U.S. Department of Labor

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

IN THE MATTER OF:

WILLIAM HALLIDAY,

COMPLAINANT,

v.

TRANSPORT EXPRESS, INC.,

and

DAN PIET,

RESPONDENTS.

ARB CASE NO. 2023-0024

ALJ CASE NO. 2020-STA-00067
ALJ FRANCINE L. APPLEWHITE

DATE: October 7, 2024

Appearances:

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

***For the Respondents*:**
Heather D. Erickson, Esq.; Sanchez Daniels & Hoffman, LLP; Chicago, Illinois

Before HARTHILL, Chief Administrative Appeals Judge, and THOMPSON, Administrative Appeals Judge

DECISION AND ORDER AFFIRMING IN PART, VACATING IN PART, AND REMANDING

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, and its implementing regulations.[1] William Halliday (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Transport Express and Dan Piet (collectively, Respondents) retaliated against him in violation of the STAA's whistleblower protection provisions. Following a hearing, a United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Denying Complaint (D. & O.) on March 3, 2023. Complainant appealed to the Administrative Review Board (ARB or Board). For the reasons explained below, we vacate the ALJ's dismissal of Complainant's complaint and remand for further proceedings consistent with the Board's opinion.

BACKGROUND

Complainant, a commercial vehicle driver with 35 years of experience, worked as a Class A hazmat line-haul driver for Transport Express, a Hazelwood, Missouri-based trucking company, from July 8 to September 27, 2019.[2] Complainant drove loaded trucks from the Wood Dale/Chicago, IL location of Transport Express to a Dixie Truck Stop in McLean, IL, where he exchanged trailers with another Transport Express driver who arrived from Hazelwood, MO.[3] The other driver and Complainant then drove to their respective Transport Express sites in Wood Dale and Hazelwood. Complainant's shift hours were 10 p.m. to 6 a.m. Complainant's duties included notifying a supervisor of issues with the equipment assigned to him and completing inspection reports at the start and end of his shifts: pickup and delivery reports (P & D reports) and driver's vehicle inspection reports (DVIRs).[4] He also informed management of safety concerns verbally and in text and email messages.[5]

During his 3-month employment tenure, Complainant filed at least 18 written complaints about the safety condition of the trucks Transport Express assigned to him.[6] He made complaints to his direct supervisor and Wood Dale, IL

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1 49 U.S.C. § 31105; 29 C.F.R. Part 1978 (2024).

2 D. & O. at 4. Hazelwood is a suburb of St. Louis, MO. The record sometimes states Transport Express's main office is Hazelwood and sometimes states it is in St. Louis.

3 Wood Dale, IL, is located near Chicago. The record refers to the Wood Dale, IL location of Transport Express as the Wood Dale location and the Chicago location interchangeably.

4 D. & O. at 4; Tr. at 35.

5 JX-1, JX-4.

6 D. & O. at 4.

operations manager, Piet, as well as to the Wood Dale second shift operations manager, Javier Serrano.[7] Complainants' reports included the following:

(1) July 10, 2019: Diesel exhaust fluid tank warning light and buzzer was on. Complainant's OSHA complaint states Complainant reported tires that had exposed belting materials in violation of commercial motor vehicle safety regulations.
(2) July 19, 2019: Leak of the rear tandem oil seal.
(3) July 22, 2019: Complainant's OSHA complaint states Complainant reported that his Tablet was malfunctioning, which Respondent denied.
(4) July 23, 2019: Trailer with two bald tires.
(5) July 24, 2019: Tire had sidewall puncture and belt showing.
(6) July 25, 2019: "Hazmat on side - not secured; bald tire."
(7) August 1, 2019: Complainant's OSHA complaint states that he asked Respondent Piet for paper logs due to his tablet malfunctioning.
(8) August 9, 2019: "Rear trailer tire, passenger side illegal," and rear door driver's side needed replacement, "cannot lock door."
(9) August 10, 2019: Inside tire "illegal."
(10) August 13, 2019: "Missing power divider toggle switch."
(11) Undated: "Right rear outside tire - less than 2/32. Illegal."
(12) August 16, 2019: "Trailer left door rod needs alignment, will not lock." Trailer has "no registration."
(13) August 21, 2019: Needed windshield wipers; "weather strip the door, lic[ense] plate light out" on trailer.
(14) August 23, 2019: Reefer unit license plate light was out.
(15) August 27, 2019: "Rear tandems on fire, both sides," right and left. Needed fire extinguisher. "Possibly brake chambers. 2 flats."
(16) September 7, 2019: "Bad vibration, pulls to right at 53-65 mph."
(17) September 20, 2019: ABS warning light was on, "front bumper not secured, protruding," "missing rig certification label."
(18) September 21, 2019: "Pre-existing bumper damage getting worse," "tire driver's side inside tread separating."
(19) September 23, 2019: "Front bumper ext. not secured, protruding. Missing rig certification label."[8]

On September 23, 2019, Complainant flagged a cracked bumper and an illuminated ABS warning light on tractor 3072 in a pre-trip DVIR report.[9] He sought paperwork from Serrano confirming that tractor 3072 was safe to drive in

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[7] D. & O. at 6.

[8] *Id*. at 4-5, 9-11. The ALJ analyzed 18 of these internal complaints as potentially protected activity, but, without explanation, did not include the July 22, 2019 complaint in their analysis. *Id.*

[9] DX-1 at 110.

case he was pulled over by the police.[10] He also told Serrano the tractor's bumper needed to be replaced.[11] Serrano told Complainant that the bumper on tractor 3072 was secure and offered Complainant an alternative vehicle. Complainant declined the alternative vehicle and drove tractor 3072 from Wood Dale to McLean the night of September 23, 2019.[12] Complainant submitted a post-trip DVIR report upon his return to Wood Dale the morning of September 24, 2019, again stating there was an issue with the "body" of tractor 3072.[13] Complainant asked Piet about the bumper again on September 24, 2019.[14]

Complainant emailed Piet later the same day, attaching "the applicable [f]ederal [r]egulation" and stating "[t]his is the identical regulation that you acknowledged receiving from me last week. You stated that the DVIR inspection was an internal document and you would look into the regulation."[15] Complainant wrote, "[a]s you know, in the past 90 days I have already had numerous maintenance issues." He listed some issues he had encountered, stating "these are all inspection issues that are not being done by other drivers."[16] Complainant further reported that [a]s the regulation states, [t]he Driver is prohibited from operating the motor vehicle if the carrier fails to make certification." He stated:

> I would appreciate having the defects I recorded on the DVIR this morning on unit 3072 certified as repaired or unnecessary in accordance with the regulation below. If you feel the bumper issue is as you state 'only plastic' just mark the DVIR as unnecessary and sign it. That way I can produce the document during an inspection if necessary. As far as the[o]ther violation I documented on the DVIR is the Rear Impact Guard missing certification. The regulation is 393.86. And, it is a 6 point violation against the driver.[17]

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10 Tr. 142-43.

11 *Id*. 143.

12 *Id*. at 145, 170, 255-56

13 DX-1 at 111.

14 Tr. at 79-80.

15 JX-1 at 25-26, 28.

16 *Id*.

17 *Id*. at 28.

Complainant attached information on § 396.11 from the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) website to his email to Piet.[18]

Piet texted Complainant that same day to inform him that his September 24 route was cancelled.[19]

On September 25, 2019, Complainant filed a complaint with the FMCSA, in which he alleged, in part, that Transport Express failed to properly repair and maintain its trucks, refused to make repair certifications required by federal regulation (§ 396.11), and threatened him with no work if he refused to operate equipment without DVIR review.[20] Complainant received a message cancelling his route that day as well and another cancellation message on September 26, 2019.[21]

On September 27, 2019, Piet called Complainant to inform him that Transport Express no longer needed his services as a second driver due to a reduction in freight tonnage.[22] One or two days later, Complainant received a formal letter signed by Piet terminating his employment. Alan Redszus, Transport Express' owner and general manager, made the final decision to terminate Complainant's employment based on feedback he received from Piet and Serrano.[23]

PROCEDURAL HISTORY

1. OSHA Complaint

Complainant timely filed an OSHA complaint on September 27, 2019, in which he alleged Transport Express violated the STAA by terminating him after he submitted internal reports of mechanical defects and informed his supervisor he would file a Department of Transportation complaint.[24] Complainant amended his complaint on November 14, 2019 to include a refusal to drive his assigned truck for

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18 *Id.* at 25.

19 D. & O. at 6; Tr. at 149.

20 D. & O. at 5.

21 Tr. at 149-50.

22 D. & O. at 6; Tr. at 149-50.

23 Tr. at 287-88.

24 D. & O. at 2.

protected reasons.[25] OSHA dismissed the complaint on April 23, 2020, upon finding no reason to believe Respondents had violated the STAA.[26]

2. ALJ Proceedings

On May 14, 2020, Complainant filed a timely appeal with the Office of Administrative Law Judges and an ALJ held an evidentiary hearing via video on May 10, 2022, and June 9, 2022.[27]

Complainant testified regarding the truck defects and his reports of defects, explaining that seemingly minor defects impacted his "[Federal Motor] CSA record, driver's license. It could result in a ticket or a violation, a fine" and signal that "I don't inspect the trucks right."[28] Complainant testified that he sought documents from Transport Express showing repairs were made that he could produce "in case [he was] pulled over for inspection."[29] Complainant stated he told Piet on September 24, 2019, "about all of the things that have gone on for the last several weeks that to my knowledge were never repaired and never taken care of."[30] Complainant testified he filed an FMCSA complaint on September 25, 2019, because "I wasn't getting anywhere through normal channels at work trying to get these issues taken care of."[31]

Complainant testified that he received a text message on September 24, 2019, telling him work was cancelled for that night and he thought Piet said the tractor was going in for repair.[32] Complainant stated that on September 27, 2019, Piet called Complainant and told him that "the work volume had decreased, and they no longer had the freight tonnage to go up there. And they don't need the second driver, and so they were moving in a different direction."[33] Complainant "took it as a layoff, because he mentioned freight volume. I was under the impression that when the freight volume came back I was going back. I didn't view it as a termination."[34]

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25 *Id.*

26 *Id.*

27 *Id.*

28 Tr. at 129-30.

29 *Id.* at 146.

30 *Id.* at 147.

31 *Id.* at 148.

32 *Id.* at 149.

33 *Id.* at 150.

34 *Id.*

Piet testified that Transport Express "tried to fix everything [Complainant reported as defective] immediately. Every day it was written up, we tried to fix it."[35] Respondent presented evidence and testimony that it terminated Complainant's employment because he had a bad attitude and threatened to leave equipment at the truck stop. Regarding attitude, Piet testified that he recommended Complainant be fired because:

> [he] had an ongoing attitude with our people. He didn't like our personnel. He didn't like our equipment. He didn't like our management. He didn't seem to get along with anybody. He didn't like doing normal truck driver responsibilities as far as fueling his truck and whatever. He had made threats on a couple of occasions of leaving our equipment behind. It always – it kept constant on, repeating over and over that he didn't need this job, he didn't need to be here. Plenty of jobs out there for him.[36]

Piet also testified that Complainant "had an arrogance about him, that he was smarter than everybody else, that he knew more than everybody else."[37] Piet testified that Complainant's September 24, 2019 email to him reporting Respondent's regulatory non-compliance (49 C.F.R. § 396.11) played no part in his recommendation that Transport Express terminate Complainant's employment.[38]

Serrano testified that Complainant called Transport Express' equipment "pieces of shit" and "complain[ed] about all our equipment numerous times,[39] and said "he did not need this job, he's been doing this for many years, he could get a job anywhere he wants by tomorrow."[40] Complainant explained that he used an expletive in describing Transport Express equipment because the truck he was referring to had previously been in a rollover accident but was subsequently placed back in service even though "[t]he steering wheel shook violently. . . [and] you had to really grab a hold of it and hold onto it to keep [the truck] between the lines." [41]

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35 *Id*. at 104.

36 *Id*. at 231-32.

37 D. & O. at 7 (citing Tr. at 83).

38 Tr. at 235.

39 *Id.* at 38, 41.

40 *Id.* at 43.

41 *Id.* at 148.

Redszus testified that he decided to fire Complainant because Complainant "didn't fit our organization." He was "very vocal" to supervisors about his unhappiness with his employment at Transport Express. "Between that portion of it, there was an attitude that [he] was conveying that he was more knowledgeable in his responsibilities than anybody within management . . . ." Redszus also noted they were reviewing his overall performance including his attitude, behavior, "and the message he was conveying to the supervision that . . . he may not bring a load back from his meeting point . . . ."[42]

Regarding Complainant's threats to leave equipment, Piet and Serrano testified that Complainant told Serrano that if the other Transport Express driver he swapped trailers with at McLean brought a trailer without a working license plate light, he would leave the trailer at the Dixie Truck Stop in McLean.[43] However, Serrano further testified that Complainant did not leave equipment at the Dixie Truck Stop, and that he did not discipline or reprimand Complainant for his remarks about potentially leaving equipment behind.[44]

Complainant explained that he was concerned with inoperable license plate lights on a trailer because they are:

> the number one violation for DOT. It's what gets you pulled over when the police are driving up and down the road. Once they see that license plate bulb out in back of the trailer, you're pulled over, and that leads to the different inspections that [can] lead to other issues.[45]

Piet also testified that at some point during Complainant's employment, Complainant was unable to refuel his tractor with Transport Express' method of payment, paid for fuel himself, and was later reimbursed. Piet testified Complainant said that if he had any other issues with fueling that he was going to leave his trailer, "and grab an Uber and bring himself home . . . . F- those people in St. Louis. I don't need this anymore.'"[46]

Complainant acknowledged that he had told Serrano he would leave a truck at the Dixie truck stop in McLean but explained that he made those remarks in the context of not wanting to drive defective equipment. He testified that he noted defects upon inspecting the trailers passed on to him at the truck stop in McLean

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42 *Id.* at 281-82.

43 *Id.* at 229, 257, 260-61.

44 *Id.* at 267.

45 *Id.* at 129. We note that Complainant's shift hours were at night.

46 *Id.* at 83-84, 229-30.

that had been missed by the previous driver.[47] He stated that his comments were part of "conversations taken out of context of longer statements regarding what I was supposed to do up at Dixie at the truck stop if I ran out of hours and I couldn't get back. It's these trucks were coming to me that needed repair or couldn't be driven. If there were out of service violations, how I was supposed to get home in the middle of nowhere?"[48]

3. ALJ Decision

A. Protected Activity

The ALJ determined that Complainant had not engaged in protected activity involving the refusal to operate a vehicle on September 23, 2019. The ALJ noted that Complainant wanted paperwork showing that certain conditions (ABS warning light, cracked front bumper, missing RIG certification sticker) were repaired or that repairs were unnecessary. Complainant wanted the paperwork "so that he wouldn't be penalized if pulled over for inspection."[49] The ALJ found that seeking such documentation "does not constitute 'reasonable apprehension of serious injury' or a belief that operation of the vehicle would violate safety regulations."[50] The ALJ further found Complainant had not engaged in protected activity via refusal to operate because he in fact drove the vehicle on September 23, 2019.[51]

The ALJ identified at least 18 internal complaints Complainant submitted to management and determined whether Transport Express responded to or corrected each one.[52] The ALJ acknowledged that internal complaints can constitute protected activity, but concluded most complaints were not protected because Transport Express responded to or repaired the concerns.[53]

The ALJ did, however, find that 5 of Complainant's safety reports constituted protected activity because the evidence did not show that Transport Express

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47 *Id.* at 128.

48 *Id.* at 153.

49 D. & O. at 15.

50 *Id.*

51 *Id.*

52 *Id.* at 4-5, 9-11; *see supra,* pp. 2-3.

53 D. & O. at 14 (citing *LeBlanc v. Fogelman Truck Lines, Inc.,* Case No. 1989-STA-00008 (Sec'y Dec. 20, 1989)).

responded to them.[54] The ALJ also noted Complainant's testimony that he told Piet on September 23, 2019 that he would file the FMCSA complaint if "this stuff isn't taken care of."[55] The ALJ also determined Complainant engaged in protected activity by filing the FMCSA complaint alleging Transport Express' safety violations on September 25, 2019.[56]

B. Adverse Action

The ALJ found that Respondent's termination of Complainant's employment was an adverse action.[57]

C. Contributing Factor

The ALJ concluded that Complainant's protected activity of filing the September 25, 2019 FMCSA complaint was a contributing factor in Transport Express' adverse action due to "the close temporal proximity between the complaint and the Complainant's termination, and the Complainant's testimony that he warned Mr. Piet of his plans."[58] The ALJ did not broach whether Complainant's internal safety complaints were a contributing factor in the decision to terminate him, despite stating earlier that the "uncorrected" crop of those complaints (totaling 5) qualified him for protection under the STAA.[59]

D. Affirmative Defense

The ALJ found that Transport Express illustrated by clear and convincing evidence that it would have fired Complainant had he never filed a safety complaint. The ALJ credited Transport Express managers' testimony that they decided to fire Complainant because he displayed an arrogant attitude and twice threatened to abandon his assigned vehicle, not because of his protected acts of filing complaints with Respondent and the FMCSA.[60]

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54 *Id.* at 15. Specifically, the "safety reports of July 19, 23, 24, 25 and September 21, 2019, which constituted internal complaint (sic) to his managers related to the safety of his vehicle." *Id.*

55 Tr. at 146.

56 D. & O. at 15.

57 *Id*. at 16.

58 *Id.*

59 *Id*.

60 *Id*. at 17.

The ALJ also found that Piet could not be held liable for any alleged STAA violation.[61]

Complainant filed a petition for review of the ALJ's decision with the Board on March 17, 2023. Both parties filed briefs with the Board.[62]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to decide appeals of ALJ decisions under the STAA.[63] The Board conducts de novo review of questions of law in STAA cases, but is bound the factual findings of the ALJ if they are supported by substantial evidence.[64] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[65]

An ALJ must "adequately explain why he credited certain evidence and discredited other evidence."[66] Although an ALJ "need not address every aspect of [a party's claim] at length and in detail," the findings "must provide enough information to ensure the Court that he properly considered the relevant evidence underlying [the party's] request."[67] The failure to address evidence or resolve

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61 *Id*. at 13-14.

62 Respondents argued in their responsive briefing that the ALJ erred in finding: (1) any complaints were protected activity; and (2) the FMCSA complaint contributed to the decision to terminate Complainant's employment. Respondent's Response Brief (Resp. Br.) at 37-43. We do not consider those arguments because Respondents did not file a cross-appeal. *See* 29 C.F.R. § 1978.110(a) ("The parties should identify in their petitions for review the legal conclusions or order to which they object, or the objections will ordinarily be deemed waived."). A "'party who neglects to file a cross appeal may not use his opponent's appeal as a vehicle for attacking a final judgment in an effort to diminish the appealing party's rights thereunder.'" *Booker v. Exelon Generation Co., LLC*, ARB No. 2022-0049, ALJ No., 2016-ERA-00012, slip. op at 18-19 n.134 (ARB Sept. 21, 2023) (citing *Batyrbekov v. Barclays Cap*., ARB No. 2013-0013, ALJ No. 2011-LCA-00025, slip op. at 8 (ARB July 16, 2014)).

63 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

64 29 C.F.R. § 1978.110(b); *Dick v. USAA*, ARB No. 2022-0063, ALJ No. 2018-STA-00054, slip op. at 10 (ARB Apr. 16, 2024) (citing *Stokes v. Albertson's, LLC*, ARB No. 2022-0007, ALJ Nos. 2020-STA-00080, -00082, slip op. at 5 (ARB May 20, 2022)).

65 *Stokes*, ARB No. 2022-0007, slip op. at 5 (citing *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

66 *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) (citations omitted).

67 *Mori v. Dep't of the Navy*, 917 F. Supp. 2d 60, 65 (D.D.C. 2013) (citations omitted).

conflicts in the evidence thus requires remand; ultimately, a reviewing court must be able to "discern what the ALJ did and why he did it."[68]

DISCUSSION

The STAA's whistleblower protection provision provides that a person may not discharge, discipline or discriminate against an employee regarding the pay, terms, or privileges of employment because the employee has engaged in statutorily protected activity.[69] Complaints under the STAA are governed by the legal burdens of proof set forth in the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century (AIR21).[70] To prevail on a STAA complaint, an employee must prove by a preponderance of the evidence that: (1) they engaged in protected activity; (2) the employer took adverse employment action against them; and (3) the protected activity was a contributing factor in the adverse employment action.[71] If the employee meets his burden of proof, the employer may avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable action in absence of the protected activity.[72]

1. Substantial Evidence Supports the ALJ's Determination That Complainant's Refusal to Operate His Assigned Truck Was Not Protected Activity Under 49 U.S.C. § 31105(a)(1)(B)

The ALJ found that Complainant did not prove the statutory requirements to invoke protection under the STAA's "refusal to operate" provision, 49 U.S.C. § 31105(a)(1)(B). That provision affords protection to a Complainant who refuses to operate a vehicle because either (i) the operation violates a regulation, standard, or order related to safety, health, or security; or (ii) he had a reasonable apprehension of serious injury to himself or the public because of the vehicle's condition.[73]

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[68] *Printz v. STS Aviation Grp.*, ARB No. 2022-0045, ALJ No. 2021-AIR-00013, slip op. at 30 (citation omitted).

[69] 49 U.S.C. § 31105(a)(1); *see also* 29 C.F.R. § 1978.102(a) ("No person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in [protected activity].") (emphasis added).

[70] 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121(b).

[71] 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a)-(b); *Johnson v. Norfleet Transp.*, ARB No. 2020-0037, ALJ No. 2019-STA-00022, slip op. at 5-6 (ARB Jan. 29, 2021) (citation omitted).

[72] 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. 1978.109(b); *Blackie v. Smith Transp., Inc.*, ARB No. 2011-0054, ALJ No. 2009-STA-00043, slip op. at 8 (ARB Nov. 29, 2012) (citation omitted).

[73] 49 U.S.C. § 31105 (a)(1)(B)(i), (ii).

The ALJ found that Complainant did not produce evidence that he refused to operate a vehicle for protected reasons, and that he in fact operated the tractor-trailer set he was assigned on September 23.[74] The ALJ further noted that Complainant sought certification that Transport Express had repaired defects he had reported or that inspection revealed the repairs were unnecessary before driving.[75] The ALJ found that "[r]efusing to operate a vehicle until documentation is provided does not constitute 'reasonable apprehension of serious injury' or a belief that operation of the vehicle would violate safety regulations."[76]

Complainant argues he engaged in a protected refusal under § 31105(a)(1)(B)(i) because he alerted Piet that operation of equipment with defects that he had marked on a DVIR violated 49 C.F.R. § 396.11's requirement that such defects be certified as repaired or noted as unnecessary upon inspection prior to operation.[77] He also argues he engaged in a refusal protected under 49 U.S.C. § 31105(a)(1)(B)(ii) because he reasonably apprehended that the defects were hazardous.[78]

Prior Board decisions afford protection under the STAA's "refusal to operate" provision where the driver refuses to operate the vehicle in the manner instructed by the employer when such operation "constitutes a violation of any Federal rules, regulations, standards or orders applicable to commercial motor vehicle safety or health."[79]

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74 D. & O. at 15.

75 *Id.*

76 *Id.*

77 Complainant's Opening Brief (Comp. Br.) at 17; Complainant's Reply Brief (Comp. Reply Br.) at 2-5; Complainant's Petition for Review (Comp. Pet. for Review) at 1-2. 49 C.F.R. § 396.11(a)(3)(i): "Prior to requiring or permitting a driver to operate a vehicle, every motor carrier or its agent shall repair any defect or deficiency listed on the driver vehicle inspection report which would be likely to affect the safety of operation of the vehicle." 49 C.F.R. § 396.11(a)(3)(ii): "Every motor carrier or its agent shall certify on the driver vehicle inspection report which lists any defect or deficiency that the defect or deficiency has been repaired or that repair is unnecessary before the vehicle is operated again."

78 Comp. Br. at 16-18; Comp. Reply Br. at 2-5; Comp. Pet. for Review at 1-2.

79 *See Maddin v. Transam Trucking, Inc.*, ARB No. 2013-0031, ALJ No. 2010-STA-00020 (ARB Nov. 24, 2014) (citation omitted), *aff'd*, *TransAm Trucking, Inc. v. Admin. Rev. Bd.*, *U.S. Dep't of Lab.*, 833 F.3d 1206 (10th Cir. 2016). The instant case is distinct from *Maddin*, in which the Board found driving the assigned vehicle in a manner contrary to the employer's instructions in order to preserve the driver's health and safety to be a protected "refusal to operate" under the STAA, stating "[c]ertain refusals or insubordinate acts arising out of the complainant's employment as a truck driver may be covered under the

Nevertheless, substantial evidence supports the ALJ's determination Complainant did not engage in activity protected under 49 U.S.C. § 31105(a)(1)(B).[80] There is no evidence Complainant refused to operate an assigned vehicle or that he refused to operate the vehicle under the conditions set out by Transport Express. Although Complainant testified that on the night of September 23, 2019, he told Serrano he would not operate his assigned tractor-trailer unless Transport Express gave him a copy of the DVIR,[81] Complainant drove tractor 3072 from Wood Dale to McLean, IL, that night despite being offered an alternative tractor before heading out on his route. He also returned from McLean to Wood Dale with his assigned haul in the early morning of September 24, 2019.[82]

Moreover, there is no indication that Complainant engaged in a "refusal to operate" protected under the STAA after returning to Wood Dale on September 24, 2019, the last day he performed work for Transport Express. Complainant testified that he informed Piet he would file an FMCSA complaint if the DVIR-reported defects were not repaired or certified as not needing repair upon his return to Wood Dale the morning of September 24, 2019.[83] He did not testify, however, and there is no evidence to suggest, that Complainant informed management he would not drive a tractor or haul a trailer because of unaddressed defects he had marked on a DVIR on September 24, 2019.[84] His September 24, 2019 email to Piet asked for DVIR certification in compliance with 49 C.F.R. § 396.11, and did not contain a refusal to drive in the manner instructed if such certification was not provided.[85] Respondents' cancellation of Complainant's line hauls from September 24 through September 26, 2019 and his subsequent firing meant that there was no assigned equipment for Complainant to refuse to drive as of September 24.

'refusal to operate' clause even where the activity does not strictly constitute a refusal to operate the vehicle." *Maddin*, ARB No. 2013-0031, slip op. at 8.

80 *See* 49 U.S.C. § 31105 (a)(1)(B)(i).

81 Tr. at 142.

82 *Id.* at 147, 170, 226, 254-56, 265.

83 *Id.* at 146.

84 *Id.* at 133-85.

85 CX-1 at 25-28. Complainant's September 24, 2019 email to Piet constituted a separate internal complaint to Transport Express. *Id.* We do not review whether it was entitled to protection under §31105(a)(1)(A), the STAA's the complaint provision, since Complainant contends in his petition for review and initial brief that the email was entitled to protection under the refusal provision of the STAA, §31105(a)(1)(B). Comp. Pet. for Review at 1-2; Comp. Br. at 16-18; Comp. Reply Br. at 2-5. We note that while an employee's relayed objection to operation of assigned equipment in the manner instructed may fall short of the definition of "refusal" under §31105(a)(1)(B), the expression of such an objection to operation is properly analyzed and can be protected under §31105(a)(1)(A).

It is therefore unnecessary to evaluate whether Complainant refused to operate due to a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition" and thus whether Complainant sought from Transport Express and was "unable to obtain, correction of the hazardous safety or security condition" qualifying him for protection under 49 U.S.C. § 31105(a)(1)(B)(ii).[86]

Accordingly, we affirm the ALJ's determination Complainant did not engage in refusal-to-operate protected activity under 49 U.S.C. § 31105(a)(1)(B).

2. The ALJ Erred as a Matter of Law in Finding Complainant's Internal Complaints Were Not Protected Activity When Respondent Corrected the Defects

The ALJ found only five internal complaints protected because they were associated with conditions that were uncorrected by Transport Express.[87] However, the ALJ relied on the provision of the STAA which applies to a refusal to operate unsafe equipment.[88] Accordingly, the ALJ asserted that "[t]o qualify for protection under section 2305(b), the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition."[89] Thus, the ALJ deemed Complainant's initially protected safety reports unprotected once Respondent made corrections.

Complainant argues that the ALJ committed legal error in so doing and that all of his internal safety complaints about defects and regulatory violations were protected under 49 U.S.C. § 31105(a)(1)(A), regardless of whether Transport Express corrected the issues.[90] We agree. Under a plain reading of that provision,

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86 49 U.S.C. § 31105(a)(2) ("Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.").

87 D. & O. at 14-15.

88 *Id*. at 15. The decision cites Section 2305(b) of the STAA (see 49 U.S.C. § 2305(b) (1983): https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg2097.pdf (page 61)).

89 D. & O. at 15.

90 Comp. Br. at 14-16. Comp. Reply Br. at 8. While Complainant mentions in his reply brief that his complaints about "regulatory violations" were protected under 49 U.S.C. § 31105(a)(1)(A), his Petition for Review and initial brief both argue these complaints were protected under the refusal provision, 49 U.S.C. § 31105(a)(1)(B). *See*, *infra* note 148.

complaints are protected without any requirement to seek and fail to obtain correction of the unsafe condition.[91]

The ALJ committed legal error by conflating the requirements of § 31105(a)(1)(A) (applicable to internal complaints) with § 301105(a)(1)(B)(ii) (applicable to refusals to operate a vehicle).[92] The requirement that an employee attempt and be unable to "obtain, correction of the unsafe condition" applies only to refusals to operate equipment under § 301105(a)(1)(B)(ii).[93] Under that section, an employee must demonstrate a "reasonable apprehension of a serious injury" to themselves or the public due to the vehicle's hazardous safety or security condition.[94] In contrast, internal complaints retain protection under § 31105(a)(1)(A) despite an employer's corrective action so long as those complaints are grounded in a reasonable belief.

The majority of cases cited by Respondent and the ALJ do not stand for the proposition that correction eliminates protection for safety complaints under that provision.[95] *Patey v. Sinclair Oil Corp., LeBlanc v. Fogleman Truck Lines,* and *Bates v. Kasbar, Inc*., addressed the correction of defects under the STAA's refusal to operate provision.[96] *Williams v. Capitol Entertainment Services, Inc.* is inapposite because the complaints that were found unprotected concerned "day to day requests for additional inventory" which were "distinct from safety-related complaints" protected under the STAA, not because of any remedial action by employer.[97]

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91 49 U.S.C. § 31105(a)(1)(A).

92 49 U.S.C. §§ 31105(a)(1)(A), 301105(a)(1)(B)(ii). Pursuant to § 301105(a)(1)(B)(ii) "[a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, privileges of employment" when "the employee refuses to operate a vehicle because the employee has a reasonable apprehension of serious injury" due to the vehicle's hazardous safety or security condition. "To qualify for protection [under § 301105(a)(1)(B)(ii)], the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 U.S.C. §31105(a)(2).

93 49 U.S.C. §§ 31105(a)(2), 301105(a)(1)(B)(ii).

94 49 U.S.C. § 301105(a)(1)(B)(ii).

95 Resp. Br. at 36-37; D. & O. at 15.

96 *Patey v. Sinclair Oil Corp.,* ARB No. 1996-0174, ALJ No. 1996-STA-00020, slip op. at 1-2 (ARB Nov. 12, 1996); *LeBlanc v. Fogleman Truck Lines, Inc.,* Case No. 1989-STA-00008, slip op. at 5 (Sec'y Dec. 20, 1989); *Bates v. Kasbar, Inc*., ALJ No. 1985-STA-00011, slip op. at 2-3 (ALJ Mar. 7, 1986).

97 *Williams v. Capitol Ent. Servs., Inc.*, ARB No. 2005-0137, ALJ No. 2005-STA-00027, slip op. at 7-8 (ARB Dec. 31, 2007).

Williams v. U.S. Department of Labor is distinguishable on the facts.[98] The complainant in *Williams* made numerous complaints of environmental contamination over a period of years, some of which constituted protected activity. However, complaints that were made after the complainant became aware of corrective measures and inspections showing no contamination were not protected because, the complainant lacked a "reasonable perception" of a violation at the time she made them.[99] Here, in contrast, Complainant complained of violations before they were corrected, and if he demonstrates a reasonable belief at the time he made the complaints, his complaints are protected under a plain reading of 49 U.S.C. § 31105(a)(1)(A)(i). Accordingly, applying the plain text of that provision, the Board has found complaints protected under the STAA even after the employer addressed and remedied the concerns.[100]

To the extent that *Carter v. Marten Transport, Ltd*. has been read to mean that the protected activity of complaining about a safety defect loses its protected status after being corrected, that reading is incorrect and does not comport with the statutory and regulatory text. In that case, the Board found some internal complaints unprotected under the STAA. The Board stated that "once an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity."[101] *Carter v. Marten Transport* relied on *Patey v. Sinclair Oil Corp*. and *Williams v. U.S. Dep't of Labor* in articulating this theory.[102] As *Patey* is unique to the refusal context and *Williams v. U.S. Dep't of Labor* is distinguishable on the facts discussed above, we decline to apply that reasoning.[103] In sum, neither *Carter v. Marten Transport* nor *Williams* stand for the proposition that protected activity is rendered unprotected simply because the employer addresses the complained of conditions.

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98 157 F. App'x 564, 2005 WL 3087895 (4th Cir. 2005).

99 *Williams*, 157 F. App'x 564, 2005 WL 3087895 at *568-70.

100 *Carter v. GDS Transp., Ltd.*, ARB No. 2008-0053, ALJ No. 2008-STA-00009, slip op. at 4 (ARB Feb. 27, 2009).

101 *Carter v. Marten Transp., Ltd.,* ARB Nos. 2006-0101, 159, ALJ No. 2005-STA-00063, slip op. at 9 (ARB June 30, 2008).

102 *Id.* at 9.

103 *Id.*; *cf. Malmanger v. Air Evac EMS, Inc*., ARB No. 2008-0071, ALJ No. 2007-AIR-00008, slip op. at 8-9 (ARB July 2, 2009) (affirming the ALJ finding that Complainant lacked a reasonable belief in a violation when he knew that the conditions he complained of had been resolved years prior).

3. The ALJ Erred in Failing to Assess Complainant's Reasonable Belief

When reviewing whether an employee's activity is protected under 49 U.S.C. § 31105(a)(1)(A), the factfinder applies the reasonable belief standard.[104] The employee "need not prove an actual violation of a motor vehicle safety regulation, standard, or order, but must at least be acting on a reasonable belief regarding the existence of an actual or potential violation."[105] The belief that a complaint is related to a violation is reasonable if it is "subjectively held and objectively reasonable."[106] "To prove subjective belief, a complainant must prove that [they] held the belief in good faith."[107] The subjective component of the reasonable belief test is satisfied where the employee actually believed that the conduct they complained of related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.[108] Complainant is to demonstrate via a preponderance of the evidence that "a reasonable person of similar experience, training, and factual knowledge would objectively believe that a violation has occurred."[109]

The ALJ did not examine whether Complainant reasonably believed that the defects he internally complained of related to an actual or potential violation of a motor vehicle safety regulation, standard, or order. As such, the ALJ's determination that only some of the internal complaints were protected is the product of error.[110]

We vacate the ALJ's determination on Complainant's internal complaints and remand for the ALJ to conduct the reasonable belief analysis as to all 18 of them. The ALJ is to thoroughly review the evidence and reach findings supported

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104 *Scott v. E.O. Habhegger Co*., ARB No. 2023-0027, ALJ No. 2019-STA-00048, slip op. at 10 (ARB Mar. 14, 2014) (citing *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 2010-0036, ALJ No. 2009-STA-00061, slip op. at 6 (ARB Nov. 16, 2011)).

105 *Dick*, ARB No. 2010-0036, slip op. at 6 (citation omitted).

106 *Mazenko v. Pegasus Aircraft Mgmt., LLC*, ARB No. 2021-0032, ALJ No. 2019-AIR-00001, slip op. at 14 (ARB June 18, 2024) (citing *Pettit v. Delta Airlines, Inc.*, ARB No. 2021-0014, ALJ No. 2018-AIR-00041, slip op. at 12 (ARB Mar. 29, 2022)).

107 *Id*. (citing *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 2014-0059, ALJ No. 2014-00059, slip op. at 5 (ARB Jan. 21, 2016)).

108 *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 2011-0019, ALJ No. 2010-STA-00022, slip op. at 7 (ARB Nov. 28, 2012); *Bailey v. Koch Foods, LLC*, ARB No. 2010-0001, ALJ No. 2008-STA-00061, slip op. at 9 (ARB Sept. 30, 2011).

109 *Morell v. DLH Holdings Corp.,* ARB No. 2023-0030, ALJ No. 2020-SOX-00005, slip op. at 11 (ARB Sept. 23, 2024) (citing *Schaefer v. New York Cmty. Bancorp, Inc.,* ARB No. 2022-0050, ALJ Nos. 2018-SOX-00048, -00051, slip op. at 13-14 (ARB June 22, 2023)).

110 D. & O. at 15.

by substantial evidence. The inquiry is not whether Respondent corrected the conditions underlying the internal complaints, but whether 1) Complainant believed a condition related to a violation of a commercial motor vehicle safety or security regulation, standard, or order existed or would occur as a result of the conditions he complained of in good faith,[111] and 2) considering the knowledge available to Complainant at the time he filed his complaints, a reasonable person with similar training and experience to that of Complainant would conclude a violation had or would occur when Complainant submitted them.[112]

Although it is the ALJ's role as fact finder to make these determinations on remand, we note that the record contains ample evidence that could demonstrate Complainant's subjective and objectively reasonable belief that the internal complaints related to a violation of a commercial motor vehicle safety or security regulation, standard, or order at the time he reported them and were therefore protected under 49 USC § 31105(a)(1)(A).

The conditions Complainant complained of included a rear tandem fire,[113] unsecured hazmat,[114] illuminated ABS warning light,[115] cracked bumper,[116]

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[111] *Dick*, ARB No. 2010-0036, slip op. at 6; *Mazenko*, ARB No. 2021-0032, slip op. at 14.

[112] *Gilbert,* ARB No. 2011-0019, slip op. at 7; *Bailey,* ARB No. 2010-0001, slip op. at 9-10; *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 14 (ARB May 25, 2011).

[113] August 27, 2019 internal complaint: "Rear tandems on fire, both sides, right and left. Need fire extinguisher. "Possibly brake chambers. 2 flats." D. &. O. at 4. Complainant testified another driver pointed to the back of his trailer while he was pulling into the Dixie truck stop. When he pulled over, he observed that wheels, brake chambers or bearings were on fire. He used a fire extinguisher to put out the fire. D. & O. at 5.

[114] July 25, 2019 internal complaint: "Hazmat on side - not secured; bald tire." D. & O. at 5. Complainant testified that the hazmat he hauled for Transport Express "was never braced, never secured." Tr. at 134. He noticed upon opening the trailer doors at the end of a haul that the hazmat "was either on the right-hand side, in the middle of the trailer -- it had slid around a little bit." Tr. at 131. It was Complainant's "understanding that the freight is to be . . . braced and packaged in such a way that it prevents motion side to side and front to back." Tr. at 131, 133; D. & O. at 5.

[115] On September 20, 2019, Complainant reported the ABS (anti-lock brake system) warning light on his assigned trailer was on. D. & O. at 5. Complaint testified that an ABS light that was on indicated "the ABS system is not operable. Not operating sufficiently." Tr. at 141: 19-20. "And if it's not working, I may not have brakes." Tr. at 141: 11-13.

[116] On September 20, 21, and 23, 2019, Complainant reported a damaged or protruding front bumper. D. & O. at 5. During the hearing, Complainant stated he reported the condition because he was concerned that if the bumper "split all the way down and the rest of it vibrated it off, it could go into somebody's windshield or get sucked up underneath the engine compartment of a truck, or -- I thought it posed a hazard." Tr. at 144: 5-24.

vibration,[117] faulty tires,[118] and inoperable license plate lights.[119] It could be determined that because Complainant attested to his good faith belief that the reported conditions related to an actual or potential violation, the subjectiveness element of the reasonable belief test has been met. It could also be deduced on the current record that a reasonable person in similar factual circumstances and with similar knowledge then available to Complainant (a commercial motor vehicle driver with 35 years of experience and a Class A license with endorsements for tanker, hazmat, doubles, triples and passengers) would have believed the conditions he reported posed an actual or potential violation, and that Complainant's belief was therefore objectively reasonable.[120]

4. The ALJ Erred as a Matter of Law in Failing to Conduct the Contributing Factor Analysis with Regard to Complainant's Internal Complaints

Under the legal burdens of proof in the whistleblower protection provisions of AIR21, which govern STAA claims, a complainant must show by a preponderance of the evidence that they engaged in activity that the STAA protects and that the protected activity was a contributing factor in the employer's unfavorable personnel action.[121]

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[117] September 7, 2019 internal complaint: "Bad vibration, pulls to right at 53-65 mph." D. & O. at 5. Complainant testified the "steering wheel shook violently. You really had to grab a hold of it and hold onto it to keep it between the lines." Tr. at 148: 6-11.

[118] Complainant reported faulty tire conditions at least eight times, including on July 10, 23, 24, August 9, 10, 27, and September 21, 2019. D. & O. at 4-5. Complainant testified that he understood the DOT "requires 2/32 of inch tread depth" such that he believed the tire depths he complained of on July 23 and August 9, 2019 were DOT violations. Tr. at 124: 4-18, 127: 24 – 128: 8. He also explained he reported a tire that had "exposed belting materials in violation of commercial motor vehicle safety regulations" on July 10, 2019 after noticing "a piece of steel belt protruding from the sidewall of the tire, up where the tread is" which he believed, based on his prior experiences, could lead the tire to "blow up", impact the distribution of the load in the trailer, and potentially cause a crash. Tr. at 123: 15-25; 124: 19 - 125: 21.

[119] On August 21 and 23, 2019, Complainant reported the license plate lights on his assigned equipment were out. D. & O. at 4. He testified that an inoperable license plate light could lead to a DOT inspection, which could affect his "CSA record, driver's license. It would result in a ticket or a violation, a fine and the loss of one or two Federal Motor Carrier points." D. & O. at 5.

[120] D. & O. at 5.

[121] 49 U.S.C. § 42121(b)(2)(B) (text of AIR21's burdens of proof); 49 U.S.C. § 31105(b)(1) ("All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b).").

Although the ALJ found that Complainant's protected activity of filing a FMCSA complaint was a contributing factor in Transport Express' decision to terminate his employment, Complainant contends on appeal that the ALJ erred in failing to evaluate whether his internal complaints also contributed to their decision.[122] We agree. The ALJ stopped short of conducting the analysis as to whether any of Complainant's protected internal complaints contributed to Respondents' adverse action. This was legal error. "To properly evaluate whether protected activity contributed to [the employer's] decision to terminate [the employee's] employment, all instances of protected activity must be thoroughly assessed."[123]

On remand, the ALJ shall fully review the record and determine whether Complainant's internal complaints were a contributing factor, i.e. played *some* role, *any* role, in Transport Express' decision to terminate his employment and explain how the arguments and evidence were credited and discredited.[124] Specifically, the ALJ should consider the evidence discussed below.

A. Direct Evidence: Respondent's Explanations

We note that Respondents' own explanations for firing Complainant provide support for the conclusion that the internal complaints were a contributing factor. For instance, Complainant's direct supervisor, Piet, testified that he recommended Complainant's employment be terminated in part because Complainant "didn't like our equipment." Second shift operations manager Serrano explained that in calling Transport Express equipment "pieces of shit", Complainant had "complain[ed] about all our equipment numerous times."[125] Among the reasons Redszus gave for approving Complainant's employment termination was that he was "getting feedback that [Complainant] wasn't happy with his tenure at Transport Express, and he was *very vocal about it to the supervision*. Between that portion of it there

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[122] Comp. Pet. for Review at 1.

[123] *Williams,* ARB No. 2005-0137, slip op. at 8; *see also Booker,* ARB No. 2022-0049, slip op. at 29 ("Because we conclude that the ALJ's finding as to contributing factor is insufficient to show that he considered or weighed evidence by the appropriate burden of proof, we remand this matter to the ALJ to fully analyze the record and make revised findings on the issue of contributing factor in such a way that explains how the ALJ credited and discredited the parties' arguments and the supporting or undermining evidence.").

[124] *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 52 (ARB Sept. 30, 2016) (reissued with full dissent, Jan. 4, 2017).

[125] Tr. at 38, 41, 231-32.

was an *attitude* that [Complainant] was conveying that he was *more knowledgeable in his responsibilities than anybody within management* and supervision."[126]

B. Circumstantial Evidence: Pretext, Shifting Explanations and Temporal Proximity

In addition to direct evidence, a complainant may establish the contributing factor element by circumstantial evidence.[127] "Circumstantial evidence may include, but is not limited to, temporal proximity, inconsistent application of an employer's policies, pretext, shifting explanations by the employer, or antagonism."[128]

Here again, we note that there is evidence in the record of pretext and shifting explanations, which could also support the conclusion that Complainant's numerous internal complaints contributed to management's decision to terminate his employment. Respondents admitted they did not warn or discipline Complainant about his remarks or attitude or share with Complainant the genuine basis for their dissatisfaction with his job performance at any point during his employment or upon its termination.[129]

Instead, in cancelling Complainant's hauls on September 24, 25, and 26, 2019, Piet told Complainant that Transport Express "didn't have any equipment for him."[130] Complainant testified he received messages from Piet cancelling his work on those days because "the tractor was going for repair."[131] Piet stated he in fact cancelled Complainant's work but did not terminate Complainant until September 27, 2019, because Transport Express was contemplating firing Complainant and "[w]e needed to make sure that we could cover – if we did let Mr. Halliday go, we needed to cover the shift."[132]

Piet then called Complainant on September 27, 2019, and told him that his services as a second line haul driver were no longer needed due to a reduction in freight tonnage.[133] A few days later, Complainant received a letter dated September

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126 *Id*. at 282 (emphasis added).

127 *Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 12 (ARB Jan. 17, 2023) (citing *Palmer*, ARB No. 2016-0035, slip op. at 55).

128 *Id.* (citing *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 8-9 (ARB Jan. 22, 2020) (citations omitted)).

129 Tr. at 14-46, 49-110, 133-85, 197-251, 252-66.

130 *Id*. at 88.

131 *Id*. at 149-50.

132 *Id*. at 88.

133 *Id*. at 150.

27, 2019, which terminated his employment effective that day "due to current work volume and staffing."[134] On the record before us, this shifting explanation could reasonably be viewed as showing pretext given that less than a week later Respondents posted Complainant's position on Indeed.com, belying its assertion that Complainant was let go due to a lack of work.[135]

Respondent's explanations for Complainant's removal from Respondent's line haul operation thus shifted from a lack of equipment on September 24-September 26, 2019, to a reduction in freight volume on September 27, 2019, and finally, by the time of the ALJ hearing, to his attitude and remarks about leaving equipment behind. This is a strong indicator that Respondent's reasons were pretextual.

Further, close temporal proximity exists between the internal complaints, and Complainant's termination.[136] Complainant's last report of an equipment defect was registered on September 23, 2019, when he emailed his concern Transport Express' handling of DVIRs failed to comply with DOT regulations on September 24, and he filed an FMCSA complaint the next day. From September 24 through September 26, he was told not to report to work, and on September 27, Complainant was relieved of his duties. Thus, the last of Complainant's internal complaints plausibly protected under § 31105(a)(1)(A) occurred only four days before Respondent ended his employment.

Considering Respondents' testimony indicating the complaints played some role in the decision to terminate, the arguably pretextual and shifting explanations for firing Complainant, and the close temporal proximity between the internal complaints and the termination, we note that the ALJ on remand could find that Complainant's protected activity of submitting internal complaints was a contributing factor in the decision to fire him.

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134 *Id*. at 151-52; CX-2.

135 CX-5; Tr. at 117-19.

136 The ALJ summarily concluded that temporal proximity plus knowledge "suffice to show causation under the Act." D. & O. at 16. We note that the fact finder *may* find causation established where temporal proximity (and knowledge) exists, but such a finding is not required. *Palmer*, ARB No. 0016-0035, slip op. at 51, 56. In other words, temporal proximity *may* "suffice" in a particular case but ALJs should consider temporal proximity/knowledge together with any other relevant evidence, and make that finding on whether Complainant met their burden to show via a preponderance, i.e., that it is more likely than not, that the protected activity was a contributing factor. *Id*. at 56; *see also Huang v. Greatwide Dedicated Transp. II, LLC,* ARB No. 2019-0053, ALJ No. 2016-STA-00017, slip op. at 8-9 (ARB May 27, 2021) (internal citations omitted).

5. The ALJ's Determination that Respondents Clearly and Convincingly Demonstrated They Would Have Terminated Complainant in the Absence of His Protected Activity Contains Error and is Unsupported by Substantial Evidence

Once a complainant proves their protected activity was a contributing factor in the employer's adverse action, the employer may avoid liability if the employer demonstrates by clear and convincing evidence that "in the absence of" the protected activity, it would have taken the same adverse action.[137] "'Clear' evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question."[138] "'Convincing' evidence has been defined as evidence demonstrating that a proposed fact is 'highly probable.'"[139] "The burden of proof under the 'clear and convincing' standard is more rigorous than the 'preponderance of the evidence' standard and denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."[140]

Substantial evidence is "relevant evidence that a reasonable mind would accept as adequate to accept an agency's conclusion."[141] Further, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."[142] As such, the fact finding must have 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."[143]

The ALJ determined Respondents illustrated by clear and convincing evidence they would have fired Complainant had he never filed a safety complaint, because he displayed an arrogant attitude and twice threatened to abandon his

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137 *Palmer*, ARB No. 2016-0035, slip op. at 56-57 (citing 49 U.S.C. § 42121(b)(2)(B)(iv))).

138 *Speegle v. Stone & Webster Constr., Inc.,* ARB No. 2013-0074, ALJ No. 2005-ERA-00006, slip op. at 11 (ARB Apr. 25, 2014).

139 *Id.*

140 *Id.* (citing *Williams v. Domino's Pizza*, ARB No. 2009-0092, ALJ No. 2008-STA-00052, slip op. at 5 (ARB Jan. 31, 2011)).

141 *Poulter v. Central Cal Transp., LLC*, ARB No. 2018-0056, ALJ No. 2017-STA-00017, slip op at 12 (ARB Aug. 18, 2020) (citations omitted).

142 *Id*. (citing *Dalton v. Copart, Inc.,* ARB No. 2001-0020, ALJ No. 1999-STA-00046, slip op. at 7 (ARB July 19, 2001)).

143 *Id*. (quoting *Bobreski v. J. Givoo Consultants, Inc*. ARB No. 2013-0001, ALJ No. 2008-ERA-00003, slip op. at 13-14 (ARB Aug. 29, 2014)).

assigned vehicle.[144] Complainant argues that: the ALJ erred in reaching the affirmative defense determination; in failing to find his remarks that he would "refuse to operate future non-compliant equipment were made in the context of his protected activity;" and, that his "expressions of attitude" were in and of themselves protected under 49 U.S.C. § 31105.[145] He further posits that complainants must be afforded leeway in expressing their safety concerns, consistent with Board precedent.[146]

We agree that the ALJ's affirmative defense analysis is flawed. First, as the ALJ did not thoroughly factor into their review the protected activity which contributed to the decision to terminate Complainant, that analysis is based on error. On remand, the ALJ may find that *all* 18 of Complainant's safety complaints were protected activity and should therefore also be factored into reviewing whether Respondents met the high burden of proving their defense under the clear and convincing standard.[147]

Second, as detailed below, the ALJ's analysis lacks acknowledgment of, and does not contend with, evidence which fairly detracts from the weight of the portions of testimony cited to support the finding Respondents met their evidentiary burden. It thus is unsupported by substantial evidence.

Third, the affirmative defense analysis lacks the requisite evaluation of whether Complainant was entitled to leeway in communicating his complaints and in remarking on not driving potentially defective equipment.

A. Complainant's "Attitude" Was Potentially Linked to Protected Activity

The ALJ failed to contend with Respondents' testimony potentially linking the assertions that Complainant was terminated for his poor attitude with his

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144 D. & O. at 17. Specifically, the ALJ relied on the following: Piet and Redszus decided to fire Complainant because of his attitude and his threats to abandon his truck and trailer, not because of his safety complaints; Piet and Serrano's testimony that Complainant had arrogant behavior and twice threatened to abandon his tractor-trailer at the Dixie truck stop; Piet's testimony that Complainant projected an "attitude" that he knew more than his peers or supervisors; and Serrano's testimony that Complainant frequently said he did not need his job with Transport Express and could get another job any time he chose. *Id.*

145 Comp. Pet. for Review at 2; Comp. Br. at 25.

146 Comp. Br. at 25 (citing *Formella v. Schnidt Cartage, Inc.*, ARB No. 2008-0050, ALJ No. 2006-STA-00035 (ARB Mar. 19, 2009)).

147 *See* 49 U.S.C. §§ 31105(b)(1), 42121(b)(2)(B)(iv) (AIR21); 29 C.F.R. § 1978.109(b) (employer must demonstrate it would have taken the same unfavorable personnel action *in the absence of the protected behavior*).

protected activity.[148] In Piet's testimony, he stated that he recommended Complainant's employment be terminated in part because Complainant "had an ongoing attitude with our people. He didn't like our personnel. *He didn't like our equipment. He didn't like our management.*"[149] Likewise, Serrano testified that when Complainant called Transport Express equipment "pieces of shit" he had also "complain[ed] about all our equipment numerous times."[150] And, Redszus testified that he made the final decision to terminate Complainant because he was "getting feedback [from Piet and Serrano] that [Complainant] wasn't happy with his tenure at Transport Express, and he was *very vocal about it to the supervision*. Between that portion of it there was an *attitude* that [Complainant] was conveying that he was *more knowledgeable in his responsibilities than anybody within management* and supervision."[151]

When reviewed in its entirety, Respondents' testimony tends to indicate that the Complainant's dissatisfaction with Transport Express and its' equipment, as well as the manner with which Complainant expressed that dissatisfaction, comprised the "attitude" that management found objectionable.

As the decision does not explain the conclusions drawn from the entirety of Respondents' testimony, the affirmative defense determination lacks contextual strength, and is unsupported by substantial evidence. We remand for the ALJ to analyze whether, in light of the entire testimony, Respondent demonstrated clearly and convincingly that they would have terminated Complainant had he not engaged in any protected activity.

B. The ALJ Failed to Consider Additional Countervailing Evidence

Direct or circumstantial evidence can clearly and convincingly show that Respondents would have taken the adverse action in the absence of Complainant's protected activity. Circumstantial evidence "can include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee's work record; (3) statements contained in relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions."[152] It could be concluded that the *lack* of such direct or circumstantial evidence showing Respondents would have still fired

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148 The ALJ granted "great weight" to Respondents' testimony, having found Piet, Serrano and Redszus "credible." D. & O. at 12.

149 Tr. at 232 (emphasis added).

150 *Id.* at 38, 41.

151 *Id*. at 282, 287-88 (emphasis added).

152 *Speegle*, ARB No. 2013-074, slip op. at 11.

Complainant, beyond their own bald testimony, illustrates Respondents' failure to meet their evidentiary burden to establish their affirmative defense and avoid liability in the instant claim.[153] Respondents' pretextual and shifting explanations for the adverse action, and the temporal proximity between that action and the protected activity could be concluded to further militate against a finding Respondents met their evidentiary burden.[154] On remand, the ALJ must consider all the evidence and countervailing evidence, discussed *supra*, Section 4, in assessing whether Respondents establish their affirmative defense by clear and convincing evidence.

C. Complainant is Entitled to Leeway When Voicing Safety Complaints

It shall also be evaluated on remand whether Complainant's attitude remained within "the leeway to which a whistleblower is entitled when voicing a safety complaint" and thus stayed within the bounds of protected activity.[155] The Board and the Seventh Circuit have established that STAA complainants are entitled to some leeway or latitude for impulsive behavior in making their safety-related complaints, such that they do not lose the protection of the statute when they "stray beyond the boundaries of workplace propriety."[156]

"The right to engage in activity protected by the STAA 'permits some leeway for impulsive employee behavior.'"[157] The employee's "entitlement to some indulgences for the manner in which he engages in protected activity 'must be balanced against the employer's right to maintain order and respect'" such that "'flagrant', 'indefensible,' 'abusive,' or 'egregious'" misconduct will not be overlooked, while modest improprieties will be.[158]

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153 *See Bobreski,* ARB No. 2013-0001, slip op. at 28. In *Bobreski*, the Board found reliance on evidence from "bald testimony" fails to meet the substantial evidence test when such evidence is overwhelmed by other evidence, is uncorroborated, or "really constitutes mere conclusion." *Id.*, slip op. at 30.

154 *See supra* pp. 22-23.

155 *Formella v. Schnidt Cartage, Inc.*, ARB No. 2008-0050, ALJ No. 2006-STA-00035, slip. op. at 5 (ARB Mar. 19, 2009).

156 *Formella v. U.S. Dep't of Lab.*, 628 F.3d 381, 391 (7th Cir. 2010) (citing *Dreis v. Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976)).

157 *Formella,* 628 F.3d at 391 (citing *Combs v. Lambda Link*, ARB No. 1996-0066, ALJ No. 1995-CAA-00018, slip op. at 4 (ARB Oct. 17, 1997)).

158 *Formella*, 628 F.3d at 391 (internal citations omitted). The Seventh Circuit upheld the Board's determination the Complainant in *Formella* exceeded the leeway to which he was entitled in voicing his concern his assigned vehicle was unsafe and refusing to drive it when he shouted his objections to managers in a tone and manner which was "'in your face,' intimidating, and antagonizing." *Id.* at 393.

The ALJ also credited the managers' testimony that they decided to fire Complainant partly because he twice threatened to abandon his assigned vehicle, and not because of his safety complaints.[159] Respondents' witnesses testified Complainant stated he would not bring a load back from the McLean truck stop if the other driver he swapped trailers with brought him another trailer with a non-working license plate light.[160]

Piet testified that while complaining to Piet after not being able to pay for fuel with Transport Express' payment method, Complainant said if he had "any other issue with fueling and he can't get his fuel, that he's going to leave the trailer right where it is, the tractor trailer sit (sic) where it is taken (sic), and grab an Uber and bring himself home…F- those people in St. Louis. I don't need this anymore.'"[161]

The ALJ's finding on Complainants "threats" lacks sufficient contextual strength and is not supported by substantial evidence. According to Serrano, Complainant's statement he would not operate equipment with an inoperable license plate light was uttered when he complained to Serrano about and needed assistance with closing a trailer's doors that could not be closed on uneven ground. The remark could be construed as having been made within the context of protected activity.[162]

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159 D. & O. at 17.

160 Tr. at 229, 257, 260-61.

161 *Id*. at 83-84, 229-30.

162 D. & O. at 11 (citing RX-5).

Complainant had also filed two earlier internal complaints about inoperable license plate lights on two other pieces of equipment, such that it arguably would not have been unexpected for Complainant to encounter Transport Express equipment with this defect.[163] As noted above, the protected nature of complaining about an inoperable license plate light on a trailer may have been established via Complainant's testimony that he reasonably believed the defect was a DOT violation.[164]

Complainant's remarks about being unable to operate defective equipment might be found to have occurred, at least in part, within the context of his protected activity. Without indication the ALJ considered this context in reaching the affirmative defense finding, the latter is unsupported by substantial evidence. Further, the remark may have been entitled to protection as it may have fallen within the leeway to which Complainant was entitled in voicing his safety concerns, and in and of itself been protected under the STAA. On remand, the ALJ shall evaluate whether Complainant's remarks on potentially refusing to operate equipment fell within the bounds of protected activity by way of context and the latitude afforded STAA complainants in expressing safety concerns.

Lastly, it is unclear whether Complainant's remark about leaving his truck behind if he had trouble paying for fuel with Transport Express' fuel card was made in the context of protected activity. If the ALJ determines that Complainant's statement is protected activity, the ALJ must explain whether Respondents clearly and convincingly showed that they would have still taken the same action absent the protected activity. If the ALJ finds that Complainant's statement is not protected, they must explain whether and how Respondents clearly and convincingly showed it would have taken the same action for the singular remark about fuel payment.

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[163] Complainant noted in a P & D report on August 21, 2019, that the "lic[ense] plate light [is] out" on trailer #5315. D. & O. at 4. JX-2 at 15. Tr. at 138-39. Complainant also submitted a P & D report/complaint on August 23, 2019, that the license plate light was out on a reefer unit. D. & O. at 4, 10; CX-7 at 62.

[164] Complainant testified an inoperable license plate light "is the number one violation for DOT. It's what gets you pulled over when the police are driving up and down the road. Once they see that license plate bulb out in back of the trailer, you're pulled over, and that leads to the different inspections that lead to other issues." Tr. at 129. We note that a complaint motivated in part by the employee's concern about the impact a violation can have on the employee's driving record may still be a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order" and be afforded protection under §31105(a)(1)(A).

6. The ALJ Did Not Err as a Matter of Law in Finding That Respondent Dan Piet Was Not Subject to Individual Liability

The ALJ found that because Piet was not a "joint employer" and "does not have the power to hire and/or fire," he thereby lacked the requisite control to make him individually liable under the STAA.[165] Although this case does not present an issue involving a joint-employer arrangement, we agree that Complainant's direct supervisor, Piet, was not subject to individual liability under the STAA.

Under the plain language of the anti-discrimination provision of the STAA, a "person," such as a manager like Piet, can be held liable if they "discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment."[166]

To determine individual liability under the STAA, the inquiry is whether the person had the authority to make decisions regarding pay, terms, or privileges of employment.[167] Here, the ultimate decision whether Complainant's employment was terminated rested with Redszus.[168] Piet recommended that Complainant be fired and Redszus, Transport Express' owner and general manager, relied on the information Piet supplied to him about Complainant, but final approval of firing Complainant emanated from Redszus.[169] For these reasons, substantial evidence supports the ALJ's determination that Piet lacked the requisite authority over Complainant's employment status and, thus, could not be held individually liable.

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165 D. & O. at 13-14.

166 49 U.S.C. § 31105(a) (emphasis added); *see also* 49 U.S.C. § 31105(b)(3)(A) (individual liability provision). A "person" is defined as "one or more *individuals*, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals." 29 C.F.R. § 1978.101(k) (emphasis added).

167 *See Anderson v. Timex Logistics,* ARB No. 2013-0016, ALJ No. 2012-STA-00011, slip op. at 8-9 (ARB Apr. 30, 2014) (citations omitted) (finding operations manager not liable under STAA despite his recommendation the employee be fired because he lacked the ability to make the "final decision" to terminate, which belonged to the sole owner); *see also Smith v. Lake City Enters., Inc.*, ARB Nos. 2008-0091, 2009-0033, ALJ No. 2006-STA-00032, slip op. at 9 (ARB Sept. 24, 2010) (reissued Sept. 28, 2010) (affirming the ALJ conclusion that a manager who was the spouse of and advisor to the president and sole shareholder not subject to individual liability under the STAA because the president made the decisions to hire and fire complainant).

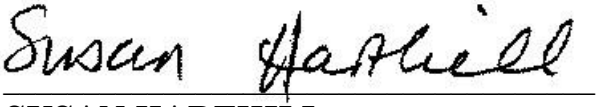
168 Tr. at 87, 231-32, 235, 279, 287-88.

169 *Id*.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's finding Complainant did not engage in a protected refusal to operate, **AFFIRM** the ALJ's finding Respondent Dan Piet is not subject to individual liability, and **VACATE** the ALJ's dismissal of Complainant's complaint. More specifically, we **VACATE** the ALJ's finding concerning whether Complainant's internal complaints were protected activity and **REMAND** for the ALJ to conduct the proper analysis as to whether they are protected, and, if found to be protected, to determine whether those complaints were a contributing factor in Respondent's decision to terminate Complainant's employment. We **VACATE** the ALJ's finding Respondents established their affirmative defense, and **REMAND** for further proceedings consistent with the Board's opinion.

SO ORDERED.



SUSAN HARTHILL
Chief Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

CERTIFICATE OF SERVICE

ARB-2023-0024 William Halliday v. Dan Piet and Transport Express (Case No: 2020-STA-00067)

I certify that the parties below were served this day.

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