U.S. Department of Labor

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

In the Matter of:

ALEXANDER KOROLEV, **ARB CASE NO. 00-006**

COMPLAINANT, **ALJ CASE NO. 98-STA-27**

v. **DATE: November 26, 2002**

ROCOR INTERNATIONAL, D/B/A ROCOR TRANSPORTATION COMPANIES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Respondent:
Thomas G. Ferguson, Jr., Esq., *Walker, Ferguson & Ferguson, Oklahoma City, Oklahoma*

FINAL DECISION AND ORDER

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act ("STAA" or "Act"), 49 U.S.C.A. § 31105 (West 1997). Alexander Korolev claims that his employer, Rocor International, discharged him for refusing to drive a commercial vehicle when to do so would have violated two federal motor carrier safety regulations. The Administrative Law Judge ("ALJ") recommended that Korolev's complaint be denied. Korolev opposes the ALJ's recommendation. Because we concur with the ALJ's well-reasoned recommended decision and order ("R.D. & O."), we adopt and attach it, briefly discussing the pertinent issues.

BACKGROUND

We summarize the ALJ's thorough recitation of the facts underlying this dispute. Rocor is a motor carrier engaged in interstate trucking. It employed Korolev as a commercial truck driver. On February 6, 1998, at 10 a.m. Korolev began to drive a load of meat from Dodge City, Kansas to Florida. He stopped for fuel in Oklahoma City at about midnight but, unable to find a place to park for the night, he continued to Rocor's

Oklahoma City truck terminal to have a safe and secure place to sleep. When he arrived at the terminal at 1:00 a.m. on February 7, his alertness and ability to drive were impaired due to fatigue.

Rocor's policy requires drivers to immediately pass through a fuel/inspection lane upon arriving at its terminals. When Korolev entered the Oklahoma City terminal he parked his vehicle and went to sleep rather than enter the fuel/inspection lane. The terminal's night supervisor, Allen Smith, noticing that Korolev's truck had not entered the fuel/inspection lane, approached the parked vehicle. Smith banged on Korolev's truck to wake him and told him to drive through the fuel/inspection lane. Korolev told Smith that he was too tired to move his truck and that he had exceeded the maximum driving time regulations. Korolev tried to sleep, but Smith again banged on the truck and insisted that Korolev drive to the fuel/inspection area. Korolev agreed to do this, but once Smith left, Korolev decided to drive his truck away from the terminal to find a place to sleep.

Smith saw Korolev leaving the terminal, ran from his office, and stood in the road as Korolev approached in the truck. Korolev stopped near Smith who again advised him about the fuel/inspection lane requirement. The confrontation escalated when Korolev "bumped" Smith with the truck. Korolev denies bumping Smith. Smith then went to the office and called Nick Cooke, the terminal manager and Smith's supervisor. He told Cooke what had just happened. Cooke told Smith to terminate Korolev's employment immediately. Smith approached Korolev, who by then had parked the truck in the fuel/inspection lane, and informed him he was fired. Soon thereafter Korolev began to drive the truck out of the terminal, and Smith again tried to stop him by standing in front of the truck. Smith claims Korolev bumped him again with the truck, and Korolev denies this too. Police were called, arrived, talked to Korolev, and left.

On Monday February 9, 1998, Korolev met with Cooke and Mr. Beamer, the president of Rocor. They gave him his formal notice of dismissal. This notice reads: "Refused to go through fuel island. When told he was terminated drove truck off lot. Had to be stopped. Police had to be called."

STANDARD OF REVIEW

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

When reviewing STAA cases the Administrative Review Board 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 Environmental Services, 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 Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1066 (5th Cir. 1991).

ISSUED PRESENTED

1. Whether Korolev's behavior in bumping Smith with the truck was indefensible under the circumstances.

2. Whether Rocor demonstrated by a preponderance of the evidence that it would have terminated Korolev even in the absence of the protected activity.

DISCUSSION

The relevant employee protection provision of STAA provides:

> (a) Prohibitions–
>
> (1) A person may not discharge an employee . . . 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;

49 U.S.C.A § 31105.

To prove that Rocor violated this section of the Act, Korolev must show by a preponderance of the evidence that he engaged in protected activity, that he was subjected to adverse employment action, and that there was a causal connection between the protected activity and the adverse action. *Clean Harbors*, 46 F.3d at 21*; see also Moon v. Transport Drivers, Inc.* 836 F.2d 226, 229 (6th Cir. 1987).

The ALJ found that Korolev engaged in protected activity when he refused to drive through the fuel/inspection lane because he was too fatigued and out of hours. R.D.& O. slip op. at 11. *See* 49 C.F.R. §§ 392.3 (2002) (motor carrier cannot require driver to operate commercial motor vehicle when impaired by fatigue), 395.3(a) (motor carrier shall not permit or require driver to drive more than 10 hours after 8 consecutive hours off duty or drive for any period after 15 on duty hours following 8 off duty hours). The ALJ also found, of course, that Korolev suffered an adverse employment action when Rocor terminated his employment. R.D.& O. slip op. at 8. Causation may be inferred by the immediate proximity of the events. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Because substantial evidence on the record considered as a whole supports these findings, they are conclusive. 29 C.F.R. § 1978.109 (c)(3). *See BSP Trans,* 160 F.3d 38; *Castle Coal,* 55 F.3d 41. We therefore concur with the ALJ that Korolev made a prima facie case of discrimination under the Act by demonstrating that Rocor terminated his employment for refusing to drive through the fuel/inspection lane at its Oklahoma City terminal. R.D.& O. slip op. at 11.

Korolev denies that he bumped Smith with the truck and characterizes the incident as a confrontation in a "hostile environment," created by Smith, from which he was trying to escape. Complainant's Brief in Opposition at 3, 6. However, substantial evidence supports the ALJ's finding that Korolev bumped Smith with the truck during a "violent and hostile confrontation." *See* Transcript ("TR") at 148-49, 211; *but see* TR at 97. He credited Smith's version of the incident over Korolev's. We find no compelling reason to overturn the ALJ's credibility determination. *Palazzolo v. PST Vans, Inc.,* 92-STA-25, slip op. at 5 (Sec'y Mar. 10, 1993). The ALJ determined that this incident was the basis for a legitimate, non-discriminatory reason to terminate Korolev. R.D.& O. slip op. at 12-13.

Korolev argues that Rocor should not be permitted to assert, as a legitimate reason for the firing, any hostile exchange he may have had with Smith. He urges us to find that Smith provoked him by unlawfully insisting that he drive through the fuel/inspection lane. He cites *Moravec v. HC & M Transportation, Inc.,* 90-STA-44 (Sec'y Jan. 6, 1992), which noted that case law is well settled that "[a]n employer may not provoke an employee to the point of committing an indiscretion and then seize on the incident as a legitimate rationale for discharge." *Id.* at 9, citing *Monteer v. Milky Way Transport Company, Inc.,* 90-STA-9, slip op. at 3 (Dep. Sec. Jan. 4, 1991).

We are not persuaded by Korolev's argument. The ALJ not only found that Korolev bumped Smith with the truck but also that he acted unreasonably under the circumstances. R.D. & O. slip op. at 12. Again, these findings are supported by substantial evidence and we are, therefore, bound. Furthermore, *Moravec* is not helpful to Korolev because it involved an employee challenging a supervisor to a fight, an "indiscretion," and not particularly egregious behavior compared to here, an assault with a truck. The Secretary has decided that the applicable standard, stemming from labor relations precedent, "requires balancing the right of the employer to maintain shop discipline and the 'heavily protected' statutory rights of employees." *Martin v. The Department of The Army,* No. 93-

SDW-1, slip op. at 3 (Sec'y July 13, 1995). Mere spontaneous or intemperate behavior associated with protected activity will not provide an employer with a legitimate reason to discipline his employee. But when the conduct is "indefensible under the circumstances," as here, it falls outside statutory protection and the employer may assert it as motivation for discipline. *Id.* The ALJ properly concluded that because Korolev had acted unreasonably in confronting and bumping Smith with the truck, Rocor was entitled to rely upon that conduct as a legitimate reason for firing Korolev.

Because substantial evidence supports the ALJ's finding of both an impermissible and a legitimate motive for terminating Korolev's employment, his dual motive analysis was warranted. *See Somerson v. Yellow Freight System, Inc.,* ARB No. 99-005, 036, ALJ No. 98-STA-9, 11 slip op. at 19 (ARB Feb. 18, 1999) and cases cited therein. "Under the dual motive analysis, when the complainant proves that retaliation was a motivating factor in the respondent's action, the burden shifts to the respondent to show that it would have taken the same action against the complainant even in the absence of protected activities." *Id.* and cases cited therein. The ALJ concluded that this complaint must be denied because Rocor would have terminated Korolev regardless of the protected activity. R.D. & O. slip op. at 14. We agree. The testimony of Cooke, the Rocor official who ordered Korolev's discharge, supports the finding that the bumping incident motivated Rocor to discharge Korolev, and it would have discharged Korolev absent his protected activity. *See* Transcript at 211 (Terminal Manager Cooke: "We absolutely do not put up with [hostile and violent behavior]."); 219 (Cooke: "I didn't terminate him because he refused to go through the safety lane…."); 224 (Cooke: The "determining factor" in firing Korolev was the hostile environment situation in which he put Smith.); 224-25 (Cooke: Some other punishment than termination would have been imposed on Korolev had the only incident been the refusal to go through the inspection lane.).

CONCLUSION

Substantial evidence on the record considered as a whole establishes that Korolev bumped Smith with the truck and that this was indefensible conduct. Therefore, Rocor provided a legitimate, nondiscriminatory reason to discharge Korolev. Because substantial evidence also establishes that Rocor would have discharged Korolev for the bumping, even

in the absence of his rightful refusal to drive to the fuel/inspection lane, the complaint is denied.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge