U.S. Department of Labor

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

In The Matter Of:

JOHN P. LAROSA, **CASE NO. 96-STA-10**

COMPLAINANT, **DATE: August 8, 1996**

v.

BARCELO PLANT GROWERS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

REMAND ORDER

This case arises under Section 405 (the employee protection provision) of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (West 1994). Before us for review is the Recommended Decision and Order (R. D. and O.) issued on April 8, 1996, by the Administrative Law Judge (ALJ). The ALJ concluded that Complainant John P. LaRosa (LaRosa) failed to show that he informed Respondent, Barcelo Plant Growers, Inc. (Barcelo), of the safety basis for his refusal to drive. Therefore, the ALJ recommended that the complaint be dismissed. After a thorough review of the record, we agree that LaRosa did not prove a violation of the "refusal to drive" section of the STAA, but find that the case needs to be remanded for consideration of LaRosa's further claim that the "complaint" section of the STAA was violated.

BACKGROUND

LaRosa was hired as a driver by Barcelo on July 27, 1995. He was dispatched for his first solo run, comprising six separate deliveries, at 4:00 a.m. on August 9, 1995. LaRosa had a very

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[1/] On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61. Fed. Reg. 19978 (May 3, 1996) (copy appended).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

difficult and unsuccessful first day as a solo driver.[2/] The scheduled run took much longer than expected. At approximately 7:00 p.m., after having been on duty for a period approaching the maximum allowed by Department of Transportation (DOT) regulations,[3/] LaRosa alleges that he called Barcelo's offices and that after the call was disconnected once, it was forwarded to Reyes Munoz (Munoz), Barcelo's dispatcher, who had gone home for the day. LaRosa also alleges that during the conversation he informed Munoz that his workday was approaching fifteen hours and that Munoz told him to return to Barcelo's premises. R. D. and O. at 3. Munoz does not recall this conversation. *Id*.

LaRosa arrived back at Barcelo at 10:30 p.m., dropped off his truck and went home. He did not return to work to take a run that was scheduled to begin only about four hours later, at 3:00 a.m. on August 10. LaRosa did not inform anyone that he would not take the August 10 run. LaRosa admits that Munoz did not tell him that he need not report to work. LaRosa contends that Munoz knew the hours he had worked, and that the scheduled 3:00 a.m. run on August 10th would violate DOT regulations. LaRosa further contends that Munoz should have put another driver on the run and not expected LaRosa to report at 3:00 a.m. R. D. and O. at 4. When Munoz returned to the office on the morning of August 10th, he saw that LaRosa had not come in to work and allegedly made the decision to fire him.

DISCUSSION

The relevant portion of the STAA states:

> (a) **Prohibitions**. (1) a person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
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> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
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> (B) the employee refuses to operate a vehicle because --
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> (I) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C.A. § 31105 (a) (1).

[2/] Despite LaRosa's problems in making the run on August 9, he was fired, according to Barcelo, solely for the failure to report for work on August 10. T.70 and 74.

[3/] The relevant substantive regulations in this case are the "hours of service" rules codified under Section 395.3 of Title 49 of the Code of Federal Regulations, which state that a driver may not drive "[f]or any period after having been on duty 15 hours." 49 C.F.R. § 395.3(a)(2).

We agree with the conclusion of the ALJ that on August 9 LaRosa was on duty for fifteen hours, R. D. and O. at 2-3, and that therefore LaRosa would have been justified in refusing to make the 3:00 a.m. run on August 10. But LaRosa's statement regarding bringing the truck in on August 9, because he was approaching fifteen hours, cannot be considered a refusal to make the 3:00 a.m. run on August 10. LaRosa wants us to assume that Munoz was aware, not only of the fact that he could not take the 3:00 a.m. run, but that the reason for refusing to take the run was safety related.

At this point in our analysis LaRosa has the burden of proof and we simply cannot assume compliance with the requirement, where reasonally possible, that a driver inform his employer of the safety basis for his refusal to drive. *Assistant Secretary of Labor and Johnny E. Brown v. Besco Steel Supply*, 93-STA-30, Sec. Dec., Jan. 24, 1995, slip op. at 3; *LeBlance v. Fogleman Truck Lines, Inc.,* 89-STA-8, Sec Dec., Dec. 20, 1989, slip op. at 12-13; *Perez v. Guthmiller Trucking Co.,* 87-STA-13, Sec. Dec., Dec. 7, 1988, slip op. at 25 n.14. LaRosa never expressly refused to take the 3:00 a.m. run, he just did not show up. Therefore, the record fully supports the ALJ's findings that LaRosa did not prove by a preponderance of the evidence that he engaged in a protected refusal to drive.

That conclusion, however, does not end our analysis. The record indicates that LaRosa's claim was also filed under subsection (a)(1)(A), the "complaint" provision of the STAA. The ALJ made no findings regarding this provision. We find that serious issues exist concerning whether LaRosa made protected complaints prior to his being terminated. Further, if such complaints were made, an analysis of the effect of those complaints on Barcelo's decision to terminate LaRosa must be made. We remand this matter to the ALJ for consideration of these issues and for the taking of additional evidence, if appropriate. The following discussion sets out certain conclusions that can be made from the present record, and should provide guidance to the ALJ in reviewing the remaining issues on remand.

The record reveals that on three separate occasions LaRosa may have engaged in protected activity. The first allegation of protected activity is found in LaRosa's October 23, 1995 statement of complaint, as follows:

> Into the second week working long hours I mentioned to Mr. Reyes [Munoz] that I can't come to work on a few hours sleep, and because of that he didn't have me scheduled to work the next day. I was told by Victor Granchukoff [that] Mr. Reyes will have you stay home because you refuse to work, but I can't properly function with a couple of hours of sleep or I will fall asleep at the wheel trying to do my job.

At 2-3. On remand the ALJ should make a finding as to whether a protected complaint was made. If so, the complaint needs to be placed into the appropriate context and a recommendation must be made as to the effect of this complaint, if any, on Barcelo's decision to terminate LaRosa.

The second allegation of engaging in protected activity involves the substance of the phone conversation that occurred between LaRosa and Munoz on August 9, at 7:00 p.m.[4/] In light of our finding that the phone call did take place, *see* n. 4 *infra*, and Munoz's failure to recall the conversation, we credit LaRosa's version of the substance of the conversation. LaRosa states that "I had mentioned [to Munoz] that I had been working quite a number of hours which had been, according to law, *(sic*) I was almost into a 15-hour day or right near that period of time." T. 20. The information conveyed to Munoz during the phone call could be interpreted as a protected safety complaint. Informal statements and internal discussions with management can constitute protected activity. *See, e.g., Nichols v. Bechtel Construction, Inc.*, Case No. 87-ERA-0044, Dec. and Order of Rem., Oct. 26, 1992, slip op. at 10 (employee's verbal questioning of foreman about safety procedures constituted protected activity), *aff'd* 50 F.3d 926, 931 (11th Cir. 1995); *Dysert v. Westinghouse Electric Corp.*, Case No. 86-ERA-39, Final Dec. and Order, Oct. 30, 1991, slip op. at 1, 3 (employee's complaints to team leader protected); *see, e.g., Brown*, slip op. at 5 (employee's cryptic statement was sufficient, when considered in context, to make a protected complaint). On remand the ALJ should put the substance of this conversation into the appropriate context,[5/] make a recommendation as to whether this constitutes protected activity, and if so, evaluate the effect, if any, this complaint had on Barcelo's decision to terminate LaRosa.

LaRosa's third allegation involves the substance of the conversation between him and Munoz on August 14, the day Munoz was terminated. Munoz alleges that he made the decision to terminate LaRosa on August 10, but did not communicate this decision to LaRosa until August 14. If this allegation is credited, any protected complaints made by LaRosa on the 14th would be moot. On the other hand, if the final decision to terminate LaRosa was not made until August 14, then the ALJ must place any protected safety complaints found to have been made during that conversation into the appropriate context and evaluate the effect, if any, this had on Barcelo's final decision to terminate LaRosa.

In reviewing this matter the ALJ should keep in mind that temporal proximity between the protected activity and the adverse action has been held sufficient to raise the inference of retaliatory motivation. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Abu-Hjeli v. Potomac Electric Power*

[4/] Even though Munoz's memory of the circumstances surrounding LaRosa's termination is quite good on most points, he does not recall talking to LaRosa on August 9 at 7:00 p.m. R. D. and O. at 3. The ALJ found that Barcelo's long distance phone record (page two of which is not in the record received by this office) supports some of LaRosa's allegations concerning the phone call. R. D. and O. at 5-6. The ALJ did not fully credit LaRosa's allegations because the record does not indicate the parties to the conversation. *Id.* LaRosa has consistently stated that he called Barcelo from Los Angeles at around 7:00 p.m., was disconnected, called back and was patched through to Munoz's home. The phone record supports, to the extent possible, these allegations. Since Munoz does not deny that the phone conversation took place and no other record evidence indicates otherwise, *e.g.* a showing by Barcelo that its phone system does not have "patch through" capability, we find LaRosa did talk to Munoz at 7:00 p.m. on August 9.

[5/] For example, Munoz seems to admit that if he had talked to LaRosa on August 9 at 7:00 p.m. and was made aware of the situation regarding LaRosa's hours, he "would figure [the violation of DOT regulations] out by myself." T. 79.

Co., Case No. 89-WPC-1, Sec. Fin. Dec. and Ord., Sept. 24, 1993, slip op. at 12-13 (temporal proximity between protected activity and adverse action may be sufficient to establish causal element of *prima facie* case). If the ALJ finds that LaRosa has proven by a preponderance of the evidence that he engaged in protected activity and that Barcelo based its decision to terminate him, in part, on this reason, then a dual motive analysis must be applied. Barcelo would then have to prove, by a preponderance of the evidence, that it would have taken the same action against LaRosa even if he had not engaged in any protected activity. *See Willimas v. Carretta Trucking, Inc,* 94-STA-07, Dec. and Order, Feb. 15, 1995, slip op. at 12; *Clifton v. United Parcel Service*, 94-STA-0016, Dec. and Order of Rem., May 9, 1995, slip op. at 18.

Accordingly, this case IS REMANDED, for the entry of a second recommend order consistent with this decision.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member