



In the Matter of:

THOMAS P. McDEDE,

ARB CASE NO. 03-107

COMPLAINANT,

ALJ CASE NO. 03-STA-12

v.

DATE: February 27, 2004

OLD DOMINION FREIGHT LINE, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:¹

For the Complainant:

Raul H. Loya, Esq., *Loya & Associates, P.C., Dallas, Texas*

For the Respondent:

Sidney L. Murphy, Esq., *Law Offices of Joel J. Steed, Dallas, Texas*

FINAL DECISION AND ORDER OF DISMISSAL

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C.A. § 31105 (West 1997) and implementing regulations at 29 C.F.R. Part 1978 (2003). The Complainant truck driver alleged that his March 18, 2002 discharge violated 49 U.S.C.A. § 31105(a)(1)(A) (retaliation for filing a complaint related to a violation of a commercial motor vehicle safety regulation) and 49 U.S.C.A. § 31105(a)(1)(B) (retaliation for refusing to operate a vehicle because the operation violates a regulation of the United States related to commercial motor vehicle safety or health or because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition).

¹ Counsel for the parties informed the Administrative Review Board that they would not file further briefs. However, they have written separate letters to the Board regarding the Complainant's action against the Respondent in the Texas state courts.

The Complainant asserted that the Respondent required its drivers to violate the Department of Transportation's maximum driving time regulations at 49 C.F.R. § 395.3 (2002) and to doctor their transportation log books to conceal these regulatory violations. He alleged that he was fired for complaining to the Respondent that he would no longer violate these requirements and that his delay in completing his round trip run from Dallas to San Antonio and back on March 14-16, 2002, was in conformance with the STAA refusal to drive provisions; therefore, the Respondent's justification that his firing was predicated on his late delivery of freight on that run was pretextual.

A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) dismissing the complaint as untimely under 49 U.S.C.A. § 31105(b) (complaint to be filed with Secretary of Labor not later than 180 days after alleged violation occurred). The ALJ found that the July 11, 2002 meeting between the Complainant, his attorney, Raul H. Loya (also representing Complainant in this proceeding), and John E. Matias, an employee of Engineering Safety Consultants, Richardson, Texas, did not constitute a complaint filing because Matias was not an employee of the Department of Labor's Occupational Safety and Health Administration (OSHA), and that Loya's September 18, 2002 complaint letter to OSHA on the Complainant's behalf was out of time.² R. D. & O. at 41-44. The ALJ rejected the Complainant's arguments that his complaint should be equitably tolled because he timely filed his complaint in the Texas state courts and because the Respondent's alleged discrimination was in the nature of a continuing violation. *Id.* at 44-54.³

The ALJ further held that the Complainant's discharge was not the result of discriminatory treatment under the STAA, assuming arguendo that his complaint was timely. The ALJ first found that while the Complainant established that he had engaged in protected activity by filing an internal complaint, he failed to establish that he engaged in any other protected activity by refusing to drive. R. D. & O. at 63-65. The ALJ then concluded that the Complainant had not met his burden of proving that his discharge was motivated by his protected activity. *Id.* at 68.

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).⁴ Pursuant to 29 C.F.R. § 1978.109(c)(1),

² Loya's September 18, 2002 complaint letter to OSHA incorrectly stated that the date of the Complainant's alleged retaliatory discharge was March 25, 2002, rather than the correct date of March 18, 2002.

³ See *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105-115 (2002).

⁴ This regulation provides, "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

the ARB is required to issue “a final decision and order based on the record and the decision and order of the administrative law judge.”

When reviewing STAA cases, the Administrative Review Board is bound by the ALJ’s factual findings if they 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); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). 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 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.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ’s conclusions of law de novo. See *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Lyninger*, slip op. at 2 (ARB Feb. 19, 2004); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

In addition, the Board accords special weight to an ALJ’s demeanor-based credibility determinations. *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 2000-STA-48, and cases cited, slip op. at 2 (ARB July 31, 2003). The ALJ discussed the Complainant’s lack of credibility at great length. R. D. & O. at 54-59.

We have reviewed the record and find that the ALJ’s factual findings are supported by substantial evidence on the record as a whole and are therefore conclusive. 29 C.F.R. § 1978.109(c)(3). The record also supports the ALJ’s thorough, well-reasoned legal conclusions. Accordingly, we adopt the findings of fact and conclusions of law in the attached R. D. & O. dismissing the Complainant’s claim. See e.g., slip op. at 2; *Hardy v. Mail Contractors of America*, ARB No. 03-007, ALJ No. 02-STA-22, slip op. at 4 (ARB Jan. 30, 2004).

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge