Issue Date: 09 September 2004 **U.S. Department of Labor** Office of Administrative Law Judges

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Case No: 2004-STA-0037

In the Matter of

CHARLES HARRIS,
Complainant,

v.

C&N TRUCKING
Respondent.

Before: **LARRY W. PRICE**
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the "whistleblower" protection of Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter STAA), 49 U.S.C. § 31105, and the regulations at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who engage in certain protected activities related to their terms or conditions of employment.

Complainant was employed as a truck driver by Respondent from August 2000 until he was terminated as a result of the events underlying the current dispute. In February 2003, Respondent terminated Complainant for refusing to comply with orders. On July 30, 2003, Complainant filed a complaint with the Department of Labor alleging Respondent violated the STAA. Following an investigation, the Regional Administrator for the Occupational Safety and Health Administration, dismissed the complaint on February 18, 2004. On March 16, 2004, the Complainant filed a notice of objection and a request for a hearing on the record.

A formal hearing was held in Durham, North Carolina, on July 12, 2004 where the Parties were afforded full opportunity to present testimony, submit documentary evidence, and give oral arguments. Complainant's Exhibits A–G were received into evidence.[1] Complainant's Exhibit H was received post-hearing and is admitted into evidence.

[1] The following abbreviations will be used as citations to the record: Complainant's Exhibit—CX.; Transcript of the proceedings—Tr.

ISSUE

Whether Complainant's refusal to operate a vehicle is protected activity under the STAA?

FINDINGS OF FACT

Based upon the hearing testimony and supporting evidence, I make the following findings of fact:

1. Complainant began working for Respondent as a truck driver in August 2000. (Tr. 11). He drove "18 wheelers," which have the capacity to haul a gross weight of greater than ten thousand pounds. (Tr. 11). He worked out of Oxford, North Carolina and his deliveries ranged as far as Maine. (Tr. 11).

2. On January 31, 2003, Complainant was making a delivery for Respondent from Virginia to Maine, when he noticed the steering had "a lot of play in it." (Tr. 11). He notified Respondent who instructed him to bring the truck to a service station to have the front wheels balanced. (Tr. 11).

3. Later on January 31, 2003, Complainant brought the truck to a commercial service station in Ruther Glenn, Virginia. (Tr. 11). While at the station, Complainant alleges a mechanic informed him of a problem with a kingpin in the front end. (Tr. 13). When notified by Complainant, Respondent instructed Complainant to return the truck to his shop in Oxford, North Carolina. (Tr. 14).

4. Respondent is a mechanic who performs repairs on his trucks. (Tr. 30). When Complainant returned the truck, Respondent examined the front end and tires. (Tr. 31). He concluded there was a "little bit of play in them," which is normal for a truck of its age (model year 1993), so there was no damage or safety issue. (Tr. 31). He concluded there was slight wear and tear, but not enough to warrant taking the truck off the road. (Tr. 31).

5. On February 5, 2003, Respondent assigned Complainant to make a delivery in the same vehicle to a location in New England. (Tr. 14). Upon arriving to pick up the truck, Complainant noticed Respondent had not made any repairs. (Tr. 14). Complainant then drove the truck to a local garage. (Tr. 14-15). A mechanic performed an inspection and "found play in the kingpins, found play in pins at right spring." CX-G.

6. After this inspection, Complainant returned the truck and refused to make the delivery, fearing the wheels would come off. (Tr. 17). Respondent informed Complainant that in his opinion it was impossible for the wheels to fall off, despite Complainant's concerns. (Tr. 28). After Complainant continued to refuse to drive, his employment was terminated by Respondent. (Tr. 17).

7. After Complainant's termination, Respondent continued to use the truck. Without making any subsequent repairs, Respondent has employed four separate drivers to make deliveries in the same truck. (Tr. 32). During this time, the truck has traveled eighty thousand miles. (Tr. 32). None of the subsequent drivers have documented, or notified Respondent of any problems with the front end. (Tr. 37).

8. On July 30, 2003, Complainant filed a complaint with Occupational Safety and Health Administration alleging that Respondent had violated STAA.

9. Complainant was unemployed for the remainder of February, March, and part of April 2003, for a total of about three months in which he collected unemployment of about four hundred and eight dollars a week. (Tr. 23, 25). In April 2003, Complainant began working as a driver with Vance Trucking, where he received approximately three hundred dollars a week. (Tr. 23). In August 2003, Complainant left Vance Trucking, and began working for his present employer, where the compensation is comparable to that received by Complainant during his employment with Respondent. (Tr. 26).

10. I found both Complainant and Respondent to be credible witnesses. I find that Complainant had a real concern for the safety of his vehicle. I also find that Respondent inspected the vehicle and found the vehicle to be free of defects.

LAW AND CONTENTIONS

A. Legal Standard

Congress included section 405(b) in the STAA for the purpose of insuring 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 these actions. See Roadway Express, Inc. v. Dole, 929 F.2d 1060 (5th Cir. 1991) (citing 128 Cong. Rec. 29192, 32510 (1982)). Consequently, the STAA protects all employees of commercial motor carriers from discharge, discipline, or discrimination for filing a complaint about commercial motor vehicle safety, testifying in a proceeding on safety, or refusing to operate a commercial motor vehicle when operation would violate a Federal safety rule or when the employee reasonably believes it would result in serious injury to himself or others. See 49 U.S.C. §31105(a). Respondent is a commercial motor carrier and Complainant operated commercial motor vehicles. The provisions of STAA are applicable to the underlying dispute.

To establish a prima facie case under the STAA, a complainant must demonstrate that (1) he engaged in protected activity, (2) he was subjected to an adverse employment action, and (3) the adverse action was taken because of his protected activity. Yellow Freight Sys., Inc. v. Reich, 27 F.3d 1133, 1138 (6th Cir. 1994). After a prima facie case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. Moon v. Transportation Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). If the employer articulates a non-discriminatory reason for the adverse employment action, the

complainant bears the burden of showing that the employer's reason is pretextual and the real reason for the adverse action was retaliation. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993).

However, since this case was fully tried on its merits, it is not necessary for the Court to determine whether Complainant presented a prima facie case and whether Respondent rebutted the showing. U.S.P.S. Bd. of Governors v. Aikens, 460 U.S. 711, 713-14 (1983); Roadway Express, 929 F.2d at 1063. Once the respondent has produced evidence in an attempt to show that the complainant was subjected to adverse action for a legitimate reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a prima facie case. Ciotti v. Sysco Foods of Philadelphia, 97-STA-30 at 5 (ARB July 8, 2003). Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. Id.

A refusal to operate a commercial motor vehicle is protected by the STAA if the driver refuses to operate the vehicle for one of the two reasons provided by statute. Specifically, the STAA provides protection to an employee who refuses to operate a motor vehicle because:

> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> (ii) the employee has a reasonable apprehension of a serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a)(1)(B). Furthermore, the STAA defines what qualifies as "reasonable apprehension." Under the statute, "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 unsafe condition establishes a real danger of accident, injury, or serious impairment to health." Id. § 31105(a)(2). Moreover, "[t]o qualify for the protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition." Id.

The Parties do not dispute that Complainant was terminated, which is an adverse employment action. There is also no dispute that Complainant was terminated in response to his refusal to drive. The focus of the controversy is whether Complainant's refusal to drive is protected activity under either prong of the STAA. If the Complainant's refusal is protected, his discharge is deemed wrongful under the STAA and the employer is liable.

B. Actual Violations

The first method by which a refusal to operate a vehicle is classified as protected activity is if the refusal is made because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." Id. §31105(a)(1)(B)(i). Complainant argues that the vehicle was not in a drivable condition, such that making deliveries for Respondent in the truck may have violated safety regulations. Complainant does not allege specific regulations were violated. However, according to the federal regulations:

> No commercial vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when as needed:
> Service brakes, including trailer brake connections.
> Parking (hand) brake.
> Steering mechanism.
> Lighting devices and reflectors.
> Tires.
> Horn.
> Windshield wiper or wipers.
> Rear-vision mirror or mirrors.
> Coupling devices.

49 C.F.R. § 392.7 (2003). Moreover, 49 CFR § 396.17 states that a driver shall "be satisfied that the motor vehicle is in safe operating condition. Id. § 396.17.

Complainant seems to fall within the parameters of these regulations. His stated reasons for his refusal to drive are based on his fear that the truck was not in good working order. Initially, he felt that the steering had "a lot of play in it." (Tr. 11). When the truck was not repaired according to his concerns, he feared that the "wheels would come off." (Tr. 17). Concerns about the working order of the steering and tires of a commercial vehicle clearly fall within the language of 49 C.F.R. §392.7. In general, Complainant remained unsatisfied that the vehicle was in safe working condition.

According to this argument, Complainant's refusal to drive is protected because Respondent's insistence on using the truck violates the federal regulations' mandate that the driver be satisfied as to the working conditions of the truck. Consequently, it appears that even though Respondent informed Complainant that in his opinion it was impossible for the wheels to fall off (Tr. 28), it would violate the federal regulations to force Complainant to drive if he remained unsatisfied.

Courts, however, have limited this argument by stressing that the driver's level of satisfaction is not unfettered. It has consistently been held that to come within the protection of this prong of the refusal to drive provision, the complainant must show by a preponderance of the evidence that an actual violation of a regulation would have occurred. Yellow Freight Sys., Inc. v. Reich, 38 F.3d 76 (2d Cir. 1994); Cook v. Kidimula Int'l, Inc., 95-STA-44 at 2 (Sec'y Mar. 12, 1996); Robinson v. Duff Truck Line, Inc., 86-STA-3 (Sec'y Mar. 6, 1987), aff'd, Duff Truck Line, Inc. v. Brock, 848 F.2d 189 (6th Cir. 1988) (per curiam) (unpublished decision available at 1998 U.S. App. LEXIS 9164). To establish a violation, it is not sufficient that a driver demonstrate a good faith subjective opinion. Instead, a complainant must prove that his assessment of the condition is correct. Brame v. Consolidated Freightways, 90-STA-20 (Sec'y June 17, 1992) (finding driver's refusal to drive a truck was improper because the only evidence of faulty breaks was his subjective opinion).

Complainant's evidence clearly does not reach the strict limitation imposed by this interpretation of the first prong. When refusing to drive, Complainant relied solely on his opinion that the front end of the vehicle was not in good working order. He alleges that a mechanic in Ruther Glenn, Virginia informed him of a problem with a kingpin in the front of the vehicle. (Tr. 11). However, the invoice from that service shop has no reference to the front end. (CX-D). Furthermore, Complainant relies on a local mechanic who documented on an invoice that he "found play in the pins at right spring." (CX-G). However, this evidence alone does not demonstrate that the truck was unsafe for deliveries, rather than just the normal condition of an older truck.

Thus, there does not appear to be any supporting evidence to warrant a driver's refusal to drive the truck at issue. Respondent's inspection of the vehicle and the subsequent 80,000 miles put on the vehicle without incident or complaint support a finding that the vehicle was in good working order. Without any evidentiary support other than his subjective opinion that an actual violation of a regulation would have occurred, I find Complainant's refusal to drive is not protected activity under the first prong of the STAA.

C. Reasonable Apprehension

The STAA also provides protection to the employee if his refusal to drive is based on a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C. § 31105(1)(B)(ii). To establish a complaint under this work refusal provision, a complainant must establish that (1) he refused to operate the vehicle because he or she was apprehensive of an unsafe condition of the vehicle, (2) his apprehension was objectively reasonable, (3) he sought to have the respondent correct the problem, and (4) the respondent failed to do so. See Brick's Inc. v. Herman, 148 F.3d 175, 181 (2d Cir. 1998); see generally Yellow Freight Sys., Inc. v. Reich, 8 F.3d 980 (4th Cir. 1993) (discussing these requirements in regard to a refusal to work based on fatigue).

The Parties do not dispute that Complainant refused to drive because of his concern that the vehicle was unsafe. Moreover, it is clear that Complainant made Respondent aware of his concern and sought to have Respondent correct the problem. Thus, the focus of the dispute is whether Complainant's apprehension was objectively reasonable. Specifically, the analysis is whether the Complainant has met his burden of showing by a preponderance of the evidence that his alleged reasonable apprehension of serious injury to himself or others was objectively reasonable. See Brunner v. Dunn's Tree Serv., 94–STA-55 (Sec'y Aug. 4, 1995).

The STAA provides the applicable standard to determine if a complainant's apprehension is reasonable. According to the statute, "[u]nder 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 unsafe condition establishes a real danger of accident, injury, or serious impairment to health." 49 U.S.C. § 31105(a)(2). To meet this standard, Complainant must provide evidence establishing that a reasonable person would conclude that there was a "bona fide danger of an accident or injury" due to the unsafe condition of the vehicle. Calhoun v. United Parcel Serv., 02-STA-31, at 21

(ALJ June 2, 2004) (citing Robinson v. Duff Truck Line, Inc., 86-STA-3, at 9-10 (Sec'y Mar. 6, 1987), aff'd sub. nom Duff Truck Line, Inc. v. Brock, 848 F.2d 189 (6th Cir. 1988)).

Complainant has not established that, at the time he refused to drive, conditions existed which created a reasonable apprehension of fear of safety. While Complainant is not required to prove the existence of an actual safety defect, he must provide sufficient evidence indicating that his assigned vehicle could reasonably be perceived as unsafe. Complainant has only provided his subjective opinion that he believed the wheels would come off. (Tr. 17). He further alleges that these fears are based on a mechanic in Ruther Glenn, Virginia who informed him of the problem with the vehicle's front end. (Tr. 13). However, the invoice from the service station does not make reference to the front end. Moreover, Complainant provides a confirmation report from another mechanic who notes that there is play in the front end of the vehicle. (Tr. 14). Yet, there is no indication that the condition of the front end was sufficient to warrant taking the truck of the road, rather than normal wear for a vehicle of that age and model.

When examining reasonableness under 49 U.S.C. §31105(1)(B)(ii), relevant factors include the driver's apprehension about past experience, the vehicle's susceptibility to the defect at issue, whether other drivers have driven under similar circumstances, and the driver's experience. See e.g., Monde v. Roadway Express, Inc., 01-STA-22, 01-STA-29 at 10 (ARB Oct. 31, 2003); Thomas v. Indep. Grocers of Abilene, Texas, 86-STA-21 (Sec'y Apr. 1, 1987). For instance, in Yellow Freight Sys., Inc. v. Reich, the Second Circuit specifically mentions that the truck driver was "an experienced over the road driver" and was entitled to creditability regarding the vehicle's lack of power and fuel problem. Yellow Freight Sys., Inc. v. Reich, 38 F.3d 76, 86 (2d Cir. 1994) (finding the refusal to drive was reasonable because of fuel system problem).

Similarly, Complainant does have experience as a truck driver, having worked for Respondent since August 2000. However, Respondent also has experience as a mechanic and often repairs his own trucks. (Tr. 30). Respondent testifies that he examined the truck and specifically the front end, but concluded that there was only slight wear and tear. (Tr. 31). While he did discover a "little bit of play" in the kingpins, he concluded it was normal for a truck of its age, so there was no damage or safety issue. (Tr. 31). There is no evidence to support an assumption that Complainant's experience is more creditable than Respondent's in regard to the performance and safety of Respondent's vehicles. Complainant cannot simply insist upon a standard of care for his vehicles that is stricter than the normal or legal standard. See e.g., Wiggins v. Roadway Express, Inc., 84-STA-7 (Sec'y Aug. 9, 1985) (concluding the complainant's refusal to drive was unreasonable because the tires in question complied with both the federal and more stringent state standards).

Additionally, the vehicle at issue was used subsequent to Complainant's termination. Without making further repairs on the front end, Respondent employed four separate drivers to make deliveries in the vehicle at issue. (Tr. 32). During this time the truck traveled eighty thousand miles. (Tr. 32). None of the subsequent drivers reported any problems with vehicle's front end. (Tr. 37). The fact that other drivers decided to make deliveries in the vehicle, and no problems were reported by anyone other than Complainant are factors that indicate Complainant did not act reasonably. While Complainant may have, in good faith, believed the vehicle was

unsafe, the fact that subsequent drivers of the same vehicle found no such concerns demonstrates that his refusal to drive was not objectively reasonable.

Furthermore, Complainant's refusal to work may still lose its protection if Respondent acted appropriately. Under "whistleblower" provisions of other statutes, it has been determined that while "a worker has a right to refuse work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful . . . [the R]efusal to work loses its protection after the perceived hazard has been investigated by responsible management officials . . . and, if found safe, adequately explained to the employee." Pensyl v. Catalytic, Inc., 83-ERA-2 (Sec'y Jan. 13, 1984), slip op. at 6-7. This rule was most notably articulated in the Pensyl decision under the Energy Reorganization Act (ERA). Id.; see also Eltzroth v. Amersham Medi-Physics, Inc., 97-ERA-31 (ARB Apr. 15, 1999) (applying the Pensyl standard to find the employer's explanation was adequate under the ERA); Williams v. Baltimore City Public School, 00-CAA-15 (ARB May 30, 2003) (applying the same standard to the whistleblower provisions under the Clean Air Act). While it has not yet been applied under the STAA, it is appropriate in work refusal cases under this statute. It is consistently held that the Pensyl v. Catalytic, Inc. decision, under the ERA, provides the relevant applicable standard in determining whether a work refusal is reasonable under the STAA. See e.g., Boone v. TFE, Inc., 90-STA-7 (Sec'y July 17, 1991) (adopting without comment on this particular ruling, the ALJ's conclusion that the Pensyl decision provides the appropriate standard when determining the "reasonableness" of a work refusal under the STAA) aff'd, 987 F.2d 1000 (4th Cir. 1992); Thom v. Yellow Freight Sys., Inc., 93-STA-2 (Sec'y July 20, 1993) (adopting the ALJ's analysis of the work refusal clause, which agrees that Pensyl provides the appropriate standard) aff'd sub nom. Yellow Freight Sys., Inc. v. Reich, 38 F.3d 76 (2d Cir. 1994).

Thus, according to the rationale of Pensyl, an important factor in determining whether an employee's apprehension is reasonable, is whether his employer has investigated the hazard, determined the vehicle was safe, and informed the employee of that determination. Respondent appears to have satisfied these criteria. According to the testimony at the hearing, Respondent inspected the vehicle, examining the front end and tires – the area in which Complainant expressed concern. (Tr. 31). He determined there was a "little bit of play in them," but this was normal for a truck of its age. (Tr. 31). Consequently, he concluded there was no damage or safety issue. (Tr. 31). When Complainant again refused to drive the vehicle, Respondent informed Complainant that he examined the truck and it was impossible for the wheels to come off, despite Complainant's concerns. (Tr. 28). Given Respondent's experience as a mechanic, this should serve as an adequate examination and explanation of the vehicle's condition. Moreover, the creditability of Respondent's testimony is further enhanced by the fact that four separate drivers made deliveries in the truck for a total of eighty thousand miles without complaint after Complainant was terminated. (Tr. 32).

In sum, I find Complainant has not produced adequate evidence to demonstrate that a reasonable person, under the circumstances confronting Complainant at the time he refused to drive, would conclude that there was a bona fide danger of accident or injury. Complainant has only provided his opinion that the truck was dangerous and it is consistently held that a Complainant's subjective good faith opinion alone does not demonstrate an objectively reasonable apprehension of serious injury. Furthermore, I find Respondent's testimony

creditable. I find that Respondent inspected the vehicle and informed Complainant that the truck was safe to drive. The safety of the vehicle is supported by the fact that Respondent continued to use the vehicle for deliveries without incident or complaint.

I find that the preponderance of evidence establishes that Complainant's refusal to drive was not protected activity under either prong of the STAA. Accordingly, I recommend that the Secretary enter the following order pursuant to 29 C.F.R. § 1978.109(c)(4).

ORDER

The complaint of Charles Harris is **DENIED**.

So **ORDERED**.

A

LARRY PRICE
Administrative Law Judge

LWP/TEH
Newport News, Virginia

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon