In the Matter of:

MICHAEL LEACH, **ARB CASE NO. 02-089**

COMPLAINANT, **ALJ CASE NO. 02-STA-5**

v. **DATE: July 31, 2003**

BASIN WESTERN, INC., AND
PACIFIC INTERMOUNTAIN EXPRESS,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Respondent:
David A. Anderson, Esq., ***Parsons Behle & Latimer, Salt Lake City, Utah***

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), and the implementing regulations at 29 C.F.R. Part 1978 (2001). The STAA protects employees from retaliation for engaging in specific types of activities that are related to motor carrier vehicle safety. 49 U.S.C.A. § 31105(a)(1)(A), (B). On June 13, 2001, the Complainant Michael Leach filed a complaint alleging that the Respondents, Basin Western, Inc. (Basin) and Pacific Intermountain Express (PIE), retaliated against him for engaging in a protected work refusal. Specifically, Leach alleged that the Respondents suspended him from his work driving a freight truck for a one-week period and terminated his employment at the end of that period because he had refused to accept a dispatch to drive a load of fuel on May 15, 2001. Leach further alleged that he declined to accept the assignment because it would have violated the Federal Motor Carrier Safety Regulations (FMCS regulations) that limit a truck driver's service hours and prohibit driving by a fatigued operator. The Department of Labor Occupational Health and

Safety Administration investigated Leach's complaint and dismissed it as lacking merit on September 13, 2001. Leach requested a hearing before an Administrative Law Judge (ALJ), which was held on April 9, 2002. Following that hearing, at which Leach represented himself, the ALJ issued a Recommended Decision and Order (R. D. & O.) concluding that Leach had failed to establish a violation of the STAA employee protection provision.

Pursuant to 29 C.F.R. § 1978.109(a), (b), the ALJ forwarded the case to the Board for review. On July 8, 2002, the Board issued a Notice of Review and Briefing Schedule pursuant to Section 1978.109(c)(2), affording the parties an opportunity to file briefs in this matter. Basin filed a brief but neither Leach nor PIE did so. The Administrative Review Board has jurisdiction to decide this matter pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Based on review of the record and the ALJ's decision, we adopt the ALJ's recommendation to dismiss the complaint. The ALJ's decision provides a thorough discussion of the relevant evidence and conclusions that are consistent with pertinent legal authority. Accordingly, with the clarification and supplementation of the ALJ's analysis that follows, we incorporate the attached R. D. & O. herein.

STANDARD OF REVIEW

Under the STAA, the Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp. 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 Envtl. Servs. 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 Secretary's designee, acts with "all the powers [the Secretary] would have in making an initial decision. . . ." 5 U.S.C.A. § 557(b)(West 1996). *See also* 29 C.F.R. § 1978.109(c) (providing for issuance of a final decision and order by the Board). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

We begin with an examination of the ALJ's finding that Leach failed to establish that the Respondents terminated his employment.[1] The ALJ's finding that Leach advised Basin that he

[1] The ALJ did not resolve the question of whether PIE and Basin both qualify as employers for purposes of STAA coverage and, in view of our dismissal of this complaint, it is similarly unnecessary for us to render a determination on that issue. *See generally Cook v. Guardian*

would return to work following his suspension only if guaranteed a $42,000 annual salary or the position of terminal manager for Basin is fully supported by the record evidence. R. D. & O. at 15; *see* PX 1, 2, 4, 5; RX 11, 12, 13, 15, 17; Tr. 135-40 (Leach).[2] The ALJ properly concluded that those facts do not establish that Leach was discharged. R. D. & O. at 15. We add that the relevant evidence fails to establish that the Respondents either terminated Leach's employment outright or created intolerable working conditions giving rise to a constructive discharge. *See Williams v. Mason & Hanger Corp.,* ARB No. 98-030, ALJ Nos. 97-ERA-14, 97-ERA-18-22, slip. op. at 67 and cases there cited (ARB Nov. 13, 2002).

Relevant to Leach's claim that the one-week suspension that was imposed on May 21, 2001, violated the STAA, the evidence is essentially in agreement that the suspension arose from a confrontation between Leach and the Basin dispatcher Kehl on the morning of May 15, 2001. R. D. & O. at 7-9, 11-12; *see* PX 1, 3; RX 11, 18-3; Tr. 87-91, 118-25 (Leach); 148-50 (Kehl); 190-93 (Dean). Leach contended that he confronted Kehl and declined a dispatch to haul a fuel shipment to Pocatello, Idaho, because accepting it would have caused him to exceed the number of hours he was permitted to be on duty and/or to be driving a commercial vehicle under the FMCS regulation at 49 C.F.R. § 395.3, and because he was too tired to drive pursuant to the fatigue rule found at 49 C.F.R. § 392.3. R. D. & O. at 2; *see* Tr. 71-93, 111-13, 245-50 (Leach). Basin contended that the suspension decision was prompted by Leach's angry confrontation of Kehl on May 15, that Leach did not raise any safety concerns at that time, and that the decision was based solely on Leach's intemperate conduct. *See* R. D. & O. at 8, 15; RX 11, 14-1; Tr. 148-50 (Kehl), 190-93 (Dean). The ALJ thus properly focused his analysis on the question of whether Leach was engaged in protected activity when he confronted Kehl and angrily refused to accept the Pocatello assignment on the morning of May 15, 2001. R. D. & O. at 15.[3]

The STAA protects an employee's complaints about vehicle safety-related issues and, in certain circumstances, an employee's refusal to drive a commercial motor vehicle. 49 U.S.C.A. § 31105(a)(1)(A), (B); *see Clean Harbors Envtl. Servs.,* 146 F.3d at 19-21; *Young v. Schlumberger Oil Field Servs.,* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 3-8 (ARB Feb. 28, 2003). The STAA complaint clause protects activities ranging from the voicing of concerns to one's employer to the filing of formal complaints related to commercial motor vehicle safety. 49 U.S.C.A. § 31105(a)(1)(A); *see Young,* slip op. at 4-6. Under the complaint clause, it is necessary that the complainant at least be acting on a reasonable belief regarding the existence of a violation. *See Clean Harbors Envtl. Servs.,* 146 F.3d at 19-21.

Lubricants, No. 95-STA-43, slip op. at 11-14 and cases there cited (Sec'y May 1, 1996) (discussing cases involving joint employers that qualify for STAA coverage).

[2] Like the ALJ, we use the following abbreviations in referring to the evidentiary exhibits and the hearing transcript: Leach's exhibits, PX; Basin's exhibits, RX; hearing transcript, Tr.

[3] The ALJ provides a concise summary of the confrontation, which both Kehl and Leach testified was very brief and involved Leach angrily throwing a freight bill on the floor and using foul language suggesting how Kehl should dispose of the freight bill. R. D. & O at 7; *see* Tr. 88-90 (Leach), 148-50 (Kehl).

The STAA work refusal clause protects two categories of work refusals, which are commonly referred to as the "actual violation" and "reasonable apprehension" categories. 49 U.S.C.A. § 31105(a)(1)(B)(i), (ii); *see Ass't Sec'y v. Consol. Freightways (Freeze),* ARB No. 99-030, ALJ No. 98-STA-26, slip op. at 5 (ARB Apr. 22, 1999). Under the actual violation category, the refusal to drive is protected only if the record establishes that the employee's driving of a commercial vehicle would have violated a pertinent motor vehicle standard. 49 U.S.C.A. § 31105(a)(1)(B)(i); *see Freeze*, slip op. at 7 and cases there cited. Under the reasonable apprehension category, the refusal to drive is protected only if based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public. *Id.* The reasonable apprehension provision expressly requires that the employee had "sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C.A. § 31105(a)(2); *see Young,* slip op. at 8; *Freeze,* slip op. at 7. In cases involving FMCS regulations limiting drivers' hours of service, protection by the actual violation provision has been interpreted as similarly requiring the driver to notify the employer of the basis for the concern before refusing an assignment. *See Ass't Sec'y v. Besco Steel Supply (Brown),* No. 93-STA-00030, slip op. at 3-4 and cases there cited (Sec'y Jan. 24, 1995).[4]

The ALJ properly examined the evidence in light of the foregoing STAA requirements but failed to explain his findings in terms of the applicable statutory provisions. R. D. & O. at 4-15. To clarify the application of the relevant legal principles to the facts the ALJ found, we provide the following supplemental analysis.

The STAA complaint and work refusal clauses summarized above provide different means by which a driver can assert a concern about fatigue and/or hours of service regulations before accepting a work assignment that may result in violation of the FMCS regulations. The facts the ALJ found demonstrate that Leach's conduct in confronting Kehl on May 15, 2001, and refusing the Pocatello dispatch failed to qualify for protection under either the complaint or the work refusal clause. The ALJ's findings also demonstrate that, since Leach had not raised safety-related concerns to Basin or PIE on May 15, or at anytime before the suspension was imposed on May 21, that the suspension decision was not motivated by an intent to retaliate against Leach for safety-related activity.

The ALJ determined that Leach did not express concern to Basin's dispatcher Kehl or to anyone else in management at Basin or PIE on May 15 regarding compliance with regulations governing drivers' hours of service or fatigue. R. D. & O. at 7, 15. The ALJ found that Leach confronted Kehl and angrily refused the Pocatello dispatch not because of safety-related concerns but because Leach was angry at receiving another assignment to haul fuel from the Amoco refinery, which was frequently time-consuming and which had resulted in some hours' delay in beginning Leach's May 14 assignment hauling fuel to Moab, Utah. R. D. & O. at 15. The ALJ also found that Leach's anger was based on Basin's repeated failure to pay Leach on time. R. D. & O. at 7, 15; *see id.* at 10, 11. Among the evidence that supports the ALJ's finding

[4] As the record in this case indicates, an employer may have the option of assigning a problematic dispatch to another driver or may have the flexibility of allowing the driver to accept the dispatch following an appropriate rest period. *See* Tr. 152-53 (Kehl).

is the hearing testimony of Basin dispatcher Kehl regarding the confrontation, Tr. 148-52, and that of PIE manager Mitchell, Tr. 173-75, who contradicted Leach's testimony that he raised safety-related concerns in a May 15 telephone call to Mitchell. *See* R. D. & O. at 15; *see also* Tr. 118-20 (Leach on cross-examination regarding telephoning Mitchell). Providing key support for the ALJ's finding that Leach failed to raise safety-related concerns on May 15 are two documents that were generated by Leach.

The first document is an e-mail that Leach sent to Mitchell at PIE within hours after his confrontation with Kehl on May 15. PX 3; RX 18-3. In that e-mail, Leach does not mention any concern about limits on his service hours or about being fatigued. Instead, Leach recounted his earlier confrontation with Kehl, emphasizing his annoyance at again being sent to carry a shipment from the Amoco refinery, in view of the lengthy delays that he had repeatedly encountered during pick-ups from Amoco. The e-mail also expressed anger about not being paid on time by Basin. PX 3; RX 18-3; *see* R. D. & O. at 7. Although Leach's e-mail message to Mitchell begins by complaining that his May 14 trip to Moab took 17.5 hours, the context in which that information was presented fully supports the ALJ's inference that Leach mentioned the number of hours spent on the Moab dispatch to support his agitation at being assigned another "low paying load." The second document is the May 16, 2001, letter written by Leach to Kehl and another Basin manager that is entitled "Notice of Intent to Sue." RX 4-1. Although the letter alleges breach of contract for failure to pay Leach the sum that he states he had been promised when hired, claims discriminatory assignments of "low paying loads," and threatens suit on those grounds, the letter contains no reference whatsoever to safety-related concerns. *See id.;* R. D. & O. at 7-8.

Finally, Leach acknowledged in his hearing testimony that he had not specifically told Kehl on May 15 that he was concerned about his available hours or that he was too fatigued to accept the Pocatello assignment. Tr. 88-90 (Leach). In fact, Leach testified, like Kehl, that Kehl asked Leach to stop and discuss why he was so angry at Kehl, but that Leach left the Basin office and went home. Tr. 88-90 (Leach), 148-50 (Kehl). Leach asserted, however, that Kehl knew that Leach was short on available hours based on Kehl's knowledge of the shipment to Moab that Leach had driven on May 14. Tr. 88-90 (Leach). Nonetheless, and as discussed by the the ALJ, the driving logs that Leach had submitted to Basin showed a total of only 6.75 hours of driving and on-duty time on May 14, and no on-duty or driving hours on May 15. PX 6; R. D. & O. at 7; *see id.* at 15. The ALJ thus concluded that Kehl's knowledge of Leach's Moab assignment did not equate to knowledge that there was an issue regarding Leach's available service hours. R. D. & O. at 7, 15.

Leach's failure to establish that he had voiced a concern about compliance with fatigue or hours of service regulations to Basin or PIE management on May 15, or that he had otherwise put Basin or PIE on notice of an issue regarding his available service hours when he refused the Pocatello assignment, precludes a finding that Leach engaged in activity protected by the STAA complaint clause or either of the two provisions of the work refusal clause. *See* 49 U.S.C.A. § 31105(a) discussion *supra; see also BSP Transp.*, 160 F.3d at 46 (complainant bears burden of establishing activity protected by the STAA).

The ALJ further concluded that Leach did not raise the issue of safety-related concerns in connection with the May 15 incident until two days after the suspension was imposed on May 21. Specifically, the ALJ found that, following receipt of the suspension letter from Basin vice-president Dean on May 21, Leach initially sent an e-mail to Dean stating that he considered his employment to have been terminated and requesting his last pay check. R. D. & O. at 8, 15; RX 10. That e-mail did not mention any safety-related concerns. RX 10. On May 23, Leach again e-mailed a message to Dean, raising the issue of how many hours Leach had been on duty on the May 14 Moab assignment, immediately before the May 15 confrontation with Kehl. R. D. & O. at 8; RX 12. Nonetheless, that e-mail also stated that Leach would return to work at Basin if he were paid a yearly salary of $42,000 or assigned to a specific, regular shipment. RX 12.

On May 25, Leach sent Dean another e-mail, in which he offered to return to work at Basin for the $42,000 annual salary or the position of terminal manager. RX 13. Later on May 25, Leach sent an e-mail again addressing the issue of the number of service hours that Leach had available on the morning of May 15 when he refused to accept the Pocatello dispatch. RX 14. At that time, Leach claimed that his May 21 suspension was unlawful because it violated motor carrier safety standards for drivers' hours of service. RX 14-2. On May 29, Dean replied to Leach's e-mail, asking why Leach had not explained his concerns to Kehl on May 15. RX 14-1. The record does not contain a response from Leach. *See* R. D. & O. at 9. As the ALJ noted, the record also contains e-mail messages subsequently sent by Leach to Dean that reiterated Leach's concern about the amount he was paid while working with Basin and PIE. R. D. & O. at 9; PX 4; RX 17.

The foregoing evidence provides ample support for the ALJ's conclusion that Leach was not engaged in protected activity on May 15 when he refused the Pocatello dispatch. It also establishes that Basin was acting on a legitimate basis, wholly unrelated to an intent to retaliate in violation of the STAA, when it suspended Leach on May 21, 2001. We thus agree with the ALJ that Leach failed to establish two of the elements necessary to prevail in a whistleblower complaint under the STAA. *See BSP Transp.*, 160 F.3d at 46.[5]

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[5] The ALJ correctly identified the elements that a complainant must establish to prevail in a STAA complaint. R. D. & O. at 13-14 (citing *BSP Transp.*, *supra*, *Castle Coal & Oil*, *supra*, and *Moon v. Transp. Drivers*, 836 F.2d 226 (6th Cir. 1987)). In this case which has been fully tried on the merits, however, it was unnecessary for the ALJ to discuss the proof necessary to establish a complainant's prima facie case. R. D. & O. at 13; *see Johnson v. Roadway Exp.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 7 n.11 (ARB Mar. 29, 2000). The relevant inquiry in this case, which the ALJ did answer through his weighing of the conflicting evidence, is whether the complainant has established the elements of his case by a preponderance of the evidence. *See Johnson, supra.* The recommended decision contains further statements of law relevant to the parties' burdens under the employment discrimination complaint framework initially set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and under the dual, or mixed motive doctrine that are not wholly accurate. R. D. & O. at 13-14. Any error in those statements is harmless, however, as it did not carry over into the ALJ's analysis. R. D. & O. at 13-15. For a concise discussion of the principles relevant to evaluation of conflicting evidence pursuant to the *McDonnell Douglas* paradigm and the dual/mixed motive doctrine in a STAA case, see *Shannon v.*

CONCLUSION and ORDER

Accordingly, with the clarification and supplementation set forth above, we adopt the ALJ's attached Recommended Decision and Order and **DISMISS** the complaint.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

Consol. Freightways, ARB No. 98-051, ALJ No. 96-STA-15, slip op. at 5-7 (ARB Apr. 15, 1998), *aff'd*, 181 F.3d 103 (Table) (6th Cir. May 14, 1999).