U.S. Department of Labor

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

In the Matter of:

JOSEPH B. BYRD, **ARB CASE NO. 98-064**

COMPLAINANT, **ALJ CASE NO. 97-STA-9**

v. **DATE: May 5, 1998**

CONSOLIDATED MOTOR FREIGHT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (West 1996). Joseph B. Byrd (Byrd) alleged that his employer, Consolidated Motor Freight (CF), violated the STAA when it disciplined and discharged him. In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) found that Byrd did not establish a STAA violation and recommended dismissal of the complaint. The ALJ's findings of fact, R. D. and O. at 2-12, are supported by substantial evidence on the record as a whole, and therefore are conclusive. 29 C.F.R. §1978.109(c)(3). We also accept the ALJ's credibility determinations and recommendation to dismiss the complaint.

BACKGROUND

Byrd began work as a truck driver for CF in 1986, based at a terminal near Atlanta, Georgia. T. 21. In 1995 he wrote a letter to CF management to complain that a motel in which he stayed on a Memphis run was so noisy that he was unable to rest. RX 3. He asked not to be required to stay at that motel on future trips. *Id*. Byrd made the same complaint to the United States Department of Transportation (DOT). T. 50-51.

Beginning in October 1995, CF required Byrd and others to drive "sleeper runs," in which the truck was operated continuously as one driver slept on a mattress in the back of the tractor while a second driver drove. T. 26. On several sleeper runs, Byrd was unable to sleep in the tractor because of the vibrations. As a result, he was so tired while driving that he pulled over to nap. T. 27-28. Byrd was not disciplined for stopping to nap during his driving shifts. T. 50 (Baton Rouge trip), 52-54 (Memphis trip), 70 (April 26-27, 1996 trip).

On a sleeper run from Atlanta to Columbia, South Carolina in 1996, Byrd was so tired that he found he had drifted from the right to the left lane without knowing why. T. 34. Upon returning from that trip, he informed his dispatcher that he would not take any more sleeper runs because they violated a motor carrier regulation that forbids driving when the driver is so fatigued that it is a danger to himself and to others. T. 35. In March 1996, Byrd sent a letter to the Federal Highway Administration complaining that sleeper runs are dangerous and violated the DOT's regulations. RX 8.

Byrd took medication for high blood pressure, which was monitored by his personal physician and a physician employed by CF to perform physical examinations of drivers. T. 38-42.

Between January 15 and August 6, 1996, Byrd was absent from work 75 days. For example, he missed work from February 5 to 8 because of burst water pipes at his home, T. 54, and from February 26 to 28 because he claimed fatigue after working 44 hours in the previous eight days. T. 55. Byrd was absent from work for one week beginning March 25, when he broke his eyeglasses in anger after being told to take a sleeper run or else quit his job. T. 61. Byrd claimed that it took seven days to obtain and adjust to his new eyeglasses, which had the same prescription as the broken glasses. T. 64. Byrd received a warning letter about this absence. RX 9.

In April 1996 Byrd missed work from the sixth to the tenth because he was ill, although there is no indication he visited a doctor during that time. T. 65. He missed work from April 14 to April 24 to have his teeth pulled. T. 69.

On May 1, 1996, CF denied Byrd's request for earned time off. Byrd nevertheless placed himself on the "sick board," claiming high blood pressure. T. 197. Byrd told a secretary that he would call in to work after visiting the doctor, but he never called that day. T. 198. Group operations manager Jerry Ard issued Byrd a final warning letter for his May 1 absence. RX 13. On May 8, CF received a note from Byrd's personal physician indicating that he had high blood pressure on May 1 and 2 and releasing Byrd to work on May 3. T. 198; RX 49 at 91. Byrd had not returned to work on May 3, 4, 5, or 6, however. T. 199.

Ard telephoned Byrd on May 6 and requested that he see the company physician, Dr. Combs, and then report to Ard. T. 200. Combs released Byrd to work on May 6. T. 201; RX 15. Byrd did not see Ard or report to work that day or the next and did not remove himself from the sick board. T. 201-202. Ard issued an intent to suspend Byrd for one day because of his absence on May 6. RX 16. Ard next issued a discharge letter to Byrd on May 8 because of excessive absenteeism. T. 203; RX 17. The union contract provided, and CF advised, that Byrd could continue driving while he pursued a grievance concerning his discharge.

The same day, Byrd made a run to Memphis with an overnight rest of 11 3/4 hours. He claimed fatigue on May 9 and CF gave him an additional eight hours' rest. T. 87, 203-204. Byrd did not place himself on the driver board after the additional rest, however. Ard considered Byrd's failure to return to work unreasonable in light of the fact that he had been off the previous week and had been permitted two eight hour rest periods after the Memphis run. T. 204. Consequently, Ard

issued another discharge letter on May 10.[1] RX 20. Byrd remained off work due to illness from May 9 through June 6 but did not see a physician during that time. T. 89.

Byrd missed work from July 5 through 7 for a sinus headache. T. 100. After Byrd reported to work on July 8 without providing a doctor's excuse, dispatch operations manager Tony Smith issued Byrd another discharge letter. T. 231; RX 25. Byrd again missed work from July 21 through 24 to visit the dentist. *Id*.

Byrd put himself on the driver board on July 25 and was dispatched on a sleeper run to Carlisle, Pennsylvania. T. 103. Although Byrd did not say he was tired, he told Ard that he would never take another sleeper run because he believed he would become tired during such a run. T. 104. Smith issued another discharge letter for refusing the sleeper run. T. 235; RX 33. The same day, Byrd disclosed to CF that he had complained to government agencies about sleeper runs. T. 242.

Byrd sent a letter to CF's chief executive officer that referred to a settlement agreement. An assistant asked Tony Smith to provide a copy of the agreement and backup information. CX 3. In a responsive note, CF employee relations manager Andy Threatt asked Smith to inform CF's chief executive officer that Byrd "is one of our wors[t] employees in Atlanta and writes letters to everyone." T. 264; CX 3.

On July 30 Byrd took himself off the driver board, claiming high blood pressure, although he did not see a doctor. T. 106-107. CF again issued Byrd a discharge letter because of excessive absenteeism, citing Byrd's testimony at an employment compensation hearing that he was capable of driving because his blood pressure was controllable. T. 238; RX 35.

CF issued yet another discharge letter because Byrd called in sick from August 2 to August 6 without providing a doctor's excuse. T. 239-240; RX 38.

The union grievance committee upheld Byrd's discharge and denied his request for reinstatement, T. 331, and consequently Byrd ceased working for CF in September 1996. Byrd filed this complaint, alleging that he was discharged because he made complaints and refused to drive sleeper runs.

DISCUSSION

The STAA provides in relevant part:

> (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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[1] CF issued the additional discharge letter to preserve its rights while Byrd grieved the earlier discharge. CF and the union, which represented Byrd, ultimately settled the grievances concerning the May 8 and 10 discharges, which were reduced to suspensions. CX 3; RX 21.

(A) the employee . . . 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

(B) the employee refused 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; 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). Byrd alleged a violation of both the complaint provision at 49 U.S.C. §31105(a)(1)(A), and the refusal to drive provisions at §31105(a)(1)(B). We will examine the complaint provision first.

The Complaint Provision

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because he engaged in protected activity. A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. at 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or 'nexus," *e.g.*, that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of Labor*, 64 F.3d 261, 277 (7th Cir. 1995). A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity *was* the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).[2]

Byrd complained, either in writing or verbally, to company superiors, his union, and to government agencies that sleeper runs were dangerous because the "resting" driver is unable to sleep in the moving tractor and consequently is very fatigued when he takes over driving. *See* CX 1 and RX 8. The STAA covers, among other things, complainants who allege violations of the "fatigue rule" of the federal motor carrier regulations:

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[2] Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a *prima facie* case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." *St. Mary's Honor Center*, 509 U.S. at 510-511. *See Carroll v. United States Dep't of Labor,* 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a *prima facie* case becomes irrelevant once the respondent has produced evidence of a legitimate nondiscriminatory reason for the adverse action).

> No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

49 C.F.R. §392.3 (1996). *See, e.g., Self v. Carolina Freight Carriers Corp.*, Case No. 89-STA-9, Sec. Final Dec. and Ord., Jan. 12, 1990. Protection is not dependant on actually proving a violation of a regulation; the complaint need only relate to such a violation. *Nix v. Nehi-R.C. Bottling Co.*, Case No. 84-STA-1, Sec. Dec. and Ord., July 13, 1984, slip op. at 8-9.

Consequently, all of Byrd's complaints constituted protected activity under the STAA. *See Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, Case No. 95-STA-34, Final Dec. and Ord., Aug. 8, 1997, slip op. at 3-4 (internal complaint to superiors is a protected activity under the STAA); *accord, Stiles v. J.B. Hunt Transportation, Inc.*, No. 92-STA-34, Sec. Dec. and Ord., Sept. 24, 1993, slip op. at 3-4, and cases there cited; *Pillow v. Bechtel Construction, Inc.*, Case No. 87-ERA-35, Sec. Dec. and Ord. of Rem., July 19 1993, slip op. at 11 (under analogous employee protection provision of the Energy Reorganization Act, contacting a union representative about a safety violation is protected), *aff'd sub nom. Bechtel Construction Co. v. Secretary of Labor*, 98 F.3d 1351 (11th Cir. 1996); and *Ake v. Ulrich Chemical, Inc.,* Case No. 93-STA-41, Sec. Final Dec. and Ord., Mar. 21, 1994, slip op. at 5 (safety complaint to government agency is protected).

In analyzing whether the articulated reason for the discharge is credible, we agree with the ALJ that there is ample evidence demonstrating that Byrd was absent an excessive amount of time in 1996. R. D. and O. at 13. Byrd's taking seven days off to replace his broken eyeglasses stands out in this regard, as does a total of 75 days absent in a seven month period in 1996. Byrd received numerous warning letters and discharge letters for excessive absences, but did not improve his attendance record.

Contending that excessive absence was a pretext for CF's discriminatory intent, Byrd cites Threatt's note to Smith as evidence: "Let Mr. Curry know that [Byrd] is one of our wors[t] employees in Atlanta and writes letters to everyone." CX 3. This note, standing alone, would seem to indicate bias against Byrd because of his written complaints about sleeper runs. We have found in other cases, however, that "[n]otwithstanding a seeming 'smoking gun' in the record, other evidence may show that there was no discriminatory intent." *Webb v. Carolina Power & Light Co.,* Case No. 93-ERA-42, Final Dec. and Ord., Aug. 26, 1997, slip op. at 14; *accord*, *Acord v. Alyeska Pipeline Svc. Co.,* Case No. 95-TSC-4, Final Dec. and Ord., June 30, 1997, slip op. at 5-9.

In this case, CF provided a credible explanation for the reference to letter writing in Threatt's note. In an earlier letter to Curry, the company's CEO, Byrd mentioned a settlement agreement that the CEO did not have in his possession. Consequently, the CEO's assistant wrote to Tony Smith to obtain a copy of the agreement "and any backup you consider necessary." CX 3. Threatt, who did not know the contents of Byrd's letter to the CEO, asked Smith to inform the CEO that it was not unusual for Byrd to write him a letter since Byrd also had sent letters to others. T. 346-347. Threatt also provided as background information the number of discharge letters already issued to

Byrd. CX 3. We credit this benign explanation for Threatt's reference to letter writing. We find that Byrd did not establish by a preponderance of the evidence that the reason given for his discharge was pretextual. *See* R. D. and O. at 14.

Even if Threatt's reference to Byrd's letter writing demonstrated animus against Byrd because of his safety complaints, it would not alter the result. When there are both legitimate and discriminatory reasons for an adverse action, the dual motive analysis applies. *Spearman v. Roadway Express, Inc.,* Case No. 92-STA-1, Sec. Final Dec. and Ord., Jun 30, 1993, slip op. at 4, *aff'd sub nom. Roadway Express, Inc. v. Reich,* No. 93-3787 (6th Cir. Aug. 22, 1994), 1994 U.S. App. LEXIS 22924. Under the dual motive analysis, 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. *Asst. Sec. and Chapman v. T. O. Haas Tire Co.,* Case No. 94-STA-2, Sec. Final Dec. and Ord., Aug. 3, 1994, slip op. at 4, *appeal dismissed,* No. 94-3334 (8th Cir. Nov. 1, 1994).

Byrd claims that his many absences were justified by his health or other circumstances. But on several occasions, Byrd remained absent for days after a physician released him to work. See R. D. and O. at 14, citing T. 199-203, RX 15 and RX 49 at 91. Likewise, we see no justification for Byrd's seven day absence to replace broken eyeglasses and adjust to new eyeglasses that were the same prescription. Byrd remained off work for a month in May - June 1996 due to claimed illness and during that time he did not visit a doctor. Byrd did not establish legitimate reasons for the vast majority of his absences. We find that CF has established that even absent any protected safety complaints on Byrd's part, the company legitimately would have fired him for excessive absences.

Refusal to Drive

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C.A. §31105(a)(1)(B)(i), requires that a complainant "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive -- a mere good faith belief in a violation does not suffice." *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993). A violation of the fatigue rule is established where the driver's "ability or alertness was so impaired as to make vehicle operation unsafe." *Smith v. Specialized Transportation*, slip op. at 6.

The ALJ found that Byrd's anticipatory refusal was not protected under 49 U.S.C.A. §31105(a)(1)(B)(i) because Byrd's "fatigue" at the time of refusing to drive was anticipated and not actual. We agree. *See Cortes v. Lucky Stores, Inc.*, Case No. 96-STA-30, Final Dec. and Ord., Feb. 27, 1998, slip op. at 4, *citing Brandt v. United Parcel Service*, Case No. 95-STA-26, Sec. Fin. Dec. and Ord., Oct. 26, 1995 slip op. at 5: "[i]t would be impossible for Brandt to prove that the decision he made on Saturday night, not to drive on Sunday night because of expected fatigue, was based on an *actual* violation of the motor carrier safety regulation." (emphasis in original).

The second refusal to drive provision focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he drove. 49 U.S.C.A. §31105(a)(1)(B)(ii); *Cortes*, slip op. at 4. The STAA defines reasonable apprehension:

> an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. §31105(a)(2).

Byrd refused to take a sleeper run on July 25, 1996 because he believed that during the run he would become too fatigued to drive safety. At the time of his refusal, he was well rested and ready to drive other runs; he refused simply because he believed he would not get enough rest in the cab. T. 103-104.

The *Brandt* decision is instructive concerning the evaluation of anticipatory fatigue under this proviso. In *Brandt*, the Complainant refused on Saturday to take a different shift on Sunday, claiming that he expected to be fatigued because of the change in his usual schedule. The Secretary found that:

> Brandt's refusal to drive was not based upon a reasonable apprehension of serious injury to himself or the public under 49 U.S.C. §31105(a)(1)(B)(ii). Given that Brandt could have, if necessary, slept for the entire 24 hour period prior to his run, it would have been unreasonable for him to be apprehensive on Saturday about his or the public's safety on Sunday.

Brandt, slip op. at 6; s*ee also Cortes*, slip op. at 5.

In this case, it was unreasonable for a well rested Byrd to be apprehensive about public safety, because if he became too fatigued to drive during his assigned shift he could have stopped the truck and rested without repercussion. The record shows several occasions on which Byrd took stops for rest and CF did not discipline him in any way. T. 50, 52-54, 70. *See* R. D. and O. at 3-4.

CONCLUSION

We find that Byrd did not establish that his refusal to drive the sleeper run was protected under either §31105(a)(1)(B)(i) or (B)(ii). We also find that Byrd did not establish a violation of the complaint provision at §31105(b)(1)(A). Accordingly, we accept the ALJ's recommendation and **DISMISS** the complaint.

SO ORDERED.

KARL J. SANDSTROM
Chair

PAUL GREENBERG
Member