



**In the Matter of:**

**MICHAEL NOETH,**

**ARB CASE NO. 07-042**

**COMPLAINANT,**

**ALJ CASE NO. 2006-STA-034**

**v.**

**DATE: March 19, 2009**

**INDIANA WESTERN EXPRESS, INC.  
d/b/a IWX MOTOR FREIGHT,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**James H. Arneson, Esq., Springfield, Missouri**

***For the Respondent:***

**Kevin L. Austin, Esq., Keck & Austin, L.L.C., Springfield, Missouri**

**FINAL DECISION AND ORDER**

Michael Noeth filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that when his former employer, Indiana Western Express, Inc. d/b/a/ IWX Motor Freight (IWX), terminated his employment, it violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified.<sup>1</sup> The STAA

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<sup>1</sup> 49 U.S.C.A. § 31105 (West 2008). The STAA has been amended since Noeth filed his complaint. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary to decide whether the

protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. After a hearing, a Labor Department Administrative Law Judge (ALJ) recommended that Noeth's complaint be dismissed. We affirm.

## BACKGROUND

IWX transports cargo by truck. It hired Noeth in November 2004 to drive its tractor-trailer vehicles. On January 20, 2006, Noeth was transporting cargo from Shepherdsville, Kentucky to Springfield, Missouri when he stopped to have his vehicle weighed. He discovered that the weight on the rear axle of the trailer portion of the vehicle was 34,720 pounds.<sup>2</sup> Noeth knew that the trailer load he was transporting was destined for California and that a rear axle weight of 34,720 pounds exceeded the weight that was allowed in that state.<sup>3</sup>

Noeth called Cathy Carl, an IWX dispatcher, and told her that the weight on the rear axle violated California law.<sup>4</sup> Carl told Noeth to re-position the rear axle farther away from the front of the vehicle, which would theoretically reduce the weight upon the rear axle.<sup>5</sup> Noeth did not make this adjustment. He then reported his concerns to Leslie Chastain, IWX's Safety Officer.<sup>6</sup> At midnight on January 21, 2006, Noeth delivered the vehicle to Springfield, Missouri. Other drivers drove the vehicle to its destination in California.<sup>7</sup>

Then, in a January 23, 2006 letter to Noeth, Lewis Stevens, IWX's Vice President, stated that "[w]e at IWX have decided to terminate your employment effective January 23, 2006. The reason for termination is 'services no longer required.'"<sup>8</sup> According to IWX, the company was engaged in a process of downsizing, and Noeth was one of approximately 80 drivers discharged pursuant to a reduction in the company's workforce.<sup>9</sup>

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amendments are applicable to this complaint, because they are not relevant to the issues presented by the case and thus, they would not affect our decision.

<sup>2</sup> Transcript (Tr.) at 49-50, 54-55; Complainant's Exhibit (CX) 5 at 112.

<sup>3</sup> Tr. at 20-21, 55, 155-56.

<sup>4</sup> *Id.* at 145-46.

<sup>5</sup> *Id.* at 55, 156-57.

<sup>6</sup> *Id.* at 61-62, 182.

<sup>7</sup> *Id.* at 21-22, 61.

<sup>8</sup> Respondent's Exhibit (RX) 122.

<sup>9</sup> Tr. at 175, 208; RX 121.

Noeth filed his STAA complaint on February 27, 2006. He alleged that IWX discharged him from employment for reporting “a violation of California statutes.” OSHA investigated the complaint, concluded that IWX had not violated the STAA, and dismissed the complaint. Noeth filed objections to OSHA’s findings and requested a hearing before an ALJ. After a hearing on October 5, 2006, the ALJ issued his recommendation that Noeth’s complaint be dismissed.<sup>10</sup> This matter is now before us pursuant to the STAA’s automatic review provisions.<sup>11</sup>

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.<sup>12</sup> Under the STAA, the ARB is bound by the ALJ’s findings of fact if substantial evidence on the record considered as a whole supports those findings.<sup>13</sup> Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>14</sup> Substantial evidence does not, however, require a degree of proof “that would foreclose the possibility of an alternate conclusion.”<sup>15</sup> Also, whether substantial evidence supports an ALJ’s decision “is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion.”<sup>16</sup> We review the ALJ’s conclusions of law de novo.<sup>17</sup>

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<sup>10</sup> *Noeth v. Indiana Western Express, Inc. d/b/a/ IWX Motor Freight*, 2006-STA-034 (ALJ Jan. 16, 2007).

<sup>11</sup> 29 C.F.R. § 1978.109(a) (2007).

<sup>12</sup> Secretary’s Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

<sup>13</sup> 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

<sup>14</sup> *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

<sup>15</sup> *BSP Trans., Inc. v. U.S. Dep’t of Labor*, 160 F.3d 38, 45 (1st Cir. 1998).

<sup>16</sup> *Dalton v. U.S. Dep’t of Labor*, 58 Fed. App. 442, 445, 2003 WL 356780 (10th Cir. Feb. 19, 1993), citing *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989).

<sup>17</sup> *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029, slip op. at 2 (ARB Oct. 31, 2003).

## DISCUSSION

### A. The Legal Standard

The STAA provides that an employer may not “discharge,” “discipline,” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order;” who “refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;” or who “refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.”<sup>18</sup>

To prevail on his STAA claim, Noeth must prove by a preponderance of the evidence that he engaged in protected activity, that IWX was aware of the protected activity and took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.<sup>19</sup>

If IWX presented evidence of a nondiscriminatory reason for discharging him, Noeth could prevail if he proved, by a preponderance of the evidence, that the reason IWX proffered is a pretext for discrimination.<sup>20</sup> In proving that an employer’s asserted reason for adverse action is a pretext, the employee must prove not only that the respondent’s asserted reason is false, but also that discrimination was the true reason for the adverse action. Noeth bore the ultimate burden of persuading the ALJ that IWX discriminated against him.<sup>21</sup>

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<sup>18</sup> 49 U.S.C.A. § 31105(a)(1).

<sup>19</sup> See *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004).

<sup>20</sup> See *Calhoun v. United Parcel Serv*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 5 (ARB Nov. 27, 2002) citing *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

<sup>21</sup> *Calhoun*, slip op. at 5, citing *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

## **B. The ALJ's Decision**

The ALJ held that Noeth engaged in protected activity when he complained to IWX that the load he was transporting on January 20, 2006, could not be legally driven into California. The ALJ also found that IWX subjected Noeth to an adverse employment action by discharging him from employment. In addition, he found that the close proximity in time between Noeth's protected activity and his termination created a presumption that IWX retaliated.<sup>22</sup>

IWX rebutted this presumption by presenting evidence that it discharged Noeth as part of a reduction in force. Testimony indicated that Noeth had been identified for discharge prior to January 20, 2006, because of his driving record, refusal to accept directions from his supervisors, and difficulty working with IWX staff.<sup>23</sup> But since Noeth failed to prove that IWX's reasons for discharging him were a pretext, the ALJ concluded that Noeth did not prove that IWX retaliated against him in violation of the STAA.<sup>24</sup>

## **C. Noeth Failed to Prove that IWX Violated the STAA.**

The record supports the ALJ's conclusion that Noeth engaged in protected activity under the STAA's section 31105(a)(1)(A) when he complained to IWX that the weight on the rear axle of the vehicle he was driving on January 20, 2006, would have violated California law.<sup>25</sup> In turn, this would also have violated a federal commercial motor vehicle safety regulation.<sup>26</sup> The record also indicates that IWX subjected Noeth to an adverse action by discharging him from employment.

Noeth presented no direct evidence that IWX discharged him because of his protected activity. Even so, as we explained, he can succeed if he proved by a preponderance of evidence that the reasons IWX proffered for his discharge were not the

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<sup>22</sup> R. D. & O. at 7-8.

<sup>23</sup> R. D. & O. at 13.

<sup>24</sup> At page 14 of the R. D & O., the ALJ states that "[t]he Complainant loses this case because there were no legitimate, non-discriminatory reasons for the discharge." The inclusion of the word "no" in this sentence is a typographical error.

<sup>25</sup> Tr. at 61-62 (Noeth testimony), 146 (Carl testimony).

<sup>26</sup> See 49 C.F.R. § 392.2 ("Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated.").

true reasons for the adverse action, but instead were pretexts. The ALJ found that Noeth did not prove pretext.<sup>27</sup>

Substantial evidence supports this finding. Rebecca Dietrich, an IWX driver-manager, testified that in December 2005 V. P. Stevens asked her to identify drivers that should be discharged during the reduction in force. She also testified that Steven Coulter, President of IWX, instructed her to compile a list of those drivers.<sup>28</sup> She indicated that prior to January 20, 2006, she placed Noeth on that list because he was “troublesome” and “argumentative.”<sup>29</sup> Dispatcher Cathy Carl also testified that she found it difficult to supervise Noeth.<sup>30</sup>

Noeth’s attorney did not cross-examine Dietrich or Carl about the reduction in force or IWX’s decision to place Noeth on the list of drivers to be discharged or otherwise address the issue of pretext. Thus, at the conclusion of the hearing, the ALJ presented Noeth’s attorney with the option of addressing the issue of pretext in a post hearing brief.<sup>31</sup> Noeth’s attorney filed a document captioned “Proposed Findings of Fact and Conclusions of Law” (Proposed Findings) in which he appears to argue that inconsistencies in some of the documents IWX presented prove that the company violated the STAA by discharging him. He states that IWX engaged in a “campaign of misinformation” regarding the reasons for his termination. In support of this statement, Noeth refers to a fax that IWX sent to a potential employer indicating that he “quit,” and a termination report IWX prepared that he claims contains “no indication of a reduction in work force.”<sup>32</sup> The ALJ wrote that though “shifting explanations” for discharging Noeth may be “suspicious” and some evidence of pretext, Noeth did not sufficiently develop this argument to convince him that Noeth had proved pretext by a preponderance of evidence.<sup>33</sup> We agree.

Noeth’s Proposed Findings also refer to two compliance reviews which, he argues, indicate that IWX did not reduce its workforce between December 31, 2005, and

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<sup>27</sup> R. D. & O. at 14.

<sup>28</sup> Tr. at 176, 208.

<sup>29</sup> Tr. at 176.

<sup>30</sup> *Id.* at 150.

<sup>31</sup> Tr. at 257-258.

<sup>32</sup> Proposed Findings at 24. Noeth did not provide record citations in his Proposed Findings for these documents, but in his Brief in Opposition to Administrative Law Judge’s Order he identifies the fax as CX 115 and the termination report as RX 135.

<sup>33</sup> R. D. & O. at 13-14.

April 14, 2006.<sup>34</sup> Noeth did not identify which of his exhibits contained these compliance reviews. In his brief before us, he identifies two exhibits as compliance reviews, but only one contains information about the number of drivers at IWX.<sup>35</sup> It sheds no light on the number of drivers discharged pursuant to the reduction in force. Therefore, it does not support Noeth's argument that IWX's explanation that he was discharged as part of a reduction in force is a pretext for discriminating against him.

Thus, the record contains substantial evidence to support the ALJ's finding that IWX terminated Noeth as part of a necessary reduction in force, not for his protected activity. Therefore, we affirm the ALJ's recommendation and **DISMISS** the complaint.

**SO ORDERED.**

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

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

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<sup>34</sup> Proposed Findings at 25.

<sup>35</sup> Brief in Opposition to Administrative Law Judge's Order at 3, citing CX 704, 714.