U.S. Department of Labor Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

PROSECUTING PARTY,

and

OTIS BATES,

COMPLAINANT,

v.

WEST BANK CONTAINERS,

RESPONDENT.

ARB CASE NO. 99-055

ALJ CASE NO. 98-STA-30

DATE: April 28, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Laura V. Fargas, Esq.; Mark J. Lerner, Esq.; Daniel J. Mick, Esq.; Donald G. Shalhoub, Esq.; Joseph M. Woodward, Esq.; Henry Solano, Esq.; *U. S. Department of Labor, Washington, D.C.*

For the Respondent:
G. Patrick Hand, III, Esq.; *The Hand Law Firm, Gretna, Louisiana*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Surface Transportation Assistance Act, "§405," and its implementing regulations. 49 U.S.C. §31105 (1997), 29 C.F.R. Part 1978 (1999). Section 405(a)(1) prohibits employer retaliation against employees who make complaints related to violations of commercial motor vehicle safety laws (§405(a)(1)(A)), employees who refuse to drive when operation of the vehicle would violate federal commercial vehicle safety regulations, standards or orders (§405(a)(1)(B)(i)), and employees who refuse to drive because of a "reasonable apprehension of serious injury" (§405(a)(1)(B)(ii)).

The Occupational Safety and Health Administration (OSHA), the agency that administers the §405 program, charged West Bank Containers (West Bank) with violating two provisions of §405(a)(1): §405(a)(1)(A) which protects employees who make complaints related to violations of commercial motor vehicle safety laws, and §405(a)(1)(B)(i) which protects employees who refuse to drive when doing so violates federal regulations, standards or orders related to commercial motor vehicle safety or health. The administrative law judge (the ALJ) affirmed the charge against West Bank based on §405(a)(1)(A).

West Bank timely filed a brief in opposition to the ALJ's decision. We have jurisdiction over this case pursuant to 29 C.F.R. §1978.109(c)(2). We review the ALJ's findings of fact under the substantial evidence standard. *Id*. at §1978.109(c)(3). Our review of questions of law is *de novo.* 5 U.S.C. §557(b) (1996).

FINDINGS OF FACT

Otis Bates worked as a truck driver for West Bank Containers in New Orleans, Louisiana for three weeks in 1998. On May 5, 1998, West Bank and Bates signed a "Trip Lease Agreement," agreeing that Bates would work as a truck driver for West Bank using his own truck tractor. Among other things, the agreement specified that Bates would be responsible for maintaining his truck in good repair and for "meet[ing] all requirements of all applicable state and federal laws, and all rules and regulations of the Louisiana Public Service Commission, U.S. Dept. of Transportation, and the Interstate Commerce Commission." CX 1; Tr. 86.[1/]

Bates was a relatively inexperienced commercial truck driver. He had one truck driving job before coming to West Bank, and that lasted for about one year. Tr. 88. Jimmy O'Brien, the West Bank supervisor who hired Bates considered him qualified; Bates had a clean driving record, had completed truck driving school, and seemed like a "nice guy." Tr.121, 125, 127. To the best of Bates' memory, he began driving for West Bank about a week after signing the agreement. Tr. 87-88.

Three weeks later, West Bank fired Bates. On that day, June 12, 1998, West Bank sent Bates to transport a cargo container from a Union Pacific facility to a CSX Railroad yard, a 30 to 40 minute drive. Tr. 30. When Bates picked up the container at Union Pacific, he signed an interchange report that listed the container weight at 67,000 pounds. Tr. 28, CX 2A, 2B. That meant that Bates' total weight (tractor and cargo container) during this drive was more than 80,000 pounds. Bates was operating at the time under a commercial motor vehicle license limited to 80,000 pounds total weight (tractor and cargo) absent a special permit. Tr. 22.

At one point during the drive to CSX, Bates testified, the truck swayed, but he regained control. Tr. 30. When Bates arrived at the CSX yard, one of his tractor tires blew out after he drove

[1/] In this decision we refer to the transcript as "Tr.," to OSHA's exhibits as "CX," and West Bank's exhibits as "RX," and to the ALJ Decision as "ALJ." References to West Bank's brief appear as "WB Br.," and references to OSHA's brief appear as "OSHA Br."

over a speed bump. Tr. 32, 36. Bates thought that the blow-out was caused by an overweight load, but he did not have the tire examined and never determined what actually caused the blowout. Tr. 80. CSX personnel took receipt of the cargo container, and Bates signed the CSX interchange, which listed the cargo container weight as 59,711 pounds. Tr. 34, CX 3. If the CXS weight figure was accurate, Bates had been driving less than 80,000 pounds.

When Bates got back to West Bank, he complained to Jody Thiaville (the dispatcher), Jimmy O'Brien (a company superintendent), and William Wactor (an official of West Bank's parent company), about being given a load that put his total weight (cargo container and truck tractor) over 80,000 pounds. Bates said he did not want to drive more than 80,000 pounds gross weight because he felt unsafe. Tr. 37, 39, 106, 121-22,137-38.

At the administrative hearing, Thiaville the dispatcher testified without rebuttal that the 80,000 pound "limit" on Bates' commercial driver's license was not a limit on how much he could carry lawfully. It was simply the maximum load Bates could haul without getting a permit. Tr. 110-111. Thiaville also testified without rebuttal that getting a permit to carry more than 80,000 pounds was a five-minute process. West Bank kept a stack of excess weight permits on the premises, and when a permit was needed, the driver only had to get his truck's exact weight on the truck scale by the yard entrance, call a State of Louisiana office, and receive a permit number to be entered on one of the blank forms. Getting permits for loads over 80,000 pounds occurred on a "routine basis" at West Bank. *Id*., 39.

West Bank's truck scale, which measured ten feet by one hundred and twenty feet, was located just inside the entrance to West Bank's yard. Tr. 112. Bates testified he never noticed it and that West Bank never called it to his attention. Tr. 68.

At the hearing, Bates testified that he thought he could not legally carry more than 80,000 pounds because of the 80,000 pound "limit" on his commercial driver's license. Tr. 22. Bates also thought it was unsafe to drive a gross weight exceeding 80,000 pounds. Tr. 39.

In rebuttal, both Thiaville and O'Brien testified that when Bates returned to West Bank after the blown tire incident, he did more than complain about carrying a load he considered too heavy. Under direct examination by the Government, Thiaville testified that Bates threatened to drop his load if West Bank ever gave him another load that put him over 80,000 pounds:

> Q. When you talked to Mr. Bates on June 12, did he say that if he had another container that he thought was overweight he would drop it wherever he was at?
>
> A. Yes, sir. He did.

Tr. 109. Under cross examination by West Bank, Thiaville used slightly different language:

Q. [Y]ou indicated under direct examination that Mr. Bates indicated to you that he, if he felt he had another overweight load, he was going to drop it in the street.

A. Yes, sir. That's what he said.

Tr. 114. On redirect, the Government sought to impeach Thiaville's testimony as inconsistent:

Q. Mr. Thiaville, Mr. Bates never said he would drop his container or his trailer in the street. Did he?

A. Yes, he did.

Q. What he really said is that if he thought that his -- he was carrying an overweight load he would drop it wherever he was. Isn't that what he really said?

A. No, sir.

Tr. 115. At this point, Government counsel further sought to impeach Thiaville's credibility by demonstrating inconsistency between Thiaville's testimony at the hearing and his deposition testimony:

Q. Do you remember what your answer was [at the deposition]?

A. That he would drop it anywhere he wants that he felt it was unsafe or overweight, whatever. He would drop it wherever he was. . . .

Q. But there was never any mention, was there, during your deposition that he would drop the load in the street. Was there?

A. No, sir.

Q. He didn't use those terms in the street. Did he?

A. He did at that day. Yes, sir. . . .

Q. But you didn't tell me that in your deposition. Did you?

A. I don't believe you asked me. . . .

Q. [I]f you go to the next page [of Thiaville's deposition]. My question was, "At any time did Mr. Bates say that he would --

did he actually say he would drop the container in the street or on the highway or was that your understanding of what he meant?"
Would you read your answer beginning on line 20. . . .

A. "That's what he said. He would drop it anywhere". . . .

JUDGE KERR: And is that what you testified to at the time of the deposition?

THE WITNESS: Yes, sir, which -- same thing. He said he would drop it anywhere.

Tr. 115-18.

O'Brien, the West Bank supervisor who told Bates he was fired, testified that, "he [Bates] threatened to drop a container in the street, endangering the public and, you know, safety laws. It's just something that can't be done. Somebody makes a threat like that, you can't allow it to proceed any further." Tr. 38, 121-22.

After Bates left, Wactor told O'Brien to write a letter for the file to document West Bank's reason for firing Bates. The letter O'Brien composed and placed in the file stated as follows:

Date: 6-12-98
To: Whom it may concern.

Today Mr [sic] Bates informed us that he would not haul any heavy loads, and if he found that the load was to [sic] heavy !!!! he would drop it at that point. That statement caused the trip lease [agreement] to be terminated. Mr. Bates [sic] services are no longer needed at this terminal. 6-12-98

Thank You
Jimmy O'Brien

Tr. 123-24; CX 5.

Government counsel questioned O'Brien about the difference in language between O'Brien's testimony and the letter:

Q. I'll ask you to read the letter, sir, and I'll ask you to tell me if there is anything in this letter about Mr. Bates telling you or telling Mr. Thiaville that he would drop a load in the street.

A. [O'Brien reads the letter out loud.]

Q. Okay. And I'll ask you again, sir, is there anything in this letter that says Mr. Bates said he would drop a load in the street?

A. No, sir, but that's what he said and not being an attorney, I didn't know I had to put that in there at the time. A memo for the files.

Tr. 123-24.

Otis Banks never denied that he threatened to drop a load "on the street," "anywhere," or "wherever he was."

DISCUSSION

"Section 405 was enacted in 1983 to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations." *Brock v. Roadway Express, Inc.,* 481 U.S. 252, 258, 107 S.Ct. 1740, 1745-46 (1987).

To prevail on a claim under §405(a), the complainant must prove that he or she engaged in protected activity as defined in subsections 405(a)(1)(A), 405(a)(1)(B)(i), or 405(a)(1)(B)(ii); 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 employment action. *BSP Trans., Inc. v. United States Dep't Labor,* 160 F.3d 38, 45 (1st Cir. 1998); *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.2d 226, 228 (6th Cir. 1987).

The ALJ concluded that OSHA, as the prosecuting party in this case,[2/] established all the elements of a §405(a)(1)(A) claim: (1) Bates engaged in protected activity when he complained to West Bank that driving more than 80,000 pounds was unsafe; (2) West Bank discharged Bates; (3)

[2/] A §405 complaint must be filed first with OSHA which, after investigation, issues a determination whether "there is reasonable cause to believe" that a violation has occurred. 29 C.F.R. §1978.104(a). OSHA ordinarily acts as the prosecuting party in cases in which the employer objects to the reasonable cause determination but the employee supports the finding. *Id*. at §1978.107(a). The employee acts as the prosecuting party if he or she objects to a "no reasonable cause" determination by OSHA. *Id*. at §1978.107(b). In any case in which the employer and the employee both object to OSHA's reasonable cause determination, OSHA serves as the prosecuting party.

In this case, OSHA found reasonable cause to believe that a violation occurred, and West Bank objected. Consequently, OSHA became the prosecuting party.

West Bank was aware of Bates' safety complaints when it discharged him, and (4) West Bank fired Bates in retaliation for Bates' safety complaints. "[T]his Court finds that a preponderance of the evidence supports a finding that Complainant's termination was based on retaliatory animus created by Complainant's protected activity of an internal safety related complaint." ALJ at 13. The ALJ awarded Bates damages in the amount of $9,609.02, plus interest.

We disagree with the ALJ's determination that West Bank terminated Bates for unlawful reasons. We find that substantial evidence in the record as a whole does not support the ALJ's conclusion that West Bank terminated Bates in retaliation for his safety complaints; rather, substantial evidence as a whole compels the finding that West Bank terminated Bates because he threatened to "drop the load" if he found himself carrying more than 80,000 pounds gross weight. We also note that the ALJ lacked an adequate basis for his ruling of law that Bates' safety complaints constituted protected activity within the meaning of §405(a)(1)(A).

1. The finding that West Bank fired Bates in retaliation for making safety complaints is not supported by substantial evidence; substantial evidence compels a finding that West Bank fired Bates because he threatened to "drop the load" if his gross weight exceeded 80,000 pounds

The evidence of West Bank's motive for firing Bates begins with the contemporaneous "memorandum for the file." In that document, O'Brien stated that West Bank terminated its trip lease agreement with Bates because Bates refused to "haul any heavy loads"[3] and because he threatened to drop the load if he found it was "too heavy." CX 5.

Three witnesses at the hearing, O'Brien and Thiaville, who testified they personally heard Bates threaten to drop the load, and Wactor, who arrived on the scene while Bates was still there and was told by O'Brien that Bates threatened to drop the load, all corroborated the accuracy of the contemporaneous writing. The company witnesses expressed the view that this action, if implemented, would endanger public safety and therefore was an intolerable threat. Bates himself corroborated the accuracy of that part of the memorandum saying that Bates refused to carry gross weight over 80,000 pounds because he considered it unsafe. And most tellingly, Bates never denied that he made the threat.

This evidence notwithstanding, the ALJ concluded that West Bank's asserted legitimate motive was mere pretext. The ALJ rejected the unrebutted evidence that Bates threatened to drop

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[3] In its brief before us, OSHA expressly abandoned the charge that West Bank violated §405(a)(1)(B)(i) ("refusal to operate") by discharging Bates for his refusal to drive loads weighing more than 63,580 pounds. (Bates' tractor trailer weighed 16,420 pounds, so any cargo exceeding 63,580 pounds would bring Bates' total gross weight over 80,000 pounds, the maximum that Bates considered safe to drive). OSHA Br. 15 n. 5. OSHA argues, however, that West Bank's reference to Bates' statement that he would not haul more than 80,000 pounds is still relevant because it "clearly indicates animus against Bates' complaints concerning driving overweight trucks." We see no logic in this reasoning; after all, Bates himself corroborated the truth of West Bank's statement at the hearing.

the load because, in his view, the witnesses testified at the hearing that Bates threatened to drop overweight loads "in the street," whereas the memorandum for the file and Thiaville's deposition testimony stated that Bates threatened to drop the load "at that point" and "anywhere." Furthermore, the judge reasoned, the fact that Bates had "never" in his three weeks employ at West Bank refused to drive a load undermined the plausibility of the testimony and the contemporaneous writing.

> [T]estimony by Respondent's dispatcher establishes that Complainant reported every day and previously had never refused to haul a dray. In addition, the deposition of Mr. Thiaville and a letter executed by Mr. James O'Brien, under the direction of Mr. Wactor, support a finding that Complainant never stated that he would drop a load "in the street." This Court does not find credible the testimony [by Thiaville] alleging that, although Complainant did not actually state that he would drop the load in the street, that is what he "meant." Furthermore, Mr. Wactor admitted that he did not hear the alleged statement, but terminated Complainant based on a statement of Mr. James O'Brien.

ALJ at 13.

We find the distinction drawn by the ALJ between the phrase "drop in the street" and "drop at that time" trifling. As O'Brien explained it at the hearing, when he used the phrase "at that time" in the memorandum, it did not occur to him that the phrase might be construed to exclude the concept of dropping the load "in the street." Thiaville testified to the same effect. This strikes us as a realistic and plausible accounting by the witnesses for the alleged discrepancies. "In the street" is in effect, a lesser included concept. Moreover, it was particularly natural for these two witnesses to think of "in the street" as a lesser included concept, since the overwhelming majority of time Bates would spend hauling cargo would be while driving on streets and highways. It is also significant that the ALJ's analysis in this regard is entirely semantic; there is no suggestion whatever in the decision below that the ALJ relied on the demeanor of the witnesses.

Because the statements are not inconsistent, to the extent the ALJ's decision depends on testimonial inconsistency by the witnesses, there is no basis in the record for the ALJ's finding that company witness testimony was not credible. Moreover, under any of the proffered formulations, the core of West Bank's reason for firing Bates was the same: company officials viewed the threat to abandon a trailer as justifying termination -- even if it is unclear whether the safety argument was articulated contemporaneously or not.

The fact that Wactor did not personally hear Bates make his threat does not undermine the testimony of Thiaville and O'Brien or the June 12 memorandum for the file. Wactor did personally hear Bates make unfounded claims that driving more than 80,000 pounds is an inherently unsafe practice -- claims that Bates corroborated at the hearing and that tend to support an overall picture of Bates as a person with mistaken notions about commercial vehicle safety laws.

With respect to Bates' prior willingness to drive the loads he was given, we reject the inference drawn by the ALJ that Bates had established a record of behavior that somehow made West Bank's charge of threats implausible. Three weeks of behavior is just that; it is not character or practice. Moreover, we know nothing from this record about the kinds of loads Bates was driving during this time.

We find West Bank's evidence of a legitimate business motive -- unwillingness to employ a driver who reserves the right to drop loads that he considers "too heavy" -- compelling. Correspondingly, we find the ALJ's reasons for discounting that evidence neither logical nor supported by substantial evidence in the record as a whole. The parties having litigated this case on the theory that West Bank had only one motive for terminating Bates -- either animus because of Bates' safety complaints or an unwillingness to employ a driver who threatens to drop loads based on his subjective judgments -- and our having concluded that the record supports only the latter and not the former, the complaint must be dismissed. *Cf. United States Postal Service v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482 (1983) (when the employer clearly sets forth, through the introduction of admissible evidence, a legitimate business reason for the adverse employment action, the trier of fact must decide which party's explanation of the employer's motivation it believes, citing *Texas Dep't Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094 (1981); *Ex rel Thom v. Yellow Freight System, Inc.*, No. 93-STA-2 (Sec'y Labor, Nov. 19, 1993) (holding that *Burdine* applies under STAA §405), *affirmed sub nom.*, *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 85 (2d Cir. 1994).

2. OSHA did not establish the necessary foundation for the ALJ's ruling of law that Bates' complaints constituted protected activity within the meaning of §405(a)(1)(A)

A. Interpretation of §405(a)(1)(A) requires *Chevron* analysis

Although our substantial evidence review of the fact findings below leads us to dismiss the complaint on its merits, we will briefly comment on the ALJ's and OSHA's analysis of the question whether Bates' safety complaints constituted protected activity within the meaning of §405(a)(1)(A). In our view, OSHA did not provide a legally sufficient basis for the ALJ's ruling that Bates' complaints were protected by §405(a)(1)(A). *Cf.* 5 U.S.C. §554(e) (agency may issue a declaratory order to terminate a controversy or remove uncertainty).

West Bank contends that safety complaints are not protected activity within the meaning of §405(a)(1)(A) unless (a) they relate to an **actual violation** of a commercial motor vehicle regulation, standard or order and (b) the regulation, standard or order in question is a **safety** law. WB Br. at 2. In this case, the truck was never weighed, and there is nothing in the record to justify giving more credence to Union Pacific's interchange than CSX's interchange. On this ground alone the record cannot support a finding that the load Bates hauled on June 12 exceeded 80,000 pounds. WB Br. 6-7. More importantly, West Bank contends, OSHA failed to establish that an 80,000 pound limit based on safety considerations even exists. "Assuming for a moment that the load the Complainant hauled was overweight, to haul an overweight container is neither unsafe nor a violation of any state or federal law. The overweight cargo may be transported provided the carrier obtains a permit to

do so." *Id.* at 13. Under West Bank's analysis, a complaint regarding an overweight load would not be a complaint alleging a violation of a safety law; thus, the complaint would be unprotected.

OSHA disputes both propositions. According to OSHA, it makes no difference whether carrying a gross weight exceeding 80,000 pounds is unlawful or whether the 80,000 pound "limit" is a safety law. All that is required by §405(a)(1)(A) is that the employee have a **reasonable belief** that the events in question violate a motor vehicle safety regulation. OSHA Br. at 12.

The ALJ did not purport to decide whether OSHA's construction of §405(a)(1)(A) was legally tenable. Instead, the ALJ treated the meaning of §405(a)(1)(A) as a matter previously resolved in two earlier decisions. The first decision cited by the ALJ was a Sixth Circuit decision holding that protection under §405(a)(1)(A) is not dependent on actually proving a violation of the commercial motor vehicle safety law in question. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992). The second was a Secretary of Labor decision in which the Secretary stated that it was undisputed that the driver refused to operate an overweight truck and that his refusal was based on the potential violation of federal regulations and a safety concern for himself and the public. *Ex rel Galvin v. Munson Trans., Inc.*, No. 91-STA-41 (Sec'y Labor, August 31, 1992).

In this case, the ALJ should have resolved the interpretive dispute between OSHA and West Bank, which was a dispute over the meaning of statutory text, by applying the traditional tools of statutory construction. The first step in that process is to determine whether Congress' intention is clear. If Congress' intentions are clear, they must be given effect. If it is not clear how Congress intended the statute to apply to the matter in issue, the adjudicator must determine whether the agency's clarifying interpretation is rational and consistent with the statute. If the adjudicator concludes that the agency's interpretation is reasonably consonant with the statutory structure and purpose, the adjudicator should defer to it. *PBGC v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 2678 (1990); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781 (1984); *OFCCP v. Keebler Co.*, No. 97-127 (ARB, Dec. 21, 1999).[4/]

[4/] Contrary to the dissent, *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1110, 115 S.Ct. 900 (1995), in no way undermines the premise that *Chevron* analysis is necessary for determining the meaning of §405(a)(1)(A). The issue in *Kelley* was whether Congress intended a provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that related to computation of liability for clean up costs to "be governed by traditional and evolving principles of common law." If so, then EPA would not stand in the traditional posture of an agency authorized to issue legislative or interpretive regulations concerning liability computation and, correspondingly, a reviewing court would have no need to apply *Chevron* analysis to the agency's views. The court concluded that in enacting this provision of CERCLA, Congress did not intend EPA to serve the traditional implementing role EPA plays under most other parts of CERCLA. We do not regard this decision as establishing a general rule that if an agency chooses, as the Secretary did under STAA, to establish an administrative enforcement scheme that affords a hearing to a claimant despite the investigating agency's conclusion that litigation is not warranted, that removes the statute from *Chevron's* ambit. *Cf. Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 585 (D.C. Cir. 1997), *cert. denied sub nom.*, *Pollin v. Paralyzed*
(continued...)

We assume, for purposes of this discussion, that Congress was silent on the question whether §405(a)(1)(A) requires proof that the related safety law was actually violated, and that OSHA's interpretive views on that question would therefore have to be evaluated for reasonableness. If that is so, it necessarily follows that OSHA would have to have made clear to the ALJ what its reasons were for construing §405(a)(1)(A) as not requiring evidence of an
actual violation. These reasons would certainly include policy choices and OSHA's experience and expertise in administering §405(a)(1)(A) and other, similar, statutes. Without a clear explanation from OSHA for the view it has taken, the ALJ has no basis on which to evaluate the reasonableness of OSHA's ultimate conclusion. "[I]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'" *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577 (1947) (internal citation omitted).

Equally important, without a clear explanation from OSHA, the ALJ lacks a legal basis for accepting OSHA's ultimate conclusion. This is because "an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *FPC v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326 (1974), *quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169, 83 S.Ct. 239, 245-246 (1962). "[A] simple but fundamental rule of administrative law" is "that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action. . . ." *Chenery, supra.*

It does sometimes happen that a case presents a question of statutory construction that has been definitively resolved in prior decisions. Under those circumstances, the adjudicator in the pending case may well accept the earlier decisions as *stare decisis* with respect to the statutory construction issue. But when the adjudicator does this, the adjudicator is still engaging in statutory construction analysis; the adjudicator is merely incorporating the statutory construction analysis of the earlier decisions into the case *sub judice*.

A special difficulty arises under a regulatory scheme like STAA's, where a statutory construction issue may be decided in a case litigated only by private parties. Neither private party is in a position to provide the adjudicator with the policy and experiential considerations that only the administering agency can know. As a result, the adjudicator makes a ruling about the statutory text in dispute but without a full interpretive analysis. Subsequently, in a case in which the agency itself is a litigant and which presents the interpretation issue previously decided without the agency's input, it makes no sense for the agency to "rely" on the earlier decision as if it were *stare decisis* concerning

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[4](...continued)
Veterans of America, 523 U.S. 1003, 118 S.Ct. 1184 (1998) (characterizing the EPA's role in *Kelley* as "merely a prosecutive role").

the meaning of the unclear text. (Ideally, the administering agency would prevent these difficulties by intervening in any case that requires resolution of ambiguous statutory text.)

Here, the parties -- one of whom is the administering agency -- squarely joined issue on whether the "related to a violation of a commercial motor vehicle regulation, standard or order" language of §405(a)(1)(A) requires proof of an actual violation or not. And even though the parties did not focus with any specificity on them, significant subordinate issues were attached, such as whether, assuming a reasonable belief is enough, the reasonable belief test should be subjective or objective, and how one is to determine whether a regulation, standard or order is a "safety" regulation, standard or order. No prior decisional rulings existed that represented a meaningful statutory construction analysis, replete with consideration of OSHA's policy and experiential reasoning.

The decisions OSHA cites cannot do substitute duty for OSHA. These decisional rulings reflect only the arguments of the employer and the employee in each dispute, neither of whom was in a position to inform the court in a relevant manner. The cases on which the ALJ relied suffered from the same infirmities. Hence, there was no basis for the ALJ's ruling of law that Bates engaged in protected activity when he "made internal safety complaints of an overweight load which is prohibited as a hazard to the public and the driver." ALJ at 11.[5/]

On review before us, OSHA argues for the first time that §405(a)(1)(A) protects safety complaints even if they have **no** connection with a violation of a commercial motor vehicle safety regulation, standard or order. "Under the 'complaint' provision of the STAA, an employer may not discharge an employee because **he made safety complaints . . . . concerning the safety of a vehicle or its load, or** concerning the noncompliance of the vehicle and its load with applicable state or federal law. 49 U.S.C. § 31105(a)(1)(A)." OSHA Br. at 11-12 (emphasis added).[6/] This reading

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[5/] Although OSHA has never asserted in this case that the 80,000 pound load "limit" was a safety law, we are satisfied that safety is indeed one of the goals of Louisiana's weight limit regulations.

Our own research shows that Louisiana assesses permit fees according to a sliding scale based on weight, mileage and number, type, and distribution of axles. La. Rev. Stat. Ann. §32:387H. The regulations state that issuance of permits is in the discretion of the State Secretary of Transportation, taking into consideration the economic necessity for permits, the necessity for transportation by public road, and the best interests of the state. *Id*. at §32:387B(1). This provision indicates that at least one purpose of the state load limits and permit system is revenue generating. However, that does not mean that the weight and permit system does not also pertain to safety. Clearly it does, since adequate road maintenance is a necessity for safe vehicle transportation. *See* 62 Fed. Reg. 1293 (1997) (in issuing a final rule under the Intermodal Safe Container Transportation Amendment Act of 1996, the Federal Highway Administration stated that, "[t]he purpose of highway weight laws is to minimize highway and bridge wear and protect the motoring public").

[6/] OSHA did not identify any motor vehicle regulation, standard or order relating to an 80,000 pound weight limit on commercial motor vehicles until it filed its brief to us. Here OSHA states in a footnote that "Louisiana State Code § 32:387 provides that a four-axeled vehicle carrying (continued...)

strikes us as untenable. First, it flatly contradicts the actual text of §405(a)(1)(A), which states that an employer shall not retaliate against an employee because the employee "has filed a complaint . . . **related to a violation of a commercial motor vehicle safety regulation, standard or order**." (Emphasis added.) Further, OSHA's reading stands in extreme tension with "the well-settled rule . . . that all parts of a statute, if possible, are to be given effect." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633, 93 S.Ct. 2469, 2485 (1973). In a different subsection of §405(a)(1), Congress provided in a very particular way for safety complaints that are unrelated to violations of law. Specifically, subsection 405(a)(1)(B)(ii) applies to refusals to drive based on a reasonable apprehension of serious injury, thereby protecting safety complaints even if they are not related to violations of law. The presence of §405(a)(1)(B)(ii) strongly suggests that this was the manner in which Congress wished to deal with generalized safety complaints, raising serious doubts whether the highly specific language of §405(a)(1)(A) can support the broad interpretation posited by OSHA.

Finally, taking the entire of text of §405(a)(1)(A) at face value creates no absurdities. One need not plumb the depths of dialectics to think of reasons why Congress might have wanted to exclude mere safety complaints from activities protected by §405. Congress is often concerned when creating whistleblower protection laws to avoid overwhelming agencies and courts with inconsequential complaints. *See* for example, *Griffith v. Wackenhut Corp.*, No. 98-067, slip op. at 13 (ARB, Feb. 29, 2000). Excluding generalized safety complaints from the ambit of §405 would seem quite an effective way of screening out litigation over speculative or idiosyncratic safety concerns. Certainly there is evidence within §405(a)(1) to suggest that Congress may have had just such a goal in mind. Each category of protected activity within §405(a)(1) contains a kind of quality-control factor. Requiring a link to a motor vehicle safety law helps to assure that both the complaint protected in subsection (a)(1)(A) and the refusal to drive protected by subsection (a)(1)(B)(i) relate to safety risks substantial enough to have caused a lawmaking body to regulate it. Requiring evidence that a refusal to drive protected by subsection (a)(1)(B)(ii) concerns a "reasonable" apprehension of "serious" injury similarly raises the bar for an actionable complaint. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 586, 103 S.Ct. 2017, 2025 (1983) (it is axiomatic that statutory text must be given effect unless doing so would defeat the statute's plain purpose).

We are at a loss to understand our colleague's dissenting view that the majority opinion "den[ies] protection to the raising of a concern about overweight loads. . . ." *Infra. at 19.* The sole purpose of this discussion is to clarify the process by which OSHA can legitimately express and invoke deference to its interpretive views of §405(a)(1)(A) during an enforcement proceeding. Nowhere do we suggest that OSHA's ultimate conclusion that proof of a violation is not a requirement of §405(a)(1)(A) is legally untenable. What we do say is that the ALJ needed more than OSHA's categorical statements about the meaning of §405(a)(1)(A) or the two prior decisions he cited.

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[6](...continued)
over 80,000 pounds may not be driven without a special permit." OSHA Br. at 12 n. 3. Notably, OSHA asserts neither that Bates' truck was a four-axeled vehicle (nor would the record support such an assertion) nor that the cited state code provision is a safety regulation, standard or order within the meaning of §405(a)(1)(A).

B. There is no existing body of decisional law that can serve as a kind of "equivalent" to an expression by OSHA of the policy and experiential considerations it believes supports a "reasonable belief" gloss on §405(a)(1)(A)

______The Sixth Circuit's 1992 decision in *Yellow Freight, supra*, cannot be relied upon as an authoritative ruling about this aspect of §405(a)(1)(A). A single circuit court decision on an interpretive issue such as this one may be helpful, even illuminating, but it is far from authoritative. More importantly, the Sixth Circuit's deference to OSHA's appellate argument about the meaning of §405(a)(1)(A) cannot be taken at face value. In that case, OSHA investigated the complainant's allegations, concluded they lacked merit, and issued a "no reasonable cause" finding pursuant to 29 C.F.R. §1978.104. When OSHA issues a "no reasonable cause" finding, the complainant has the option of litigating the case on his own. *Id*. at 1978.105, .107(b). This particular complainant chose to do so. OSHA did not participate in any way in the litigation of the case before the ALJ or the Secretary of Labor.

The Secretary of Labor ruled in favor of the complainant, and Yellow Freight appealed that decision to the Sixth Circuit. *See* 49 U.S.C. §31105(c); 29 C.F.R. §1978.110. When a decision by the Secretary of Labor under §405 of the Act is appealed to a United States Court of Appeals, the Department of Labor's Office of the Solicitor defends that decision. *See* 51 Fed. Reg. 42,091 (Nov. 21, 1986). This is what happened in *Yellow Freight*. Whether the court of appeals fully appreciated that the views expressed in the Department's brief to the court were not views that OSHA had expressed in the administrative litigation is impossible to know.

The views expressed by the Department in its brief to the Sixth Circuit were not the kind of agency "litigating positions" ordinarily associated with deference analysis. *Compare Martin v. OSHRC*, 449 U.S. 144, 157, 111 S.Ct. 1171, 1179 (1991) ("The Secretary's interpretation of OSH Act regulations in an administrative adjudication . . . is agency action. Moreover, when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress"). In other words, the agency "litigating positions" that are generally accorded the same deference analysis as is accorded to rules issued after notice and comment are interpretive views and policy choices the agency has chosen to establish on a case-by-case basis, drawing on the agency's authority to create rules by adjudication. Whether agency views expressed in a brief in defense of an agency decision that resolved only a dispute between the complainant and the company is comparable to agency views expressed by means of administrative adjudication has yet to be considered. *Id*. at 1178 ("Our decisions indicate that agency 'litigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court. *See Bowen v. Georgetown Univ. Hospital* [488 U.S. 204, 212, 109 S.Ct. 468, 473-474 (1988)]").

Finally, contrary to the dissent, we do not regard the body of decisional law touching on the phrase "related to a violation of a safety regulation, standard or order" as "provid[ing] well reasoned analyses interpreting the complaint clause." *Infra.* at 18. Rather, we find this body of decisional law almost devoid of OSHA input on anything, much less OSHA's views concerning the proper construction of the "related to a violation of law" concept.

For example, OSHA issued a "no reasonable cause" finding in *Clean Harbors, supra*, and did not participate in the administrative hearing or appeal. In its decision in that case, the ARB treated the question, what does §405(a)(1)(A) require the complainant to prove, as a question it was free to decide *de novo*. It was not an issue for decision by the Court of Appeals. In *BSP Transp., supra*, OSHA found no reasonable cause and did not participate in the administrative hearing or appeal. The First Circuit vacated the complaint based solely on the ALJ's finding of fact that BSP had a legitimate motive. In *Castle Coal & Oil v. Reich*, 55 F.3d 41 (2d Cir. 1995), OSHA issued a no reasonable cause finding and did not participate in the administrative hearing or appeal. The Second Circuit affirmed the §405(a)(1)(A) citation on the ground that "the mere allegation of a violation" is enough -- even though no related safety law was ever even identified in the case. In *Yellow Freight v. Reich*, 38 F.3d 76 (2d Cir. 1994), OSHA made a no reasonable cause finding and did not participate in the administrative hearing or appeal. The issue in the case was whether the complainant proved he was discharged in retaliation for refusing to drive under §405(a)(1)(B)(ii), the "reasonable apprehension of serious injury" clause. In *Moon v. Transport Drivers, supra*, OSHA issued a no reasonable cause finding and did not participate in the administrative hearing or appeal. The Sixth Circuit vacated the complaint on the ground that Transport Drivers fired Moon for legitimate business reasons; the meaning of the phrase "related to a violation of a safety law" was never discussed.

In *Davis v. R.H. Hill, Inc.*, 86-STA-18 (Sec'y Labor, March 19, 1987), OSHA issued a no reasonable cause finding and did not participate in the administrative hearing or appeal. The Secretary treated the question, what does "related to a violation of a safety law" mean, as an issue it was free to decide *de novo*. In *In re Nix v. Nehi-RC Bottling Co.*, 84-STA-1 (Sec'y Labor, July 13, 1984), OSHA issued a no reasonable cause finding and did not participate in the administrative hearing or appeal. The Secretary treated the interpretive question *de novo* and gave no reason for his conclusion.

In *Brink's Inc. v. Herman*, 148 F.3d 175 (2d Cir. 1998), OSHA made a no reasonable cause determination and did not participate in the administrative hearing or appeal. The Second Circuit rejected the Secretary's claim that Brink's violated the "complaint clause" because "the statute only protects complaints relating to a 'violation of a commercial motor vehicle safety rule, regulation, standard or order'. . . ; the Secretary points to no such rule or regulation covering radio sets [the subject of the employee's complaints]." 148 F.3d, *supra* at 179 n. 6. In *In re Robinson v. Duff Truck Line, Inc.*, 86-STA-3 (Sec'y Labor, March 6, 1987), OSHA did participate in the administrative hearing and appeal and argued that a driver's good faith belief that accepting a particular assignment would violate a safety law was protected activity, but the Secretary **rejected** that argument as contrary to the plain meaning of the statute. In *In re Williams v. Carretta Trucking, Inc.*, 94-STA-7 (Sec'y Labor, Feb. 15, 1995), OSHA found no reasonable cause and did not participate in the administrative hearing or appeal. The Secretary treated the "related to" question as one to be decided *de novo*, and held that the phrase "violates a regulation standard, or order" in clause §405(a)(1)(B)(i) requires proof of an actual violation; **"it is not sufficient that the driver had a reasonable belief** about a violation." Slip op. at 4 (emphasis added). *In re Brame v. Consolidated Freightways*, 90-STA-20 (Sec'y Labor, June 17, 1992) (same). In *Ex rel Galvin v. Munson Transp., supra,* OSHA issued a no reasonable cause finding and did not participate in the administrative hearing or appeal. The Secretary stated that Galvin's refusal to drive based on a potential violation of federal law constituted

protected activity. Slip op. at 4. However, this statement was sheer fiat, with no discussion whatever.

In short, the decisional law on this point is inconsistent, replete with conclusory statements, short on analysis, and virtually bereft of OSHA input.

ACCORDINGLY, Respondent's objections to the Decision below are accepted and the complaint is **DISMISSED.**

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

E. Cooper Brown, Member, concurring in part and dissenting in part:

I concur in the disposition reached by the majority on the merits, *i.e.,* that the record does not support a finding that Mr. Bates was terminated in violation of Section 405(a) of the STAA. In essence, I agree with my colleagues that the evidence establishes that West Bank terminated Bates because of the manner in which Bates stated he would dispose of an overweight load, not because Bates raised a concern about transporting overweight loads. *Cf. Holtzclaw v. Commonwealth of Kentucky*, 95-CAA-7 (ARB Feb. 13, 1997), slip op. at 5-6. I do not, however, join my colleagues in their rejection of "the ALJ's and OSHA's analysis" of the question of whether Bates had engaged in activity that qualifies for protection under Section 405(a). In the interest of brevity, I will summarize the essential points giving rise to my disagreement with the majority's reasoning.

I cannot agree with my colleagues that deference in this case to the Assistant Secretary's position regarding protected activity is not warranted. Opinions issued by the Secretary, the ARB, and the courts provide well reasoned analyses interpreting the "complaint clause" of the STAA, and thus provide us with an adequate standard against which to gauge the Assistant Secretary's interpretation of Section 405(a).[7] Notable among the cases that discuss the range of activities covered

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[7] *See Clean Harbors v. Herman*, 146 F.3d 12, 19-21 (1st Cir., 1998); *Yellow Freight Systems v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1198-99 (2d Cir. 1993); *Yellow Freight Systems v. Martin,* 954 F.2d 353, 356-57 (6th Cir. 1992); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-229 (6th Cir. 1987); *Dutkiewicz v. Clean Harbors Envtl. Servs.*, 95-STA-34, 97-ARB-090 (ARB Aug. 8, 1997), slip op. at 3-4; *Rehling v. Sandel Glass Co.*, 91-STA-33 (Sec'y Jan. 6, 1992), slip op. at 4-5; *Moyer v. Yellow Freight Systems*, 89-STA-7 (Sec'y Nov. 21, 1989); *Davis v. H.R. Hill*, 86-STA-18 (Sec'y Mar. 19, 1987); *Nix v. Nehi-RC Bottling Co.*, 84-STA-1 (Sec'y July 13, 1984), slip op. at 8-9. *Cf. Galvin v. Munson*
(continued...)

by the "complaint clause" is the opinion of the U. S. Court of Appeals for the Sixth Circuit in *Yellow Freight Systems v. Martin,* 954 F.2d 353, 356-57 (6th Cir. 1992). Under the Secretary of Labor's interpretation of Section 405(a) in *Martin*, the complainant's protection was not dependent upon whether an actual violation of a federal safety provision had been proven, but whether the underlying proceeding in question was "based upon possible safety violations." 954 F.2d at 357. Mindful of the deference due the Secretary's interpretation of a statute Congress had charged the Secretary with administering, the court held the Secretary's interpretation of Section 405(a) to be "reasonable, consistent with the statutory mandate, and persuasive." *Id.* The fact that only private litigants prosecuted the case does not render the interpretation of Section 405(a) coverage thus reached of any less precedential weight than had OSHA participated in the case before the Sixth Circuit.[8/] *See Kelley v. Environmental Protection Agency*, 15 F.3d 1100, 1108 (D.C. Cir. 1994).[9/]

On this basis, as well as for the reasons set forth by the Supreme Court in *Brock v. Roadway Express, Inc.,* 481 U.S. 252, 258, 262, 107 S.Ct. 1740 (1987), and by the Secretary in such cases as *Rehling v. Sandel Glass Co.*, *supra*, I conclude that the Assistant Secretary's position in this case -- that an employee's expression of concern about the assignment of overweight loads qualifies as a *safety-related* complaint for purposes of STAA coverage -- is wholly consistent with the statutory scheme. Furthermore, I believe that it is clear that the position concerning protected activity that is advanced by the Assistant Secretary is based on OSHA's "policy and experiential considerations." To deny protection to the raising of a concern about overweight loads, which is obviously related to the question of maintaining adequate control over the operation of a truck and trailer rig, can only have a chilling effect on the raising of such concerns. *See Brock v. Roadway Express, Inc.,* 481 U.S. at 258. In my view, the Assistant Secretary's prosecution of this complaint demonstrates recognition of this reality.

E. COOPER BROWN
Member

[7/](...continued)
Transportation, 91-STA-41 (Sec'y Aug. 31, 1992) (refusal to drive overweight load based on potential violation of federal regulations held "protected activity" under Section 405(a)(1)(B)).

[8/] The decision that was before the court in *Yellow Freight Systems v. Martin* was rendered by the Secretary of Labor, *Moyer v. Yellow Freight Systems*, 89-STA-7 (Sec'y Nov. 21, 1989).

[9/] The *Kelley* court, in holding *Chevron* judicial deference to the EPA's statutory interpretation inappropriate, stated, "even if an agency enjoys authority to determine such a legal issue administratively, deference is withheld if a private party can bring the issue independently to federal court under a private right of action." 15 F.3d at 1108.