (R. D. & O.) on December 28, 2000. The ALJ held that Becker's testimony during the hearing was "inconsistent and evasive," R. D. & O. at 25, and he was "unable to credit his testimony on any of the key issues." R. D. & O. at 15. On the other hand, he found the testimony of West Side's witnesses to be reliable. In his R. D. & O., the ALJ found that Becker engaged in STAA-protected activity when he complained to management that its trip scheduling and planning practices caused him to be tired or fatigued. R. D. & O. at 28. The ALJ determined that West Side did not retaliate against Becker because he voluntarily quit his employment. R. D. & O. at 28. However, the ALJ also found that with the exception of his initial refusal to drive the hurricane relief supplies because he was fatigued, Becker had not advised West Side at the time that he was driving that he was fatigued. R. D. & O. at 5-7. The ALJ also held that West Side articulated a legitimate non-discriminatory reason for refusing to rehire him. R. D. & O. at 29.

ISSUES BEFORE THE BOARD

- (1) Did Becker engage in protected activity?
- (2) Did the ALJ err in ruling that Becker quit his employment with West Side?
- (3) Did the ALJ err in ruling that West Side did not violate the STAA by refusing to rehire Becker?
- (4) Did West Side violate the STAA by supplying negative information about Becker to an employment history-reporting service?

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board ("ARB" or "Board") has jurisdiction to decide this matter by authority of 49 U.S.C. § 31105(b)(2)(C)(1994) and 29 C.F.R. § 1978.109(c)(2002). *See also* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C. § 557(b) (1994). Therefore, the Board reviews the ALJ's conclusions of law *de novo*. *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991). However, when reviewing STAA cases, the ARB is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In addition, we accord special weight to an ALJ's demeanor-based credibility determinations. *See Phillips v. Stanley Smith Security, Inc.*, ARB No. 98-020, ALJ No. 1996-ERA-30 (ARB Jan. 31, 2001), *citing Kopack v. NLRB*, 668 F.2d 946, 953 (7th Cir. 1982) ("One must attribute significant weight to an ALJ's findings based on demeanor because neither the Board nor the reviewing court has the opportunity similarly to observe the testifying witnesses.").

Requirements of the STAA

The STAA provides in pertinent part:

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

(A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding

49 U.S.C. § 31105(a)(1)(A) (1994).

To prevail under the STAA, the complainant must prove that he engaged in protected activity, that the employer was aware of the protected activity, that the employer discharged, disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and that there was a causal connection between the protected activity and the adverse employment action. 49 U.S.C. § 31105 (1994); *See, e.g., BSP Trans, Inc.*, 160 F.3d at 46; *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 1133, 1138; *Metheany v. Roadway Package Systems, Inc.*, ARB No. 00-063, ALJ No. 2000-STA-11, slip op. at 7 (ARB Sept. 30, 2002).

DISCUSSION

1. The ALJ's Ruling That Becker Engaged in Protected Activity is Supported by Substantial Evidence.

The Board finds substantial evidence to support the ALJ's ruling that Becker engaged in protected activity. *See R. D. & O.* at 28. Becker's September 1998 complaint to the dispatcher that he was fatigued and therefore could not drive was protected by the STAA. *R. D. & O.* at 5. Moreover, Becker's letter to management commenting on its procedures that could cause drivers to drive while fatigued may also constitute protected activity.

2. The ALJ's Ruling That Becker Quit His Employment Is Supported By Substantial Evidence.

Becker contends that West Side violated the STAA by discharging him in retaliation for his protected activity. West Side argues that it took no adverse employment action against Becker with respect to his employment status because Becker voluntarily quit his position. We conclude that the ALJ's determination that Becker voluntarily quit his employment at West Side and was not discharged is supported by substantial evidence. The ALJ's determination that West Side legitimately treated Becker as having quit because of his statements that he was quitting and his conforming conduct also is supported by substantial evidence.

The record establishes that Becker told two West Side managers that he was quitting. Leslie testified that Becker "told me he's had it. I was f'ing nuts, that he was going to, he wanted to come in and quit, run him back to CR." 2T 37. Cruise testified that Becker told him "I had enough of this shit. I've got an app in at GSTC, you route me in so I can turn my truck in." T. 234.

West Side fulfilled Becker's November 19, 1998 request to return to Cedar Rapids by altering his assignment and dispatching him under a Cedar Rapids-bound load. Upon his return, Becker met with company officials who interpreted his words and actions as indicating he was quitting. This understanding is most vividly memorialized in the Vogt letter.

The record also supports the ALJ's finding that Becker quit and subsequently attempted to alter his logbook to portray his resignation as a discharge. The ALJ asked Becker whether the date next to which he wrote the words "End Employment" in his final entry of the logbook was November 20, 1998 or November 26, 1998. Becker testified that he could not tell "whether it was a six or a zero" and that the entry was "eleven something '98, end employment." T. 191. Despite his inability to decipher his own writing he contended that he wrote the words "End Employment" the week after he received the Vogt letter in the mail. T 191-93. The ALJ reviewed the logbook and compared the way Becker wrote the "20" in the date next to "End Employment" to the other dates that included the number "20." The ALJ concluded that someone changed the date next to "End Employment" to make the "0" in the "20" look like a "6" in order to support Becker's contention that he did not write "End Employment" in his logbook until after he received the Vogt letter regarding his decision to quit. R. D. & O. at 13.³

Becker did not testify that he was ever told that he was discharged, nor did he indicate why he considered his request to be routed back to Cedar Rapids to be anything other than a quit. The ALJ correctly noted that:

The fact that Mr. Becker failed to raise or discuss his status after having been rerouted in pursuant to his declaration of "quit,"

³ The ALJ also noted that Becker's failure to apply for unemployment insurance payments might indicate that he quit, rather than that he was discharged. R. D. & O. at 8. The ALJ did not rely on this fact, however, in finding that Becker quit his job.

may not be projected upon the Respondent as its failure, when at all times it acted consistently in the actions of its officials that they considered him to have quit his employment at West Side.

R. D. & O. at 29. Thus, the record supports the ALJ's findings that Becker did quit and that West Side understood Becker as having quit (because of Becker's statements and conforming conduct) and acted based on that understanding, not based on Becker's protected activity.

3. The ALJ's Determination That West Side's Refusal To Rehire Becker Did Not Violate the STAA Is Supported By Substantial Evidence.

The employee protection provision of the STAA does not require an employer to reinstate an employee who engages in STAA-protected activity, quits his employment and subsequently changes his mind. Moreover, an employer is not required to rehire an employee when that employer is dissatisfied with the employee's previous work record. *See, e.g., Gibson v. Arizona Public Service Co.*, 90-ERA-29, 46 and 53 (Sec'y Sept. 18, 1995). In *Gibson* a supervisor who had knowledge of a former employee's protected activity did not select that person for rehire. The Secretary ruled that respondent was justified in its refusal to rehire the complainant because the supervisor took into account the complainant's prior performance as an unproductive and uncooperative employee.

Substantial evidence in the record supports the ALJ's determination that Becker's conduct toward West Side employees and managers constituted a legitimate, nondiscriminatory reason for refusing to rehire Becker:

Mr. Becker was a relatively short term employee at West Side. Basically he contested the system that management used to run its operation from the outset of his employment there. His letter of November 21st recounts that fact. In reply, he simply has failed to meet his burden by a preponderance of the evidence. It is my conclusion . . . that Mr. Becker offered insufficient credible evidence to the accounts offered by Mr. Leslie and Mr. Cruise about this conduct, and by so doing, he basically set himself up for the result of his quit. He did so voluntarily, and is saddled with the result.

R. D. & O. at 29-30.

The record indicates that Becker had conflicts with a number of dispatchers, 2T 19; did not conduct himself professionally, T. 249; was verbally abusive toward fleet managers and safety personnel, T. 249; would not pull his truck over and stop to sleep when fatigued, T. 61; did not call for relief when fatigued, T. 61; knowingly violated Department of Transportation regulations by falsifying logs, 2T 89; and violated company rules by directly contacting a West Side customer, T. 175.

Becker bears the burden of showing that West Side's reason for refusing to rehire him

was pretext for discrimination based on his protected activity. He has failed to do so.

4. Becker Has Not Proven by a Preponderance of the Evidence That, Because of His Protected Activity, West Side Informed DAC Services That Becker Made “Excessive Complaints.”

DAC Services is a company that maintains employment histories of commercial drivers for over 2500 truck lines and private carriers in the United States. West Side informed DAC Services that Becker had a work record of “excessive complaints.” Respondent’s Exhibit F. Communication of an adverse recommendation in retaliation for protected activity is a violation of the STAA. *See, e.g., Earwood v. Dart Container Corp.*, 93-STA-16 (Sec’y Dec. 7, 1994); *Leideigh v. Freightway Corp.*, 88-STA-13 (Sec’y June 10, 1991). Becker argues before the Board that West Side violated the STAA by providing negative information about his job performance to DAC Services.

Becker suggests that *Earwood* and *Leideigh* compel a determination in his favor. He is mistaken, as the facts here differ in significant respects from those cases. In *Earwood* the Respondent company’s office manager reported to a prospective employer that the former employee had taken the Respondent to court, specifically referencing the fact that Earwood had filed a STAA complaint. Similarly, in *Leideigh*, the employer referenced complaints to “other government agencies,” implicating Leideigh’s STAA complaint. Here, there is no evidence that the words “excessive complaints” specifically referenced STAA-protected activity or would be understood (by those viewing the report) as indicating STAA-protected activity. Further, in *Earwood*, the office manager acknowledged that he made the report because he was angry about Earwood’s protected activity, and in *Leideigh* the employer acknowledged it would not rehire Leideigh because of his complaints to government agencies (including his STAA complaint). Becker has failed to show any such animus generated by his protected activity in this case.

The record indicates both that Becker complained a great deal and that most of the complaints Becker made to management were not STAA-related. Leslie testified that “complaining was a continuing on thing with Dale.” 2T 28, and that he had conflicts with a number of West Side’s dispatchers. 2T 19. Cruise testified that Becker was always “second guessing” decisions made by the Operations Department, T. 218, and that Becker sent a message to dispatch stating that West Side was not a “very smart operation.” T. 226. Becker also expressed disdain toward driving certain routes. 2T 28. Apart from his fatigue concerns, he was dissatisfied with the amount of time he had to wait between arriving at a destination and departing after his truck had been loaded, contending on at least one occasion that he should not be required to make a morning delivery to a location that was open during the afternoon. T. 220-221, 226. He also complained that West Side should change its policies on scheduling trips to include more pay for the loading phase of his assignments. R. D. & O. at 26, fn. 10.

Becker bears the burden of establishing by a preponderance of the evidence that West Side provided the information to DAC in retaliation for his STAA-related activity. He has failed to do so.

CONCLUSION

The record evidence supports the ALJ's findings of fact, and his legal conclusions are fully supported by the applicable law. Accordingly, the R. D. & O. is **AFFIRMED** and Becker's case is **DISMISSED**.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge