



Issue Date: 08 August 2018

Case No.: 2012-STA-00061

In the Matter of:

RODERICK A. CARTER,
Complainant,

v.

CPC LOGISTICS, INC.,
CPC MEDICAL PRODUCTS, LLC, and
HOSPIRA FLEET SERVICES, LLC,
Respondents.

DECISION AND ORDER ON REMAND

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act (“STAA” or “the Act”), 49 U.S.C. § 31105 et seq., and the implementing regulations found at 29 C.F.R. Part 1978. Complainant Roderick A. Carter alleges that he was terminated after refusing to drive while fatigued. On remand, and after reconsideration of the evidence in the record, I find that Respondents did not violate the Act.

Procedural History

On February 28, 2014, I held a hearing in Columbia, South Carolina into Mr. Carter’s allegations. At the conclusion of Mr. Carter’s case-in-chief, Respondents moved for a directed verdict. Finding that Hospira was not a joint employer of Complainant, I granted Hospira’s motion for a directed verdict and denied Mr. Carter’s complaint against Hospira. I denied CPC’s motion for a directed verdict.

On April 16, 2015, I issued a Decision and Order Denying Complaint (“Decision and Order”), concluding that Respondents did not violate the STAA. On December 22, 2016, the Administrative Review Board issued a Final Decision and Order, affirming the Decision and Order. Mr. Carter petitioned the United States Court of Appeals for the Fourth Circuit for review, and the Court granted his petition. Upon review of the matter, the Fourth Circuit remanded the case back to the Secretary for reconsideration of Mr. Carter’s refusal to drive claim. *Carter v. CPC Logistics*, No. 17-1905, ARB No. 15-050, ALJ No. 2012-STA-00061 (4th Cir. Sept. 5, 2017).

Fourth Circuit Opinion

On review of the record, the Fourth Circuit concluded that I had made inconsistent findings of fact which prejudiced Mr. Carter.

In the Decision and Order, I found that Mr. Carter's general demeanor demonstrated that he believes he was unfairly wronged, and his belief caused inaccurate recollection as well as exaggerated or untruthful testimony. Decision and Order at 28. As such, I credited the testimony of Respondents' witnesses over Complainant's testimony. *Id.* In doing so, I credited the testimony of Ron Covert and Ken Pruitt. Mr. Covert testified that Mr. Carter could not explain his delay on September 26, 2011 when asked, stating vaguely he might have been sick. Mr. Pruitt testified that he was not told that Mr. Carter was taking rest breaks. Believing Mr. Covert's and Mr. Pruitt's version of the events, I declined to credit Mr. Carter's testimony that he told Mr. Covert, Mr. Worthington, and Mr. Pruitt that his delays were caused by fatigue breaks. *Id.* at 41.

The Fourth Circuit ruled my finding that Carter never mentioned fatigue breaks to his supervisors was not supported by substantial evidence. *Carter*, No. 17-1905, slip op. at 6. First, the Court noted, this finding may conflict my determination that Mr. Carter made only general statements that he was entitled to rest breaks. *Id.*; Decision and Order at 40. Second, the Court stated in a footnote that my credibility analysis on this issue cited Mr. Carter's failure to call dispatch "as he was required to do," but noted that I "neglected to cite any evidence indicating that a driver was required to notify dispatch each time he took a break." *Carter*, No. 17-1905, slip op. at 7, n.3. Third, and most importantly, this finding directly contradicts CPC's position statement to OSHA. In its statement to OSHA, CPC acknowledges that Mr. Carter mentioned fatigue breaks to two supervisors when questioned about his performance and that Mr. Carter's rest breaks were a factor in the decision to terminate. *Id.* at 6-7.

The Court furthermore ruled my finding that Carter's delays were not actually caused by fatigue breaks, rested on the flawed factual analysis discussed above, and was not supported by substantial evidence. *Id.* at 7. Given CPC's admission that Mr. Carter's delays were factor in the decision to terminate, the Court concluded that Mr. Carter was prejudiced by the flawed factual analysis. Accordingly, the Court remanded the case back to the Secretary for reconsideration.

Reconsideration of the Evidence and New Findings

In light of the Fourth Circuit's opinion, I vacate my previous findings (1) that Mr. Carter never mentioned fatigue breaks to his supervisors and (2) that Mr. Carter's rest breaks were not a factor in the decision to terminate.

CPC, in its position statement to OSHA, wrote:

Mr. Carter was repeatedly late returning to Columbia, and CPC Regional Manager Ron Covert discussed this job performance deficiency with Mr. Carter. Mr. Carter told Mr. Covert that he ran late because he got sleepy and had to pull over to rest. Mr. Covert responded that if Mr. Carter was getting sleepy while driving so frequently he must not be getting adequate rest.

In another conversation about Mr. Carter's late arrivals, Mr. Carter asked CPC Division Manager Ken Pruitt over the phone whether Mr. Pruitt was saying he

couldn't stop if he was sleepy. Mr. Pruitt said he was not saying that. But Mr. Pruitt also told Mr. Carter that it was his responsibility to get proper rest, and that if he repeatedly needed such frequent and extensive rest breaks he must not be doing so. Mr. Carter said that he was allowed by the DOT to take rest breaks if he needed them.

...

In this conversation with Mr. Pruitt, Mr. Carter also accused CPC of not caring about safety and threatened to report CPC. Mr. Carter also made a couple of veiled threats, such as, "You don't want to come down here and see me; you don't know what I'm like." Mr. Pruitt finally told Mr. Carter it just came down to whether or not he was going to do his job. Mr. Carter said his lawyers would "take care of" Mr. Pruitt and Mr. Covert, and then he hung up.

Thus, CPC knew Mr. Carter had verbally claimed that he often got sleepy while performing his driving duties and therefore needed frequent rest breaks, and that Mr. Carter had referred to the DOT when stating he was entitled to such breaks.

...

Mr. Carter's termination was definitely not based solely on his excessive breaks and delays, as shown by the detailed review of Mr. Carter's extremely long and unsatisfactory disciplinary record, above. **However, these breaks and delays were a significant factor.**

CX 3 at 8, 13-14 (emphasis added). In light of these admissions, I find (1) Mr. Carter told Mr. Covert and Mr. Pruitt that his extended run times were caused by rest breaks, and (2) his rest breaks were a factor in the decision to terminate Mr. Carter. I do not, however, change my previous finding that Mr. Carter's delays were not caused by fatigue breaks. Even though Mr. Carter told multiple individuals from CPC and Hospira that his delays were a result of fatigue breaks, I find that Mr. Carter was untruthful in making those statements for a number of reasons.

First, I find it unbelievable that Mr. Carter suffered from fatigue on nearly every run he made. As I have previously found, Mr. Carter routinely took significantly longer to complete his runs than other drivers. *See* RX 53; Decision and Order 31-40 (summarizing and discussing RX 53). There were 44 days on which Mr. Carter and the team 1 driver drove the Jacksonville route. Decision and Order at 38. On 39 of those days, the team 1 driver made the run in less time than Mr. Carter did, averaging about 67 minutes less than it took Mr. Carter. *Id.* On each of the five days on which Mr. Carter took less time than the team 1 driver did, the team 1 driver was delayed in Jacksonville for one to three hours. *Id.* at 38-39. And, there were 44 days on which Mr. Carter and the team 2 driver (Walter Moore) drove the Jacksonville route. *Id.* at 39. On 38 of those days, Mr. Moore completed the trip in an average of 111 minutes less time than it took Mr. Carter. *Id.* On the other six days, Mr. Moore took longer than Mr. Carter, but Mr. Moore was waiting for the train at the Jacksonville railyard on each of those days. *Id.*

Second, the evidence demonstrates that Mr. Carter delayed his runs to spite his partner, Mr. Gordon. Mr. Gordon became frustrated with Mr. Carter because Mr. Carter was disrupting his schedule. Mr. Carter was taking 14 hours to complete his runs and was leaving at a later time

each day, which, in effect, added an hour to Mr. Gordon's start time each day. TR at 150-52. Mr. Gordon, hoping to remedy the problem, spoke to Mr. Carter about leaving at 2:00 a.m., the predetermined departure time observed by other drivers; Mr. Carter was leaving at 3:00 a.m. *Id.* at 153-54. Mr. Carter stated that he was going to leave at a time that allowed him proper rest. *Id.* Mr. Gordon interpreted his response as a refusal to cooperate. *Id.* at 154. Mr. Gordon, frustrated by Mr. Carter's response, got Mr. Covert involved. Mr. Gordon advised Mr. Covert of the days that it took an extended time for Mr. Carter to make his run, as well as mornings that Mr. Carter was not there to take over the truck when Mr. Gordon arrived at the terminal. *Id.* at 156. Mr. Gordon eventually told Mr. Covert that he thought Mr. Carter was being spiteful because he complained about Mr. Carter not starting on time. Before Mr. Gordon complained, Mr. Carter was not extending his run; Mr. Carter was just delaying his start times. But after Mr. Gordon complained, Mr. Carter was both delaying his start times and extending his run. Eventually, the problem between Mr. Gordon and Mr. Carter reached a tipping point one Friday evening when Mr. Carter ran out of drive time. Mr. Gordon told Mr. Carter over the phone to be more reasonable with his time, and stop what he was doing. During the course of their argument, Mr. Carter said some things that made Mr. Gordon feel that he should not engage with Mr. Carter at the side of the road, and made Mr. Gordon concerned for his safety. *Id.* at 157. That same evening, Mr. Gordon reported their argument to Mr. Covert and Mr. Pruitt, and was told describe the event in an email. *Id.* at 158. He did so, and RX 26 is the email he sent. *Id.* at 159. That email reads:

Hello Ken. I'll begin by apologizing for the disturbance that occurred on Friday evening. It started when Carter called me stating that he was out of drive time about five miles from the terminal and he had arranged for someone to drive me to the truck. I mistakenly thought that I could use this as an opportunity to discuss with him the importance of teamwork and maybe resolve the issue we were having with our schedule. **He then started to yell and curse making statements like "you did me a favor by complaining about my times so now I'm gonna take my breaks and take my time coming back." I asked him if he was not concerned about putting his job in jeopardy, his reply was "no, Ron can't fire me, if he could he would have by now."** At this point I realized that his tone was not very friendly and I told him that I would not meet him at the truck for fear of verbal or physical altercation. At this point I phoned dispatch.

RX 26 (emphasis added).

Mr. Carter's statements demonstrate that his delays were not caused by fatigue. Rather, Mr. Carter purposefully extended his run times to spite Mr. Gordon. Mr. Carter believed that he could take his time without consequence and did not have to consider how his actions affected those around him. Those statements are characteristic of his relationships with colleagues at CPC. *See, e.g.*, RX 47 at 15 (Catherine Kiely testified, "I don't believe I ever spoke to him where he was pleasant...I don't recall ever having a conversation with Mr. Carter that he was not rude and snippy."); RX 10-2 (Catherine Kiely wrote in an email, "I prefer not to talk to [Mr. Carter] with his bad attitude, condescending manner" and asked for permission to not be required to take phone calls from Mr. Carter); TR at 186 (Ron Covert testified, "I had received complaints from dispatch folks of [Mr. Carter's] belligerence. And just he was a hard person to get along with, very argumentative over policy, basically."); TR at 234-35 (Ron Covert testified that from

personal experience, Mr. Carter was a rude and belligerent person, and that they have engaged in shouting matches); TR at 249 (Ken Pruitt testified that during a phone call with Mr. Carter, Mr. Carter was rude and belligerent and made veiled threats to Mr. Pruitt).

Third, CPC had a policy requiring its drivers call in if the driver experienced any significant delays. RX 1-2 (“CPC Logistics Inc. Truck Operator Job Description”) (CPC requires its truck drivers, among other things, to “[p]romptly **report any delays** due to breakdowns, weather or traffic conditions or other emergencies, or in the event of irregularities relating to pickup or delivery of products”) (emphasis added); RX 2-7 (“CPC Uniform Rules and Regulations for Drivers Providing Services for Hospira, Inc.”) (prescribing progressive discipline for failing to call in). Furthermore, the evidence clearly demonstrates that Mr. Carter was aware of CPC’s call-in policy. RX 3 (acknowledgement of receipt of CPC Uniform Rules and Regulations for Drivers Providing Services for Hospira, Inc. signed by Mr. Carter); RX 6 (warning letter from Mr. Covert to Mr. Carter, dated August 12, 2009, for failure to follow call-in procedures) (“Every team is required to call-in to dispatch...when experience **delays** of more than one hour...” (emphasis in the original)); RX 8 (second warning letter from Mr. Covert to Mr. Carter, dated March 3, 2010, for failure to follow call-in procedures); RX 22 (memorandum from Mr. Covert to all CPC Logistics drivers assigned to Hospira, Columbia, SC, dated April 29, 2011, regarding call-in procedures).

Despite being required to promptly report his delays, there is no evidence to suggest Mr. Carter ever did so. The rules required Mr. Carter report delays of more than one hour, *see* RX 6, and the evidence, discussed above, shows that Mr. Carter was delayed by more than an hour (on average, relative to his counterparts) on nearly all of his runs, *see* RX 53. Mr. Carter may have told his supervisors that his long run times were caused by fatigue breaks, *see* CX 3, but Mr. Carter did not make those statements while he was suffering from a bout of fatigue. Because the statements were not made contemporaneous with any bout of fatigue, and I find Mr. Carter to be generally non-credible, I find those statements were merely *post hoc* excuses and give them no probative weight.

After re-reviewing all of the evidence in the administrative file, I affirm my other findings of fact in the Decision and Order, and they are incorporated herein.

Discussion

To prevail under the STAA, Mr. Carter must show: (1) that he engaged in protected activity, (2) that he was subject to an adverse employment action, and (3) that his protected activity was a contributing factor in the adverse employment action. If a complainant establishes each factor by a preponderance of the evidence, then CPC can avoid liability only if it shows by clear and convincing evidence that it would have taken the same adverse action even in the absence of protected activity.

Protected Activity

Mr. Carter identified the sole protected activity upon which he bases his complaint: refusal to operate his truck while fatigued. Under 49 C.F.R. § 398.4(c), no driver may be required to operate a vehicle when “his/her ability or alertness is so impaired through fatigue,

illness, or any other cause as to make it unsafe for him/her to begin or continue to drive....” Thus, if Mr. Carter refused to operate his vehicle because he was ill or fatigued, then he engaged in protected activity.

Mr. Carter has shown by preponderance of the evidence that he engaged in protected activity on one occasion. The evidence is clear that he took much longer than other drivers did to complete the Jacksonville run, but, as discussed above, Mr. Carter has not established that the extra time he took was caused by taking rest breaks due to fatigue.

The only recorded incident of protected activity occurred on July 15, 2011. On that date, Peter Millar sent an email to Ron Covert informing him that “Roderick was almost an hour late again getting into work this morning and at 0600 stopped at a rest area for an hour.” RX 25. Mr. Millar sent a follow-up email shortly thereafter stating, “Roderick called in and Christie [Olson] asked about his delay. He said he wasn’t feeling well and he is entitled to a break.” *Id.* Based on this email, I find that Mr. Carter engaged in one instance of protected activity on July 15, 2011. This email is the only contemporaneous report of Mr. Carter refusing to drive because of illness or fatigue. For reasons discussed above, Mr. Carter did not stop due to fatigue, as he claims; rather, on that one occasion, he stopped due to illness, which is protected activity as driving under those conditions would have constituted a violation of 49 C.F.R. § 398.4(c).

Adverse Employment Action

It is undisputed that Mr. Carter suffered an adverse employment action when he was terminated on October 5, 2011, and I so find.

Contributing Factor

Mr. Carter has the burden to show by a preponderance of the evidence that his protected activity was a “contributing factor” in the decision to terminate his employment. Engaging in protected activity is a contributing factor if it “alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 11 (ARB Feb. 29, 2012). A complainant can show contribution by either direct or indirect proof. *Id.* If Mr. Carter “does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment.” *Id.* One method indirect proof is evidence of “temporal proximity” between the protected activity and the adverse action. *Id.*, citing *Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010).

The sole protected activity in which Mr. Carter engaged was his report of illness on July 15, 2011. He was terminated about two and a half months later; this is sufficiently close in time that, in the absence of other factors, it could be assumed that he was terminated for refusing to drive when he fell ill in July. However, there is no such absence of other factors. After July 15, Mr. Carter continued to take far longer than other drivers to complete his runs, and he continued to be the subject of complaints by Mr. Gordon throughout August and September. Mr. Carter engaged in behavior that Mr. Gordon found threatening on August 5, 2011, three weeks after the protected activity occurred. Additionally, Mr. Carter had a threatening demeanor during his conversation with Mr. Pruitt on September 9, 2011. After Mr. Covert issued his letter to all

drivers in early August, Mr. Carter's turnaround time got worse rather than better. One week before his termination, Mr. Carter received a disciplinary letter from Mr. Covert regarding his failure to be available for work assignments.

Rather than Mr. Carter's engaging in a single protected activity, it was Mr. Covert's review of Mr. Carter's manifest – motivated by Mr. Gordon's continuing complaints – that led to his recommendation for Mr. Carter's termination. Mr. Wallis made the decision to terminate Mr. Carter based on his disciplinary history, his failure to improve his performance, and his unexplained delays on the Jacksonville run. CPC, in its position statement to OSHA, stated that "Mr. Carter's termination was definitely not based solely on his excessive breaks and delays," and "these breaks and delays were a significant factor." CX 3 at 13, 14. However, these statements should not be construed to mean that Mr. Carter's one instance of refusing to drive while ill contributed to the decision to terminate his contract. These statements should be interpreted to mean that one factor CPC used in its decision to terminate Mr. Carter was that he took excessive breaks. As previously discussed, these breaks were not due to fatigue and thus are not protected by the Act. *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 987-88 (4th Cir. 1993) ("An employer obviously remains free to sanction an employee for chronically tardy conduct or indeed for any action not protected by the STAA. The STAA protects only a driver who may unexpectedly encounter fatigue on the course of a journey; it obviously does not protect delays unrelated to the statutory purposes of public and personal safety.").

ORDER

Based on the foregoing, IT IS ORDERED that the complaint of Roderick C. Carter under the Surface Transportation Assistance Act is DENIED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ, Jr./PML/ksw
Newport News, Virginia

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Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).