

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 29 June 2007**

Case No.: 2005-STA-00038

In the Matter of:

JOHN BRONSKI,  
Complainant,

v.

RISER FOODS, INC.,  
Respondent,

APPEARANCES:

John Bronski, *Pro se*  
For the complainant

Patricia Wozniak Henk, Esq.  
For the respondent

BEFORE: DONALD W. MOSSER  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (the Act), as amended, 49 U.S.C. § 31105 (1997), and its implementing regulations promulgated there under, 29 C.F.R. Part 1978 (2005).

Complainant, John Bronski, filed a complaint with the Secretary of Labor on March 18, 2005, alleging that Riser Foods, Inc. (Riser), discharged him in reprisal for refusing to drive because he was ill, in violation of Section 31105 of the Act. The Secretary, acting through her duly authorized agents, investigated the complaint and determined that there was no reasonable cause to believe that Riser violated § 31105 of the Act. The Secretary's findings were issued on May 10, 2005. (ALJX 1).

On June 7, 2005, complainant mailed his appeal opposing the findings of the Secretary. (ALJX 2). I conducted a formal hearing on November 2, 2006 at Cleveland, Ohio, at which time the parties were afforded the opportunity to present both documentary and testimonial evidence on all of the issues. The record remained open for sixty days following the hearing for the filing of post-hearing briefs.<sup>1</sup>

### **ISSUE**

Whether Riser violated the Act's refusal to drive clause, 49 U.S.C.A. § 31105(a)(1)(B), by retaliating against the complainant for refusing to operate a vehicle when driving would have violated the "illness/fatigue" rule at 49 C.F.R. § 392.3.

### **FINDINGS OF FACT**

Riser is a commercial motor carrier and its primary transportation truck facility is located in Bedford Heights, Ohio. (Tr. 46). The complainant was hired as a driver for Riser on February 21, 2001. He drove Riser's trucks over highways in commerce to haul grocery and perishable products. (Tr. 46; EX 15).

Riser's trucking business operates on a 24-hour basis with its drivers reporting to work at various times to accommodate the company's busiest time periods. (Tr. 57-58). The drivers usually are scheduled to work 8-1/2 to 9 hours per day and are guaranteed under their union contract to work at least 42-1/2 hours per week. (Tr. 90-91, 105). However, the drivers may actually work more time each day or week depending on the weather, road conditions and the amount of loads to be delivered. (Tr. 91, 92). Under the regulations or guidelines pertinent to this case, drivers are allowed to work no more than 16 hours per day and 70 hours in an 8 day period. They are not allowed to drive more than 10 hours per day. (Tr. 90-91, 129). Riser's drivers are made aware of these guidelines or regulations through the handbook given to them annually by their employer and through training programs. (Tr. 48, 90-91, 129).

As part of his employment, Mr. Bronski was required to sign an employment agreement which in part required that he would follow the company's dispatch procedures. (EX 2, 3). Under these procedures, a driver is "dispatch ready" for a second or subsequent dispatch once he finishes the previous delivery and returns to the dispatch window and hands in his completed trip sheet. (Tr. 57; EX 3). If a driver wishes to take a break, he must fill out the trip sheet indicating the break prior to coming to the dispatch window. (Tr. 64; EX 3). The trip sheet is required to be completed before coming to the dispatch window because Riser does not permit drivers to come to the window, look at the available loads, and then choose to take a break because the available loads are undesirable. (Tr. 64). If a driver becomes ill while on a delivery, the driver is to immediately inform the transportation supervisor by either using his cell phone, the tractor CB, or by using a store phone. (Tr. 80).

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<sup>1</sup> References in this decision to ALJX, CX and EX pertain to the exhibits of the administrative law judge, complainant, and respondent. The transcript of the hearing is cited as Tr. and by page number.

On November 19, 2004, Mr. Bronski reported to work at 3:00 p.m. and was scheduled to work until 11:30 p.m. (Tr. 27, 57-58, 92). He drove two loads for his employer which involved a little over 1-1/2 hours of actual driving. (Tr. 29, 93-96). He returned to the dispatch window about 8:40 p.m. (Tr. 11, 29, 93). He glanced at the trip sheet for the next load that was on the dispatch window, which he admitted you could not help noticing. (Tr. 30, 81). When asked if that was the next load, his supervisor told him that was the only load available. (Tr. 11, 66, 82, 104). That load to North Canton, Ohio and back would have taken about 3 hours to complete. (Tr. 100-101).

Mr. Bronski next began writing on his trip sheet. (Tr. 12, 66, 69). When asked by his supervisor if he was "filling out your lunch and breaks," the complainant did not respond. (Tr. 66, 83, 109). Mr. Bronski was asked again what he was writing down and the complainant again failed to respond. (Tr. 66, 83, 109). As he turned to leave, his supervisor asked the complainant to turn in his trip sheet before leaving, but he did not respond, other than to say "I'll be right back." (Tr. 66, 69-70, 109).

Complainant next returned to his tractor and drove it behind the garage where all the tractors are parked. (Tr. 23, 71, 113-114). He then returned to the dispatch window, handed in his trip report and informed his supervisor that he was going home because he had a headache. (Tr. 30, 72, 115). Mr. Bronski had not mentioned a headache or any illness until he told his supervisor he was leaving. (Tr. 78, 81, 116). His supervisor immediately informed her supervisor of the incident by e-mail.

Prior to returning to the dispatch window at 8:40, Mr. Bronski did purchase some Tylenol from a grocery store. (Tr. 17-20; CX 2). However, he did not advise his supervisor that he was ill while driving his first two loads by either the CB radio or telephone. (Tr. 34-35). He did not seek medical care for his headache after leaving work. (Tr. 24, 150). The medical report pertaining to his last physical examination on February 14, 2003 does not contain any notation that Mr. Bronski had a history of headaches or migraines. (Tr. 155).

Riser's dispatch procedure policy was reviewed with the union in 2002 and it was documented that drivers who refused to take a load would be removed from the schedule and disciplined up to and including immediate termination. (Tr. 136-137; EX 5). Refusal to take a load was considered by Riser to constitute insubordination. (Tr. 137). Mr. Bronski knew of this procedure and had previously been warned by Riser for violating the policy. (Tr. 37-38). Complainant was terminated by Riser based on his refusal to work on November 19, 2004 and ignoring his supervisor's attempts to give him direction. (Tr. 143).

### **CONCLUSIONS OF LAW**

The employee protection provisions of the Act prohibit disciplining or discriminating against an employee because he had refused to drive in certain circumstances:

- (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges because

(A) the employee, or another person at the employee's request, had filed a complaint...

(B) the employee refuses to operate the vehicle because  
(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health...

49 U.S.C.A. § 31105(a). These activities, which are referred to as protected activities, are the only activities for which redress is available under the Act. Different wrongful activities by an employer may be redressed under different statutes, but those statutes are not at issue in this proceeding.

Generally, in order for a claim under the Act to proceed, a complainant must first make out a *prima facie* case showing that he engaged in protected activity, that he was subjected to adverse action, and that respondent was aware of the protected activity when it took the adverse action. Complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Mace v. Ona Delivery Systems, Inc.*, 91-STA-10 (Sec'y Jan. 27, 1992).

There is no dispute as to whether Mr. Bronski was subject to adverse action; he was terminated from his position. Therefore, this case turns on whether Mr. Bronski was engaged in protected activity and whether the suspension constituted retaliation for that protected activity.

A driver engages in protected activity under the Act when he refuses to drive a commercial vehicle when he is too sick to do so safely. The motor carrier regulations provide in pertinent part:

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

49 C.F.R. § 392.3.

A refusal to drive because of illness is not necessarily protected activity under the Act; rather, to be protected, a refusal to drive must be based on an illness that impairs the driver's ability to drive safely. *See* 49 C.F.R. § 392.3. An employer may take action against employees who feign illness, and the Act does not prohibit an employer from establishing reasonable methods or mechanisms for assuring that a claimed illness is legitimate and serious enough to warrant a protected refusal to drive. *Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia*, 97-STA-30 @ 7-8 and nn.7-8 (ARB July 8, 1998) (in the instant case, however, there was substantial evidence that complainant's illness was not fabricated and that respondent had reason to know that).

In *Palinkas v. United Parcel Service*, the Secretary accepted the administrative law judge's recommendation that a work refusal was not protected under the facts of the case. Although the complainant alleged that he was very upset and could not drive because of his emotional state after being admonished by a supervisor, the administrative law judge noted that the complainant had driven home in his girlfriend's car and that the complainant had not taken medication or consulted a physician. The administrative law judge concluded that the complainant was simply angry because of the rebuke, and decided that he was not going to complete his run. *Palinkas v. United Parcel Service*, 95-STA-30 (ALJ Dec. 13, 1995).

Based on the testimony in this case, I do not find that Mr. Bronski engaged in protected activity when he refused to drive. He testified that he was suffering from a headache and he therefore could not continue to drive. He also complained that his stomach ached and he was feeling “groggy” and he was upset over his infant daughter’s hospitalization. While these may be legitimate reasons to refuse to drive, if proven, I find that the evidence is not sufficient to support Mr. Bronski’s allegations that he was too sick to drive.

Instead of seeking medical treatment when he left the dispatch office, Mr. Bronski claims he drove to the hospital to see his daughter. Mr. Bronski testified extensively about his ill daughter and submitted medical records pertaining to her hospitalization during the time involved in this case. (CX 1). I find this testimony credible but conclude that there is no credible evidence proving this was reason for the complainant’s refusal to complete his work on November 19, 2004. If so, he obviously was well enough to continue driving, similar to the complainant in *Palinkas*. Complaints of a headache and purchasing Tylenol are not sufficient evidence for me to conclude that Mr. Bronski was too sick to drive. Also similar to the complainant in *Palinkas*, it appears that Mr. Bronski’s motive for refusing to drive was because he did not want the load he was to be assigned. He admitted that he had the opportunity to see the load. Moreover, he never mentioned a headache when he first entered the dispatch office. It was only after looking at the load slip and returning to his truck for several minutes that he mentioned he was not feeling well.

I do not find Mr. Bronski’s testimony regarding the night in question to be credible. He stated that he was fully aware of the company’s dispatch policies and had been warned about them on previous occasions. He did not use a telephone or the CB radio to call the dispatch office to report his illness, as is the company policy. Furthermore, I am not persuaded by Mr. Bronski’s statement that he suddenly became overcome with sickness a few seconds after he had the opportunity to view the load slip. It is more likely that after seeing the load slip, he feigned illness to avoid taking the undesirable load which would require several more hours of work. Based on the testimony and evidence presented in this case, I find that Mr. Bronski has failed to show that he was engaged in protected activity when he refused to drive.

Even if Mr. Bronski could establish that he was engaged in protected activity, he still fails to make the *prima facie* case because he cannot show that the respondent was aware of the protected activity when it took the adverse action. To establish that the employer was aware of the protected activity, the complainant has the burden of proving that he explained to his employer he was ill and that because of the condition he could not drive without creating a danger to himself or to the public at large. It is not enough simply to state that he is not feeling

well. *Lorenz v. H & J Manufacturing Services*, 92-STA-26 (ALJ Dec. 17, 1992), *aff'd* (Sec'y Apr. 7, 1993).

In *Lorenz*, the administrative law judge found that the complainant did not establish communication of a safety related reason for the work refusal when he simply asserted, "I'm sick. I'm going home," where, in view of the events that had just taken place, it would have been reasonable for a supervisor to interpret that this was nothing more than a statement made in the heat of anger. *Id.* See also *Wrobel v. Roadway Express, Inc.*, ARB No. 01 091, ALJ No. 2000 STA 48 (ARB July 31, 2003) (holding that the mere assertion that the complainant was "sick," particularly under the circumstances presented [evidence casting significant doubt on the credibility of the assertion that he was sick], was inadequate to provide notice to the employer), and *Smith v. Specialized Transportation Services*, 91-STA-22 (Sec'y Apr. 30, 1992) (holding that the complainant's statement that she was not well and unable to work could reasonably have been interpreted as backlash from an earlier argument).

Mr. Bronski's assertion that he had a "headache" was not adequate to provide notice to Riser of any protected activity. The Administrative Review Board has held on several occasions that simply stating, "I'm sick" is not adequate notice. See *supra*. Mr. Bronski also had a history of refusing loads after he had the opportunity to look at them. Given the fact that Mr. Bronski looked at the trip sheet for the next night in question, it is reasonable to conclude that his "headache" was nothing more than a statement made to escape the undesirable load assignment. Therefore, the adverse action Riser took against the complainant in removing him from the schedule was not made in awareness of any protected activity.

Mr. Bronski offered no explanation why he had not mentioned to Riser that he suffered from migraine headaches. He had several opportunities to further explain his medical condition before the adverse actions, but there is no evidence that he ever expanded upon his assertion of a headache or that he ever sought medical care for this condition. Riser had no reason to suspect that Mr. Bronski's complaints of a headache were valid, given the circumstances surrounding the assertion. Furthermore, Riser had no reason to suspect that a simple headache would impair Mr. Bronski's ability to drive without further knowledge of the severity of the headache. I therefore find that the complainant has failed to establish his *prima facie* case because he has not shown that the respondent was aware of the protected activity when it took the adverse action against complainant.

In summary, the complainant has failed to show that he was engaged in protected activity or that the employer was aware of any possible protected activity when it engaged in adverse actions. Therefore, the complainant has failed to establish his *prima facie* case and his claim must be denied.<sup>2</sup>

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<sup>2</sup> Even if I were to find that the complainant had established a *prima facie* case, the employer has submitted substantial evidence that it had a non-discriminatory reason for the discharge. *Olson v. Missoula Ready Mix*, 95-STA-21 (Sec'y Mar. 15, 1996). The complainant broke several of the company's dispatch policy procedures and he also refused to respond to questions from his supervisor. (Tr. 66; EX 3). Riser Foods has reasonable procedures set in place for drivers who become too ill to drive. (Tr. 80). Complainant refused to follow any of these procedures. As detailed in the dispatch procedure policy, complainant's actions were grounds for discharge. (Tr. 136; EX 5). It

**RECOMMENDED ORDER**

For the above stated reasons, IT IS HEREBY RECOMMENDED that the complaint of John Bronski under the Surface Transportation Assistance Act is DISMISSED.

**A**  
DONALD W. MOSSER  
Administrative Law Judge

NOTICE: This Recommended Decision and Order, along with the administrative file, will be forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

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is clear from the facts that Mr. Bronski was discharged for insubordination, not for engaging in any protected activity.