



In the Matter of:

THOMAS GATTO,

ARB CASE NO. 2019-0008

COMPLAINANT,

ALJ CASE NO. 2018-STA-00003

v.

DATE: June 19, 2019

GENERAL UTILITIES,

RESPONDENT.

Appearances:

For the Complainant:

Russell E. Adler, Esq.; *Law Offices of Russell E. Adler PLLC*; Katonah, New York; and Lauren G. Gatto, Esq.; New York, New York

For the Respondent:

Thomas B. Wassel, Esq.; *Cullen and Dykman LLP*; Garden City, New York

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*.

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended. 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2018) (the STAA's implementing regulations).

Thomas Gatto was a seasonal driver for General Utilities who delivered fuel to customers during the winter months. Decision and Order (D. & O.) at 2. On

December 23, 2016, Gatto noticed fuel oil leaking from his truck's tank and he notified his supervisor, Frank Cassella. Cassella directed him to take a spare truck, Truck 96, to finish the deliveries. D. & O. at 2, 5. Gatto refused to drive Truck 96 as he stated it was unsafe, based on his prior experience when he was unable to open the doors or windows of the truck and similar complaints of other drivers. *Id.* Cassella told Gatto to discuss his complaint with the chief mechanic, who determined that Truck 96 was safe to drive. D. & O. at 2. Gatto nonetheless continued to refuse to drive the truck. D. & O. at 6. Because Truck 96 was the only truck available to complete the deliveries, Cassella told him to go home. On December 27, 2016, Gatto's employment was terminated for abandoning his job. D. & O. at 3.

Gatto filed a complaint pursuant to the employee protection provisions of the STAA with the Occupational Safety and Health Administration (OSHA) claiming retaliation for engaging in protected activity. The STAA protects drivers who, among other things, refuse to operate a vehicle based on a reasonable belief that doing so would constitute a serious risk of injury to themselves or the public. 49 U.S.C. § 31105(a)(1)-(2). OSHA dismissed the complaint, finding no reasonable cause to conclude that General Utilities violated the STAA. Gatto objected to OSHA's findings, and the case was assigned to an Administrative Law Judge (ALJ).

The ALJ held a hearing and thereafter found that Gatto did not engage in protected activity under the STAA. For a refusal to drive to be protected under the STAA, the complainant must demonstrate a subjectively and objectively reasonable belief of a violation. *Mauldin v. G & K Servs.*, ARB No. 16-059, ALJ No. 2015-STA-054, slip op. at 8 (ARB June 25, 2018). Because the ALJ found that an objectively reasonable person would not believe that the operation of Truck 96 would cause a serious risk or injury to themselves or the public, Gatto did not meet his burden of proving that he engaged in protected activity. D. & O. at 19-24. Specifically, the ALJ found that Gatto based his perception on his prior experience with Truck 96. D. & O. at 23-24. It is undisputed that Gatto did not conduct a pre-trip examination of Truck 96, enter Truck 96, or try its door or windows for problems before claiming that it was unsafe and refusing to drive it on December 23, 2016. *Id.* In finding Gatto's refusal unreasonable, the ALJ cited the truck's maintenance history. Truck 96 had been repaired in March 2016. D. & O. at 21. In October 2016, before the December 23 refusal, the truck passed a New York safety inspection. D. & O. at 22. Finally, after Gatto's complaint, General Utilities had the chief mechanic inspect the truck. The mechanic found no safety problems. Another driver drove Truck 96 to complete the fuel delivery and found the truck safe to drive. Truck 96 was also used within a week of December 23, 2016, without report of safety problems. D. & O. at 23. Because engaging in protected activity is a required element of a successful STAA claim, the ALJ dismissed Gatto's complaint for failing to prove that he engaged in protected activity. D. & O. at 24; *Harris v. C & N Trucking*, ARB No. 04-175, ALJ No. 2004-STA-037, slip op. at 2 (ARB Jan. 31, 2007).

Gatto petitioned the Administrative Review Board (ARB or Board) for review of the ALJ's decision.¹ Upon review of the ALJ's D. & O., the pleadings, and the record, we conclude that the ALJ's factual findings are supported by substantial evidence and his conclusions of law are correct and well reasoned. Accordingly, we adopt and attach the ALJ's decision and we **DENY** Gatto's complaint.

SO ORDERED.

¹ The ARB has jurisdiction to review the ALJ's STAA decision pursuant to Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. Part 1978. The ARB reviews questions of law de novo and is bound by the ALJ's factual determinations if the findings of fact are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.110(b).