



Issue Date: 15 September 2010

In the Matter of
JAMES AUSTERMAN
Complainant

v.

Case Number 2010 STA 00018

BEHNE, INC. & MR. NATHAN BEHNE
Respondent

Paul Taylor, Esquire, and Joseph Taylor, Burnsville, Minnesota
For Complainant
Beth Serrill, Esquire and Kevin A. Velasquez, Esquire, Mankato, Minnesota
For Respondent
Before: Daniel F. Solomon, Administrative Law Judge

ERRATA DECISION AND ORDER
ORDER OF DISMISSAL

This case came to hearing in St. Paul, Minnesota pursuant to a claim under the Surface Transportation Assistance Act, 49 USC § 31105 (formerly 49 USC app. § 2305) and under 29 CFR Part 1978, implementing regulations found at 29 CFR Part 24, and the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 CFR Part 18 on May 14, 2010. At that time, I entered one joint exhibit, “JX” 1; Complainant’s exhibits, “CX” 1 to CX 15 and CX 17-CX 18; Respondent’s exhibits, “RX” 1 to RX 5, RX 10-RX 12, RX 20 to RX 27, RX 29 to RX 56. Testimony was provided by the Complainant, Mr. Nathan Behne, Veronica Austerman and Joseph Shaffer. See Transcript, “Tr.”

STIPULATIONS

The parties agree and I find:

Respondent Behne, Inc. is engaged in interstate trucking operations and is an employer subject to the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (JX-1, ¶ 2) Complainant was an employee of Behne, Inc. within the meaning of 49 U.S.C. § 31101 and 31105 from May 4, 2009 to June 1, 2009. As an employee of Respondent, Complainant operated commercial motor vehicles having a gross vehicle rating of 10,001 pounds or more on the highways in interstate commerce (JX-1, ¶ 4). On June 1, 2009, Respondents discharged Complainant (JX-1, ¶ 5). On July 2, 2009, Complainant filed a complaint with the Secretary of Labor alleging that Respondents had discharged him and discriminated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (JX-1, ¶ 6) . On January 14, 2010, the Secretary of Labor issued preliminary findings and an order pursuant to 49 U.S.C. § 31105

(JX-1, ¶ 9). On January 19, 2010, Complainant, by his attorney, filed timely objections to the Secretary's Findings and Order (JX-1, ¶ 10). The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of this proceeding. (JX-1, ¶ 11; Tr. 9-10).

APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

(a) Prohibitions:

(1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

(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 [or prospective employee] has a reasonable apprehension of serious injury to the employee [or prospective employee] or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a).

Under the Statute:

'employee' means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an Respondent, who--

(A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and

(B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

'Respondent'--

(A) means a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but

(B) does not include the Government, a State, or a political subdivision of a State.

49 USC § 31101 (2) and (3).

Protected Activity

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. *Yellow Freight System, Inc. v.*

Martin, 954 F.2d 353, 356-57 (6th Cir. 1992); *see also Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-00031 (Sec’y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-00001, slip op. at 8-9 (Sec’y July 4, 1984). An employee’s threats to notify officials of agencies such as the Department of Transportation or the Federal Motor Carrier Safety Administration may also be protected under the STAA. *William v. Carretta Trucking, Inc.*, 1994-STA-00007 (Sec’y Feb. 15, 1995).

Such complaints may be oral rather than written. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. *See Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (holding that the complainant’s oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

An employee can also engage in protected activity by refusing to operate a vehicle because “the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health” or because “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.A. §§ 31105(a)(1)(B)(i)-(ii). These two types of refusal to drive are commonly known as the “actual violation” and “reasonable apprehension” subsections. *Eash v. Roadway Express, Inc.*, ARB No. 04-036, slip op. at 6 (Sept. 30, 2005) (*citing Leach v. Basin Western, Inc.*, ARB No. 02-089, slip op. at 3 (July 31, 2003)).

Prima Facie Case

Claims under the STAA are adjudicated pursuant to the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, the Complainant can prove discrimination with either direct or indirect evidence.

To prove a claim using direct evidence, the Complaint must prove, by a preponderance of evidence, that the Respondent took adverse action against him for engaging in protected activity. Evidence may constitute direct evidence if I am persuaded that it proves a particular fact in question without any inference or presumption. *Randle v. LaSalle*, 876 F.2d 563, 569 (7th Cir. 1989). If the Complainant presents direct evidence of discrimination, the burden will shift to the Respondent to demonstrate that the Complainant would have been disciplined regardless of his protected activity. *Pogue v. U.S. Dept. of Labor*, 940 F.2d 1297, 1298-90 (9th Cir. 1991).

Under the inferential method, the Complainant must establish a *prima facie* case of retaliatory discharge, which raises an inference that the protected activity was the likely reason for the adverse action. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987); *see also Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To establish a *prima facie* case, the Complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the Respondent. *Moon*, *supra*.

Adverse Employment Action

The employee protection provisions of the Surface Transportation Assistance Act provide that “[a] person may not discharge an employee” for engaging in protected activity under the

Act. 49 U.S.C. § 31105(a). The Complainant has not been returned to status and I accept that he suffered adverse employment action within the meaning of the Act in this case.

Causal Connection

A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the Respondent was aware of the protected activity and that adverse action followed closely thereafter. See *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Thus, close proximity in time can be considered evidence of causation. *White v. The Osage Tribal Council*, ARB No. 99- 120, slip op. at 4 (Aug. 8, 1997). While temporal proximity may be used to establish the causal inference, it is not necessarily dispositive. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6 (Apr. 28, 2006). When other, contradictory evidence is present, inferring a causal relationship solely from temporal proximity may be illogical. *Id.* Such contradictory evidence could include evidence of intervening events or of legitimate, nondiscriminatory reasons for the adverse action. *Id.*

Rebutting the Complainant's Prima Facie Case

If the Complainant can carry his burden of establishing a *prima facie* case, the burden shifts to the Respondent to rebut that *prima facie* case by articulating a legitimate, nondiscriminatory reason for its employment decision. The Respondent “need not persuade the court that it was actually motivated by the proffered reasons,” but the evidence must be sufficient to raise a genuine issue of fact as to whether the Respondent discriminated against the employee. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). “The explanation provided must be legally sufficient to justify a judgment for the [Respondent].” *Id.* If the Respondent is successful, the *prima facie* case is rebutted, and the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the Respondent is a mere pretext for discrimination. *Id.* at 255-256.

Pretext

If employer has successfully rebutted the inference of retaliation that arises from the Complainant's *prima facie* case by showing a legitimate motive for the adverse action, the burden shifts to the employee to rebut the employer's showing by proving that the employer's articulated reason was not the true reason for the adverse action. An employee can prevail by proving that the reason given by employer is "unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, *supra*.

FINDINGS OF FACT

Complainant James “Sonny” Austerman holds a Minnesota commercial driver’s license with endorsements allowing him to operate double and triple trailer vehicle combinations, and tanker trailers (Tr. 120). Complainant first became a commercial truck driver in 1972 (Tr. 120). Complainant first worked as a truck driver for Bethlehem Steel and operated flatbed trailers hauling steel for about five years (Tr. 120-22). He later moved to the West Coast where he operated commercial passenger vehicles and tractor-trailer combinations for several years. Complainant moved to Minnesota where he worked as a truck driver (Tr. 121). Complainant has driven approximately 3 million miles operating commercial motor vehicles (Tr. 121-22). He has had no DOT-chargeable accidents in a commercial vehicle and has won safety awards from his employers (Tr.122). Complainant has worked for four to

five flatbed carriers (Tr. 122).

On May 4 2009, Complainant applied for work with Behne, Inc. (Tr. 50, 166; RX-11). Complainant was unemployed and went to Sherburn, MN to apply for work with another trucking company located nearby (Tr. 123). He saw some truck-tractors parked nearby at Behne, Inc. (Tr. 123). Mr. Nathan Behne, a co-owner and president of Behne, Inc., interviewed Complainant and told him that Behne, Inc. operated flatbed trailers and hauled various types of freight throughout the 49 contiguous United States (Tr. 123; JX-1, ¶ 3). Behne, Inc. hired Complainant on May 4, 2009 (JX-1, ¶ 4). Complainant passed a Department of Transportation physical before starting work for Behne, Inc. (Tr. 90).

Behne, Inc. operates flatbed trailers and transports oversized and overweight loads requiring specialized handling (Tr. 81). It currently operates 14 truck tractors (Tr. 48). When Mr. Behne hired Complainant, he knew that Complainant had he had not had recent experience operating flatbed trailers. He also knew that Complainant was going to need some training and time to become familiar with flatbed carrier operations and heavy hauling (Tr. 37). Complainant took some training with Behne, Inc. consisting of watching safety-related videos, and a load securement video (Tr. 52-53). At the end of this training, Complainant asked to take the load securement video home so he could watch it there (Tr. 53).

Complainant took his first load for Behne, Inc. on May 11, 2009 (RX-10, RX-41). Complainant called Mr. Behne during several dispatches for advice on the method of proper load securement (Tr. 37, 43-47; RX-10). Other drivers have done this in the past, so the fact that Complainant called Mr. Behne for advice was not unusual (Tr. 37-38). On May 22, 2009, Complainant picked up a shipment at Blaine, MN consigned to Lancaster, PA (RX-23; Tr. 46, 54). This shipment was transported on the same trailer with a shipment going from Burnsville, MN to Normalville, PA, and a shipment going from Baldwin, WI to Bensalem, PA (RX-10, RX-21; RX-22, Tr. 54). While loading the shipment at Blaine, MN, Complainant asked Mr. Behne for load securement advice. This was the last time that Complainant asked for advice on load securement or load placement (Tr. 44-46; RX-10). Mr. Behne was not overly concerned with Complainant's experience and ability at that point (Tr. 46).

On May 24, 2009, Complainant was en route to Pennsylvania, when a winch rail on his assigned trailer broke while he was driving near Gary, IN (Tr. 126-27, 192; RX-1). Winches fasten and secure load straps to the winch rail affixed to the trailer (Tr. 126-27). After temporarily securing the load, Complainant resumed driving and went to the nearest truck stop, a Travel Center of America station in Gary, IN (Tr. 127). A mechanic there told Complainant that the winch rail had popped (Tr. 128-29). Complainant called Mr. Behne and told him a winch rail had come loose on his assigned trailer (Tr. 56). Mr. Behne authorized Complainant to have the winch rail repaired at the truck stop (Tr. 56-57, 129-32). Mr. Behne thought that the price that the truck stop had quoted as an estimate to repair the winch rail was unreasonably expensive (Tr. 57-58, 131).

While the truck stop was having the winch rail repaired, Complainant and the mechanic observed that an outside tire on the trailer had a large bald spot (Tr. 132-33). Complainant told the mechanic that he needed to speak with his (Complainant's) boss to find out what he wanted done about the defective tire (Tr. 133). Complainant called Mr. Behne and told him that a mechanic at the truck stop had discovered a bald spot approximately 6 to 8 inches long on one of the trailer tires (Tr. 58, 133-34, 196). Complainant indicated that the

mechanic said there was “some steel showing” and that the tire could blow out at any time (Tr. 58, 134). Complainant had not previously observed any problems with any of the tires on the trailer, including the spare tire (Tr. 197).

Mr. Behne instructed Complainant to have the shop replace that defective tire with the spare tire with which the trailer was equipped (Tr. 58-59, 135). Behne, Inc. equips all of its trailers with spare tires. The spare tires have previously been used and worn down (Tr. 60, 224-225). Complainant told the mechanic that Mr. Behne had told him to mount the spare tire (CX-4, pg. 9; Tr. 135). After the mechanic pulled the spare out of its rack in order to mount it, he told Complainant that there was a problem with the spare (Tr. 135). The mechanic showed Complainant where there was a large piece of rubber missing from the center of the tire with no tread depth in that location (Tr. 135-36). Complainant personally observed this defect (Tr. 202-03). Complainant also saw that there were other places on the tire where the tread depth did not appear to meet DOT specifications (Tr. 203-04). The mechanic also told Complainant that the tire had dry rot and excessive cracks. Truck stop personnel told Complainant that the spare tire could not be mounted on the trailer (Tr. 136; CX-4, pg. 10). The service advisor, Emilio Camacho, saw that the spare tire had less than 2/32” tread depth and a piece of the tire missing (CX-4, pgs. 11, 12, 29). Mr. Camacho told Complainant that he should refuse to drive with the defective tire mounted (CX-4, pg. 12).

Complainant called Mr. Behne a third time from the truck stop in Gary, IN. He told Mr. Behne that a mechanic at the truck stop would not mount the spare tire on the trailer because it did not meet Department of Transportation specifications. Complainant indicated that a “chunk” was missing from the center of the tire and that the shop recommended replacing it with a new tire (Tr. 33, 59, 61, 136-37; CX-3; RX-20). He also told Mr. Behne that truck stop personnel thought the tire was unsafe to use (Tr. 202). Mr. Behne refused to authorize purchase of a new tire (Tr. 91-92; RX-20). He told Complainant that the truck stop was “just in the business of selling tires and just to put the spare on.” (Tr. 59). Complainant also told Mr. Behne that the shop personnel said the tire had inadequate tread depth and that the shop refused to put the spare tire on the trailer (Tr. 33-34). Mr. Behne told Complainant that Behne, Inc. does not replace tires on the road, away from the home terminal (Tr. 33-34, 137). He also told Complainant that if the truck shop did not want to mount the spare tire that he would have the trailer taken to someplace that would mount it (Tr. 62).

Complainant told the mechanic that Behne, Inc. had told him that the spare had to be put on the trailer. The service advisor or mechanic at the truck stop told Ausrterman that they could not legally put the tire on the trailer (Tr. 138; CX-4, pg. 9). The mechanic showed Complainant places on the tire where there was not 2/32” tread depth (Tr. 213-214). Complainant called Mr. Behne again told him that the service advisor had stated that the spare tire could not be legally mounted (Tr. 138). Mr. Behne became angry and told Complainant to tell them to “put on the damned tire, you tell them to put on the damned tire or we’ll take the truck somewhere else.” (Tr. 138-39). Complainant told the service advisor that he was “between a rock and a hard place.” The service advisor told Complainant he would try to find a used tire to mount. No suitable used tire was available (Tr. 139-40). Ultimately the shop personnel in Gary, IN, mounted the spare tire (Tr. 34, 140; CX-4, pgs. 14, 35). The truck stop prepared a work order/invoice noting that it had advised Complainant that the tire needed replacement but that Behne, Inc. had refused to replace it (CX-3, CX-4, pgs. 8, 11).

Complainant began driving after the spare tire was mounted in Gary, IN (RX-1; Tr.

62). Shortly after Complainant had crossed into Pennsylvania, several drivers told him via the C. B. Radio that his trailer was dog-tracking (Tr. 142). Dog-tracking is a safety concern because a trailer does not trail straight behind a truck-tractor. Instead it will “trail off to either the right or the left side” due to misalignment caused by a bad bushing or suspension defects. Dog-tracking makes it difficult to control the set (Tr. 35-36, 141). Complainant did not feel the dog-tracking as he drove (Tr. 142). Complainant’s vehicle inspection reports for May 24, 25, and 26 noted no defects (RX-1, RX-2, RX-3).

Complainant delivered his shipments with his final stop in Bensalem, PA on May 26, 2009 (Tr. 141; RX-3, RX-10). Complainant called Mr. Behne and told him that he was unloaded in Bensalem, PA. Mr. Behne told Complainant he was working on putting a load together for him to haul. Mr. Behne told Complainant to go to the truck stop in Bordentown, NJ (Tr. 66). Later that day Mr. Behne dispatched Complainant on a shipment consisting of a reel of steel cable weighing in excess of 35,000 pounds going from near Baltimore, MD to Van Nuys, CA, a distance of approximately 2,800 miles (Tr. 40-41, 66, 142-43; RX-25).

While Complainant was at the truck stop in Bordentown, NJ, he sought advice from other flatbed drivers and a heavy haul driver because he was concerned about transporting the load of steel across the country with the trailer equipped with a defective tire (143-44, 209). He asked a very experienced driver to inspect the tire that had been mounted on the trailer in Gary, IN (Tr. 144). He told the driver that he had been dispatched to transport steel coil to Los Angeles (Tr. 144). The experienced driver inspected the tire and told Complainant that the tire was “crap” and that he “wouldn't haul this to the next truck stop down the line.” (Tr 144). Another experienced flatbed driver from whom Complainant sought advice told him that the tire was defective and that he should not haul the steel coil on it (Tr. 144-45). A coil would roll if it became unsecured (Tr. 146).

On the evening of May 27, 2009, Complainant avers that he was afraid to take the shipment on which he had been dispatched across the country including desert with the bad tire (Tr. 143, 148). He believed that the weight of the coil presented a danger that the securement chains could break if the tire blew out (Tr. 148). Complainant called Mr. Behne and told him that he did not believe that it was safe to drive across the country to California due to the defective tire (Tr. 39-40, 67-73; CX-1). He stated that other drivers told him that if he tried to drive across the country with the defective tire on the trailer he probably would not make it (CX-1; Tr.73, 105). He also told Mr. Behne that the trailer had been “dog-tracking” (Tr. 35, 71-72; CX-5). Mr. Behne understood that Complainant did not believe that the tire met Department of Transportation specifications (Tr.36). Complainant recorded this conversation on the advice of his wife. Mrs. Complainant told him that if someone became hurt or was killed, he would be able to prove that he had advised Mr. Behne of the problem (Tr. 149). Complainant’s vehicle inspection report for May 27, 2009, noted the defective tire (RX-4).

Mr. Behne reassigned Complainant to pick up a shipment loading in Bedford, PA going to Burns Harbor, IN (RX-10, RX-24, Tr. 55, 73-74, 149-50). Complainant accepted the dispatch because he needed a way home and hoped that the load would be a shorter load (as opposed to a coil) which, he believed reduced the danger of driving with a defective tire (Tr. 150-51). Complainant picked up the shipment in Hanover, MD and delivered it on May 29, 2009. (RX-10). After delivering this shipment in Burns Harbor, IN, Behne, Inc. dispatched Complainant on load of steel beams and bar from Chicago, IL to Dodge Center, MN (RX-10 RX-26; Tr. 55-56, 75, 150). Complainant delivered the shipment on June 1,

2010 (RX10).

On June 1, 2009, Mr. Nathan Behne and Behne, Inc. fired Complainant (JX-1, Tr. 153). He told Complainant when he fired him that “nobody tells me how to run my G--damned business.” (Tr. 153). Complainant told Mr. Behne that he was not trying to tell him how to run his business. In response, Mr. Behne told Complainant that “we ain't going to get along.” Behne told Complainant to clean out the truck and then leave (Tr. 154). Mr. Behne fired Complainant after Complainant had complained about the tire that had been mounted in Gary, IN and because he complained that the trailer dog-tracked (CX-5; Tr. 35). At the time he made the decision to fire Complainant, Mr. Behne had not inspected the trailer tire about which Complainant had complained (Tr. 39). Complainant worked for Behne, Inc. for approximately 22 days (Tr. 53; RX-10, RX-41).

Complainant felt humiliated and embarrassed when Mr. Behne fired him (Tr. 154). As he drove home he wondered how he was going to face his wife and children. He felt very badly (Tr. 154). Complainant looked for work with more than 10 trucking companies after Mr. Behne fired him (Tr. 158; RX-48, pgs. 4-13). Complainant was not offered work by anyone (Tr. 156). The summer of 2009 was difficult for Complainant and his family due to the lack of a paycheck and because Complainant's family looks to him for support (Tr. 158-59).

Joseph Shaffer inspected the tire about which Complainant had complained when Complainant returned to Sherburn, MN (Tr. 76-77, 231). In 2006, Mr. Shaffer had installed the spare tire on the trailer that Complainant operated at the end of his employment with Behne, Inc. (Tr. 225, 233). The tire was already a used tire when it was put on the trailer as a spare (Tr. 233). A portion of the tire was exposed to the elements. Moreover, tires will deteriorate with age and heat simply by sitting underneath a trailer (Tr. 234). Mr. Shaffer is a mechanic for Behne, Inc. and DOT certified inspector (Tr. 48-49, 224). As a DOT-certified inspector, Mr. Shaffer is authorized to perform annual DOT-required inspections on commercial vehicles (Tr. 224). The inspections are conducted using Appendix G to 49 C.F.R. Part 396 which sets forth inspection standards (Tr. 229-30). The tire does not meet DOT specifications because it has a cut in the sidewall and, in Mr. Shaffer's opinion; it has served its life purpose (Tr. 39, 98, 231-32). The tire also has less than 2/32" tread depth on some major groove patterns (Tr. 214-16, 232). Complainant applied for unemployment compensation benefits with the Minnesota Department of Employment and Economic Security (“DEES”). Mrs. Behne submitted a form to the DEES which Mr. Behne approved opposing Complainant's application for unemployment compensation (Tr. 31, 84-85). The form stated that Complainant was fired because: “he was given a load to take to California and the dispatcher [Mr. Nathan Behne] got the impression he didn't want to go there, he made the excuse that the tires were too thin and the trailer dog-tracked”. (CX-5). The form explained that Complainant was discharged because of “reluctance to go to California” (CX-5). Behne, Inc. gave no other reasons for discharging Complainant (Tr. 32).

At the time of his discharge, Complainant's rate of pay with Behne, Inc. was 40 cents per mile (Tr. 41, 124). Behne, Inc. drivers drive an average of between 1,800 miles per week and 2,500 miles per week (Tr. 42). Work for some of Behne, Inc.'s drivers slowed during the summer of 2009 (RX-50; Tr. 83). Complainant earned \$ 864.40 during the 3-week period that he actually drove for Behne, Inc., from his first load on May 11, 2009, until his discharge on June 11, 2009 (CX-6; RX-12, RX-41).

If Complainant had remained employed with Behne, Inc. he would have been eligible for health insurance through Behne, Inc. after 90 days of consecutive employment (Tr. 43; RX-43). Behne, Inc. would have paid 80 per cent of the health insurance premium (Tr. 43) Complainant already had health insurance through the State of Minnesota when he went to work for Behne, Inc. (Tr. 166-67). His wife planned to have his family obtain health insurance through Behne, Inc. when he became eligible because he would have reached an income level at which he no longer qualified for government health insurance (Tr. 238) He has not applied for health insurance through past employers when he was eligible for coverage but was responsible for paying a portion of the insurance premium (Tr. 166, 172) Complainant suffered a heart attack on September 5, 2009 (Tr. 160; JX-1¶ 7). On September 11, 2009, he suffered cardiac arrest and a stroke (Tr. 186 JX-1). Complainant has been unable to work since September 5, 2009 (JX-1, ¶ 7). His medical expenses were paid by the State of Minnesota Medicaid Program (JX-1, ¶ 8)

DISCUSSION

Protected Activity, Prima Facie Case and Adverse Employment Action

Although Employer argues that Complainant failed to prove that he had engaged in a protected activity, there was no assertion of a prima facie case, and no adverse employment activity, I find otherwise. As stated above, Emilio Camacho testified that he observed the spare tire that Mr. Behne wanted to have mounted on Complainant's assigned trailer and that it had less than 2/32" tread depth and a "chunk" missing (CX-4, pg. 11-12). Mr. Camacho testified that he told Complainant that he should refuse to drive with the spare tire mounted (CX-4, pgs. 12-13).

Mr. Behne testified that Complainant called him from the truck stop in Gary, IN and complained that the spare tire was defective and had insufficient tread depth (Tr. 33). Mr. Behne testified that he told Complainant that Behne, Inc. did not replace tires on the road.(Tr. 33-34). Mr. Behne testified (and CX-1 confirmed) that Complainant called him on May 27, 2009, again complaining about the tire that had been mounted in Gary, IN and that it would be dangerous to drive across the country hauling a shipment of steel (Tr. 39-40, 67-73; CX-5). Mr. Behne testified that he understood that Complainant did not believe the tire met Department of Transportation specifications (Tr.36).

Austerman made internal complaints to Behne, Inc. about two defective tires on his assigned trailer and he also complained of "dog-tracking". Respondents argue that his complaints were not protected because most of the defects that he complained about either did not exist, or did not render the vehicle unsafe to drive. I agree that these defenses are insufficient to defeat a claim under 49 U.S.C. § 31105(a)(1)(A)(i). Complaints need not concern an actual violation of a vehicle safety regulation in order to be protected under the STAA. Complainant's complaints about his trailer tires were related to a violation of 49 C.F.R. § 393.75.

Mr. Behne testified that he discharged Complainant on June 1, 2009. The employee protection provisions of the Surface Transportation Assistance Act provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). The Complainant has not been returned to status and I accept that he suffered adverse employment action within the meaning of the Act in this case.

Rebutting the Complainant's *Prima Facie* Case

Once Complainant has carried his burden of establishing a *prima facie* case, the burden shifts to the Respondent to rebut that *prima facie* case by articulating a legitimate, nondiscriminatory reason for its employment decision. The Respondent "need not persuade ...that it was actually motivated by the proffered reasons," but the evidence must be sufficient to raise a genuine issue of fact as to whether the Respondent discriminated against the employee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). "The explanation provided must be legally sufficient to justify a judgment for the [Respondent]." *Id.* If the Respondent is successful, the *prima facie* case is rebutted, and the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the Respondent is a mere pretext for discrimination. *Id.* at 255-256.

Respondent argues that Complainant's purported protected activities were not contributing factors in Mr. Benhe's determination to terminate Complainant's employment. Mr. Benhe decided to terminate Complainant's employment because Complainant demonstrated a pattern of behavior that Mr. Benhe believed showed a lack of skill or a lack of confidence and/or assertiveness that would prohibit Complainant from being a productive, efficient employee. Complainant was unable to secure loads without Mr. Benhe's instruction, as evidenced by Complainant's multiple calls to Mr. Benhe regarding how to secure cargo on his first assignment. Behne, Inc., needs drivers who are self-sufficient and able to do their jobs without extra assistance.

Respondent also avers that Complainant was also not knowledgeable about trailer repairs, as evidenced by his call to Mr. Benhe regarding the repair to the winch rail. Complainant was unaware how long the repair should take and was, therefore, vulnerable to being taken advantage of by a salesperson who works on commission. Complainant did not notice the defective tire with a 6-8 inch bald spot. Complainant was also unable to opine about the condition of the spare tire; he was only able to relay to Mr. Benhe what the commissioned salesperson told him. When Complainant called on May 27, 2009, he indicated a concern about dog-tracking that was noticed by other drivers. If the trailer was dog-tracking, it was something Mr. Benhe would expect Complainant to be able to identify on his own.

Finally, Complainant was not assertive enough to ensure cargo was loaded correctly and safely. The steel in Chicago was loaded incorrectly, causing the load to be overweight on the trailer's axels. When Mr. Benhe told Complainant to have the cargo reloaded, correctly, Complainant told Mr. Benhe that he did not want to ask for the steel to be reloaded because the loaders "might get mad at [him]." Mr. Benhe was simply not comfortable employing a driver who was not assertive enough to require that cargo be loaded correctly.

After a review of all of the evidence, I find that Respondent has articulated a legitimate business reason for termination.

Pretext

Because Respondents successfully rebutted the inference of retaliation that arises from the Complainant's *prima facie* case by showing a legitimate motive for the adverse action, the burden shifts to the employee to rebut the employer's showing by proving that the employer's articulated reason was not the true reason for the adverse action. An employee can prevail by proving that the reason given by employer is "unworthy of credence." *Texas Dept. of Community Affairs v. Burdine, supra*.

Complainant argues that he was fired, in part, because Complainant complained that he did not want to take the load to California due to the defective tire (Tr. 30). Complainant alleges that this was substantiated by Behne, Inc.'s submission to DEES (CX-5). "Clearly, the testimony of Mr. Benhe shows that Complainant's protected activities were contributing factors in Respondents' decision to discharge Complainant. Respondents have failed to show by clear and convincing evidence that they would have discharged Complainant in the absence [sic.] of his protected complaints."

I find that Complainant has confused the burden in this fact pattern. Complainant argues that the following colloquy is direct evidence:

Q And one of the reasons that you fired Mr. Austerman was because he was given a load to take to California and the dispatcher got the impression he didn't want to go there, he made the excuse that the tires were too thin and the trailer dog-tracked. That's part of the reason why you fired Mr. Austerman, correct?

A Yes.

(Tr. 30).

Q When you got concerned was when he expressed a reluctance to drive to California because of the bad tire, correct?

A No.

Q That was part of it, correct?

A Yes.

(Tr. 46-47)

Whereas the Respondent in a scenario such as in *Carter v. Marten Transport, Ltd.*, 2005-STA-63, ARB Case No. 06-101 (ARB June 30, 2008), where there was evidence of direct evidence of whistleblowing (Complainant was on the telephone talking to the authorities when fired) would have switched the burden to respondent, here, I find that the inferential, *Mc Donald Douglas* method of proof is required. I find that although this may be a factor for consideration, it is not a "smoking gun," as alleged by Complainant.

Complainant is correct that a complainant may also prove discrimination by showing that the employer's proffered reason is unworthy of credence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). I accept Complainant's rendition: On June 1, 2009, Mr. Nathan Behne and Behne, Inc. fired Complainant (JX-1, Tr. 153). He told Complainant when he fired him that "nobody tells me how to run my G-- damned business." (Tr. 153). Complainant told Mr. Behne that he was not trying to tell him how to run his business. In response, Mr. Behne told Complainant that "we ain't going to get along." Behne told Complainant to clean out the truck and then leave (Tr. 154). Mr. Behne fired Complainant after Complainant had complained about the tire that had been mounted in Gary, IN and because he complained that the trailer dog-tracked (CX-5; Tr. 35). At the time he made the decision to fire Complainant, Mr. Behne had not inspected the trailer tire

about which Complainant had complained (Tr. 39). Complainant worked for Behne, Inc. for approximately 22 days (Tr. 53; RX-10, RX-41).

Complainant alleges that when Mr. Behne testified that he discharged Austerman because he had lost confidence in his ability to do the job as it should be performed; this reason is unworthy of credence. The discharge decision was apparently made after Austerman “exhibited to [Mr. Behne] that he did not have the confidence to transport the load safely to California.” (Tr. 73) “The only reason why Mr. Behne could have believed that Austerman could not do his job was because Austerman complained about the trailer tire and dog-tracking. Respondents may claim that this lack of confidence by Mr. Behne was also motivated by Austerman’s requests for advice on loading, however the last time Austerman asked for such advice was May 22, 2009 and Mr. Behne was not overly concerned about Austerman’s abilities at that time (Tr. 46). Moreover, Mr. Behne knew that Austerman had no recent flatbed hauling experience when he hired him and that Austerman would need additional training (Tr.37).”

I am also directed to the fact that Respondent does not replace tires on the road and instead uses its spare tires, and this was a reason for discharge. Respondent argues that Mr. Behne simply told him to have the spare mounted because he knew that it had been inspected by his mechanic, whom he trusted more than Complainant or the commissioned truck stop mechanic. “Complainant did not tell Nathan [Behne] that Complainant thought the tire was unsafe. The tire issue was not brought up again until after Behne had assigned a difficult steel coil load.” He also alleges that there was time to have changed the tires before engaging on a cross country trip.

I had an opportunity to examine the record exhibits and listen to the testimony. The Complainant bears the burden of proof. Although I am asked to find that the Respondent’s stated reasons for discharge are impeached, I find that there is no basis to do so, as there is no showing that the Respondent lied or proffered a pretextual reason for the discharge. It is reasonable that Respondent could have replaced the tire prior to sending it on the cross-country trip and that the replacement of the tire with a new tire while on the road in New Jersey or Pennsylvania would have been more costly to respondent. The Complainant did not rebut the allegations regarding tying the loads or the issues regarding Complainant’s meek demeanor as factors for discharge.

The Complainant is correct that had there been a “smoking gun,” my decision would have been otherwise. However, in this fact pattern, I do not find that Respondent’s rendition is patently or inferentially false and the Complainant has not met his burden.

ORDER

The prior Recommended Order is hereby **VACATED**.

I find that Complainant is not entitled to relief under 49 U.S.C. § 31105(b)(2)(A), and requests for reinstatement, back wages, emotional distress damages, punitive damages, interest, attorney fees and costs, and abatement are hereby denied.

It is hereby **ORDERED** that the Complaint is **DISMISSED**.

A

Daniel F. Solomon
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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

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