

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 13 April 2005**

Case No.: 2004-STA-0054

In the Matter of:

LARRY G. WAINSCOTT,  
Complainant,

v.

PAVCO TRUCKING, INC., INNOVATIVE PERSONNEL SOLUTIONS,  
and BASF CORPORATION.,  
Respondents.

Before: DANIEL A. SARNO, JR.  
Administrative Law Judge

Appearances:

For the Complainant:  
Mary McCormac, Esq.

For the Respondent IPS:  
n/a.

For the Respondent Pavco:  
John Nader, Esq.

For the Respondent BASF:  
Charles Carter, Esq.

**RECOMMENDED DECISION AND ORDER**

Complainant, Larry G. Wainscott, filed a complaint with the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor on or about May 11, 2004, alleging that Respondents, PAVCO Trucking, Inc. ("Pavco"), Innovative Personnel Solutions ("IPS"), and BASF Corporation ("BASF"), discriminated against him in violation of

Section 405 of the Surface Transportation Assistance Act (STAA) of 1982, 49 U.S.C. § 31105 (formerly 49 U.S.C. § 2305) and the regulations at 29 C.F.R. § 1978. Complainant alleged that he was terminated as a truck driver because of his refusal to drive in adverse weather conditions.

A formal hearing was held in Greenville, South Carolina, on December 14 and 15, 2004. Complainant and Respondents Pavco and BASF appeared at the hearing and were represented by counsel.<sup>1</sup> Complainant submitted exhibits (CX) 1 through 9.<sup>2</sup> Respondent Pavco submitted exhibits 1 through 4. Complainant and Respondent agreed to certain stipulations, which were read into the record and accepted by the court. Complainant and Respondents Pavco and BASF submitted post-hearing briefs to the court.<sup>3</sup> After consideration of the entire record and the arguments of the parties, this court recommends that the complaint be dismissed.

### STIPULATIONS

1. Complainant was hired by IPS on or about June 30, 2003.
2. The State of Indiana identified IPS as the employer for Complainant for purposes of determining the party responsible for unemployment benefits. (Tr. 83).
3. Respondent Pavco is a person within the meaning of 1 U.S.C. §§ 1 and 49 U.S.C. Section 31105.
4. Respondent Pavco is a commercial motor carrier within the meaning of 49 U.S.C. § 31101.
5. Respondent BASF maintains a place of business in Central, South Carolina.
6. Complainant was an employee of Respondent Pavco.
7. Complainant drove Pavco's leased trucks over highways in commerce to haul hazardous materials for BASF.
8. In the course of employment, Complainant affected commercial motor vehicle safety.
9. Complainant was discharged on or about January 28, 2004.

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<sup>1</sup> Respondent IPS did not appear at the hearing and did not submit a post-hearing brief.

<sup>2</sup> The following abbreviations will be used:  
CX – Claimant's Exhibits  
RX – Respondent Pavco's Exhibits  
Tr. – Transcript

<sup>3</sup> In a March 17, 2005 letter, Complainant moved to strike Attachment 1 of BASF's post-hearing brief. Complainant argues that this document was not introduced into evidence at the hearing and the statements contained therein are offered for their truth, thereby constituting hearsay. The record was closed by the Presiding Judge at the hearing, and no motions were made by BASF to reopen the record. (Tr. 410). Therefore, Complainant's motion to strike Attachment 1 from the record is granted.

10. On or about May 11, 2004, Complainant filed a timely complaint with the Occupational Safety and Health Administration, alleging that Respondents violated 49 U.S.C. § 31105.
11. On or about July 2, 2004, Cindy Coe Laseter, the Regional Administrator of OSHA, OSHA, issued “Secretary’s Findings” determining that Respondents did not violate 49 U.S.C. § 31105(a)(1)(B)(i).

### **ISSUES**

1. Is IPS covered by the STAA?
2. Is BASF covered by the STAA?
3. Was Complainant discharged in retaliation for refusing to drive in adverse weather conditions under 49 U.S.C. § 31105(a)(1)(B)(i) or (ii)?

### **BACKGROUND**

Complainant was an employee of Innovative Personnel Solutions of Jeffersonville, Indiana, and worked as a contract truck driver for Pavco Trucking, Inc., of Clarksville, Indiana. Pavco has a Motor Transportation Contract with BASF Corporation. Under the terms of this contract, Pavco transports, via its flatbed trailers, various size BASF tanks containing hazardous materials from the BASF Central, South Carolina site, to numerous BASF customers throughout the United States. Pavco also customarily picks up from the same BASF customers the spent tanks containing residual urethane resin and returns those pressurized tanks to the Clemson facility.

### **SUMMARY OF THE EVIDENCE**

#### **Larry Wainscott**

On the morning of January 26, 2004, Complainant was in Bude, Mississippi, picking up spent BASF tanks from BASF customer American Railcar. Complainant was headed towards the BASF facility in South Carolina, to drop off the spent tanks. (Tr. 103). Complainant testified that he took Interstate 85 (“I-85”) from Atlanta towards the BASF facility. (Tr. 103). He had reached the Atlanta vicinity around 7:30 p.m. (Tr. 104). Complainant began to receive communications over his CB radio that the weather conditions were bad. Drivers on the CB testified that South Carolina roads “would probably have been shut down” by the time Complainant reached the state border. (Tr. 104). When Complainant crossed into South Carolina, there was a light fog and the roads had begun to freeze. (Tr. 105). He learned on the CB that there was an accident on I-85 Northbound between exits 14 and 19. Based on this information, Complainant elected to get off the Interstate at Exit 14, which is Highway 187. (Tr. 105). Complainant testified that Highway 187 was often used as a shortcut by drivers leaving BASF and heading south. (Tr. 106). Complainant stated that it was his intention to get the trailer as close to the BASF facility as possible; however, he feared getting on Highway 93,

which leads to the BASF facility, because it is a heavily trafficked road and he expected the conditions on it to be poor. (Tr. 109). Complainant testified that he passed the Ryder facility in Anderson within a few miles. (Tr. 147). As an alternative, Complainant chose to take Highway 123, a four lane highway which Complainant expected the State would maintain during the inclement weather. (Tr. 109). Complainant knew that he would soon approach Route 27, which is a “narrow little road”, measuring approximately 2 and one-half miles, that leads to the BASF plant. (Tr. 113). Complainant was concerned if he tried to take Route 27, something was going to go wrong and he was going to get stuck or possibly worse. (Tr. 113). Complainant knew of a lot near Routes 27 and 123, and chose to drop his trailer there. (Tr. 113). Complainant had dropped trailers in this lot before. (Tr. 114). Complainant believes that it was safer to leave the trailer and “bobtail” home. (Tr. 148). Complainant believes that it is safer to bobtail (i.e. to unhook the tractor from the trailer and just drive the tractor) than it is to drive the tractor with an attached flatbed trailer containing two empty tanks on an icy road. (Tr. 149). Complainant did not call the Pavco dispatcher that night because he didn’t think any dispatchers would be on duty. Complainant then continued with his tractor up 1.1 miles on Route 123 to his house, so that he could get off of the road. (Tr. 113, 116). It took Complainant approximately 15 minutes to reach his home after he dropped the trailer. (Tr. 118). Complainant stated that the road leading to his house, Partee Road, was a solid sheet of ice. He had trouble getting the tractor into the driveway, but eventually the tractor slid down the driveway and came to a stop. (Tr. 119).

On January 27, 2004, Complainant attempted to move the tractor from his driveway, but the tractor wheels would only spin. (Tr. 126). Complainant stated that he was not overly concerned because in his experience, there was never a deadline for returning the empty tanks to BASF unless he had received explicit instructions from a dispatcher telling him otherwise. (Tr. 126-127). Complainant called the Pavco dispatcher, Mia Cato, around 9:30 during the morning of January 27, 2004, and informed her that he was at home, and the tractor was stuck. He also explained that he had dropped the trailer the night before due to adverse weather conditions. (Tr. 127). Ms. Cato did not give Complainant any instructions at that time regarding a deadline for returning the trailer to BASF. (Tr. 128). Complainant anticipated that even if he could get the tractor out of his driveway, the conditions on Partee Road would be unsafe. (Tr. 129). Complainant attempted to move the tractor again during the day, but his efforts were unsuccessful. (Tr. 130). During the day, Complainant received a call from another Pavco dispatcher, Sandy Lancaster. (Tr. 130). Ms. Lancaster asked Complainant if he could get the trailer over to BASF. (Tr. 130). At approximately 6:00 p.m. on January 27, 2004, Complainant received a call from Pavco President Terry Roy. (Tr. 129). Mr. Roy told Complainant he wanted the trailer over to BASF immediately. Complainant informed Mr. Roy that he could not get the tractor out of the driveway at that time, but that he would deliver the trailer to BASF as soon as possible. (Tr. 129).

Complainant began trying to move the tractor out of his driveway around 6:00 a.m. on the morning of January 28, 2004. (Tr. 133, 155). He put salt and sand on the driveway and after about one and a half hours, he was able to get the tractor out. (Tr. 155). Complainant testified that the sun, which he believes rose around 7:00 a.m. that morning, helped to melt the ice on his driveway. Tr. (154-156). He delivered the trailer to BASF at approximately 20 minutes after 8:00 on that morning. While at BASF, he received a call from Mia Cato, who asked whether he had delivered the trailer, to which he replied “yes.” Complainant then received a call from Terry

Roy, who told Complainant that he failed to do what he was told. (Tr. 133). Complainant told Mr. Roy that he delivered the trailer as quick as he possible could, just as he had told Mr. Roy previously. (Tr. 133). Mr. Roy then informed Complainant to take his truck to Ryder and clean it out. (Tr. 133-34). Complainant was not given any explanation by Mr. Roy regarding the reason for his termination. (Tr. 134).

Complainant stated that he had never received a write-up during his tenure at Pavco. (Tr. 148). Complainant acknowledged that on one occasion, Terry Roy took money form his paycheck for allegedly driving his tractor home. (Tr. 384-85). However, Mr. Roy paid Complainant the money back at a later time. (Tr. 394-95). Complainant was not told on any other occasion during his 11 years that he was receiving a warning. (Tr. 385).

Complainant picked up his Ryder tractor at the Ryder facility in Anderson, not in Jeffersonville. (Tr. 385). Complainant states he does have a DOT certificate on his license, but did not go through any other schooling. (Tr. 386). Complainant did not have any conversation with Terry Roy regarding the placarding rules with empty tanks. (Tr. 386). Complainant stated that it was generally the rule that tractors were not to be taken home, as problems would arise with batteries going bad or drivers leaving the refrigerators on. (Tr. 386). However, Complainant stated that when the South Carolina terminal closed, the drivers would take home their trucks, which was common knowledge around the company. Complainant stated that the drivers would wash their trucks, or they would bring them over to Complainant's property, where he had kept parts and tools to use in washing the trucks or in small repairs. (Tr. 387). After Pavco entered into the Ryder contract, Complainant and two other drivers would take their trucks home. One driver, Richard, who lived in North Carolina, would leave his car at the Ryder facility when he had his truck. (Tr. 387). Complainant did take his tractor for maintenance at the Ryder facility, but states that he was never told to park his tractor there at all times. (Tr. 388).

Complainant understood that if the gauge on the tank was at zero, and the valves were open, then the tank was empty. Therefore, Complainant operated under the assumption that there was no hazardous material left in the trailer. (Tr. 159). Complainant stated that placards 1956 are for non-flammable gas. (Tr. 159). Complainant testified that the load contained placards on the way down to the delivery destination. (Tr. 159). Complainant knew the valves were open on the tanks because it is a lever type valve, and it was standing straight up. (Tr. 389). Complainant observed that the gauges showed the tanks were empty. Tr. 389-90. Complainant thought it was very rare that both tanks were empty. (Tr. 390). Complainant stated that hazardous placards were on the truck. (Tr. 391). However, Complainant emphasized that because the valves were open he thought the load to not be hazardous. (Tr. 392). Complainant stated that when he picked up the tanks, they were already placarded. (Tr. 394). Complainant stated that if a placard blows off of a tank due to wind, on a load that he knows to be dangerous, then it is his responsibility to put another placard on. (Tr. 395). On the night of January 26, however, Complainant was not concerned with whether the placards were on and off because of the inclement weather. (Tr. 395). Complainant noted that the bill of lading stated that the tanks "last contained" a hazardous materials load; therefore, Complainant understood that if the valves were open and the gauges showed zero, the tanks were empty. (Tr. 406). While on the BASF

facility, no one supervised Complainant's actions, although he was subject to their requirements while on BASF property. (Tr. 92).

Since beginning his employment with Pavco or its predecessor CMT, Complainant has worked as a driver, terminal manager, and dispatcher. (Tr. 144). While employed by Pavco, Complainant earned a weekly gross of \$750 to \$900. (Tr. 135). He received medical and life insurance benefits. He also had a 401K plan which was matched by the employer, with a maximum employer contribution of \$500 per year. (Tr. 136). Following his termination, Complainant became depressed, angry and frustrated, and had to have his blood pressure medication increased. Complainant had to use savings and was forced to sell his motor home to make ends meet until he found new employment. (Tr. 136).

Complainant stated that Terry Roy was upset with him when they spoke on January 27, 2004 because of Complainant's failure to deliver the trailer. (Tr. 162). Complainant stated that he parked similar loads at the same location. (Tr. 163). Most of these loads had placards attached. (Tr. 162). Complainant collected unemployment from February until November 2004. (Tr. 137). He was offered several driver jobs, but turned them down because the potential employers weren't offering a comparable salary. (Tr. 156-57). He found a new job, which he began on November 29, 2004, as a driver manager for Owen Kennedy Transportation Specialists, where he currently earns \$750.00 per week plus bonuses. (Tr. 138).

### **Jane Waller**

Jane Waller lives with Complainant. (Tr. 259). Ms. Waller stated that driving conditions around the area, and particularly on her street, were very icy on January 26. (Tr. 259). Ms. Waller told Complainant over the phone on the evening of January 26 to be careful coming up the road and particularly into their driveway. (Tr. 259). Ms. Waller stated that their driveway remained icy on January 27 because the temperature never rose above 32 degrees. (Tr. 261). She stated that Complainant made attempts to get the tractor out of the driveway on January 27. (Tr. 261-62). Ms. Waller stated that when she and Complainant bought their house, Jim Roy told Complainant during a conversation in Clarksville, Indiana that he could use his yard to park trailers in, since Pavco no longer had the Central yard. (Tr. 264, 268-69). This conversation took place in November or December 2002, prior to the commencement of the Ryder contract in July 2003. Ms. Waller has also observed BASF trailers in either the lot on Route 93 or in the lot on Route 127. (Tr. 264).

### **Larry Kiefer**

Mr. Kiefer is the Operations Manager for BASF. (Tr. 28, 372). He has worked for BASF for eleven years and has held the position of Operations Manager for four years. (Tr. 372). On January 27, 2004, Mr. Kiefer was told that a flatbed trailer containing BASF cylinders was spotted by the side of a road. (Tr. 28). Upon learning this information, Mr. Kiefer called Pavco

and relayed this information. At the time he made this call, Mr. Kiefer was not particularly upset, but wanted Pavco President Terry Roy to investigate the situation. (Tr. 29-30.) Mr. Kiefer received a call from Terry Roy around 9:00 a.m. that morning, in which Mr. Roy acknowledged that one of their trailers was parked alongside the road and that Pavco would take care of it. (Tr. 31). When Mr. Kiefer left work around 5:30 p.m., he drove by and personally observed the trailer still sitting alongside the road. (Tr. 32). Prior to January 27, 2004, Mr. Kiefer had never seen nor been told of a BASF trailer being parked alongside the roads near the BASF Central facility. Mr. Kiefer noted that BASF employee Carl Williams assumed, when he saw Complainant's trailer on the side of the road that it contained hazardous material. (Tr. 377). Mr. Kiefer explained that it was "a big deal" for Mr. Williams to have viewed an un-placarded trailer parked beside a road. (Tr. 378). Mr. Kiefer could not recall this having occurred previously during his 11 years at BASF. (Tr. 378). Mr. Kiefer did not get out of his car and physically check the gauge when he observed the parked trailer on January 27. (Tr. 381). He assumed, based on his years of experience, that the load was hazardous. (Tr. 381).

The BASF facility in Central, South Carolina blends urethane resins. (Tr. 47). Urethane resin is mixed with isocyanate, which when mixed together makes foam. (Tr. 47). The material shipped by BASF to its customers is called autofroth isosynate. This material is placarded as hazardous material "because it exerts a pressure above 25 pound gauge on a dial gauge." (Tr. 48). As such, all sides of the trailer and the tanks themselves must be placarded with UN (United Nations) 19656 placards. (Tr. 48). Because this material would increase 20 fold when exposed to the atmosphere, it is very important that a certain pressure in the tank is maintained at all times. (Tr. 334). BASF asks the customer not to use up the entire contents of the tank; therefore, when tanks are returned, some residual remains. (Tr. 334). Mr. Kiefer explained that if a tank is returned with less than 60 pounds of pressure, then the material would be flat and BASF would be unable to use it. Therefore, the customer would not get credit for the material and would lose whatever the material was worth. (Tr. 335).

A truck load of cylinders is delivered to the plant typically on flatbeds. Depending on the customer, up to three sets – or six tanks – could fit onto as trailer. (Tr. 48-49). The cylinders generally weigh about 1,200 pounds empty, and 5,000 pounds full. (Tr. 48). The cylinders are brought into the plant, and dropped into the dock area. The paperwork is transferred back to BASF. The operators go out with a forklift, unchain the wheel cylinders, pick them off, and drive them into the plant across a scale. The operators read the weight and then pick up a fresh blank cylinder check-in sheet and go through answering all the questions. (Tr. 345). Mr. Kiefer remarked that he was absolutely sure that Complainant brought back on January 28 the empty cylinders listed on RX 4, which showed 100 pounds of pressure and 900 plus pounds of product. (Tr. 356). The return bill of lading is filled out by the company that ordered and received the product. In this case, that company was American Railcar. (Tr. 362). Mr. Kiefer explained that customers know not to empty the tank by the level gauge, so they normally use the gauge to stop emptying at around 5 percent. (Tr. 363). Mr. Kiefer explained that Complainant's Exhibit 4 exists to transport cylinders which are placarded DOT hazardous through all the weigh stations back to BASF. Once the cylinders are back to BASF, the return bill of lading is taken and processed. (Tr. 365). Then the cylinder from the returning box or van is removed, weighed, and processed through. (Tr. 365).

Mr. Kiefer stated that this type of material is hazardous and must always be placarded. (Tr. 367). A placard is approximately 13 inches square. (Tr. 367). All flatbeds have a permanent placard holder on all four sides, and those placards contain a vinyl placard 1956 that travels with the flatbed. (Tr. 368). The cylinders also have a placard that is affixed to the sides of the cylinders themselves. (Tr. 368). The placard on the cylinders is not permanently affixed and Mr. Kiefer noted that there have been some problems with this placard when a truck travels at 60 miles an hour. (Tr. 368). However, he emphasized that the flatbed's placard is inside a holder, which is permanently affixed. (Tr. 368). DOT requires that all four sides of a vehicle carrying HAZMAT materials be placarded. (Tr. 268). Mr. Kiefer noted that if a placarded trailer left a facility but reached its destination without placards, then those placards would have had to have been physically removed. (Tr. 369). Mr. Kiefer explained that the placard holders are operated by strong springs and that it takes a lot of pressure to remove the placard. (Tr. 369). Mr. Kiefer stated that DOT regulations require that the shipper tender to the carrier the appropriate placards for that shipment. (Tr. 370-71). However, BASF has also given its carriers – Pavco and others – a packet of placards in case the shipper does not provide the required placards. Mr. Kiefer explained that on CX 4, the checked-off box indicates that placards had been tendered; this signifies that the shipper either verified that the truck had proper placards or that the shipper physically gave the driver the placards. (CX 4, Tr. 372). This bill of lading was signed by Complainant. (Tr. 372-73). Mr. Kiefer stated that an individual can not simply open the valves on the tanks to take the pressure off. (Tr. 375). He explained:

These tanks have on top of them ... a check valve. It basically looks like ... the stem on your car tire. On top of these tanks are a small check valve that is a vapor space, just goes in the vapor space, that the customer hooks up to – it's like a bicycle tire. He hooks up the connection, female – it's a male – he hooks up the female part. He pressures up these tanks to take the contents out. He disconnects it, it self-checks, it's all screwed in there, pipe thread. Beside that is a liquid port. It is a round cylinder with a stand pipe to the bottom.

On top of that is a larger check valve device. It's a self-sealing pop-it, self-sealing fitting. If the customer were to open the valves, it wouldn't go anywhere. The nitrogen wouldn't leave, so it'd be stopped. God forbid, the liquid, because if you open it up you get shaving cream, and you've got a hazardous spill. So, if you open the valves – you simply cannot open the valves to take the pressure off. ... If you take the fitting off the liquid you've got liquid everywhere. If you open the valve on the vapor you have to unscrew the assembly down to the ball valve, and then open it up. Then you have to wait two hours for it to vent to zero, and screw the assembly back on.

(Tr. 374-375). Mr. Kiefer stated that even if the valves are open, the material is still considered hazardous waste by DOT standards if the gauge reads 25 psig. (Tr. 376). In this particular case, at least one of the cylinders (# 10-5239) returned by Complainant on January 28 had a psig of 100. (Tr. 376, RX 4 at 2). Although it has happened, Mr. Kiefer stated that it was rare for a customer to send back a tank empty, because they would lose the credit for the returned material. (Tr. 376). Mr. Kiefer estimated that empty tanks are returned about four times a year.



### **Sandra Lancaster**

Sandra Lancaster is a dispatcher for Pavco. She has worked in various positions during her tenure at Pavco and its predecessor Coast Midwest. (Tr. 170). Ms. Lancaster was one of the dispatchers on duty on January 27, 2004. (Tr. 171). Ms. Lancaster stated that it was a Pavco system-wide rule that drivers were not supposed to take home their trucks unless that had received permission. (Tr. 174). She stated that the Pavco CEO, James Roy, wanted the trucks to be left at the terminals so that they could be serviced and maintained. (Tr. 174). Ms. Lancaster stated that after the Central, South Carolina Pavco facility was closed in the late 1990s, drivers were instructed to park their tractors at BASF or at the Ryder Truck Company in Anderson, South Carolina. Tr. 174-175. On January 27, 2004, Ms. Lancaster received a call at approximately 5:00 p.m. from Carl Williams at BASF. (Tr. 175). Mr. Williams was very upset; he told Ms. Lancaster that he saw a BASF trailer parked in an undesignated place, and that he wanted it moved immediately. (Tr. 175). Ms. Lancaster then phoned Complainant and told him that he needed to get the trailer and return it to BASF. Complainant told Ms. Lancaster that he was not going to get it; he stated that if “they [BASF] want the f’ing trailer they can come get it their self.” (Tr. 176). Ms. Lancaster then handed the phone over to Terry Roy, who had been standing near Ms. Lancaster during the conversation and heard her portion of the conversation with Complainant. (Tr. 176).

### **Mia Cato**

Mia Cato works as the head dispatcher at Pavco. She has been employed with Pavco and its predecessor Coast Midwest since September 1992. (Tr. 196). Ms. Cato has never worked as a driver. (Tr. 196). Ms. Cato stated that James Roy never wanted drivers to take home their tractors because it always presented problems. (Tr. 197). Ms. Cato described these problems as tractors getting broken into or getting stuck in mud and requiring the assistance of a tow truck. (Tr. 197). It is Ms. Cato’s belief that for BASF loads, any tanks containing residue had to be placarded. (Tr. 197).

Ms. Cato stated that Complainant called her on the morning of January 27, 2004, and told her that he had run into bad weather and had dropped the trailer along side of the road. Complainant told her that it was in a safe spot and that it was not a HAZMAT load. (Tr. 199). Complainant also told her that there was no pressure reading on the gauges. (Tr. 204). Ms. Cato told Complainant that he needed to get the trailer back to BASF. (Tr. 199). In Ms. Cato’s opinion, Complainant understood the need to return the trailer as soon as he could safely get out of his driveway. Tr. 200. Ms. Cato assumed that Complainant would have the trailer to BASF by later that day. Ms. Cato spoke to Complainant again on January 27, Complainant had still not gotten the trailer out, but that he was doing his best to get it back over to BASF. (Tr. 200, 205). Ms. Cato stated that since July or August 2003 it was company policy for the drivers to drop their tractors at the Ryder terminal in Anderson. Ms. Cato was told by drivers in the South Carolina area that driving conditions were very poor on the evening of January 26, but that the roads were passable by Tuesday, January 27, 2004. (Tr. 201-202). Ms. Cato did not send a tow truck out to Complainant’s home to assist in moving the tractor, because she had no reason to

believe there was any rush to get the trailer back to BASF. Ms. Cato explained that there is usually no rush for the trailers to be returned unless BASF is in need of empty trailers or if PAVCO needs to get a driver to go back out on the road. (Tr. 206). Ms. Cato was not aware that Larry Kiefer had called Pavco on the morning of January 27. (Tr. 207). Ms. Cato stated that Pavco fined drivers who took their tractors home or out of route. (Tr. 206). Ms. Cato knew that Complainant had taken his tractor home on previous occasions. However, Ms. Cato explained that Complainant had “started the [Pavco] plant down there [in South Carolina] and basically I didn’t make waves.” (Tr. 208). Ms. Cato did not personally receive any complaints from BASF regarding Complainant, but she believed that Jim and Terry Roy had received complaints. (Tr. 208-209). Ms. Cato stated that a quarry had been used in the past as a place to leave trailers; this place had been set up by Complainant in between his running the terminal in South Carolina and when Pavco began renting trucks from the Ryder facility. (Tr. 209).

### Terry Roy

Terry Roy is the President of Pavco Trucking. (Tr. 213). He has been with Pavco and its predecessor Coast Midwest since September, 1992. (Tr. 213). Mr. Roy stated that Pavco’s policy is to prohibit drivers from taking their tractors home except on certain occasions. (Tr. 215). Drivers are never allowed to take their vehicles home if they are transporting hazardous material loads. (Tr. 215). Mr. Roy stated that if the bill of lading requires placards, then the load must be placarded. (Tr. 216). Mr. Roy stated that drivers will sometimes not placard a trailer with hazardous material to avoid getting attention at a truck scale. (Tr. 217). Mr. Roy has fired drivers who received previous warnings and multiple fines. (Tr. 217). Mr. Roy stated that the Central, South Carolina Pavco facility was opened sometime in 2000. At that time, Complainant’s primary job was to oversee the drivers, do small maintenance items, and take care of trailers. (Tr. 218). Complainant worked in that capacity for approximately two years. (Tr. 218).

After September 11, 2001, business at Pavco slowed, and the Pavco maintenance facility in South Carolina was closed. Pavco then asked Complainant to work as a driver. (Tr. 219). After the Pavco facility closed, Mr. Roy worked out an arrangement with Ryder in Anderson, South Carolina which allowed Pavco drivers to leave their tractors there. (Tr. 219). Ryder also allowed Pavco to park HAZMAT loads there, and the driver was not required to stay with the load. (Tr. 220). The primary purpose of the arrangement, however, was for drivers to drop their loads at BASF and then drop their tractors at Ryder. (Tr. 221). Pavco bought the assets of Coast Midwest in July 2003. (Tr. 221). Mr. Roy signed the lease with Ryder during that month. (Tr. 221). Mr. Roy testified that he doesn’t have personal knowledge regarding what the drivers do with their tractors, as he is at a different physical location than most of the drivers. However, he noted that he takes action when he learns that a particular driver is taking his tractor home. (Tr. 223).

Mr. Roy explained that it is in the driver’s discretion to decide whether it is safe to drive during bad weather. (Tr. 224). Drivers are expected to call Mr. Roy if a situation arises that makes it unsafe for the driver to deliver the load on-time. (Tr. 224).

At approximately 9:30 on the morning of January 27, 2004, Mr. Roy learned, from a voice mail message left by Larry Kiefer, that a BASF HAZMAT trailer had been left on the side of the road (Tr. 225). After receiving this message, Mr. Roy worked with Ms. Cato to determine to which driver the trailer belonged. (Tr. 226). Ms. Cato then received a call from Complainant, and after that call, Mr. Roy believed that Complainant would attempt to deliver the trailer later that afternoon. (Tr. 226). At around 5:00 p.m. on January 27, Mr. Roy was coming up to the office when he heard Sandy Lancaster involved in a heated conversation. Ms. Lancaster was upset, and told Mr. Roy that he needed to deal with Complainant. (Tr. 228). Ms. Lancaster had just received a call from BASF and learned that the load was still sitting on the side of the road. (Tr. 228). Ms. Lancaster told Mr. Roy that BASF was upset because it was a hazardous load and it was un-placarded. (Tr. 229). Ms. Lancaster handed the call over to Mr. Roy, who then asked Complainant whether he was going to deliver the trailer to BASF that evening. Complainant told Mr. Roy that he would not deliver it that evening, but would deliver it in the morning. Mr. Roy then asked Complainant if he would deliver the trailer before 7:00 am on January 28, 2004, which is the time when BASF employees arrive at their plant. (Tr. 229). Complainant said that he would deliver the trailer by that time. (Tr. 229).

On the morning of January 28, 2004, Mr. Roy arrived at the Pavco office at approximately 8:10 a.m. Mr. Roy then retrieved a voice mail message from his phone, which informed him that the trailer was still on the side of the road. (Tr. 230). Mr. Roy tried to telephone Larry Kiefer at BASF, but could not get in touch with him. Mia Cato then got in touch with a guard at BASF at about 8:25 a.m., who informed her that Complainant had just arrived with the load. (Tr. 230). Complainant then called the dispatch office, and reached Ms. Cato, who handed the phone over to Mr. Roy. Mr. Roy asked Complainant why the load was not delivered by 7:00 a.m., but Complainant did not respond with an answer. (Tr. 230). Mr. Roy then told Complainant to take his truck to Ryder and clean his stuff out of it. (Tr. 230). Mr. Roy testified that Pavco's relationship with BASF is very important and that Complainant's actions were problematic. (Tr. 231). Mr. Roy explained that he was very concerned by Complainant's actions especially given Complainant's extensive experience in driving and, in particular, delivering loads for BASF. (Tr. 232). Mr. Roy noted that Complainant drove past the Ryder shop, where he could have safely left the trailer. (Tr. 232). Mr. Roy noted that drivers have to be recertified in HAZMAT every two years. (Tr. 233). Mr. Roy also noted that the Homeland Security Act requires that terminals have procedures in place regarding where and how loads will be dropped. (Tr. 234).

Personnel records on Pavco employees are housed in Clarkesville, Indiana. (Tr. 236). Mr. Roy stated that Complainant had not had any accidents while employed by Pavco, and had never been issued a bad performance rating in his 11 years with the company. (Tr. 242). Mr. Roy recalled discussing the policy of dropping the trucks off at Ryder when Complainant was in Clarkesville. (Tr. 244). Mr. Roy testified that Complainant had to have driven in the vicinity of the Ryder facility in Anderson and the BASF plant at Central. (Tr. 247). However, Mr. Roy also stated that other than Interstate 85, he did not know at the time of Complainant's termination what other roads Complainant may have taken before dropping the trailer and reaching his home. (Tr. 249). Mr. Roy stated that if a bill of lading states that a particular load is HAZMAT, then the driver should abide by that and placard accordingly. (Tr. 250). Mr. Roy did not have any

documentation that Complainant was told that he was carrying a HAZMAT load, or that Complainant specifically was told about the Ryder policy. (Tr. 250-51). Mr. Roy spoke of one occasion when he learned that Complainant had taken his tractor home. Mr. Roy subsequently charged him for the extra mileage, but returned the money after Complainant became upset. (Tr. 254).

### **James Roy**

Pavco CEO James Roy stated that Pavco writes a check to IPS, and IPS in turn issues paychecks to Pavco employees. (Tr. 278). IPS delivers the checks to Pavco, and then Pavco puts them in envelopes and gets them to the terminals associated with each driver. (Tr. 278). Mr. Roy believes that IPS provides similar services for approximately 20 to 30 other companies. (Tr. 279). IPS does not have any control, supervision, instruction or connection with Pavco drivers. (Tr. 279). Pavco hires the drivers, and then sends IPS a form regarding how much it is paying each particular driver. (Tr. 279). If Pavco terminates a driver, it sends a form to IPS with the relevant information. (Tr. 280). Pavco is headquartered and has a terminal in Clarkesville, Indiana; Pavco also has terminals in Jacksonville, Florida and Fontana, California, and dedicated operations in Greenville, South Carolina. (Tr. 281).

Mr. Roy did not know anything about the quarry allegedly used by Pavco drivers to drop trailers. (Tr. 284). Mr. Roy stated that he never allowed drivers to take tractors home, especially because it is prohibited by their insurance companies. Mr. Roy testified that he had fired a driver with a CDL (commercial driver's license) just a week before the hearing because he had taken his tractor home for the third time. (Tr. 289).

Mr. Roy explained that a driver who is returning to South Carolina with empty tanks is first supposed to drop the empty tanks at the BASF facility; if BASF doesn't have another load for the driver to deliver, then the driver should take his tractor to Ryder. (Tr. 291). Pavco has an arrangement with Ryder so that drivers can leave their cars at their facility. (Tr. 292). Mr. Roy stated that in his experience, it is more dangerous to bobtail on slick and icy roads than it would be when pulling a trailer. (Tr. 296).

Mr. Roy stated that if the bill of lading states that hazardous material is being transported, then the law requires that the material be placarded. (Tr. 297). Mr. Roy noted that the trailer which Complainant was carrying on January 26 contained hazardous materials and should have been placarded and attended to at all times, and should never be out of the driver's sight. (Tr. 301). Mr. Roy noted that under new Homeland Security laws concerning the transport of hazardous material, the only place that placarded trailers can legally be parked is either a Ryder facility, the shipper's facility, or at a Pavco terminal. (Tr. 301). Mr. Roy did not recall ever having a conversation with Ms. Waller in which he agreed to allow trailers to be parked at Complainant's residence. Mr. Roy noted that Complainant had mentioned to him on the phone a few times that he was thinking of buying a parcel of land which could accommodate the tractors, but Mr. Roy stated that he never agreed to anything and would never have agreed to such an arrangement without personally seeing the land in question. (Tr. 303-304).

Mr. Roy noted that he and his son, Jim Roy, would not have gone home the evening of January 27 if they had any doubt that Complainant would not deliver the trailer before 7:00 a.m.

the next morning. (Tr. 315). Mr. Roy was not aware on the afternoon of January 27 that the reason Complainant had dropped the trailer and taken the tractor home was because of the ice storm. (Tr. 315). Mr. Roy noted that it takes all complaints from BASF seriously, and if a customer didn't want a certain driver then Pavco would not send that driver back.<sup>4</sup> (Tr. 325).

## DISCUSSION

Congress passed the STAA in 1982 to fight the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (quoting remarks of Sen. Danforth at 128 Cong. Rec. 32509, 32510 (1982)). *See also, Yellow Freight Systems, Inc., v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993) ("Congress enacted the STAA to promote safe interstate commerce of commercial motor vehicles.") *quoting Lewis Grocer Co., v. Holloway*, 874 F.2d 1008, 1011 (5th Cir. 1989). The STAA attempts to fulfill this goal, in part, by prohibiting discrimination against trucking employees who complain of commercial motor vehicle rule violations by trucking companies. *See* 49 U.S.C. § 31105(a); *Brock*, 481 U.S. at 258; *Yellow Freight*, 8 F.3d at 984. The employment discrimination jurisprudence governing Title VII also governs actions under the STAA. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Specifically, the STAA prohibits the discharge, discipline, or discrimination against an employee who:

- (A) has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
- (B) the employee refuses to operate a 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 serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105 (a)(1)(A) – (B)(i)(ii).

Section (2) states that

“under (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,

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<sup>4</sup> The record does not reflect any examples of BASF rejecting a particular driver and Pavco honoring that request.

or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

### **A. Coverage under the STAA**

The parties dispute which entities are covered under the STAA. These entities include IPS, Pavco, and BASF. The parties agreed that Respondent Pavco is a person within the meaning of 49 U.S.C. § 31105. Complainant argues that IPS and BASF are also respondents for purposes of Complainant's STAA claim. Complainant states that IPS functioned as a leasing agent for truck drivers to Pavco and other companies. (Comp. Brief 11). IPS paid Complainant, made deductions from and made taxes on his wages. IPS also handled Complainant's insurance benefits and 401K program. Complainant stated that after Pavco sent a form to IPS after Complainant was terminated, and IPS subsequently stopped paying him. (Tr. 82). Complainant notes that the STAA does not require knowing participation for joint employers, and cites case law in support of this argument. See *Western Truck Manpower, Inc. v. United State Department of Labor*, 12 F.3d 151 (9th Cir. 1993).

BASF argues that it is not an employer of Complainant. BASF states that it was not involved in, nor did it have any control over the activities of Complainant during the time period in issue. BASF further argues that it was not involved in the decision to terminate Complainant. Complainant disputes BASF's characterization. Complainant states that he was expected to follow BASF's rules while on its property, and from time-to-time received direct instructions from BASF. Complainant notes that BASF constituted 12 percent of Pavco's business, and was able to terminate its agreement with Pavco on only 30 days notice. Therefore, BASF was in the position to initiate termination of a Pavco driver; Complainant stated that BASF had exercised this authority in the past. (Tr. 100). Complainant points to BASF's actions regarding the dropped trailer, particularly noting that BASF's Carl Williams was very upset. (Tr. 175-177, 194). The BASF operations manager also commented in an email to Terry Roy, upon learning of Pavco's decision to terminate Complainant, that it "agreed with [your] decision." (CX 1.)

An employee is defined under the STAA and the regulations enacted thereunder as "any individual other than an employer; who is employed by a commercial motor carrier and who in the course of his employment directly affects commercial motor vehicle safety, but such term does not include an employee of the United States, any State, or a political subdivision of a State who is acting within the course of such employment." 29 C.F.R. § 1978.101(d)(4); 49 U.S.C. §31101(2)(A)(B). An employer is defined under the STAA as "any person engaged in a business affecting commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it in commerce, but such term does not apply to the U.S., state, or political subdivisions." 49 U.S.C. §31101(3)(A)(B). The STAA defines a "person" as "one or more individuals, partnerships, associations, corporations, business trusts, or any other organized group of individuals" for purposes of the subchapter, 49 U.S.C. app. § 2301(4). Courts have recognized, therefore, that "person" could include multiple individuals or organizations that together function as an employer. See, e.g. *Palmer v. Western Manpower Inc.*, 85-STA-16 (Sec'y Mar. 13, 1992).

The court does not find that BASF qualifies as a joint employer in this case. The language of Section 31105 states that a “person may not discharge an employee.” This language indicates that an employer-employee relationship must exist. In cases where the respondent is not the complainant’s direct employer, other evidence of a requisite degree of control is sufficient to establish STAA coverage. *See Feltner v. Century Trucking, LTD, and Mainline Road and Bridge Construction, Inc.*, ARB 03-118, 2003-STA 1, 2003-STA-2, (ARB Oct. 27, 2004) citing *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 03-026, ALJ No. 96-CAA-8, slip op. at 9 (ARB Sept. 29, 2004).<sup>5</sup> The record does not support the contention that BASF and Complainant were in an employer-employee relationship, or that BASF exercised sufficient control over Complainant to establish STAA coverage. Although BASF was an important customer of Pavco, it does not appear that BASF actually participated in Pavco’s decision to terminate Complainant’s employment. BASF exercises no supervisory or direct authority over Pavco employees, including Complainant. The record also indicates that BASF had no authority to discipline or terminate a Pavco employee. Although Pavco testified that it would abide by the wishes of BASF not to assign a particular driver to its shipments, the record does not show that BASF ever requested such action.<sup>6</sup> Pavco’s dispatchers testified that they receive directions and conditions of delivery from BASF directly; Pavco’s dispatchers then communicate these terms to Pavco’s drivers. Furthermore, the facts surrounding Complainant’s termination, to be discussed *supra*, further support BASF’s argument that it is not a joint employer. Therefore, Complainant has not established that BASF has exercised control sufficient to establish STAA coverage.

However, the court does find that IPS, along with Pavco, is a joint employer of Complainant. IPS did not make an appearance at the hearing nor did it submit any written correspondence or a post-hearing brief.<sup>7</sup> (Tr. 5). Therefore, the court is only able to rely on the testimony of Complainant and Pavco’s witnesses in its ruling on this issue. Complainant was paid by, and received checks from IPS. Complainant stated that he was an employee of IPS. IPS deducted taxes from Complainant’s wages, paid taxes on his wages, handled his insurance plan, administered his 401(k) plan, and reimbursed him for expenses. IPS maintained workers’ compensation insurance on its employees. Complainant was awarded unemployment benefits by the State of Indiana, and IPS was responsible for those benefits. After Pavco terminated Complainant’s employment, it sent a form to IPS. IPS then stopped paying Complainant. It was unclear from the testimony at the hearing whether IPS could have assigned Complainant to another company, and there is nothing in the record to indicate if IPS made any investigation into Complainant’s termination. The Board has held the STAA does not require knowing

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<sup>5</sup> In *High*, the Board noted that “the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is evidence of the requisite degree of control. Slip op. at 9.

<sup>6</sup> In *Feltner*, respondent Mainline exercised control over the complainant’s employment by actually requesting that respondent Century not send complainant back to the job. The Board found this sufficient to establish STAA coverage. ARB 03-118, 2003-STA 1, 2003-STA-2, (ARB October 27, 2004).

<sup>7</sup> IPS’s president, Mr. Doug Briscoe, did participate in a telephone conference call with the Presiding Judge and the other parties on August 31, 2004. At that time, the Presiding Judge advised Mr. Briscoe to retain an attorney and have the attorney file a notice of appearance as soon as possible. *See* 2004-STA-0054, Pre-Hearing Order # 1. IPS also failed to cooperate in the exchanging of exhibits and a witness list. (Tr. 5).

participation for joint employers. See *Western Truck Manpower, Inc., v. United States Department of Labor*, No. 85-STA-16 (Sec’y Remand Dec., Jan. 16, 1987); *aff’d*, 12 F.3d 151 (9th Cir. 1993).<sup>8</sup> The court finds that IPS’ ability to stop payment of wages to Complainant is sufficient indicia of control over his employment. Therefore, IPS’ control over Complainant’s pay and other benefits is sufficient to establish STAA coverage.

### **B. Did Pavco and IPS Violate Section 31105?**

To establish a *prima facie* case of discriminatory treatment under the STAA, Complainant must prove that he was engaged in an activity protected by the STAA, of which the employer had knowledge; that he was the subject of an adverse employment action; and that a causal link exists between his protected activity and the adverse employment action. *BSP Trans. Inc. v. United States Dept. of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Moon v. Transport Drivers, Inc.*, 838 F.2d 226, 299 (6th Cir. 1987). The causal connection component may be established by showing the employer was aware of the protected conduct and that the adverse personnel action followed closely thereafter. *Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec’y Feb. 16, 1989). Close proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec’y Oct. 1, 1993).

I find that Complainant has successfully established his *prima facie* case. Complainant chose not to drive his truck because of adverse weather conditions. He stated that he did not think he would be able to make up the hill to BASF’s plant because of the icy road conditions. Instead, he chose to drop the trailer in a roadside lot and continue on to his house. The employer was aware of Complainant’s actions the next day when it received a call from Carl Williams at BASF and also when its dispatchers spoke to Complainant about the incident. Complainant was terminated on January 28, only two days after the protected activity took place. Therefore, an adverse employment action was taken against Complainant, and a causal link exists between this action and his protected activity on January 26.

The burden of production then shifts to Respondent to show a non-discriminatory reason for the adverse employment action. Respondent Pavco argues that Complainant was not terminated because he refused to drive in what he deemed to be adverse weather conditions. Pavco contends that Complainant was instead fired because he violated the policies of Pavco and BASF by leaving a hazardous load trailer unattended, and by failing to deliver the trailer by 7:00 a.m. on the morning of January 28, 2004, as he had promised. Respondent further states that Complainant was not required to drive in bad weather, and he was authorized to drop his trailer at either the Ryder Rental facilities in Anderson, SC or the BASF facilities in Central, SC. The evidence showed that on January 27, Pavco employees communicated to Complainant over the telephone that it was important that Complainant deliver the trailer which he had left unattended

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<sup>8</sup> In the Remand Decision, the Secretary found that the STAA does not require “knowing participation” for the imposition of back pay liability for a joint employer. However, the Secretary noted that if the Act did require knowing participation, respondent Western would still be liable because it knowingly participated in respondent Ryerson’s violation of the STAA. On appeal, the Ninth Circuit affirmed the Secretary’s decision, but noted that it was not necessary for it to decide the appropriate standard for imposing liability as respondent Western violated the Act under either standard. *Western*, 12 F. 3d at 153.



on the side of the road. Therefore, I find that Respondent Pavco has met its burden of production by giving a non-discriminatory reason for Complainant's termination.

Once the employer has presented a non-discriminatory reason for the adverse employment action, it is incumbent on the Complainant to prove, by a preponderance of the evidence, that the reason proffered by Respondent is a mere pretext for discrimination. Complainant has not met this burden and the record does not support the argument that Pavco's termination of Complainant was a pretext for discrimination. The court does not find that Complainant's termination is rooted in his protected activity.

The weight of the evidence does not support the contention that Complainant was fired because he engaged in protected activity – namely, refusing to drive during a dangerous ice storm. The testimony of all parties in this case indicates that the weather conditions in the area of Central, South Carolina were very dangerous on the evening of January 26, 2004. Pavco does not dispute that it was within Complainant's right to not drive his truck in dangerous weather conditions. Nor does the evidence show that Complainant was fired for not delivering the trailer to BASF on January 26. Instead, I find that it is the nature of Complainant's actions on the night of January 26, as well as the events of January 27 and 28 that gave rise to his subsequent termination. I find the testimony of Pavco's dispatchers and Terry and Jim Roy credible that both they and BASF were concerned about the unattended, hazardous material trailer.

The evidence shows that Complainant's actions violated BASF and Pavco policies. Specifically, the Pavco Driver Manual states "You must be in attendance of your unit at all times while transporting Haz-Mat. (Within 100 feet of the vehicle with a clear view.)" CX 8 at 9. Additionally, the manual states

**"Never drop a Haz-Mat load** without first getting authorization from dispatch. There are only 5 places a Pavco driver is allowed to drop a hazardous material load.

- I. Clarkesville, Indiana Terminal**
- II. Fontana California Terminal**
- III. Jacksonville, Florida Terminal**
- IV. BASF Facility in Central, South Carolina**
- V. Ryder Shop in Anderson, South Carolina**

(CX 8 at 9-10) (emphasis in original). Therefore, to avoid driving in dangerous weather conditions, Complainant could have dropped the trailer and tractor at the Ryder facility in Anderson, South Carolina or at the BASF facility. If those locations were not feasible to reach at the time of the storm, then Complainant could have pulled into a truck stop and remained with the vehicle until driving conditions were safe. Complainant knew that he was prohibited from bringing home his tractor without prior permission as evidenced by the incident in which he was fined for taking his tractor home. The testimony from Pavco's witnesses regarding this policy was consistent. Despite Complainant's testimony that he had previously dropped trailers in lots and at quarries, the evidence indicates that he knew that it was against BASF and Pavco policies to drop a hazardous material trailer in any location other than those specified, namely, Ryder or BASF. Although Complainant contends that the tanks were empty when he left the trailer

alongside the road, and therefore not hazardous, the weight of the evidence does not support his contention. Complainant admitted that the bill of lading stated that the tanks “last contained” hazardous material; however, he argued that statement does not mean that there is necessarily any residue material in the tanks. The court does not find Complainant’s reasoning persuasive. Additionally, both Complainant and Larry Kiefer testified that it is very rare for tanks to come back empty. Mr. Kiefer also referenced RX 4, on which the psig is listed as 100 for one of the cylinders which was returned by Complainant on January 28, 2004. Mr. Kiefer stated that any cylinder with a psig above 25 is characterized as hazardous material. Mr. Kiefer was absolutely certain that this particular cylinder was among the cylinders which were returned by Complainant on January 28. Additionally, Complainant’s testimony on the question of whether the trailer and tanks was placarded when he left the American Railcar facility was inconsistent.

The events of January 27 also influenced Pavco’s decision to terminate Complainant. The gate log maintained by BASF shows that 32 trucks passed through the gate on January 27; three of those trucks belonged to Pavco. This fact detracts from Complainant’s argument that it was too icy for him to get his tractor out of his driveway, and to deliver the trailer to the BASF facility on January 27. Despite Complainant’s argument that Pavco did nothing to assist Complainant or investigate the situation, the court finds the steps taken by Pavco to be sufficient under the circumstances. Complainant told Ms. Cato on the morning of January 27 that the trailer did not contain hazardous material. Ms. Cato noted that she had no reason to doubt Complainant, as he had been doing his job for a long time. Additionally, Pavco’s dispatchers and managers were not able to observe the trailer in question as they were not physically located in South Carolina at the time of this incident.

Lastly, the weight of the evidence indicates that Complainant was fired, most directly, for his failure to deliver the trailer to BASF by 7:00 a.m. on January 28, despite his promise to Terry Roy that he would deliver the trailer before that time. The fact that Complainant was terminated only after he failed to timely deliver the trailer on the morning of January 28, 2004 is further support that Respondent’s preferred reason is not merely a pretext for discrimination. The court finds that Pavco’s discharge of Complainant for his failure to timely deliver the trailer to BASF, in conjunction with his violations of company policy, is grounded in fact and was not a pretext for discrimination.

### CONCLUSION

Complainant established a *prima facie* case of discrimination under the STAA. Respondent Pavco rebutted the inference of discrimination by offering a legitimate non-discriminatory reason for the adverse employment action. In weighing the evidence on record, I find that Complainant has not shown, by a preponderance of the evidence, that the legitimate, non-discriminatory reason given by Respondent is a pretext for discrimination.

**RECOMMENDED ORDER**

It is hereby RECOMMENDED that the complaint filed in this matter is DISMISSED.

**A**

Daniel A. Sarno, Jr.  
Administrative Law Judge

DAS/jrr

**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 notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).**