U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

BERNADINE POULTER,

COMPLAINANT,

v.

CENTRAL CAL TRANSPORTATION, LLC and RYAN ROTAN,

RESPONDENTS.

ARB CASE NO. 2018-0056

ALJ CASE NO. 2017-STA-00017

DATE: August 18, 2020

Appearances:

For the Complainant:
Peter L. LaVoie, Esq. and Paul O. Taylor, Esq.; *Truckers Justice Center*; Edina, Minnesota

For the Respondents:
Denise Greathouse, Esq. and Holly E. Courtney, Esq.; *Michael Best & Friedrich LLP*; Milwaukee, Wisconsin

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Heather C. Leslie, *Administrative Appeals Judges,*
Judge Thomas H. Burrell, dissenting

DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended.[1] Bernadine Poulter

[1] 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2019) (the STAA's implementing regulations).

(Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on December 21, 2015, alleging that Central Cal Transportation, LLC and Ryan Rotan violated the employee protection provisions of the STAA by terminating her employment in retaliation for raising safety concerns.

Following a hearing on her complaint, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) concluding that Respondents violated the STAA, ordering Respondents to reinstate Complainant, and awarding damages and attorney's fees.

Respondents appealed the D. & O. to the Administrative Review Board (ARB or Board). For the following reasons we reverse the ALJ's ruling and dismiss the complaint.

BACKGROUND

1. Parties

Respondent, Central Cal Transportation, LLC (Central Cal), is an intermodal transport trucking company, and at all relevant times, the employer of Respondent, Ryan Rotan, who worked as a Terminal Manager.[2] Although Respondent Rotan did not hold a commercial driver's license, his duties included dispatching trucks, assigning work, and managing requests from shippers.[3]

Complainant was a truck driver employed by Central Cal starting in June 2015.[4] Complainant received her commercial driver's license in October 2012, and had worked as a truck driver before she joined Central Cal.[5]

2. Incident

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[2] Hearing Transcript (TR) at 17, 18, and 21.

[3] *Id*. at 18 and 20.

[4] *Id*. at 63.

[5] *Id*. at 62.

On December 18, 2015, after completing the first load of the day, Complainant was tasked to haul a second load.[6] Complainant drove from Sparks, Nevada approximately 200 miles to Lathrop, California.[7] The second load of the day contained Michelin tires, and she picked up the sealed intermodal container unit somewhere between 11:00 a.m. and noon at the BNSF rail yard in Lathrop, California.[8] She then proceeded directly to the truck scales in Stockton, California.[9]

Under applicable Department of Transportation and California state regulations, the maximum total gross weight for a truck and its load operating on an interstate highway is 80,000 pounds.[10] The regulations also require that the maximum gross weight permitted on any one axle is no greater than 20,000 pounds, and the maximum weight on tandem axles is no greater than 34,000 pounds.[11]

Although Complainant's total vehicle gross weight for her second load was approximately 4,000 pounds under the legal limit, the weight was not evenly distributed.[12] Apparently, during transit, the tires had piled up within the sealed container toward the back doors so that the weight on the trailer (tandem) axle was 600 pounds over the limit, even though the steering axle and the drive axles were well within regulatory limits.[13]

Complainant sent the dispatcher (Respondent Rotan) a text message to inform him of the overweight condition of the trailer axle, and it led to the following series of texts.[14]

Complainant: "Overweight. 600 in rear!!!!"

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6 *Id*. at 71.

7 *Id*. The ARB takes judicial notice that the driving distance between Sparks, Nevada and Lathrop, California is approximately 200 miles.

8 TR at 59, 21, 38, and 113.

9 *Id*. at 37.

10 23 C.F.R. § 658.17 (b) (2007); Cal Veh Code § 35551(a).

11 23 C.F.R. § 658.17 (c)-(d); Cal. Veh Code § 35551(b).

12 TR at 126; JX-2.

13 *Id*.

14 JX 3.

Respondent Rotan: "Send scale ticket."

Complainant: "Just did. U have. Em if u got this message. !"

Respondent Rotan: "Try to slam it. You can legal 34500"

Complainant: "Nope. Nit gonna. Move."

Respondent Rotan: "No you need to know what is legal and what is not. 34500 is legal on an axle, as long as the other two axles are not overweight."

Complainant: "Well. That's. Not true. ! I've drop it at comtrac. And u can't. Make. Me run a over weight Load... Only the front axle can legally. Go over the back 2 NOT…..Am I bob tail home. Or r u sending. Me. Another. Load?"

Respondent Rotan: "You need to call the office."

At the hearing, Respondent Rotan testified that his purpose in directing Complainant to call was to specifically clarify that he was not instructing her to drive an overweight load.[15] During the call, Respondent Rotan directed Complainant to try to shift the location of the tires in the load, by using forward momentum with an abrupt stop, to redistribute the load forward and shift some of the weight of the vertically stacked tires off the back axle.[16]

Both Complainant and Respondent Rotan agree that the significance of the telephone conversation was his instruction to Complainant that she should try to bring the load into compliance with the weight restrictions noted earlier, and determine whether the load could be safely transported.[17] Further, both the

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[15] TR at 34.

[16] *Id.* at 35. The shifting maneuver is one technique to adjust the load, and is sometimes referred to in trucking jargon as "slamming" or a "slam" maneuver (as used by Respondent Rotan in his text messages with Complainant on the day of the incident). The dissent adopts an unnatural reading of the term "adjust" which is generically used to mean shift, transfer, or move the weight of the load on the rear trailer axle. There are several techniques to accomplish this task.

[17] *Id.* at 35, 49; Poulter Deposition Transcript (PDT) at 55.

Complainant and Respondent Rotan agree that Complainant refused to attempt to try to bring the load into compliance.[18]

Finally, Complainant and Respondent Rotan agree that she was instructed not to drive the load once she refused to try to adjust or shift the weight off the rear axle.[19] In the words of the Complainant, "He wouldn't let me take it to the yard; he wouldn't let me take it anywhere."[20]

During the course of the texts and the conversation, Complainant refused (at least twice) to attempt to make the load safe for transport.[21] As the conversation progressed, Complainant became agitated and yelled at Respondent Rotan.[22] As a result of the incident, the Complainant was terminated for insubordination from her employment at Central Cal.[23]

3. OSHA Complaint

On December 21, 2015, Complainant filed a complaint alleging that Respondents retaliated against her in in violation of the STAA, 49 U.S.C. § 31105(a). On November 18, 2016, OSHA issued its determination under 49 U.S.C. § 31105 (b)(2)(A) that Complainant was not the victim of retaliation, and on December 2, 2016, Complainant filed her request for a hearing before a Department of Labor administrative law judge (ALJ).[24]

4. Administrative Law Judge Decision and Order

On June 8, 2017, an ALJ conducted a hearing on the issues presented by Complainant's complaint.[25] On June 19, 2018 the ALJ issued his decision, finding in

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18 *Id.* at 35, 45, 49, 110; PDT 51.

19 *Id.* at 51; PDT at 51.

20 PDT at 50.

21 JX 3; TR at 93.

22 TR at 126; PDT at 57-58.

23 *Id.* at 94.

24 D. & O. at 2-3.

25 *Id.* at 1.

favor of the Complainant.[26] The ALJ concluded that Complainant had engaged in protected activity, and that protected activity had caused and contributed to her termination. Further, the ALJ concluded Respondents did not establish by clear and convincing evidence that they would have taken the same adverse action in absence of the protected activity.

Pertinent to the appeal before us, the ALJ made several credibility determinations. The ALJ found Complainant "less than credible in significant portions of her testimony."[27] This included her testimony regarding her alleged safety concerns surrounding attempting to shift the load, as well as her inconsistent testimony regarding the reasons for her firing. The ALJ did credit some aspects of her testimony, including her belief that trying to shift the load would not make a difference because of the weight of the 600 pound differential.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to issue agency decisions under the STAA.[28] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence.[29] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[30] The Board will uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable."[31]

DISCUSSION

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[26] *Id.*

[27] *Id.* at 10.

[28] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); *see* 29 C.F.R. § 1978.110(a).

[29] 29 C.F.R. § 1978.110(b); *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted).

[30] *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

[31] *Jacobs*, ARB No. 2017-0080, slip op. at 2 (quotations omitted).

Retaliation claims under the Surface Transportation Assistance Act (STAA) are determined based on a burden-shifting analysis.[32] As we explained in *Jeanty v. Lily Transp. Corp.*: [33]

> To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); *Buie v. Spee-Dee Delivery Serv., Inc.*, ARB No. 2019-0015, ALJ No. 2014-STA-00037, slip op. at 3 (ARB Oct. 31, 2019). If the employee does not prove one of these requisite elements, the entire claim fails. *Riess v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 2011-0032, ALJ No. 2008-STA-00011, slip op. at 5 (ARB Dec. 19, 2012) (citation omitted).

1. Protected Activity

Under the complaint clause of the STAA whistleblower statute, a complainant may engage in protected activity by making a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order . . . ."[34] A complainant may also engage in protected activity by refusing to drive under certain conditions. The refusal to drive provision sets out two distinctly different kinds of protected activity. In the first instance, a driver is protected if she refuses to drive because operation of the vehicle would violate a safety regulation; in the second instance, a driver is protected if she refuses to drive because she has a reasonable concern that operation would cause a safety hazard. As the text of the statute provides, "Whistleblower" protection is conferred if:[35]

> (B) the employee refuses to operate a vehicle because—

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[32] See 49 U.S.C. § 31105(a)(2)(b) (STAA complaints must be considered in accordance with 49 U.S.C. § 42121(b)(2)(B)).

[33] ARB No. 2019-0005, ALJ No. 2018-STA-00013, slip op. at 4 (ARB May 13, 2020) (per curiam).

[34] 49 U.S.C. § 31105(a)(1)(A).

[35] 49 U.S.C. §§ 31105(a)(1)(B)(i) and (a)(1)(B)(ii).

> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
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> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

Here, the ALJ found Complainant's refusal to drive on December 18, 2015 constituted protected activity under the complaint clause and the refusal to drive clause because the operation of a vehicle with an overweight rear trailer axle would violate "the commercial vehicle weight regulations at 23 C.F.R. § 658.17, 49 C.F.R. § 392.2, and Cal Veh Code § 35551."[36] According to the ALJ, Respondent Rotan's error in restating the legal axle weight limit at "34,500," instead of the accurate limit of 34,000, represented an instruction to drive with weight in excess of the correct limit, and rendered Complainant's refusal to haul the second load protected.

We hold that the ALJ's ruling, and his focus on Respondent Rotan's misstatement, was error, because it ignored credible evidence in the record demonstrating that Complainant's asserted "refusal to drive" the load was not protected under the STAA.

To appreciate this error, we first note undisputed facts from the record. Significantly, it is clear that Respondent Rotan never instructed Complainant to operate the vehicle at the 34,600 axle weight it registered at the scales. Despite Respondent Rotan's verbal misstatement regarding the legal limit for axle weight, he and Complainant were in agreement that 34,600 pounds was over the limit.[37] And, although the interpretation of the text messages Respondent Rotan sent to Complainant may be disputed on other grounds, Complainant was actually instructed not to drive the load with an excessive weight of 34,600 pounds resting on the rear axle.[38]

When Respondent Rotan realized that he was being misunderstood by the Complainant, he immediately decided to switch from texting to a telephone conversation in order to clarify that she was not to drive with an overweight rear

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[36] D. & O. at 18.

[37] TR at 29-30, and 74.

[38] TR at 51 and 92.

axle.[39] On this point, Complainant testified, "He wouldn't let me take it to the yard; he wouldn't let me take it anywhere."[40] This evidence from Complainant's testimony confirms that she was forbidden to drive the load with an overweight rear axle.[41]

Complainant confirmed in addition that she had never been instructed to drive an overweight load during her employment with Respondent Central Cal.[42] The undisputed general policy of Respondent Central Cal was for drivers to reject loads that could not be adjusted to comply with legal weight requirements, and to pick up another load or, if none was available, to return without a load.[43]

According to Complainant's testimony, it was her primary responsibility to try to adjust an overweight load.[44] In context, it is the driver who attaches the load, who takes the load to the scales, and who is informed of any overweight conditions. Further, it is the driver who is best positioned to take reasonable corrective action when safety issues are discovered.

On the record below, the practice of attempting to adjust the weight distribution of a load by momentum was understood by both Complainant and Respondent Rotan not to violate any vehicle codes or DOT regulations, and was common practice for Respondent's drivers.[45] Complainant acknowledged that she had also previously attempted to adjust loads when necessary using the load shifting momentum technique.[46]

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39 *Id.* at 34.

40 PDT at 50.

41 *Id.* at 50 and 51.

42 *Id.* at 65.

43 *Id.* at 31-32, 49, 50, and 51.

44 Question, "[W]hen you have an overweight load, what as a driver is your responsibility?" Answer, "One, you find out it's overweight, you scale it; two, you try to adjust it if you can adjust it." PDT at 31 (emphasis added).

45 TR at 31-32, 37, 39-40, 53, 54, 110; RX 8 at 16; "Both Mr. Rotan and Complainant testified that the slamming technique does not violate any vehicle codes or DOT regulations." D. & O. at 15 and 19.

46 TR at 77 and 110.

Respondent Rotan repeatedly requested that Complainant attempt the shifting maneuver to redistribute the weight of the second load.[47] Although Respondent Rotan and Complainant disagreed as to how much redistribution was necessary, or whether the maneuver would have resulted in a sufficient redistribution to create a legal load, they agreed that he ordered Complainant to try the technique.

Despite Respondent Rotan's instruction to attempt shift the load, Complainant refused to attempt the maneuver and actually determine how much weight could be redistributed.[48] Instead, she chose to drive the load (while overweight) to the Comtrac facility where she dropped it off.[49]

We find it undisputed that Complainant was neither instructed, nor permitted to drive in violation of the axle weight limitations on December 18, 2015. With 34,600 pounds on the rear axle, she was under a clear order not to drive per her telephone conversation with Respondent Rotan. Complainant disobeyed this order by transporting the load to Comtrac. Even when Complainant refused the order to attempt to shift the load, she admitted in the record that she understood management's instruction to try to adjust her load represented a standard practice, and was not a violation of any vehicle codes or DOT regulations.

Her refusal to attempt to adjust the weight in spite of repeated requests, rendered the hypothetical question of whether Respondent Rotan would have attempted to compel her to drive irrelevant. Notably, when asked why she did not try the maneuver, and then tell Respondent Rotan that she could not get below the legal limit, she said she did not know why.[50]

If Complainant refused to shift the weight, the question of whether she might have been instructed or required to drive overweight invites mere speculation on the part of the ALJ. The undisputed facts clearly show that the load always remained at 34,600 pounds on the rear axle. At this weight both parties agreed the vehicle would not be operated.

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47 TR at 31, 35, and 49; JX 2 at 1.

48 *Id.* at 35, 93, and 94.

49 *Id.* at 50-51. Complainant's text message, "I've drop it at comtrac" at JX 3.

50 *Id.* at 122.

The ALJ concluded in the D. & O. that Respondent's order to try to shift weight off of the rear axle before hauling the load "contemplated" an "inherent" violation of the regulations, and rendered Complainant's refusal to drive under the circumstances protected, because she still would have been over the actual legal limit.[51] This conclusion would be relevant only if Respondent had actually instructed Complainant to drive the load overweight. The question in this case is not a form of words dispute about whether the Respondent might have implicitly instructed Complainant to drive. Respondent explicitly told Complainant not to drive overweight. Although Respondent Rotan misstated the weight restrictions and confused matters, no interpretation of the evidence before the ALJ supports the inference that Rotan's factual error amounted to an instruction to drive overweight.[52]

The ALJ also erred as a matter of law in neglecting to consider Complainant's obligation to attempt to make the load safe and bring the load into regulatory compliance before further operation, regardless of Respondent Rotan's misstatement regarding the load limit. Adjusting the load is identical to a myriad of tasks that require the driver's prompt attention while in the field. By way of example, these tasks include the fundamental observation that the driver must fasten his or her seatbelt before operation. The driver must turn-on the headlights after dark, and scrape ice off the windshield. For each of these tasks, like the obligation to try to adjust the load, there are both regulatory requirements and safety implications. However, it is also true that these safety responsibilities are the obligation of the driver.

Therefore, we conclude that the ALJ erred when he failed to resolve a conflict created by the countervailing evidence that Complainant was never directed to drive an overweight load and that, for that reason alone, she could never have refused to

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[51] D. & O. at 18.

[52] TR at 47. This result would have been in accord with Complainant's testimony regarding her experience with how much she could redistribute weight with a shifting maneuver. According to Complainant, in her experience, she had only ever shifted less than 100 pounds using the technique. TR at 77.

do so.[53] "Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support the [agency's] conclusion."[54] In *Dalton v. Copart, Inc.*,[55] we held,

> the substantial evidence standard does not require us to affirm the ALJ's findings of fact merely because there is evidence in the record which would justify them, without taking into account other - contrary - evidence in the record. Rather, as the Supreme Court held in *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951), "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

Similarly, in *Bobreski v. J. Givoo Consultants, Inc.*,[56] we clarified:

> The fact finding must "take into account whatever in the record fairly detracts from its weight," having a sufficient contextual strength. A finding of fact lacks contextual strength and substantial evidence if "the [adjudicator] ignores, or fails to resolve, a conflict created by countervailing evidence" or "if it is overwhelmed by other evidence or if it really constitutes mere conclusion."

As applied, the weight of the evidence here leads to the conclusion that Complainant was never instructed to drive in violation of the axle weight limitations on December 18, 2015. The ALJ relied on Respondent Rotan's initial

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[53] See Fed. R. Evid. 401, *Bartlik v. Tenn. Valley Auth.*, 1988-ERA-00015 (Sec'y Apr. 7, 1993), *Collins v. Am. Red Cross*, 715 F.3d 994, 998-99 (7th Cir. 2013), *Alcala v. Woodford*, 334 F.3d 862, 886-88 (9th Cir. 2003), *United States v. Irvin,* 682 F.3d 1254, 1274 (10th Cir. 2012).We believe the dissent makes the same analytical error, and again fails to explain how complainant can refuse a task that she was, in fact, never given. While our dissenting colleague mentions "mixed motives" we can find no support for this analysis in the events of this case.

[54] *Steed v. Astrue,* 524 F.3d 872, 874 (8th Cir.2008) (citing *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir.2000)).

[55] ARB No. 2001-0020, ALJ No. 1999-STA-00046, slip op. at 7 (ARB July 19, 2001).

[56] ARB No. 2013-0001, ALJ No. 2008-ERA-00003, slip op. at 13-14 (ARB Aug. 29, 2014) (internal citations omitted).

misstatement of the applicable weight limit, when substantial evidence is required. Thus, we hold that the ALJ committed reversible error.

2. No Protected Activity to Form a Contributing Factor of Causation

It is axiomatic that without protected activity, there can be no causal relationship between the Respondents and any claim of adverse action. It is clear from the record before us that both Complainant and Respondent Rotan agreed that she would not be allowed to operate the vehicle as long as it was overweight.[57] This means that it was Complainant's refusal to attempt to make the load safe which caused her termination. This refusal cannot be characterized either as protected activity or as a contributing factor under the statute.[58]

Even if Complainant were assumed to have engaged in protected activity by reporting the overweight condition of her load, the ALJ erred in concluding that this asserted protected activity contributed to the decision to terminate her employment.

We take special notice of the ALJ's discussion of the "intertwined" nature of Complainant's alleged protected activity and her termination.[59] As we explained in *Thorstenson*, the ARB has recognized that an "inextricably intertwined" or "chain of events" analysis may impede the necessary analysis of the facts and the law.[60] While we understand that *Thorstenson* was issued subsequent to the issuance of the decision, the discussion of the intertwined nature of Complainant's termination and alleged protected activity is in error, because it obscured and oversimplified the evidence in this case.

We find that the ALJ's analysis of the circumstantial evidence surrounding the termination is in error. The ALJ notes that the temporal proximity of the firing supports contributing factor causation, relying on her complaints regarding the overweight container and refusal to follow Rotan's instructions. However, as discussed above, Complainant testified that Rotan never asked her to drive an overweight load. The ALJ specifically concluded that Complainant's testimony was

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57 PDT at 50; TR at 51.

58 49 U.S.C. §§ 31105(a)(1)(B), 42121(b)(2)(B)(i).

59 D. & O. at 21.

60 *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052, slip op. at 10 (ARB Nov. 25, 2019). The use of analytic tools may create an unjustified merger of events which merit individual consideration.

less than credible surrounding why she was fired. The ALJ identified her inconsistent and contradictory testimony regarding whether it was for refusing to attempt to adjust the load, or for driving an overweight load, and that "her contradictions caution against affording her testimony significant weight."[61] The ALJ's analysis finding that Complainant's alleged protected conduct was a contributing factor seemingly fails to account for the credibility findings noted above.

The record shows that during the Complainant's entire employment with Respondent she had previously reported overweight loads and had never been told to drive the load.[62] She also had attempted to adjust loads in the past with a momentum shift when she identified a load that was within maximum gross weight, but overweight on the rear axle.[63] In each case, while employed by Respondent if the load could not be adjusted, she was instructed to take another load, or if there was no other load available, to return to the facility without a load.[64]

The ALJ noted that "Respondents were not hostile in general to drivers reporting overweight loads."[65] To the contrary, the evidence reflects that Respondents were accommodating to drivers reporting overweight loads. Respondent Rotan stressed to Complainant on the day of the incident that he did not want her to drive overweight, and that Respondents had, admittedly, never required her to drive a load that was overweight.[66]

Her refusal to follow her employer's instruction stands in contrast with her direct testimony that attempting to adjust the load was her part of her obligation as

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61 D. & O. at 11.

62 PDT at 65; TR at 37.

63 TR at 37 and 77; PDT at 32 and 63.

64 PDT at 31.

65 D. & O. at 22.

66 PDT at 34, 65.

a driver, and that attempting to adjust the load is the immediate corrective action required to make the load safe.[67]

As a result, the ALJ's conclusion that the circumstantial evidence established contributing factor causation is not supported by substantial evidence in the record.

3. Respondent Central Cal Has Provided Clear and Convincing Evidence it Would Have Taken the Same Action in the Absence of the Claimed Refusal

Alternatively, we hold that Respondent has provided clear and convincing evidence that it would have taken the same action in the absence of the claimed refusal based on the Complainant's insubordination in refusing a direct order to attempt to balance the load.

As we stated in *Gordon v. Brindi Trailer and Service, Inc.*, an employer will have a complete affirmative defense when it can prove "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity."[68] Further, the high bar of clear and convincing evidence has been defined as "evidence indicating that the thing to be proved is highly probable or reasonably certain."[69]

Here, Respondent Central Cal's affirmative defense is based on Complainant's insubordination. Insubordination is defined as the "willful and

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[67] *Id.* at 31. Our dissenting colleague also suggests that the use of momentum to shift the load was merely a "practice," and therefore could not be considered a "policy." Although we hold this semantic point to be a distinction without a difference, the record establishes that shifting the weight of cargo using this procedure actually was the Respondent's "policy." In this case, policy is simply a practice that has ripened into an expectation of management. Beyond question Complainant's past use of the technique, its customary use by other drivers at the company, coupled with Respondent Rotan's direct instruction, demonstrate that the shifting technique was an expectation of management and therefore a "policy." We note that the dissent explicitly concedes that if Respondent's instruction to the Claimant concerned a "policy," then Complainant's failure to comply broke any conceivable chain of causation arising from the alleged protected activity.

[68] *Gordon v. Brindi Trailer and Serv., Inc.*, ARB No. 2017-0054, ALJ No. 2016-STA-00019 slip op. at 5 (ARB Mar. 13, 2020)(per curiam); *accord Coryell v. Ark. Energy Servs., LLC*, ARB No. 2012-0033, ALJ No. 2010-STA-00042 (ARB Apr. 25, 2013).

[69] *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, 852 F3d 268, 286 & fn. 99 (3rd Cir. 2017)(quoting *Black's Law Dictionary* (10th ed. 2009).

intentional *refusal* [emphasis supplied] to obey an authorized order of a superior officer which the officer is entitled to have obeyed."[70] During the course of the hearing, Respondent introduced substantial evidence that it had a disciplinary action policy that included the remedy of termination for insubordination.[71]

The evidence in the record shows that Complainant was insubordinate. She received an unambiguous, authorized order to attempt to shift the load. She failed to show that order was illegal, and the ALJ discredited her contention that she believed at the time that the maneuver under the circumstances would have been unsafe. In the proceedings below, she offered no credible explanation for why she would not attempt to shift the load, other than her personal belief that it would not have resulted in a sufficient redistribution of the weight to make the load legal. Her subjective belief in the futility of the exercise does not excuse her from engaging in what was an unobjectionable task that was within her means and experience to try. Separately, Complainant also admitted that her conduct in yelling at her supervisor was both inappropriate and possible grounds for termination.[72]

In this case, the ALJ erred when he identified the correct legal standard, but then applied it incorrectly to the underlying facts.[73] The ALJ cites the employee handbook, and notes the evidence that the Complainant was very combative at times. Indeed, the ALJ went so far as to confirm that "[t]he record reflects that Complainant was hostile and insubordinate to her supervisor, an attitude that manifested at her deposition."[74] However he found that this evidence was insufficient to prove that Respondent "would have terminated Complainant for insubordination absent her complaint about the overweight load."[75]

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[70] *Yates v. Manale*, 377 F.2d 888 (5th Cir.1967). cert. denied, 390 U.S. 943, 88 S.Ct. 1037, 19 L.Ed.2d 1139; *Gallagher v. Dep't of Labor*, 10 M.S.P.B. 528, 11 M.S.P.R. 612 (1982).

[71] The policy stated, "Refusal or failure to follow job instructions or a supervisor's orders or other insubordination, restricting, slowing down or interfering with production or causing, advising, or directing others to do so." TR at 44. Violation of the policy included disciplinary action, "Up to and including termination." *Id.*

[72] TR at 126-127.

[73] *United States v. Hinkson*, 585 F.3d 1247, 1251, 1261-63 (9th Cir. 2009)(en banc).

[74] D. & O. at 22.

[75] *Id.* at 23.

The ALJ erred in his consideration of key facts: Complainant refused a direct order to attempt to make the load safe, and also drove the unsafe load to Comtrac, contrary to a direct order not to drive the load anywhere. During the course of this series of insubordinate events, the Complainant became combative and yelled at her supervisor. As a result, Respondent Rotan was faced with a complete rejection of his authority to control a driver and to mitigate an unsafe condition.[76] As a result, it is Complainant's insubordination in refusing to attempt to make the load safe, coupled with her open hostility towards her supervisor, that provides clear and convincing evidence of Respondents' complete affirmative defense.[77]

CONCLUSION

The record does not support the ALJ's conclusion that Respondents subjected Poulter to an adverse employment action in retaliation for engaging in STAA-protected activity. Accordingly, we **REVERSE** the ALJ's Decision and Order, **VACATE** the ALJ's award of relief, and **DISMISS** Poulter's complaint.

SO ORDERED.

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[76] *Galvin v. Munson Transp., Inc.*, No. 1991-STA-00041 (Sec'y Aug. 31, 1992)("Complainant refused to follow instructions concerning a reasonable correction of the overweight load, and accordingly, Respondent legitimately replaced him for that work assignment. Such replacement for a specific assignment would not be a protected work refusal under the STAA . . . .").

[77] *See*, *Noeth v. Ind. W. Express, Inc.*, ARB No. 2007-0042, ALJ No. 2006-STA-00034 (ARB Mar. 19, 2009)(affirmative defense prevails even if complainant proves all of the elements of the claim). At one point the dissent proposes that the legal term of "insubordination" should be considered "elastic." Naturally legal concepts must be applied to the facts of each case but we reject the suggestions that those concepts and the words which identify them should be drained of meaning. The insubordination in this case is clear. There is no ambiguity which requires interpretive adjustment.

Thomas H. Burrell, Administrative Appeals Judge, dissenting

Respectfully, I dissent from my colleagues. I would affirm the ALJ's opinion.

1. The ALJ's Finding that Poulter Engaged in Protected Activity is Supported by Substantial Evidence

The ALJ found that Poulter engaged in protected activity under 49 U.S.C. § 31105(a)(1)(A) when she conveyed to her supervisor, Respondent Ryan Rotan, that his request to drive the truck with an overweight tandem-axle would violate the law (23 C.F.R. § 658.17) and when she refused to drive under § 31105(a)(1)(B)(i). I would affirm the ALJ on both findings.

a. Poulter's "complaint" of a violation

The ALJ's finding that Poulter filed a complaint with her supervisor "related to a violation of a commercial motor vehicle safety or security regulation, standard" under 31105(a)(1)(A) is supported by substantial evidence.[78] On December 18, 2015, Poulter had the truck weighed and reported to Rotan that the truck was overweight on the tandem axle. She asked Rotan what she should do. Rotan erroneously instructed Poulter multiple times that 34,500 was the correct legal weight.[79] Poulter corrected Rotan on this point multiple times.[80]

b. Poulter's refusal to drive

Poulter also refused to drive the overweight truck. The ALJ found that Poulter's refusal was protected activity under 31105(a)(1)(B)(i).[81] The ARB has said that a 31105(a)(1)(B)(i) refusal is protected activity when the operation of the vehicle would actually violate a rule or regulation or when the employee has a subjective and objective reasonable belief that such operation would violate a rule or

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78 D. & O. at 14-15.

79 *Id.* at 5, 11.

80 *Id.*; Tr. 75.

81 *Id.* at 17-18.

regulation.[82] The ALJ's finding is supported by substantial evidence. Poulter's driving the truck at 34,600 (or at 34,500 as Rotan instructed) would constitute an actual violation of trucking regulations. Trucking regulations provide a maximum of 34,000 weight on the tandem axle.[83]

Respondents and the majority emphasize that the ALJ erred because he did not correctly consider Respondents' position that the employer did not instruct Poulter to drive an overweight truck.[84] The Respondents may not have had a motive to violate the trucking law, but that is not the focus of STAA's employee-protection provision. Rather, the employee-protection law is to protect whistleblowers and a whistleblowing environment so that whistleblowers can blow the whistle without a fear of retaliation. This includes protecting employees in a "mixed-motives" environment. Whistleblower provisions "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment."[85]

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[82] *Jeanty v. Lily Transp. Co.*, ARB No. 2019-0005, ALJ No. 2018-STA-00013 (ARB May 13, 2020). The 11th Circuit has held that an employee's refusal is protected under the STAA only if that refusal is based on an actual violation of trucking rules and regulations. *Koch Foods, Inc. v. Sec'y Dep't of Labor*, 712 F.3d 476 (11th Cir. 2013). The ARB follows 11th Circuit law in that Circuit. *Bailey v. Koch Foods, LLC*, ARB No. 2014-0041, ALJ No. 2008-STA-00061 (ARB May 30, 2014). The 11th Circuit's reasoning in favor of "actual violation" finds support in standard principles of statutory construction as "reasonable" language is in (B)(ii) but not in (B)(i). However, many refusals are based on conditions that defy proof of "actual violation," such as an employee's illness or fatigue. For other common refusals, the ability of the employee to prove that the basis for the refusal is actually a violation is in the employer's control such as having the truck formally weighed at scales or having a professional mechanic inspect the truck. For these cases, the STAA may protect an employee's honest, reasonable refusal based on a perception of a violation of trucking rules and regulations grounded on facts then present to the employee. *Yellow Freight v. Martin, Sec'y of Labor*, 983 F.2d 1195, 1199 (2d Cir. 1993) (concluding that the relevant time period is the employee's belief at the time of the refusal and a later discovery of clerical error precluding an actual violation does not affect driver's protected refusal at that time).

[83] 23 C.F.R. § 658.17.

[84] Resp. Br. at 15-16; *supra* at 7-8.

[85] *Passaic Valley Sewerage Comm'rs v. Dep't of Labor*, 992 F.2d 474, 478 (3d Cir.1993).

2. The ALJ's Finding that Poulter's Protected Activity Contributed to Her Termination is Supported by Substantial Evidence

After Poulter reported the overweight truck and refused to drive it, Rotan asked Poulter to accelerate the truck and slam on the brakes to attempt to shift the cargo's weight off the tandem axle to 34,500 (legal weight was 34,000). The conversation between Rotan and Poulter shifted from text messages to a phone call. Rotan again instructed her to "do her job" by slamming the load to shift weight. Poulter refused[86] and the argument became heated.[87] During the phone call, Rotan terminated Poulter for insubordination for not following her supervisor's instructions to slam the load.[88]

The ALJ found that Poulter's protected activity contributed to her termination. In support, the ALJ cited the intertwined nature between refusing to slam and Poulter's protected refusal to drive. The ALJ's findings are supported by substantial evidence. Specifically, the ALJ cited the temporal proximity between the refusal and her termination, Rotan's shifting explanations between instructing her to drive and slam at 34,500 and his subsequent after-the-fact attempt to state that

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[86] The majority characterizes her refusal as a refusal to adjust and then juxtaposes that refusal with her testimony that it is the employee's responsibility to adjust the load. *Supra* at 9. "Adjust" in this context is ambiguous and could refer to a practice of drivers to adjust the tandem axle to alter the weight on the axle. PDT (Poulter's Deposition) 31, 45. But in this region, drivers do not adjust an axle because they are set to California specifications. PDT at 45; Tr. 57. "Adjust" could also refer to the more common practice of reworking the load, which was not an option in this case because the trailer was sealed by the customer.

[87] D. & O. at 5.

[88] *Id.*; Tr. 35-36. It is undisputed that Rotan terminated Poulter for refusing to slam. D. & O. at 21-22; Resp. Br. at 8, 19. The majority transforms Poulter's refusal to drive and slam euphemistically into a refusal to bring the truck into compliance for safe transport before operating the vehicle. *Supra* at 4-5. From this perspective, it was Poulter who violated the trucking laws, not Central Cal. *Supra* at 9-10, 11, 16. The refusal at issue is Poulter's refusal to drive the truck on the scheduled load from Lathrop/Stockton to Reno/Sparks. D. & O. at 3. The ALJ did not find and parties do not argue that either Poulter's combative posture or Poulter's *de minimus* transportation of the overweight truck from the Stockton scales where its weight was ascertained to the Comtrac yard for reworking were bases for her termination.

he really meant 34,000, and the hostility between Rotan and Poulter in the phone call that resulted in Poulter's termination.[89]

I agree with the majority's legal theory on intervening events and the premise that in some cases insubordination can constitute an intervening event. Nonetheless, insubordination is an elastic term which presents quite the difficulty when the insubordination accompanies the protected activity in the same conversation. Even then, courts have routinely held that temporally proximate insubordination is actionable in cases of threats of violence or disruptive activity extending beyond the leeway given to "heated words" accompanying the protected activity.[90]

However, this is not the case where Poulter's "insubordination" constitutes an intervening event severing the causal chain of events. Poulter was protected when she complained of the overweight axle and refused to drive. She did not lose that protected status when the employer asked her to slam and she refused. The ALJ analyzed the refusal and the slam as separate for purposes of protected activity but noted that they were intertwined for purposes of contributing-factor causation and the Respondents' affirmative defense.[91]

For purposes of STAA's contributing factor element, I agree with the ALJ that Poulter's refusal to drive because the truck was overweight encapsulates her

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[89] D. & O. at 22.

[90] *Asst. Sec'y for Occupational Safety & Health Admin. & Self v. Carolina Freight Carriers Corp.*, No. 1991-STA-00025, slip op. at 6 (Sec'y Aug. 6, 1992) ("right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against employer's right to maintain order and respect in its business by correcting insubordinate acts; key inquiry is whether employee has upset balance that must be maintained between protected activity and shop discipline; defensibility of employee actions turns on distinctive facts of case") (citations omitted).

[91] D. & O. at 11, 20-23.

refusal to slam the truck to remedy that overweight axle.[92] Poulter's concerns with slamming overlap with her refusal in several respects.[93] Poulter testified that trying to shift weight that cannot be moved was an illegal act.[94] The ALJ found that the slam maneuver to 34,500 as Rotan instructed would not have made the truck legal.[95] The record does not yield support for slamming as an industry standard or a formal company policy, a fact which could have constituted a foundation for an intervening event. Poulter and Rotan testified that normally overweight trailers are dropped in the yard to be reworked and drivers pick up another trailer.[96] Parties testified that slamming is not a known DOT violation, and Poulter admits that she has slammed before when the amount to be slammed was less than 100 lbs but believed that slamming to attempt to shift 600 lbs could make the "load unstable and unsafe."[97] Parties do not dispute that the slamming technique is not appropriate in some circumstances, for example, a fragile load.[98] If the weight shifted as easily as Rotan thought, then it could, Poulter testified, re-shift during

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[92] The ALJ cited several ARB opinions on "inextricably intertwined." The ARB has criticized the rule of inextricably intertwined when the causal connector is that the wrongful conduct would not have been discovered but for the protected activity, which served as an "initiating event" to the discovery of the wrongful act. *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0069, ALJ No. 2015-FRS-00052, slip op. at 10 (ARB Nov. 25, 2019). However, an ALJ can find that protected activity was intertwined with (was the proximate cause for) the adverse action through normal causation analysis without violating the criticism identified in *Thorstenson*. *Id.* at 10 ("This is not to say that an ALJ may not find that an adverse action and protected activity are intertwined such that contributing factor causation is factually established."). The point of *Thorstenson* was that the ALJ was using a rule as a shortcut to analysis because of an initiating event that informed the employer of the wrongdoing.

[93] While the ALJ had credibility issues with Poulter's after-the-fact statements concerning slamming, these go more toward the ALJ's finding that Poulter did not, in refusing to slam, engage in independent protected activity because of safety concerns with slamming. D. & O. at 10-11.

[94] D. & O. at 7; PDT at 110.

[95] *Id.* at 15, 22.

[96] *Id.* at 4 n.2, 7, 22; PDT at 32.

[97] D. & O. at 5, 7, 15; Tr. 54, 77; but see PDT at 74-75.

[98] Poulter testified that she did not know what was in the truck. D. & O. at 4 n.3; PDT at 68, 74-75. But even if Poulter knew that tires, a nonfragile load, were in the cargo, this does not alter the outcome of my analysis.

normal driving conditions or when going back down the Donner Pass and become unsafe.[99]

3. The ALJ's Finding that Respondents did not Prove by Clear and Convincing Evidence that it would have Terminated Poulter in the Absence of Protected Activity is Supported by Substantial Evidence

Because Poulter's refusal to slam did not constitute an intervening event and the ALJ found strong temporal proximity, shifting explanations, and hostility toward Poulter, the ALJ further found that Respondents failed to prove by clear and convincing evidence that it would have terminated her in the absence of her refusal. For the same reasons that I would affirm the ALJ's finding of contributing factor causation, I would affirm the ALJ's finding that the Respondents failed to prove its affirmative defense.

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[99] D. & O. at 3, 7; Tr. 113-15; PDT at 74.