



Issue Date: 26 September 2012

Case No.: **2009-STA-00030**

In the matter of:

BYRON WARREN,
Complainant,

v.

CUSTOM ORGANICS,
Respondent.

DECISION AND ORDER ON REMAND

This proceeding arises from a claim under the Surface Transportation Assistance Act (STAA or the Act), 49 U.S.C. § 31105 (2007), and the implementing regulations found at 29 C.F.R. Part 1978 (2008). Section 405 of the Act provides protection to covered employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules from retaliatory acts of discharge, discipline, or discrimination.

Procedural History

On July 18, 2008, Byron Warren (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that Custom Organics (“Respondent”) terminated his employment on July 16, 2008 in retaliation for voicing concerns regarding the safety of the company’s trucks, being forced to haul overweight loads and being forced to drive in violation of the Department of Transportation (DOT) hours-of-service rules and regulations, in violation of the employee protection provisions of the STAA. On March 13, 2009, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, found that Complainant’s claim did not have merit.

On April 2, 2009, the Complainant filed objections to the Administrator’s findings and requested a formal hearing before an Administrative Law Judge. The undersigned issued a decision and order denying benefits on April 27, 2010. The Claimant timely appealed the undersigned’s decision to the Administrative Review Board (“the Board”). On February 29, 2012, the Board remanded the case to the undersigned.

The Board stated that the undersigned must consider whether the Complainant’s actions constituted protected activity, specifically whether the Complainant’s submission of checklists

and verbal communications constituted notice of a safety complaint. *Warren v. Custom Organics*, ARB No. 10-092, slip op at 7 (Feb. 29, 2012). The Board also suggested that the undersigned should reconsider the evidence regarding whether Complainant complained about hauling overweight trailers, stating that “the evidence of record supports Warren’s testimony that he engaged in STAA whistleblower protected activity through his complaints to management about hauling overweight trailers. *Id.* at 9.

If the undersigned determines that the Complainant’s actions did constitute protected activity, the Board stated that on remand the undersigned must then determine whether that activity was a “contributing factor” in the Employer’s decision to terminate the Complainant. *Id.* at 10. Specifically, the Board ordered:

On remand, the ALJ should determine whether the temporal proximity between Warren’s protected activity, including reporting the overweight loads and any other activity that the ALJ finds protected (e.g., submission of the checklists and oral safety complaints, all of which occurred in the spring and summer of 2008) and Warren’s termination in July 2008, may be sufficient to establish the element of causation.

Id. at 11.

Finally, if protected activity is determined to be a contributing factor in the Complainant’s termination, the Board stated that the undersigned must apply the correct burden of proof to determine if the Employer has shown by “clear and convincing evidence” that it would have taken the same adverse action in any event. *Id.* at 11.

The case was returned to the Office of Administrative Law Judges in May 2012. Both parties submitted briefs on remand on July 23, 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Congress included section 405(b) in the STAA to ensure that employees in the commercial motor transportation industry who make safety complaints, participate in proceedings, or refuse to commit unsafe acts, do not suffer employment consequences because of those actions. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060 (5th Cir. 1991) (citing 128 Cong. Rec. 29192, 32510 (1982)). The Act protects all employees of commercial motor carriers from discharge, discipline, or discrimination for the following activities: filing a complaint about commercial motor vehicle safety, testifying in a proceeding on safety, refusing to operate a vehicle when operation would violate a federal safety rule, and refusing to operate a vehicle when the employee reasonably believes it would result in serious injury to himself or others. 49 U.S.C. §31105(a).

In order to prevail on an STAA complaint, a complainant must make a *prima facie* case of discrimination by showing that: (1) he engaged in protected activity, (2) the employer was aware of his activity, (3) he was subject to adverse employment action, and (4) there was a

causal link between his protected activity and the adverse action of his employer. *See Clean Harbors Envtl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987).

The protected activity need only be a contributing factor to the employer's decision to terminate the Complainant. 29 CFR Part 1979.109(a) ("A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."). If the Complainant shows his protected activity was a contributing factor, the Respondent may escape liability only by showing by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant's protected activity.

A. Complainant's *Prima Facie* Case

1. Protected Activity

The Board remanded this case for reconsideration of two of Complainant's claimed protected activities: (1) reporting unsafe conditions in the vehicles and (2) complaining about having to haul overweight vehicles.

a. Unsafe vehicle conditions

Complainant claimed he reported safety issues with his trucks both orally and in writing on pre-trip check lists. TR at 14-15. The Board held that on remand the undersigned must determine whether the company had constructive knowledge of Complainant's concerns documented in writing. With regards to Complainant's alleged oral complaints, the Board stated that an employee reported safety concerns as part of his job responsibilities may still have engaged in protected activity.

The Complainant testified that after he became lead driver in May or early June 2008, he began verbally reporting problems with his trucks to Mr. Cowan. TR at 14. In his statement to OSHA, Mr. Cowan stated that "if there was an issue with a vehicle or trailer he verbally told management of the issue." RX 16a. Mr. Craig testified that the Complainant complained to him about missing mud flaps, and after speaking with Mr. Cowan, they were fixed within 24 hours. TR at 188-189. The evidence is uncontradicted that the Complainant made some verbal safety complaints. I find that those oral complaints constitute protected activity.

Both Mr. Cowan and the Complainant testified that the company provided pre-trip checklist forms to be completed listing safety problems with the trucks. The checklists submitted by the Complainant into evidence show he noted on the forms that the trucks needed new tires, breaks, mud flaps, and signal lights. CX 3.

Although they agreed drivers were told to note safety concerns on the forms, Mr. Cowan and the Complainant testified differently as to what the drivers were told to do with the forms after completing them. Mr. Cowan testified that the pre-trip checklists were to be turned in to

him and that he never informed the Complainant not to turn them in. TR at 142-144. He also stated that the Complainant was not good about turning them in. TR at 143. The Complainant stated that he attempted to turn the checklists in to Mr. Cowan, but he was told to hold on to them. TR at 14-15, 57-58. Richard Taylor testified that the drivers were not instructed to turn the checklists in to anyone. TR at 76. The evidence is uncontradicted that a copy of the checklists was left in the back of the truck. There was no testimony as to whether Mr. Cowan or other managers ever reviewed the checklists left in the trucks.

Nonetheless, the parties agree that Mr. Cowan directed the Complainant to put his safety complaints in writing on the forms. If the Complainant is to be believed, Mr. Cowan chose to remain ignorant of those complaints by refusing to accept the forms. If Mr. Cowan is to be believed, the Complainant chose not to submit the forms as instructed. Either way, it is undisputed that the forms are the method by which the company instructed the drivers to record any safety concerns and copies of those forms were available in the trucks. Thus, I find the company was on constructive notice of the Complainant's written safety complaints because Complainant followed the company's procedure for making written report of issues.

b. Overweight vehicles

The Complainant testified that he made numerous verbal complaints to management regarding overweight trucks. TR at 17. The Board found that "while there may exist contradictory evidence about *how often* Warren complained, the fact that he nevertheless *did* complain is uncontradicted." Slip op at 9. The Board further stated, "Warren need not show that an actual violation occurred (that his managers expressly directed him to drive overweight trucks); he need only show that he had a reasonable belief (objective and subjective) that he had to drive overweight trucks based on a preponderance of direct *or* circumstantial evidence." Slip op at 9, fn 3.

Mr. Milton testified that he was with the Complainant once when he encountered an overweight trailer. TR at 95. He stated that the Complainant called Mr. Cowan to report the trailer's weight, and Mr. Cowan told him not to pull the trailer. *Id.*

Mr. Cowan and the Complainant both testified to another instance where Complainant called Mr. Cowan to report an overweight trailer. TR at 62-63, 150-151. In that case, the men agree that Mr. Cowan went out to the site and assisted the Complainant in getting the trailer to within the legal weight. *Id.*

The Complainant alleges additional instances in which he reported overweight trailers. TR at 17. In those cases, he testified Mr. Cowan and Mr. Ryko, the plant manager, told him he needed to haul the trailers back. TR at 19, 69. Specifically, he testified to an instance in which he called Mr. Cowan about an overweight trailer on July 7, 2008 and Mr. Cowan told him to pull it anyway. TR at 20. He did and said he left a copy of the weight ticket with a note on Mr. Cowan's desk that the company needed to fix the overweight trucks or he would go to the Department of Transportation. TR at 17. Mr. Cowan testified the Complainant did not call him prior to hauling the trailer and he reprimanded him when he found out he had done so. TR at 121-122.

Although there remains dispute over whether Mr. Cowan or other plant managers ever told Complainant to pull overweight trailers, there is no dispute that in at least two instances the Complainant did report to Mr. Cowan that the trailers he was scheduled to pull were overweight. Therefore, I find Complainant did engage in protected activity by reporting he was dispatched to pull trailers that were overweight.

2. Causal Link Between the Protected Activity and the Adverse Action

Once the Complainant has shown he engaged in protected activity, he must next show by a preponderance of the evidence that that protected activity was a “contributing factor” in the Employer’s decision to terminate him. A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision, and may be established by direct or circumstantial evidence. *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-52, slip op. at 6 (ARB Jan. 31, 2011). The Complainant argues that he established that his protected activity was a contributing factor through a showing of circumstantial evidence, including the timing of his termination, comments made by management at the time he was terminated, the fact that he was given a raise two months before he was terminated, and the Employer’s shifting explanations for why he was terminated.

A complainant can establish a causal link between the protected activity and the adverse employment action by showing that the employer was aware of the protected activity and that the adverse action followed closely thereafter. *Kovas v. Morin Transport, Inc.*, ALJ Case No. 92-STA-41, slip op. at 4 (Sec’y Oct. 1, 1993) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Although temporal proximity can support an inference of retaliation, that inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 03-AIR-22, slip op. at 9 (ARB Nov. 30, 2005). For example, when an independent intervening event could have caused the adverse action, it would be illogical to rely on the temporal proximity of the protected act and the adverse action. See *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001). Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee’s burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

I have found that Complainant’s complaints about hauling overweight trailers constituted protected activity. Those complaints occurred during the summer of 2008 prior to the Complainant’s termination on July 16, 2008. In one specific instance, the evidence shows that Complainant hauled an overweight load on July 7, 2008. RX 20. The Complainant contends that Mr. Cowan told him to haul the trailer on that date even after he told him that it was overweight. TR at 20. The Complainant said he threatened to report the Employer to the Department of Transportation at that time. TR at 17. However, Mr. Cowan testified he did not know the trailer was overweight before the Complainant hauled it and never told him to haul it despite it being overweight. TR 121-122. I find Mr. Cowan’s description of the July 7 incident to be more credible. The Complainant presented no evidence to corroborate his version of the events. In fact, other than his testimony, he presented no other direct evidence that he was ever asked by the Employer to haul any overweight load at all. While another driver, Mr. Taylor, testified that

he had been told to haul overweight loads, two other drivers testified they had been told not to do so. Management also testified drivers were told not to haul overweight loads and the Complainant agreed that in another specific instance Mr. Cowan had helped him reduce the weight in an overweight trailer when he called to report it. Given the totality of the evidence, I do not find Complainant's version of the events on July 7, 2008 to be credible. However, the evidence does show Complainant made other complaints about overweight trailers prior to his termination.

Complainant's other protected activity consisted of reporting safety concerns about the trucks and trailers. He testified he made verbal complaints in May or early June when he first was given a dollar raise and additional responsibility for the safety of the vehicles. TR at 14. He also testified he completed pre-trip checklists in which he noted problems with the vehicles. TR 14-17. A number of those checklists from March and April were submitted into evidence. CX 3. The Complainant testified he continued completing the checklists after April but left both copies in the truck. TR at 59. I find Complainant's protected activity of complaining both about overweight loads and reporting safety concerns occurred in the months before his July termination, a temporal proximity that could indicate a causal link. However, I note the ongoing nature of the complaints over a period of time rather than any specific complaint immediately preceding his termination do not necessarily suggest a causal link.

The Complainant also argued that Mr. Cowan's statements during the termination meeting suggested antagonism or hostility toward his protected activity. The Complainant testified that Mr. Cowan stated he was being terminated for not being able to adapt to the company. The Complainant argued that he would not have received a promotion to lead driver or raise six weeks earlier if he had been unable to adapt to the company. Mr. Cowan testified that the Complainant was given a dollar raise for helping with maintenance issues, but was not promoted. TR at 115. He stated that the company did not have a lead driver position because the transportation manager was in charge of communications between the drivers and management. TR at 117, 119-120. Mr. Taylor also mentioned that he did not have knowledge of the Complainant being made lead driver. TR at 75. I find the alleged statement by Mr. Cowan during the termination hearing to be too ambiguous to establish the Complainant's termination was motivated by his protected activity.

Complainant also argued that the fact that he was given a raise in May of 2008, even after hitting a light pole and bringing his son along in his truck, showed the Employer's attitude toward him changed after he made his protected complaints. Complainant testified the raise was in connection with him being promoted to "lead driver," while the Employer explained there was no such position and the additional money was to compensate him for taking on additional duties regarding the safety and repair of the trucks. TR at 35, 115. I agree the raise does suggest the Employer's opinion of the Claimant changed between that date and the date he was terminated in July. However, as the Employer notes, a number of other incidents unrelated to any protected activity also occurred between May and July. Specifically, the Complainant had an argument with a supervisor on July 3, he left a container of product exposed to the rain on July 12, and on July 14 he took a company truck home and was unreachable the next morning before the first scheduled pickup. I find Mr. Cowan and Mr. Desmelik's version of each of those events to be more credible than the Complainant's.

Those three July incidents are cited by the Employer as the incidents that contributed to the Complainant's termination. Mr. Cowan, Mr. Craig, and Mr. Desmelik all testified that the discussion on whether to terminate the Complainant did not include any mention of his complaints of safety issues or overweight loads. TR at 128-129, 169, 188. Mr. Cowan testified that when the Complainant took the truck home without permission and was not available the next morning for a pick-up it "was really the last incident that we were willing to put up with." TR at 127. With regards to the July 3 argument, both the Complainant and Mr. Desmelik similarly testified the argument was due to Mr. Desmelik telling Complainant not to use a Bobcat the way he was using it. TR at 26-27, 164-167. The Complainant testified that he didn't subsequently walk off the job, but rather left for lunch. TR at 27. However, Mr. Desmelik testified that Complainant left materials on his desk, which he wouldn't normally have done before going to lunch. TR at 166. Regardless of whether Complainant intended to leave temporarily or permanently, the evidence is clear an argument occurred. As to the Employer's contention that the Complainant left product out in the rain, Mr. Cowan's testimony that he did so in July is uncontroverted. TR at 123. Finally, the parties agree that the Complainant took a truck home on July 14. However, the Complainant contended that he often took a truck home while Mr. Cowan testified the company did not allow drivers to take trucks home, with the exception of a temporary allowance for one particular driver. TR at 123-124. Also, Complainant testified he reported to work the next morning, while Mr. Cowan testified the Complainant was unreachable by phone the next morning, causing a delay in a pickup from a customer. TR at 22, 126. Complainant's contention that drivers were allowed to take trucks home is unsupported by the other evidence in this case. TR at 84-85, 106, 123-124, 185-186. Although Complainant testified Mr. Milton took trucks home, Mr. Milton testified he only did so once and he was reprimanded for it. TR at 95. I do not find the Complainant's testimony credible. I find that drivers, including the Complainant, were or reasonably should have been aware that they were not allowed to take trucks home and that it was not a commonplace occurrence.

Although Complainant did engage in protected activity in the months prior to his termination, I do not find that temporal proximity sufficient to establish a causal connection between the two events given the time span of his protected activity and the independent intervening events. Nor do I find the other circumstantial evidence cited by the Complainant to be sufficient. The Complainant was employed by the Employer for a fairly short amount of time from January 28, 2008 to July 16, 2008. While I find the Complainant did engage in protected activity during that period, I do not find he has shown by a preponderance of the evidence that his protected activity was a contributing factor in the Employer's decision to terminate him.

B. Respondent's Rebuttal

If the Complainant had shown by a preponderance of the evidence that his protected activity was a contributing factor in the Employer's decision to terminate him, the Employer would then have to show by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity in order to avoid liability. I find that the Employer would meet that burden.

As discussed above, the Employer cited to three specific incidents that occurred in July—an argument with a member of management, leaving product exposed to the rain, and taking a truck home without permission—that combined as part of a deterioration of the Complainant's performance to prompt his termination. TR at 127. Mr. Cowan also testified the Complainant had become more unreliable and pointed to a note he had put in his file on July 9, 2008 stating that the Complainant was increasingly unavailable for work and consistently late. TR at 115, 121. Given the evidence of the Complainant's unreliability and the specific incidents that occurred in July, I find that had the Complainant shown his protected activity was a contributing factor in his termination, the Employer would have shown it would have terminated him for the above described unrelated reasons regardless.

C. Conclusion

Although I find that the Complainant suffered an adverse employment action when he was terminated on July 16, 2008 and that he engaged in protected activity by complaining about hauling overweight loads and safety issues on the trucks, I find that Complainant has failed to establish that his protected activity had any causal connection to his termination. Because he has failed to carry his burden of proof under the STAA, the Complainant's claim for relief must be denied.

ORDER

For the foregoing reasons, Byron Warren's claim is DENIED.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/amc
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).