



In the Matter of:

JERRY L. MONDE,

ARB CASE NO. 02-071

COMPLAINANT,

**ALJ CASE NOS. 01-STA-22
01-STA-29**

v.

DATE: October 31, 2003

ROADWAY EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., *Truckers Justice Center, Eagan, Minnesota*

FINAL DECISION AND ORDER

This case arises under Section 405 (employee protection provision) of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (West 1997), and the regulations set out at 29 C.F.R. Part 1978 (2003). Relevant Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT) regulations appear at 49 C.F.R. Parts 392, 395, 396, and 397 (2002).

Complainant Jerry L. Monde filed complaints of unlawful discrimination against his employer Roadway Express (Roadway) on July 17 and October 13, 2000, which after investigation the Occupational Safety and Health Administration found to be without merit. Following timely objections, an Administrative Law Judge (ALJ) heard the complaints on November 13-15, 2001. On April 26, 2002, the ALJ issued a Recommended Decision and Order (R. D. & O.) denying the complaints. Monde petitioned for review of the R. D. & O. and filed a

brief in opposition. Although Roadway participated before the ALJ, it declined to file a brief on review. We affirm the ALJ's decision as described below.

Jurisdiction and Standard of Review

This Board has jurisdiction to review the ALJ's recommended decision under 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c). See Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the STAA).

Pursuant to 29 C.F.R. § 1978.109(c)(3), an ALJ's factual findings are conclusive if they are supported by substantial evidence on the record considered as a whole. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991).

In reviewing an ALJ's conclusions of law, the Administrative Review Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 1996), *quoted in Goldstein v. Ebasco Constructors, Inc.*, No. 86-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992) (applying analogous employee protection provision of Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1995)); see 29 C.F.R. § 1978.109(b). The Board accordingly reviews questions of law de novo. See *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir.1993); *Roadway Express, Inc. v. Dole*, 929 F.2d at 1063. See generally *Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body).

Issues

- (1) Whether Monde engaged in protected activity when he performed regular, interim tire inspections on his truck tractor and trailers in the course of completing a dispatch.
- (2) Whether Monde engaged in protected activity by logging compensated layover time at foreign domiciles as "on duty" time.
- (3) Whether Monde demonstrated a causal nexus between protected activity and adverse action.
- (4) Whether the outcome of grievances filed by Monde affects the STAA proceeding.
- (5) Whether after-acquired evidence of wrongdoing bars relief.

Statutory and Regulatory Provisions

Section 405 of the STAA prohibits employment discrimination against any employee for engaging in protected activity, including filing a complaint or beginning a proceeding “related to” a violation of a commercial motor vehicle safety regulation, standard, or order or testifying or intending to testify in such a proceeding. 49 U.S.C.A. § 31105(a)(1)(A). Protected activity also includes a refusal to operate a commercial motor vehicle because “(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.” 49 U.S.C.A. § 31105(a)(1)(B).

Part 397, 49 C.F.R., governs commercial motor vehicles engaged in the transportation of hazardous materials and required to be marked or placarded. *See* 49 C.F.R. §§ 172.500-172.560 (2002). The driver of any such motor vehicle equipped with dual tires on any axle must “stop the vehicle in a safe location at least once during each 2 hours or 100 miles of travel, whichever is less, and must examine its tires.” 49 C.F.R. § 397.17. The regulation requires the driver to “examine the vehicle’s tires at the beginning of each trip and each time the vehicle is parked.” *Id.*

Section 392.7 of 49 C.F.R. provides: “No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order” The list that follows includes tires. Tire specifications appear at 49 C.F.R. § 393.75 (2002).

Section 396.11 of 49 C.F.R. requires drivers to prepare a written report at the completion of each day’s work covering vehicle parts and accessories, including tires. Drivers should be aware of the condition of the parts and accessories after having operated the unit during the preceding ten hours of drive time. Section 396.13 of 49 C.F.R. requires that a driver “[b]e satisfied that the motor vehicle is in safe operating condition” prior to its operation.

Under section 395.2 of 49 C.F.R., “on duty” time is “all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work.” It includes “[a]ll time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier” Requirements for recording duty status appear at 49 C.F.R. § 395.8. Drivers must record their duty status for each 24-hour period and certify that the log entries are correct.

Background

Roadway employed Monde as an over-the-road operator of commercial motor vehicles from July 1999 until his discharge in August 2000. During this period Roadway issued Monde disciplinary letters, which contemplated warnings, suspension, and discharge. Monde grieved all discipline pursuant to the collective bargaining agreement and remained working pending the

outcome of any discharge hearings. On July 28, 2000, however, Monde received a disciplinary discharge letter, which he failed to grieve until August 21 – well beyond the ten-day limitations period.¹ On August 16, Roadway notified Monde that he had been discharged. The Joint Area Committee ruled the grievance untimely at a May 16, 2001 Over-the-Road Committee Hearing, which rendered moot all other pending grievances.

In his complaint of unlawful discrimination, Monde alleged that certain activity for which he received disciplinary letters was protected under STAA section 405. This activity included performing tire inspections not required expressly under regulations for the transportation of hazardous materials (49 C.F.R. Part 397), logging compensated layover time at a foreign domicile as “on-duty,” and exceeding running times between terminals, thereby delaying freight. Monde’s particular arguments and Roadway’s rejoinder follow:

Tire Inspections. Prior to departure, Monde inspected vehicle tires as part of the pre-trip inspection. The parties do not dispute that 49 C.F.R. §§ 392.7 and 396.13 mandate this practice. Also undisputed is the propriety of inspecting tires in accordance with 49 C.F.R. § 397.17 when transporting placard loads. This practice entailed tire examination every two hours or 100 miles of travel, whichever was less. Monde extended this practice, however, to circumstances in which he transported any hazardous material even if of insufficient weight or amount to require a placard. Monde argued that he performed two-hour/100-mile inspections on non-placard loads containing hazardous materials to satisfy himself that the tires remained in good working order during the course of the trip and to apprise himself of any defects or deficiencies associated with the tires for purposes of completing the post-trip vehicle inspection report. According to Monde, because he undertook these inspections in compliance with 49 C.F.R. §§ 392.7, 396.11 and 396.13,² his refusal to forgo the two-hour/100-mile inspections and instead to continue driving, as directed by Roadway, constituted activity protected under 49 U.S.C.A. § 31105(a)(1)(B)(i) (refusal to operate a vehicle when operation violates a safety regulation). Monde asserted in addition that the “reasonable apprehension” clause of section 405 afforded him protection. 49 U.S.C.A. § 31105(a)(1)(B)(ii). Roadway argued that none of the regulations cited by Monde required routine two-hour/100-mile inspections on non-placard loads and that Monde’s

¹ That letter stated: “On 7/26 & 7/27/00 you falsified your logs. This is the tenth time in a 9 month period that you have falsified your logs.” Respondent’s Exhibit (RX) 15, page 1. The term “falsification” is a misnomer in the sense that Monde did not “lie” in logging tire inspections as time spent “on duty (not driving).” Monde actually performed the inspections and logged them correctly. Roadway’s position was that the inspections were unnecessary.

² These regulations prohibit a driver from operating a commercial motor vehicle unless he is satisfied that parts and accessories, including tires, are in “good working order” and “safe operating condition.” Additionally, upon completing a trip, a driver must report any defects or deficiencies which would affect the safe operation of the vehicle or result in its mechanical breakdown. Monde used two-hour/100-mile tire inspections to achieve these objectives.

adherence to this tire inspection schedule was unnecessary. Roadway also argued that Monde's apprehension of serious injury was unreasonable.

Compensated layover time. When at a foreign domicile awaiting dispatch and in readiness to depart, Monde logged hours after a certain period as "on duty (not driving)" in accordance, he argued, with 49 C.F.R. §§ 395.2, 395.8(f)(7), and Federal Highway Administration FMCSA regulatory guidance at 62 Fed. Reg. 16,370, 16,422 (Apr. 4, 1997). Monde claimed protection under 49 U.S.C.A. § 31105(a)(1)(B)(i) in arguing that he refused to operate a motor vehicle with the time logged incorrectly as "off duty" in violation of 49 C.F.R. § 395.8.³ Roadway argued that Monde's circumstances on layover did not come within the regulatory definition of "on duty" and that FMCSA regulatory guidance applied which permitted logging the time as "off duty." See Respondent's Exhibit (RX) 26, page 9.

Running times. Roadway issued Monde discipline for exceeding running times between points of origin and trip destinations. The running times were negotiated between Roadway and Local Union 135 of the International Brotherhood of Teamsters. Monde exceeded these running times because he performed the two-hour/100-mile tire inspections and because he performed thorough pre-trip inspections. Roadway argued that the regular, interim tire inspections on non-placard loads were not protected under the STAA.

The ALJ found that Roadway had not violated any DOT regulations by precluding non-mandated tire inspections and by directing that layover time be logged as "off-duty." With regard to the running times, the ALJ found that the only portion of the activity mandated by regulation – the pre-trip inspection (49 C.F.R. § 396.13) – did not motivate Roadway to issue discipline. The ALJ accordingly recommended that Monde's complaint be dismissed. On review, Monde argues that the ALJ erred in finding an absence of protected activity motivating Roadway's adverse action and in finding a lack of causation between the protected activity of performing pre-trip inspections and discipline.

The record evidence varies significantly, especially as to the necessity for the regular, interim tire inspections that Monde argues are permitted under the so-called general regulations appearing at 49 C.F.R. Parts 392 and 396. Critical to our consideration is whether the ALJ's factual findings are "supported by substantial evidence on the record considered as a whole" because, if so, the findings are conclusive and we are constrained to adopt them. 29 C.F.R. § 1978.109(c)(3). We consequently summarize the testimony of witnesses and any documentary evidence bearing on the contested issues. We then turn to the ALJ's findings.

³ Under 49 C.F.R. § 395.8(f)(7), a driver must certify that all duty status log entries are true and correct. "On duty" time is defined as including time when a driver "is required to be in readiness to work," time "remaining in readiness to operate [a] commercial motor vehicle," and time "waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier." 49 C.F.R. § 395.2. Monde considered himself "on duty" when restricted to a motel room for an extended period awaiting dispatch.

A. Evidence before the ALJ

Jerry Monde's testimony

Monde testified that he performed tire inspections whenever he parked a commercial motor vehicle and returned to it, when he hauled any hazardous material regardless of placard, and when he noticed a trailer pulling differently or a truck tractor's sluggish steering. Hearing Transcript (T.) 63. Monde checked tires on non-placard hazmat loads for a number of reasons, including the following:

- (i) Not having been present at the loading dock, Monde was not aware of the manner in which the hazardous material was loaded in the trailers, for example whether the weight was loaded on a single tire. T. 64, 323. Excessive weight on a tire can overheat the tire and cause a tire fire.
- (ii) Monde also was concerned about Roadway's use of recapped tires on trailers. T. 66. He had experienced ten to twelve tire blowouts while pulling double trailers for Roadway. When a tire blows out on a rear trailer, the trailer will fish tail in the driving lane and possibly cross into another lane. T. 66-67. This "crack-the-whip" effect interferes with a driver's ability to control the vehicle.⁴ Oversteering can cause both trailers to flip over. T. 67. A rear trailer tire blowout nearly resulted in an accident involving Monde. T. 68.
- (iii) Under Roadway's procedures, Monde never operated the same truck tractor or trailers. Monde was unfamiliar with the previous driver and the equipment. T. 69. The trailers used by Roadway receive abuse and damage when shipped through rail yards. T. 70-71.
- (iv) Monde performs tire inspections because he is concerned about his safety and the safety of the public on the highway. T. 74, 175. Hazardous material that is flammable or explosive presents a heightened risk.

⁴ The Roadway Road Driver's Manual recognizes this general effect. It states "Combination units (doubles and triples) handle differently than single units. Abrupt steering changes can cause a whipping action in the rear trailer. To avoid this possible hazard, make steering changes gradually." RX 21, page 23.

Although a driver's documentation lists the weight of the hazardous material, a driver has no way of verifying that the weight listed is correct. The weight of the hazardous material generally determines whether a vehicle requires a placard.

A tire inspection entails feeling for overheated tires and looking for tread separation, breakage, cracks, and flat spots. T. 77. These conditions could result in a blowout. Monde checks the tire rims for metal fatigue and the tires for air leaks. He checks the lug nuts to make certain that they are secure and checks the hub seal for leakage. Grease leaking from a seal can cause the bearings to overheat and create a tire fire. Monde also checks tire pressure. Tires and tire pressure change over the course of a trip. T. 78, 269. Inspection requires a driver to position himself under the vehicle in order to check for cuts or bulges on the inside of each tire. A bulge signals that a tire likely will blow out. T. 79. Monde also listens for air leaks in the brake lines and checks the brake pads for cracks. T. 80. He checks for foreign objects lodged between dual tires, for example rocks, pieces of metal, or pieces of recapped tires from the highway. Monde inspects each of the 18 tires on a fully assembled Roadway set of doubles. T. 85. *See* T. 63-86.

Robert Spearman's evidence

The report of Robert Spearman, an experienced operator of truck tractors hauling semi-trailers, double trailers, and triple trailers and a 31-year employee of Roadway, generally supports Monde's testimony. Spearman testified that the contents of his report are true and correct. T. 384.

The report states that Spearman performed tire inspections "regardless of placard or not." Spearman gave the following reasons: (i) to satisfy himself that the tires were in good condition for safe operation of the vehicle and safety of the motoring public, (ii) to remind himself of two co-workers killed as the result of blown steering tires on their units, and (iii) because of an accident that he witnessed involving another Roadway unit resulting in a blown tire and damage to an automobile. Complainant's Exhibit (CX) 4, page 2. With reference to whether drivers should inspect the tires on non-placard hazmat loads, Spearman's report states: "The same conditions should be met with any amounts of Hazard[ous] Materials. Being safe is the main issue, for the safety of the motoring public. Checking your tires and vehicles every 2 hours or 100 miles also helps to reduce fatigue." *Id.* The report describes three hazardous materials spills experienced by Spearman involving non-placard loads. In all instances drums of hazardous materials had been damaged by forklift blades prior to loading in the trailers. Spearman failed to detect the damage during the pre-trip inspection because the trailers had been sealed prior to transport. *Id.*, page 4. Spearman states that tire checks done properly take 15 minutes or more depending on the situation and should include examination of both exterior and interior surfaces of all tires for knots, cracks in the side wall, tread separation, loose lugs, cracked rims, objects between the duals, and leaking fluids. *Id.*, page 2.

Spearman logged layover time as “on duty (not driving)” and flagged the area in the “remarks” section of the log to show time waiting in readiness for dispatch following a required rest period. CX 4, page 3. Drivers were confined to their motel rooms and could wait for as many as 32 hours before being dispatched. When required to remain in readiness in a motel room with nowhere to go, a “fatigue situation” may develop.

Lawrence Alden’s testimony

Alden currently fills the position of chief union steward. Employed by Roadway for 23 years as an over-the-road truck driver, Alden testified that he performs tire inspections on non-placard trailers when transporting hazardous materials, although not always. When asked why he performs interim tire inspections on non-placard loads, Alden testified: “If I have any inclination that there’s anything wrong with the tires on the vehicle, even if it’s empty, I will immediately stop and check the tires at the nearest, safest location like on the top of a ramp.” T. 391. Every time he stops the truck he inspects his equipment including the tires, coupling devices, and air hoses. Whether he stops every two hours on a non-placard load would depend on what he had on board. Although it is the safe course to stop every two hours or more frequently, he will not necessarily do so. The condition of tires changes in transit. Sometimes tires go flat without the driver’s knowledge. Flat tires will produce heat and may catch fire or go to pieces and possibly fly into automobiles. *See* T. 391-398. According to Alden, the quality of Roadway’s equipment is poor. T. 390-391.

Dennis McMickens’s evidence

McMickens has been employed by Roadway since 1994 in a variety of management positions, including Director of Corporate Safety. McMickens testified that Roadway is committed to safety, has received numerous awards for safety, and maintains a very good safety record. T. 401-403.

McMickens’s positions are set out in RX 32 (Report of Dennis McMickens). If a trailer requires no placard under DOT regulations, tire checks are not necessary. Roadway drivers are not authorized to establish their own standards for tire checks beyond the requirements of DOT regulations. McMickens testified that Roadway has no publication that states that a driver may not check his non-placard equipment every two hours or 100 miles to ensure its safety. T. 412. He is not aware of any serious problems as the result of using recapped tires and similarly is not aware of any rollovers resulting from tire failure. Recapped tires have shorter lives than non-capped tires. A peeled cap can present a hazard to other drivers and trailing equipment. Roadway has experienced spills of hazardous materials, even on non-placard loads. T. 418.

McMickens stated that logging time for paid layovers that last more than 14 hours as “on duty (not driving)” is improper under DOT regulations. CX 32, page 2. DOT safety regulations do not apply to compensation issues, which are determined under the collective bargaining

agreement. If a driver is free from an employer's obligations and is able to use time awaiting dispatch to secure appropriate rest, the time may be logged as "off duty." *Id.*

James Grizzel's testimony

Grizzel is an over-the-road truck driver employed by Roadway for 28 years and a defensive driving and hazmat instructor. He testified that Roadway's use of recapped tires does not alarm him and that in all his years with Roadway he has blown a dozen tires. Grizzel never has flipped a trailer as the result of a blow out. He does not perform interim tire checks except when at a truck stop for a break. Grizzel testified that overheating from a flat tire is virtually unheard of. Tire fires may result, however, from a faulty wheel bearing or overheated brakes. The Roadway Road Driver's Manual prohibition against running with a soft or flat tire, *see infra*, would require tire checks. If a tire is hot the driver will smell it. T. 493-523. A DOT inspector accompanying him during a test run did not require him to stop for tire inspections every two hours or 100 miles when, during the return trip, he transported a non-placard load containing hazardous materials. T. 508-510. Grizzel strongly disagreed with testimony that the condition of Roadway's equipment is poor. T. 488-489.

Grizzel testified as to various methods for maintaining contact with Roadway's dispatch on layover while leaving the motel room and pursuing his own interests. T. 485-488.

Jerry Lyons's testimony

Lyons, a business agent for Teamsters Local Union 135, maintains a commercial driver's license and worked for 20 years as a truck driver. He is not aware of any work rule prohibiting tire inspections on non-placard vehicles carrying hazardous material. T. 590. Lyons testified as to the union's involvement in negotiating running times. Drivers can make the running times even if they must perform interim tire checks. T. 574-576. Lyons testified that he attended a "settlement" meeting with Monde and other union officials during which Monde was told he should not perform routine tire checks unless he was hauling a placard load. Monde agreed to follow the advice. T. 567, 569, 749. Lyons testified to a number of additional conversations with Monde regarding Roadway's position on tire inspections. T. 570, 571.

Kelly Wade's testimony

Wade has been employed by Roadway as an over-the-road driver for 11 years. Wade serves on various safety committees, inspects Roadway equipment, and is a hazmat instructor. His testimony about procedures for inspecting tires is consistent with Monde's testimony. T. 612-614. Wade does not routinely perform interim tire inspections on non-placard loads carrying hazardous materials. T. 622-623. He inspects his tires in certain circumstances including if he believes he has run over something inadvertently or when he stops to eat. The condition of the tires changes during a trip, for example tires may lose air pressure or recapped

tires may peel. He has experienced peeling tires on 30-50 occasions. Unless he sees pieces of rubber coming off a tire in his rear view mirror or a tire just completely blows, he has no indication of a problem when driving. A blown tire results in more weight on the other (dual) tire. T. 623-626. The post-trip driver vehicle inspection report reflects what the driver noticed during the pre-trip inspection and any problems that he noticed during the trip. T. 644-645. Wade disagrees with testimony that the quality of Roadway's equipment is poor. In his opinion Roadway's equipment is safe. T. 611-612.

Wade testified to a variety of methods for maintaining contact with Roadway's dispatch on layover while leaving the motel room. T. 614-615.

Ronald Baysinger's testimony

Baysinger is a relay manager employed by Roadway. Previous positions in his more than 24-year tenure with Roadway included dispatch clerk, dispatcher, relay coordinator, and driver superintendent. T. 648. Baysinger testified that when drivers take rest breaks they should check their tires before they resume driving. Drivers are not required to take their entire allotted rest period during a single break. They may take a number of breaks in 15-minute increments, for example. T. 699-700. Drivers may pull off the road if they have reason to believe their equipment is faulty. T. 705. Roadway has experienced spills of hazardous material with non-placard loads. T. 729. Unnecessary routine tire checks were part of the discipline issued to Monde. T. 682. Baysinger denied retaliating against Monde for any safety issue. T. 688. Disciplinary letters and corresponding trip logs contained in RXX 1-20 represent only a sample of Monde's runs. In many instances Monde made his running times. When Monde hauled placard loads, he performed interim tire checks legitimately.

Baysinger testified about the history of the negotiated running times which include allocations for pre-trip inspections, maximum drive time, and breaks. Leeway exists within the drive times to allow for heavy traffic, inclement weather, and tire inspections. T. 660-667.

Gary Behling's testimony

Behling, employed by Roadway as manager of labor relations, never has held a commercial driver's license and never has worked as a truck driver. He testified initially that drivers are not required to check tires every two hours or 100 miles on non-placard loads, but that a driver of a non-placard load has a right to do so if he makes his running time. T. 781-782. He later testified that he "misspoke there." T. 783, 785.

Behling testified about disciplinary letters issued to Monde for exceeding running times/delay of freight. T. 761-771.

Documentary evidence

A Roadway *Spotlight* publication directs drivers to “[s]chedule a break every two hours or every 100 miles” in the event of fatigue and during the break to “safety-check [their] rig.” CX 1, page 6.

In the portion of Roadway’s booklet explaining FMCSA Part 397 regulations that “apply to each driver of a motor vehicle requiring DOT hazardous material placards,” Roadway states:

While driving a vehicle with any amount of hazardous materials, you must stop and check the tires at least every 2 hours or every 100 miles, whichever is less, and indicate the tire check on your log. If you discover a flat, leaking, or improperly inflated tire, it must be repaired or inflated before further operation of the truck; the truck may be driven to the nearest safe place to make the repair or change. An overheated tire must be removed.

CX 2, page 10.

The Indiana Commercial Drivers License Manual directs drivers to conduct inspections “during a trip,” specifically that they should “check vehicle operation regularly” including checking tires. CX 3, page 16. It also states:

Check the tire mounting and air pressure. Inspect the tires every two hours or every 100 miles when driving in very hot weather. Air pressure increases with temperature. Do not let air out or the pressure will be too low when the tires cool off. If a tire is too hot to touch, remain stopped until the tire cools off. Otherwise the tire may blow out or catch fire.

Id. at 20.

Under the heading “Improperly Inflated or Hot Tires,” a Roadway Road Driver’s Manual fire prevention provision instructs drivers never to run on a soft or flat tire and sets out the procedures drivers must follow should these conditions occur. RX 21, page 47. These procedures include moving the unit “to the nearest place where a tire change or repair can be made safely.” The Manual admonishes against leaving the unit upon discovering a hot tire, rather the driver should “have it removed or wait until it is cool.” The Manual contains separate instructions for drivers carrying hazardous materials. The Roadway Road Driver’s Manual’s sample log appearing under the “General On-Duty Policies and Procedures” section shows five tire inspections, logged in 15-minute increments, as time spent “on duty (not driving).” RX 21, page 14.

B. The ALJ's Findings

The Necessity for Regular, Interim Tire Inspections

The ALJ found that the 49 C.F.R. § 397.17(a) requirements do not require routine tire checks for non placard vehicles. R. D. & O. at 17. He reasoned that “operating such a vehicle without performing tire checks every two hours or 100 miles would not violate a ‘regulation, standard, or order of the United States related to commercial motor vehicle safety or health,’ pursuant to section 405(B)(i) [and that] Monde’s refusal to so operate a vehicle does not constitute protected activity.” *Id.*

In discussing reasonableness under 49 U.S.C.A. § 31105(a)(1)(B)(ii) (reasonable apprehension of serious injury because of unsafe condition), the ALJ considered Monde’s apprehension about past experience with tire problems, double trailers prone to a “crack the whip” effect, his relative inexperience as a truck driver, and his concern that he could not inspect sealed trailers. He found Monde’s testimony to lack credibility based on inconsistencies and inaccuracies in his testimony and also his demeanor at trial. The ALJ acknowledged testimony by Alden regarding the poor condition of Roadway’s equipment as compared to other commercial motor vehicles. He found Alden’s testimony regarding the safety of Roadways’ trucks to be incredible because it was based on his “casual observance” of Roadway’s trucks and he did not back it up with specifics.

On the other hand he found the testimony of Grizzel and Wade, who are on safety committees and are driving and hazardous materials trainers, to be credible. They testified as to Roadway’s maintenance program and the good condition of Roadway’s equipment. R. D. & O. at 14. The ALJ also credited the testimony of McMickens, Director of Corporate Safety, citing the safety awards received by Roadway, the regular safety maintenance and Roadway’s record on DOT inspections. Grizzel, Wade and McMicken’s safety testimony was consistent, corroborated and therefore very credible. R. D. & O. at 15.

The ALJ also noted: “Jerry Lyons testified that none of the nine hundred drivers that he represents, regardless of their experience, perform tire checks on non-placarded loads,”⁵ citing to pages 567 and 590 of the hearing transcript. R. D. & O. at 18.⁶

⁵ As noted above, drivers *are* required to perform pre-trip tire inspections on any vehicle, placarded or not, under 49 C.F.R. §§ 392.7 and 396.13.

⁶ The cited testimony follows: When asked about a communication with Monde, Lyons testified, “I told him that the guidelines under the DOT, you could not log to work and back[⁶] or the issues on the placard loads – I represent 900 people here in Indianapolis that’s road drivers and he was the only one doing this.” T. 567. Lyons did not elaborate on the meaning of “this.” Lyons also testified –

Continued . . .

The ALJ addressed the reasonableness of Monde's apprehension due to inability to inspect sealed trailers before driving by referring to relay manager Baysinger's testimony about Roadway's "exhaustive" procedures to ensure safe handling. R. D. & O. at 18-19.

Based on the above-referenced evidence, the ALJ stated: "I find tire inspections on non-placarded loads reasonable when prompted by suspicion of a problem or when exiting the truck for breaks. I find that Monde's apprehension regarding tire failure is not reasonable, and his tire inspections on non-placarded vehicles do not, therefore, constitute protected activity pursuant to section 405(b)(ii)." R. D. & O. at 18.

In discussing reasonableness in conjunction with the standard under 49 U.S.C.A. § 31105(a)(1)(B)(i) (refusal to operate a vehicle in violation of regulations) the ALJ stated:

Section 405(b)(ii) requires that an employee's apprehension regarding the safety of his equipment be reasonable. Interpreting section 405(b)(i) to protect all refusals to operate vehicles without the driver being personally satisfied, pursuant to [49 C.F.R.] sections 392.7 and 396.13, regardless of the reasonableness of their personal satisfaction, would serve to render [STAA] section 405(b)(ii) ineffective.

R. D. & O. at 19. The ALJ's final statements about reasonableness in this regard follow:

To interpret sections 392.7 and 396.13 as providing protection for every driver's refusal to drive when premised upon even the most unreasonable of safety concerns, serves to tie an employer's hands

Q. Mr. Lyons, are you aware of any Roadway work rules or procedures that prohibit a driver from doing tire checks on non-placarded shipments?

A. I'm not aware of anything.

Q. Prior to this issue arising with Mr. Monde doing those tire checks, were there other drivers who had the same type of issues or is this the first time it came up?

A. First time it came up.

Q. So it was kind of a new situation, that people didn't know how to deal with it, correct?

A. The company maybe, not the union.

T. 590.

with respect to personnel control. Monde's apprehensions regarding the safety of his equipment were outside the bounds of reason. I find that an unreasonable apprehension is not converted to protected activity by sections 392.7 and 396.13.

R. D. & O. at 20.

Compensated Layover Time at Foreign Domiciles

The ALJ noted the applicable regulation, 49 C.F.R. § 395.2, which defines "on duty" time, and FMCSA regulatory guidance for Part 395 that permits time spent by a driver awaiting dispatch after a required eight-hour rest period to be logged as "off-duty" time. RX 26, page 9. The ALJ found that Roadway had instituted procedures for contacting drivers by telephone for response to work calls and that "Monde was not confined to his hotel room while awaiting a call." R. D. & O. at 21. Permitted under the guidance, recording this time as "off-duty" consequently did not violate 49 C.F.R. § 395.8 (recording correct duty status) for purposes of protection under 49 U.S.C.A. § 31105(a)(1)(B)(i) (protected work refusal when operation constitutes violation of regulation).

Excessive Running Times

Monde asserted that Roadway imposed discipline for his failure to meet negotiated running times (i) because he conducted lengthy, thorough pre-trip inspections and (ii) because of his regular, interim tire inspections; both of which, according to Monde, constituted protected activity. Based on Baysinger's testimony that 15- to 30-minute pre-trip inspections were acceptable but would not prevent a driver from meeting the running times, the ALJ found that Monde's pre-trip inspections were not unreasonable and constituted protected activity. R. D. & O. at 21. As noted above, the ALJ found Monde's interim tire inspections on non-placard loads to be unreasonable. *Id.* Examination of the comparative amounts of time spent on pre-trip and tire inspections and the amount of time by which Monde exceeded running times persuaded the ALJ that the discipline was "not causally connected to the thoroughness or length of his pre-trip inspections." *Id.* at 23.

Discussion

STAA section 405 provides in pertinent 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 motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refused 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.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105(a). To prevail on a complaint of unlawful discrimination under this section, a complainant must establish by a preponderance of the evidence that the respondent took adverse action against the complainant because he engaged in protected activity. *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). In the event that a complainant meets this burden, a respondent may avoid a finding of liability by proving that it would have made the same decision even in the absence of the protected activity. *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148, 2150 (2003), citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989). Here, Roadway does not contest that it disciplined and ultimately discharged Monde because he refused to cease performing routine tire inspections on non placard vehicles transporting hazardous materials. The primary issue, then, is whether performing these inspections constituted protected activity.

The ALJ concluded that routinely performing the tire inspections was not protected. As noted above, the ALJ's associated factual findings are conclusive if supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3).

Substantial evidence is more than a scintilla but less than a preponderance; it must succeed in creating more than a mere suspicion of the existence of a fact. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d at 47, citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Services v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971). It does not, however, require a degree of proof "that would foreclose the reasonable possibility of an alternate conclusion." *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d at 47.

Additionally, “the determination of whether substantial evidence supports [an] ALJ’s decision ‘is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion.’” *Dalton v. United States Dep’t of Labor*, No. 01-9535, 2003 WL 356780, at *445 (10th Cir. Feb. 19, 2003), quoting *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989). A determination whether evidence is substantial on the record considered as a whole must “take into account whatever in the record fairly detracts from its weight.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). “A single piece of evidence will not satisfy the substantiality test if the [adjudicator] ignores, or fails to resolve, a conflict created by countervailing evidence.” *Dorf v. Bowen*, 794 F.2d 896, 901 (3rd Cir. 1986).

The ALJ made specific credibility findings regarding testimony by Monde and Alden. R. D. & O. at 12-15. We accord special weight to an ALJ’s demeanor-based credibility determinations. See, *KP&L Elec. Contractors, Inc.*, ARB No. 99-039, ALJ No. 96-DBA-34, slip op. at 4 n.2 (ARB May 31, 2000); *NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983) (contrasting exceptional weight accorded to ALJ credibility findings that rest on demeanor with lesser weight accorded to credibility finding based on other aspects of testimony, such as internal discrepancies or witness self-interest). “One must attribute significant weight to an ALJ’s findings based on demeanor because neither the Board nor the reviewing court has the opportunity similarly to observe the testifying witnesses.” *Kopack v. NLRB*, 668 F.2d 946, 953 (7th Cir. 1983). In particular, the ALJ found that Monde agreed in the course of settling a grievance to cease logging commute times and layovers as “on duty” and to cease performing interim tire inspections. R. D. & O. at 12. The ALJ also found that Monde knew about Roadway’s position that the tire inspections were unnecessary. *Id.* at 13. The ALJ based these findings on the testimony of Baysinger and Lyons. As to information about tire inspections imparted at a 2001 safety meeting, the ALJ credited testimony of Grizzel and Wade over that of Alden. *Id.* at 14-15. The ALJ relied on the testimony of Grizzel, Wade, and McMickens in finding that the condition of Roadway’s equipment was good. *Id.* These specific findings are supported by substantial evidence, and we adopt them.

As to Monde’s and Alden’s testimony generally, the ALJ found it not to be credible “overall,” although he relied in some part on Alden’s testimony. R. D. & O. at 14, 15, 18. Findings discrediting a witness’s testimony completely normally are not sustainable. *Dorf v. Bowen*, 794 F.2d at 900-902 (judge’s wholesale discounting of testimony, especially in light of other record evidence which supported it, required reversal); *Kent v. Schweiker*, 710 F.2d 110, 114-116 (3rd Cir. 1983) (conclusory wholesale rejection of testimony did not meet substantial evidence test). We accordingly have considered portions of Monde’s and Alden’s testimony where corroborated by credible evidence elicited from other witnesses.

The ALJ concluded that 49 C.F.R. § 397.17 did not require Monde to inspect tires on non-placard loads every two hours or 100 miles. The language of the regulation dictates this result, and Monde has not argued that Part 397 applied in the majority of actions at issue or to the discipline that precipitated his discharge. We agree with the ALJ’s interpretation of the regulation and adopt the underlying factual finding that Monde routinely performed two-hour/100-mile tire inspections on non-placard vehicles carrying hazardous materials. This

regulation accordingly did not afford Monde protection for refusing to cease performing these inspections.

The ALJ also concluded that Monde's use of the two-hour/100-mile standard was unreasonable for purposes of 49 U.S.C.A. § 31105(a)(1)(B)(ii), i.e., that absent a "suspicion of a problem" Monde's apprehension of tire failure was not reasonable. R. D. & O. at 18. This application of STAA section 405 seemingly follows from the statutory language. It requires "a reasonable apprehension of serious injury to the employee or the public because of the vehicle's *unsafe condition*." (Emphasis added). Monde did not present evidence of any unsafe condition possibly affecting his tires when he stopped every two hours or 100 miles to inspect tires. The two-hour/100-mile standard applies in specific circumstances, e.g., when hauling placard vehicles. See CX 1, page 6, CX 3, page 16. In gauging reasonableness, the ALJ relied on testimony by Alden, Grizzel, and Wade. Wade's testimony in particular is persuasive. An over-the-road truck driver, safety committeeman, equipment inspector, and hazmat instructor, Wade testified that he performed interim tire inspections when he suspected a problem, for example when he inadvertently ran over an object in the road or witnessed a tire peeling. Recognizing that the condition of tires changes during a trip, Wade inspected his tires when taking a break. Grizzel and Alden testified similarly. Contrary testimony by Monde and evidence contained in Spearman's report is not overwhelming. The ALJ consequently premised his conclusion on factual findings that are supported by substantial evidence.

The ALJ next turned to the so-called general regulations, 49 C.F.R. §§ 392.7, 396.11, and 396.13, and attempted to engraft a reasonable apprehension standard. R. D. & O. at 19-20. We consider the issue of whether Monde "ha[d] a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition" for purposes of 49 U.S.C.A. § 31105(a)(1)(B)(ii) to be a separate issue. The issues for purposes of 49 U.S.C.A. § 31105(a)(1)(B)(i) are whether Monde complied with the general regulations by performing regular, interim tire inspections on non-placard vehicles carrying hazardous materials and whether Roadway violated these regulations by prohibiting Monde's compliance.

Captioned "Equipment, inspection and use," 49 C.F.R. § 392.7 prohibits vehicle operation "unless the driver is satisfied" that listed parts and accessories, including tires, "are in good working order." The regulation mandating pre-trip inspections, 49 C.F.R. § 396.13, provides that the driver shall "[b]e satisfied that the motor vehicle is in safe operating condition" prior to vehicle operation. This regulation contains no listing of the parts and accessories covered, suggesting that section 392.7 may be read in conjunction with section 396.13. This interpretation derives support from Federal Highway Administration rulemaking comments. See 63 Fed. Reg. 33,254, 33,265 (Jun. 18, 1998) (consideration given to moving section 392.7 "pre-trip inspection checklist" to part 396 or to deleting section 392.7 altogether as duplicative of section 396.13; "agency agrees with the commentators that there is a need for drivers to have instructions specifically identifying critical safety components"). While the regulation requiring completion of a post-trip vehicle inspection report, 49 C.F.R. § 396.11, lists the parts and accessories covered, it nowhere dictates any specific timeframe for identifying associated defects or deficiencies except "at the completion of each day's work." Monde argues that he performed two-hour/100-mile tire inspections pursuant to these regulations in order to satisfy himself that

the equipment remained safe during the course of the trip and to discover defects and deficiencies that required notation in the post-trip vehicle inspection report. Monde's approach to ensuring safe tire condition was prospective rather than actual in the sense that he inspected the tires routinely at designated intervals and without specific cause.

We are unable, based on the instant record, to construe the general regulations as Monde urges. The FMCSA/DOT bears responsibility for interpreting and enforcing these regulations. Although the record contains FMCSA regulatory guidance (e.g., RX 26) and we otherwise can access materials pertaining to the regulations (e.g., 62 Fed. Reg. 16,370, 16,422 (Apr. 4, 1997); 63 Fed. Reg. at 33,265, 33,270-33,271), we have found nothing to establish the lengths to which a driver in Monde's circumstances reasonably may go to satisfy himself that his equipment is safe. On the other hand, the record is replete with testimony as to Roadway's safety record and experience with blowouts. Driver trainers testified that tires were required to be inspected as part of a pre-trip inspection and at intervals during a road trip when there was reason to suspect there may be a tire problem, i.e., running over something in the road, burning rubber. They also testified they checked the tires each time they took a scheduled break.

The Secretary of Labor addressed a similar issue of regulatory interpretation in *Spinner v. Yellow Freight Sys., Inc., and Ass't Sec'y of Labor for Occupational Safety and Health*, No. 90-STA-17, slip op. at 14-18 (Sec'y May 6, 1992), *aff'd sub nom. Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195 (2d Cir. 1993). In construing 49 C.F.R. §§ 392.7, 396.11 and 396.13, the Secretary applied three Federal Highway Administration/DOT statements addressing the precise circumstances presented in that case and rejected a contravening statement due to its inherent unreliability. Without such guidance, we are unable to conclude that the general regulations mandate regular, interim tire inspections and that Monde was protected in performing these inspections.

Based in part on our conclusion that the tire inspections did not constitute protected activity, we adopt the ALJ's disposition pertaining to excessive running times. R. D. & O. at 21-23. Substantial record evidence, particularly the testimony of relay manager Baysinger, supports the finding that thorough pre-trip inspections would not have caused Monde to exceed negotiated running times, which Baysinger characterized as generous. Baysinger testified that, although the running times permitted only a six-minute period for pre-shift inspection and an occasionally necessary 15- to 30-minute pre-shift inspection admittedly would impinge to an extent on the maximum drive time, a driver generally would not receive discipline if the drive time exceeded the maximum by one-half hour to an hour. *See* T. 660-666, 685-688, 708-714. Roadway consequently did not violate the STAA for issuing this discipline.

Substantial evidence also supports the ALJ's finding that drivers at foreign domiciles were not confined to their motel rooms awaiting dispatch. Both drivers Grizzel and Wade testified about specific methods for maintaining contact with dispatch while leaving the motel. T. 485-488, 614-615. *See* RX 26, page 9 (FMCSA guidance stating that wait time properly may be recorded as "off-duty" if driver is free from obligations to employer and is able to use the time to secure appropriate rest; time spent standing by for work-related call, following required off-duty period, may be recorded as "off-duty"). Contrary general testimony/evidence by Monde

and Spearman is not overwhelming. Although Monde submitted regulatory guidance in support of his position (62 Fed. Reg. at 16,422 (logging meal and other routine stops)), we consider it less dispositive than RX 26, which speaks directly to recording time spent on-call awaiting dispatch. Roadway consequently did not violate 49 C.F.R. § 395.8(f)(7) by directing Monde to log compensated layover time as “off-duty.”

Because we decide against Monde on the merits, we do not reach the remaining issues regarding the effect of Monde’s grievances on the STAA proceedings and appropriate relief.

Conclusion

The ALJ’s findings of fact are supported by substantial record evidence and his legal conclusions are fully supported by the applicable law. Monde failed to prove by a preponderance of the evidence that he engaged in protected activity under the STAA. Monde also failed to prove by a preponderance of the evidence that the protected activity of conducting thorough pre-trip inspections motivated Roadway in issuing discipline, causation also being requisite to findings of violation. Accordingly, the complaints are **DENIED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge