



In the Matter of:

MARK JOHNSON,

ARB CASE NO. 2022-0013

COMPLAINANT,

ALJ CASE NO. 2018-STA-00028

v.

DATE: May 20, 2022

FEDEX GROUND PACKAGE  
SYSTEM, INC., OSD TRANSPORT,  
INC., and STEVE OLSON,

RESPONDENTS.

Appearances:

*For the Complainant:*

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

*For Respondent FedEx Ground Package System, Inc.:*

Travis W. Vance, Esq.; *Fisher Phillips LLP*; Charlotte, North Carolina  
Joseph P. McHugh, Esq.; *FedEx Ground Package System, Inc.*;  
Pittsburgh, Pennsylvania

*For Respondents OSD Transport, Inc. and Steve Olson:*

Mark G. Pryor, Esq.; *Brown and Carlson PA*; Minneapolis, Minnesota

Before: James D. McGinley, *Chief Administrative Appeals Judge*,  
Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

## DECISION AND ORDER

PER CURIAM. This matter arises under the Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, and its implementing regulations.<sup>1</sup> Complainant Mark Johnson (Johnson) filed a complaint alleging that Respondents FedEx Ground Package System, Inc. (FedEx), OSD Transport, Inc. (OSD), and Steve Olson (Olson) (collectively, Respondents) retaliated against him in violation of the STAA's whistleblower protection provision. After a formal hearing, a United States Department of Labor Administrative Law Judge (ALJ) determined that Johnson had not engaged in activity protected by the STAA and denied his claim. Johnson appealed the ALJ's decision to the Administrative Review Board (ARB or the Board). For the reasons set forth below, we affirm the ALJ.

### BACKGROUND

OSD hired Johnson in November 2016 to perform a dedicated, daily route hauling FedEx freight from a terminal in St. Paul, Minnesota, to Ames, Iowa.<sup>2</sup> To complete this assignment, Johnson drove east in a loop around the St. Paul area to Interstate 35 (I-35), which he took south to Ames.<sup>3</sup> In Ames, Johnson delivered his trailers, picked up new trailers, and returned to the St. Paul terminal.<sup>4</sup>

On February 25, 2017, Johnson began his drive from St. Paul to Ames around 6:00 a.m.<sup>5</sup> The area had suffered a winter storm the previous night.<sup>6</sup> According to Johnson, the weather conditions were "fine" when he began his drive towards Ames, but there was a "hard packed layer of ice" on the roads.<sup>7</sup>

Although the snow eventually stopped, Johnson says the road conditions worsened as he drove south along I-35.<sup>8</sup> According to Johnson, the southbound lanes had yet to be treated, resulting in slippery conditions.<sup>9</sup> Johnson reduced his speed

---

<sup>1</sup> 49 U.S.C. § 31105 (2007), and its implementing regulations at 29 C.F.R. Part 1978 (2021).

<sup>2</sup> D. & O. at 1.

<sup>3</sup> *Id.*; Hearing Transcript (Tr.) at 15-16.

<sup>4</sup> D. & O. at 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; Tr. at 25-26, 56.

<sup>8</sup> D. & O. at 1-2; Tr. at 26, 29.

<sup>9</sup> Tr. at 28-29, 57-58.

and called Olson, OSD's owner, approximately four hours into his drive.<sup>10</sup> Johnson advised Olson of the worsening road conditions and expressed that he was concerned with what would lie ahead on his route.<sup>11</sup> Johnson did not indicate during that call that he believed it was too dangerous to continue driving.<sup>12</sup> Olson cautioned Johnson to be careful and reduce his speed, and instructed him to stop at a truck stop a few miles to the south in Owatonna, Minnesota.<sup>13</sup> Johnson did not stop, and continued his drive towards Ames.<sup>14</sup>

Johnson called Olson again after he had traveled another five to ten miles and expressed that the truck was losing traction.<sup>15</sup> Again, Johnson did not express that it was too dangerous to continue driving.<sup>16</sup> Olson implored Johnson to use more caution, but Johnson continued his drive.<sup>17</sup>

Eventually, Johnson determined that the road conditions were too dangerous to continue driving south.<sup>18</sup> Johnson exited the highway and attempted to park on the incline of an exit ramp.<sup>19</sup> When he applied his brakes, the truck slid backwards about fifteen feet before coming to a rest at the base of the ramp.<sup>20</sup>

When Johnson's truck came to a rest, he called Olson again, told Olson about his slide down the ramp, and told Olson that it was not safe to continue towards Ames.<sup>21</sup> Olson instructed Johnson find a safe place to stop and wait for conditions to improve.<sup>22</sup> Rather than finding a safe place to stop, Johnson insisted he was going to return to FedEx's terminal near St. Paul instead.<sup>23</sup> Olson responded that when Johnson got back, he should clean out his truck and that his employment with OSD

---

<sup>10</sup> D. & O. at 1-2.

<sup>11</sup> *Id.* at 2; Tr. at 33.

<sup>12</sup> *See* D. & O. at 2; Tr. at 33, 59-60.

<sup>13</sup> D. & O. at 2; Tr. at 79.

<sup>14</sup> D. & O. at 2.

<sup>15</sup> *Id.*; Tr. at 33.

<sup>16</sup> *See* D. & O. at 2; Tr. at 33-34.

<sup>17</sup> D. & O. at 2; Tr. at 34.

<sup>18</sup> D. & O. at 2.

<sup>19</sup> *Id.*; Tr. at 35.

<sup>20</sup> D. & O. at 2; Tr. at 35-36.

<sup>21</sup> D. & O. at 2; Tr. at 36-37.

<sup>22</sup> D. & O. at 2; Tr. at 37, 61, 62-63, 80.

<sup>23</sup> D. & O. at 2.

was terminated.<sup>24</sup>

Olson dispatched another driver from St. Paul to take possession of Johnson's trailers and complete the delivery to Ames.<sup>25</sup> Johnson returned to the northbound lanes of I-35, which had been plowed and treated, and drove back to Owatonna where he waited for his replacement.<sup>26</sup> By this time, the road conditions south on I-35 had improved.<sup>27</sup> The replacement driver took possession of the trailers from Johnson and made the delivery in Ames in close to the normal amount of time for that route.<sup>28</sup>

The ALJ conducted a formal hearing on August 27, 2021. On November 18, 2021, the ALJ issued a Decision and Order Denying the Claim (D. & O.). The ALJ concluded that Johnson failed to demonstrate that he engaged in activity protected by the Act.<sup>29</sup> This appeal followed.<sup>30</sup>

---

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; Tr. at 39-41, 58, 61.

<sup>27</sup> D. & O. at 2; Tr. at 41, 83-84, 86.

<sup>28</sup> D. & O. at 2; Tr. at 83-84. Other drivers also made it from St. Paul to Ames and to nearby Des Moines, Iowa, using the same route as Johnson on the morning of February 25, 2017. Tr. at 75-77, 84-86.

<sup>29</sup> In the D. & O., the ALJ also determined that Johnson had not provided adequate proof of damages. In addition, in an earlier Order Granting Respondent FedEx's Motion for Summary Decision, the ALJ determined that Johnson could not establish that FedEx was liable for his termination from employment under the STAA. Johnson appealed these conclusions to the ARB as well. However, we need not, and do not, address whether the ALJ erred with respect to these other conclusions because we affirm the ALJ's dispositive conclusion that Johnson failed to prove that he engaged in protected activity.

<sup>30</sup> On February 7, 2022, Johnson filed a motion requesting the Board strike OSD's and Olson's joint responsive appellate brief as untimely. Respondents were required to file their responses to Johnson's opening brief on or before January 24, 2022. OSD and Olson did not file their response brief until February 2, 2022. OSD and Olson did not file a motion with the Board asking for an extension of time before filing their response brief out of time, as required by the Board's Briefing Order. Additionally, OSD and Olson have not articulated good cause or excuse for missing the deadline. Accordingly, we grant Johnson's motion and strike OSD's and Olson's response brief. However, we have considered FedEx's timely response brief.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA.<sup>31</sup> The Board reviews questions of law de novo but is bound by the ALJ’s factual determinations if they are supported by substantial evidence.<sup>32</sup> Substantial evidence “means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>33</sup>

### DISCUSSION

#### 1. Johnson Did Not Engage in Protected Activity

The STAA’s whistleblower protection provision provides that an employer may not discharge or otherwise retaliate against an employee regarding the employee’s pay, terms, or privileges of employment because the employee engaged in STAA-protected activity.<sup>34</sup> 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 for the 21st Century (AIR 21).<sup>35</sup> To prevail on a STAA claim, the complainant must prove by a preponderance of the evidence that: (1) he engaged in activity protected by the Act; (2) the employer took adverse employment action against him; and (3) the protected activity was a contributing factor to the adverse employment action.<sup>36</sup>

Johnson contends that he engaged in protected activity during his third call with Olson when he refused to continue driving to Ames in icy conditions. The STAA protects a driver when he “refuses to operate a vehicle” under two circumstances. First, a driver is protected when he refuses because operation of the vehicle would violate a commercial motor vehicle safety regulation, standard, or

---

<sup>31</sup> Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

<sup>32</sup> 29 C.F.R. § 1978.110(b); *Cottier v. Bayou Concrete Pumping, LLC*, ARB No. 2020-0069, ALJ No. 2019-STA-00046, slip op. at 7 (ARB Jan. 18, 2022) (citation omitted).

<sup>33</sup> *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quotations and citation omitted).

<sup>34</sup> 49 U.S.C. § 31105(a)(1); *see* 29 C.F.R. § 1978.102(a).

<sup>35</sup> 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121(b).

<sup>36</sup> 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).

order.<sup>37</sup> Second, a driver is protected when he refuses because he has a reasonable apprehension that operating the vehicle would cause serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.<sup>38</sup> The ALJ concluded that Johnson's conduct on February 25, 2017, did not constitute a refusal to drive under either of these subsections, and therefore was not protected by the STAA.

The crux of the ALJ's decision lies in his finding that "Olson provided Complainant options to permit him to stop driving in unsafe weather conditions. Complainant did not take them."<sup>39</sup> Johnson argues this key factual finding is not supported by substantial evidence. We disagree with Johnson.

The record amply supports the conclusion that Olson gave Johnson every opportunity, and indeed the instruction, to discontinue his route and avoid dangerous driving conditions, even before Johnson encountered them. When Johnson first alerted Olson to the deteriorating road conditions, before he engaged in alleged protected activity, Olson instructed Johnson to slow down and to stop at a forthcoming truck stop in Owatonna.<sup>40</sup> Yet, Johnson did not heed Olson's instruction, and instead chose to continue driving. When Johnson called Olson a second time, again before he engaged in alleged protected activity, he admits Olson implored him to use more caution.<sup>41</sup> Yet again, Johnson elected to continue driving towards Ames. When Johnson reported during their third call that conditions had finally become too dangerous to continue, Olson, once again, instructed Johnson to find a safe place to stop and wait.<sup>42</sup> Instead of doing so, Johnson told Olson that he was going to return all the way to the St. Paul terminal.

---

<sup>37</sup> 49 U.S.C. § 31105(a)(1)(B)(i). Johnson cites 49 C.F.R. § 392.14 as the safety regulation he would have violated had he continued driving towards Ames. That regulation states:

Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. . . . If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated.

<sup>38</sup> 49 U.S.C. § 31105(a)(1)(B)(ii).

<sup>39</sup> D. & O. at 6.

<sup>40</sup> Tr. at 79.

<sup>41</sup> *Id.* at 34.

<sup>42</sup> *Id.* at 37, 61, 62-63, 80.

Consistent with Olson’s instructions and implorations, Johnson also conceded that he knew he had the option of stopping and waiting for the adverse road conditions to improve, as he had done multiple times in his career.<sup>43</sup> He acknowledged that if he felt uncomfortable, he could have initially stopped in Owatonna, like Olson told him to do during their first call.<sup>44</sup> He also conceded that when he finally felt conditions were too dangerous to continue, he could have turned back north on I-35, which had better road conditions than the southbound side of the highway, to find a safe place to wait until conditions improved.<sup>45</sup> Indeed, this is precisely what he did when he drove back to Owatonna to wait for a relief driver.<sup>46</sup>

Despite this evidence, Johnson argues on appeal that Olson did not give him the opportunity to find a safe haven, and instead instructed him to keep driving south, at least until he reached the next truck stop.<sup>47</sup> Johnson’s testimony at the hearing belies this argument. Johnson agreed at the hearing that Olson told him to find a safe place to stop, and that he knew that stopping was an option available to him.<sup>48</sup> Likewise, while Johnson argues now that it is uncontroverted that Olson “told” him to continue driving south,<sup>49</sup> he testified at the hearing that Olson never gave him such an instruction.<sup>50</sup>

---

<sup>43</sup> *Id.* at 53. The ALJ also found that Johnson was aware that road conditions would improve over time. D. & O. at 6. The snow had stopped, and Johnson knew that typically road crews treated the highway to improve conditions. Tr. at 29, 58. In fact, the conditions did improve, allowing Johnson’s relief driver to make the delivery to Ames in close to the normal amount of time for that route. *Id.* at 41, 83-84, 86.

<sup>44</sup> *Id.* at 60.

<sup>45</sup> *Id.* at 38, 58, 61-62, 68; *see also id.* at 78-79, 81.

<sup>46</sup> *Id.* at 61.

<sup>47</sup> Complainant’s Initial Brief (Comp. Br.) at 6 (“Mr. Olson did not give Mr. Johnson the option of driving back north to find a safe haven to park until road conditions improved. Instead, he told Mr. Johnson to continue driving south to a truck stop.”).

<sup>48</sup> Tr. at 37, 53, 61-63. On appeal, Johnson faults Olson for not explicitly suggesting he return northbound to find a safe location to stop. Johnson also argues that the specific suggestions Olson had offered (i.e., stopping on the shoulder of the ramp, on the overpass, or at the next truck stop), were not satisfactory. However, once again, we observe that Johnson conceded that Olson told him to find a safe place to stop, and that he knew turning back north to find a safe place was an option.

<sup>49</sup> Comp. Br. at 20.

<sup>50</sup> Johnson testified to the following:

Q. To be clear, Mr. Olson never told you to continue driving in bad weather; is that right?

A. No, he did not.

In summary, substantial evidence supports the finding that on multiple occasions, including before Johnson alleges that he engaged in protected activity during his third call with Olson, Olson gave him clear, legal, and viable options to avoid dangerous conditions, and Johnson acknowledged such options were available to him. Yet, Johnson declined to take them. Although the icy conditions Johnson encountered may have been dangerous, Johnson was never asked, required, or expected, implicitly or explicitly, to drive in conditions that may have violated a safety regulation or that risked causing serious injury; to the contrary, at every avenue he was given the option and the instruction to avoid such a scenario. In these circumstances, the ALJ reasonably concluded that Johnson’s conduct could not be considered a “refusal” to operate in circumstances that were protected by the STAA.

## **2. The ALJ’s Reference to *McDonnell Douglas* and Johnson’s Prima Facie Case Was Harmless Error**

Johnson also contends the ALJ committed legal error by citing *McDonnell Douglas Corp. v. Green*, which established a three-part burden-shifting framework for analyzing claims under Title VII of the Civil Rights Act of 1964.<sup>51</sup> Johnson is correct that the *McDonnell Douglas* framework is not applicable in a STAA case, and the ALJ erred by citing it.<sup>52</sup> However, while the ALJ initially cited *McDonnell Douglas*, the ALJ did not actually articulate or analyze the three-part burden-shifting framework identified therein. Instead, as Johnson concedes, the ALJ articulated the AIR 21 burden and framework.<sup>53</sup> Furthermore, the ALJ’s determination that Johnson did not engage in protected activity is dispositive as an essential element of his claim under either framework or standard. Thus, any error in the ALJ’s legal citations was harmless, and did not carry over into, or affect the

---

Tr. at 62; *accord id.* at 85. Johnson testified that Olson “offered” and “indicated” that he could proceed south to the next truck stop, but did not testify that Olson told him he had to do so. *Id.* at 38-39, 68.

<sup>51</sup> 411 U.S. 792 (1973).

<sup>52</sup> See 49 U.S.C. § 31105(b), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); see also *Blackie v. D. Pierce Transp., Inc.*, ARB No. 2013-0065, ALJ No. 2011-STA-00055, slip op. at 9-11 (ARB June 17, 2014); *Palmer v. Canadian Nat’l Ry./Ill. Cent. R.R. Co.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 26 n.113 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017).

<sup>53</sup> See D. & O. at 4. We note that although the ALJ separately identified the employer’s knowledge of Complainant’s protected activity as an independent element of Johnson’s initial burden, knowledge instead should be considered as part of the causation analysis. See *Newell v. Airgas, Inc.*, ARB No. 2016-0007, ALJ No. 2015-STA-00006, slip op. at 8 n.34 (ARB Jan. 10, 2018) (citations omitted). Like the citation to *McDonnell Douglas*, this was harmless error.

outcome of, his legal and factual analysis.<sup>54</sup>

### CONCLUSION

Accordingly, we **AFFIRM** the ALJ's D. & O. and the complaint in this matter is **DENIED**.<sup>55</sup>

**SO ORDERED.**

---

<sup>54</sup> See *Blackie*, ARB No. 2013-0065, slip op. at 14; *Butler v. Midnight Flyer AKA RW Transp.*, ARB No. 2010-0139, ALJ No. 2009-STA-00007, slip op. at 4 n.2 (ARB Mar. 30, 2012); *Clark v. Hamilton Hauling, LLC*, ARB No. 2013-0023, ALJ No. 2011-STA-00007, slip op. at 4 n.4 (ARB May 29, 2014).

<sup>55</sup> In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).