In the Matter of:

DAVID J. JOURNEAY, **ARB CASE NO. 01-046**

COMPLAINANT, **ALJ CASE NO. 2001-STA-3**

v. **DATE: June 25, 2001**

BARRY SMITH TRANSPORTATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C.A. §31105 (West 1997), which prohibits discrimination against employees because they have engaged in various activities protected under the statute, including a refusal to operate a motor vehicle in violation of a safety or health regulation.[2/] Specifically implicated in this case are the Department of Transportation's "Hours of Service" regulations, which provide, *inter alia*, that a commercial vehicle driver generally cannot be

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[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

[2/] The STAA states, in relevant part:

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

permitted or required to drive more than ten hours following eight consecutive hours off duty. 49 C.F.R. §395.3(a)(1) (2000).

The following facts are undisputed. Respondent Barry Smith Transportation is a trucking company located in Hennessey, Oklahoma. In early 1999, Respondent hired Complainant David Journeay as a truck driver. At that time, the company primarily transported construction materials or rock and paid its drivers on an hourly basis.

Beginning in the summer of 1999, the company ceased paying drivers on an hourly basis and instituted a commission system under which drivers were paid a percentage of the gross pay of each load. The company also expanded its business to include transporting pigs (referred to as "pig loads"). Unlike the other cargo hauled by the company, pigs were loaded in the late afternoon, sometimes after dark, and usually driven through the night by a team of drivers to Creede, Nebraska.

On the evening of October 11, 1999, Respondent's dispatcher foreman, Terry Castonuay, advised Journeay that he was trying to arrange a pig load for that evening. According to Journeay, he declined the assignment because he was already at the 10-hour driving limit for that day and Respondent was unable to pair him with a teammate who was not in a similar situation, *i.e.*, without available driving hours. Respondent, however, contends that this was a team assignment and that Journeay refused to participate even if his teammate had sufficient legal driving hours available to drive the first leg of the trip.[3/]

On October 18, 1999, Respondent terminated Journeay. The company stated several reasons for the termination, including Journeay's (1) tardiness to work; (2) failure to wash his truck for two weeks in a row, and (3) refusing to accept the pig load assignment. Journeay subsequently filed a complaint with the Labor Department's Occupational Safety and Health Administration ("OSHA")[4/] alleging that his termination was actually in retaliation for his refusal to violate the 10-hour driving limitation under 49 C.F.R. §395(a)(1). After investigating the matter, OSHA found no merit to the complaint. Journeay objected to that determination and the matter was referred to an Administrative Law Judge ("ALJ") for a hearing, pursuant to 29 C.F.R. §1978.105.

In a Recommended Decision and Order ("RD&O") dated February 6, 2001, the ALJ recommended that the complaint be dismissed, concluding that Journeay had failed to prove a

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[3/] Respondent's truck was equipped with a sleeper berth that would have allowed Journeay to rest while someone else drove. Journeay does not assert that there is anything improper in this arrangement as long as the other driver does not exceed the 10-hour driving limit.

[4/] OSHA is the agency within the Department charged with investigating complaints that an employer has violated the STAA's whistleblower protection provisions. 29 C.F.R. §1978.102(c) (2000).

prima facie case of discrimination.[5/] As his rationale for that recommendation, the ALJ noted that in establishing a *prima facie* case, Journeay would need to show two elements in order to prevail. First, he would need to show that Respondent "presented an illegal request by asking him either to drive the pig load alone, even though he was out of hours, or to ride on the team, as the resting driver, with another driver who was also out of hours." RD&O at 17-18. Second, if Journeay established that he was presented with an illegal request, he also would have to show that "had he agreed to the request, a violation would have occurred." RD&O at 21.

Based largely on Journeay's demeanor and less-than-candid responses to a number of questions, the ALJ found that Journeay failed to establish the first element. With regard to the second element, the ALJ stated:

> As the situation unfolded on October 11, 1999, a violation of the hours of operations regulations would have occurred that night only if Mr. Journeay and another driver agreed to drive on the team and they were both out of hours. Standing alone, Mr. Journeay's acceptance of Mr. Castonuay's assignment to the driving team on October 11, 1999 is not an infringement of the hours of operations regulations . . . . [Journeay] did not indicate that Mr. Castonuay, while knowing the other driver was out of hours, requested him to drive anyway . . . . [T]here is no evidence that the other driver, who was also out of hours, agreed to drive the pig load on October 11, 1999 so that if Mr. Journeay had acquiesced to Mr. Castonuay's request, a violation of the hours of operations would have occurred.

RD&O at 21 (emphasis in original). Therefore, the ALJ concluded that Journeay had not proven a case of unlawful discrimination under the STAA and recommended that the complaint be dismissed.

JURISDICTION

The decision of the ALJ is before the Board pursuant to the automatic review procedures under 29 C.F.R. §1978.109(c)(1).

[5/] We note that the ALJ focused his analysis on whether Journeay made out the elements of a *prima facie* case. However, once the case has been tried on the merits, the question of whether the complainant established a *prima facie* case is irrelevant. Instead, the question is simply whether the respondent intentionally discriminated against the complainant because he engaged in protected activity. *See Carroll v. Bechtel Power Corp.*, No. 91-ERA-46, slip op. at 11 (Sec'y Feb. 15, 1995). Although the ALJ mischaracterized the issue, the mistake is harmless since the ALJ found that Journeay failed to prove his case of unlawful discrimination.

STANDARD OF REVIEW

Under the STAA implementing regulations, the 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). The Board reviews the ALJ's conclusions of law *de novo*. *Johnson v. Roadway Express, Inc.*, ARB No. 99-011, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000) citing *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

Although 29 C.F.R. §1978.109 (c)(1) permitted Journeay to file a brief in opposition to the ALJ's recommended decision, he did not do so. Thus, Journeay has not identified any error in the ALJ's decision.

To prevail on a claim under §31105(a), the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity; that his or her employer was aware of the protected activity; that the employer discharged, disciplined or discriminated against him or her; and that there is a causal connection between the protected activity and the adverse action. *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc*., 836 F. 226, 228 (6th Cir. 1987). In our view, there is substantial evidence in the record to support the ALJ's determination that Respondent did not terminate Journeay for engaging in protected activity. Therefore, we adopt the ALJ's recommendation that this complaint be **DISMISSED.**

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member