**In the Matter of:**

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| **THEODORE R. JACKSON,** | **ARB CASE NO. 04-012** |
| **COMPLAINANT,** | **ALJ CASE NO. 00-STA-57** |
| **v.** | **DATE: December 30, 2004** |

**WYATT TRANSFER, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
**Theodore R. Jackson*, pro se, Chesterfield, Virginia***

***For the Respondent:***
**David W. Chewning*, pro se, Richmond, Virginia***

## FINAL DECISION AND ORDER

Theodore Jackson complained that Wyatt Transfer Company, Inc. (Wyatt) violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004), and its implementing regulations, 29 C.F.R. Part 1978 (2004), when it denied him a suitable truck to drive for four days in October 2000 and then terminated his employment in December 2000. We conclude that Wyatt did not violate the STAA, and therefore we deny Jackson's complaint.

### BACKGROUND

Our recitation of the facts is based upon the transcript of the August 8, 2003 hearing and the exhibits introduced therein.[1] Jackson was a local delivery driver for Wyatt. T. at 8. As of at least October 2000, he began complaining that the seat in his

[1] Hearing transcript (T.); Complainant's Exhibits (CX) 1-8; Respondent's Exhibits (RX ), grouped and marked as numbered pages 1-32.

assigned truck 172 did not oscillate (float to cushion the ride). *Id.* at 9; CX 1. He obtained a doctor's note recommending an oscillating seat for relief of back pain. CX 1. On Monday, October 16, Jackson was assigned truck 172, which was not satisfactory to him. T. at 9. David Chewning, the president of Wyatt, told Jackson to see Marty Coltrain, who was responsible for vehicle maintenance, but Jackson initially declined to do so. *Id.* at 12-14; RX at 4. Accordingly, Jackson did not drive on Monday, October 16 or Tuesday, October 17.

After a search of the yard with Coltrain, Jackson found a truck with a seat he liked, 229, so he drove it on Wednesday, October 18. RX at 2, 4. However, he did not like the truck. T. at 16. Wyatt did not have a truck available on Thursday, October 19 that suited Jackson. Jackson returned to meet with Coltrain again on or about Friday, October 20. RX at 2, 4. They found a seat that satisfied him on truck 207, and that seat was installed on his regular truck, 172, on October 20. RX at 2. He returned to his normal work schedule on Monday, October 23. T. at 15-17, 22; RX at 7. Jackson alleges that, because he complained about the seat, he was deprived of four days' work in violation of the STAA. T. at 6-7.

Jackson also contends that his whistleblowing resulted in his wrongful discharge in December. However, Chewning testified that the company's insurance agent obtained the driving records of all Wyatt employees, and recommended that Jackson and one other driver be taken off the road. *Id.* at 23, 28; RX at 3. Of particular concern was a June 2000 conviction for reckless driving that resulted in a one-week license suspension. T. at 24, RX at 3. The record also shows three speeding convictions. CX 5.

Before these events, Jackson had filed a complaint with the Occupational Safety and Health Administration (OSHA) on May 24, 2000, claiming that Wyatt was discouraging him from reporting defects in Driver Vehicle Inspection Reports (DVIRs) and discriminating against him by requiring him to operate unsafe vehicles. See ALJ's Recommended Decision and Order of October 23, 2003 (R. D. & O II) at 1. OSHA dismissed the complaint as without merit and Jackson requested an evidentiary hearing before an Administrative Law Judge (ALJ). *Id.*

On November 1, 2000, the ALJ allowed Jackson to amend his complaint to charge that Wyatt had retaliated against him for filing DVIRs by denying him work for four days. *Id.* at 2. The ALJ held the hearing on December 19, 2000. Both parties appeared and have continued to appear pro se. The ALJ issued a Recommended Decision and Order on May 24, 2001 (R. D. & O. I), in which he denied payment for four days of work in October 2000 and denied reinstatement and back wages following the termination of Jackson's employment.

On appeal to the Administrative Review Board (ARB or Board), Jackson argued that the May 24, 2001 decision was void, because it relied on the unsworn testimony of witnesses. The Board noted that the ALJs' rules of practice required that testimony be under oath, 29 C.F.R. § 18.603, and remanded the case for further proceedings. *Jackson v. Wyatt Transfer, Inc.*, ARB No. 01-076, ALJ No. 200-STA-57, slip op. at 4 (ARB Apr.

30, 2003) After an additional hearing on August 8, 2003, the ALJ issued his second decision dismissing the complaint on October 23, 2003. R. D. & O II.

The case is now before us again under the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2004). In response to our briefing order, Jackson filed a one-page letter on December 2, 2003, and Chewning informed us by letter dated November 10, 2003, that Wyatt would not file a brief.

## ISSUES

The following are dispositive: (1) whether the conduct of the ALJ's second hearing on August 8, 2003, resolved the procedural defect of failing to place the witnesses under oath at the first hearing on December 19, 2000; and (2) whether substantial evidence from the new hearing, the testimony together with the exhibits, supports the ALJ's ruling that Wyatt did not violate the STAA by taking adverse action against Jackson for making protected motor carrier safety complaints.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) to the Board. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c) (2004).

When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor,* 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich,* 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman,* 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales,* 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's legal conclusions, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . .." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's legal conclusions de novo. *See Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1066 (5th Cir. 1991).

## DISCUSSION

### I. Effect of second hearing

In its prior consideration of this case, the ARB determined that the ALJ's December 19, 2000 hearing was procedurally flawed because the ALJs' rules of practice, require that hearing testimony be under oath, 29 C.F.R. § 18.603, and the witnesses for that hearing, Jackson and Chewning, were not sworn. In remanding the case to the ALJ,

the Board said, "We do not decide . . . that the R. D. & O. [I] is void. Nor do we order that a new hearing must be held . . .. However, we remand in order that the ALJ may remedy the defects noted . . .." *Jackson*, slip op. at 4.

The ALJ conducted an additional hearing on August 8, 2003. This time, the ALJ placed Jackson and Chewning under oath. T. at 5. However, he did not request them to adopt their prior testimony under oath, or suggest whether the second, abbreviated hearing was intended to supplant or just supplement the first. As in the first, he allowed the parties to state their positions and to answer his questions, but there was no opportunity for cross-examination by the other party. The ALJ's resulting R. D. & O II relies on testimony from both the December 19, 2000 and the August 8, 2003 hearings without explaining how his continued dependence upon unsworn testimony from the first hearing addresses the concerns the Board expressed in its remand order. *See generally* R. D. & O II.

At this juncture, we do not need to declare the first hearing void or to decide how much weight to give the unsworn testimony. Because the same two witnesses later gave essentially the same testimony under oath, and neither party is prejudiced by our approach, we have concluded that our final decision should be based upon the testimony and exhibits from the second hearing. We therefore proceed to the merits of the case.

## II. Consideration of the merits

Jackson failed to prove Wyatt took adverse action against him for making protected motor carrier safety complaints. Substantial record evidence supports the ALJ's conclusion that Wyatt did not violate the STAA. R. D. & O II at 12.

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities. These protected activities include: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," § 31105(a)(1)(A); "refus[ing] 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," § 31105(a)(1)(B)(i); or "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition, § 31105(a)(1)(B)(ii).

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip

op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

We agree that Jackson was an employee entitled to seek protection under the STAA, that Wyatt was his employer, and that Wyatt was aware of activities that Jackson asserts were protected. R. D. & O II at 9. The extent to which Jackson engaged in protected activity is more problematic. Jackson's May 24, 2000 complaint to OSHA alleging that Wyatt violated Department of Transportation (DOT) safety provisions relating to carbon monoxide and noise exposure were protected under the STAA. R. D. & O II at 9. But the testimony and documentary evidence involved events in October and November 2000, that were unrelated to the May complaint.

Wyatt introduced several DVIRs that raised safety issues, but which post-date the four days in October for which Jackson was not paid. RX at 24 (10/31/00 – fuel leak, fumes in cab), RX at 27 (11/28/00 – steering pulling to the right, oil leak, engine noise), RX at 28 (11/15/00 – windshield wipers don't work). Although Jackson testified that he reported safety deficiencies in DVIRs, his discussion was vague as to the content, timing and consequences of those complaints. T. at 17-18. While these DVIRs were protected, Jackson failed to demonstrate that they caused Wyatt to take the actions that he says were discriminatory under the STAA.

The only DVIR Jackson introduced or testified specifically about at the August 8, 2003 hearing was his October 13, 2000 report that the seat in his assigned truck did not oscillate and therefore caused discomfort in his back. T. at 9; CX 1. Despite Jackson's attempt to link this complaint to safe driving, T. 13, he did not point to any DOT safety regulation that an uncomfortable seat implicated. Nor does his apprehension that an uncomfortable seat is an unsafe condition appear reasonable. *Cf. Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-5, slip op. at 3 (ARB July 31, 2003) (complainant must reasonably believe in safety violation); *Harrison v. Roadway Express*, ARB No. 00-048, ALJ No. 1999-STA-37, slip op at 6 (ARB Dec. 31, 2002) (same). Therefore, we decline to view Jackson's complaint that his driver's seat did not oscillate as a STAA-protected safety complaint.

Moreover, Jackson failed to prove that protected safety related complaints caused Wyatt to take adverse action against him. On the contrary, the events of the week of October 16 show that Wyatt tired to accommodate him with a seat that he liked. When Jackson would not drive his assigned truck, 172, on Monday, October 16, because it had an unsatisfactory seat, Chewning instructed him to see Coltrain in vehicle maintenance, which he would not do until the afternoon on Tuesday, October 17. T. at 9, 12-14; RX at 2, 4. They found a truck with an oscillating seat that Jackson liked, truck 229, which he drove on Wednesday, October 18, but he did not like the truck. T. at 16. Wyatt did not have a truck-seat combination that suited Jackson for Thursday, October 19. Jackson resumed discussions with Coltrain and on Friday, October 20, a seat he liked on truck 207 was installed on his regular truck, 172. RX at 2. With the issue resolved, Jackson resumed his regular work schedule on Monday, October 23. T. at 15-17, 22; RX at 7. These facts fail to establish retaliation.

Likewise, the substantial evidence demonstrates that Jackson was discharged for legitimate, non-discriminatory reasons. After reviewing the driving records for all Wyatt drivers, Wyatt's insurance agent recommended that Chewning take Jackson, who had a recent reckless driving conviction, and one other driver off the road. T. at 23-24, 28; RX 3. Consequently, Jackson's driving record, not his protected activity, was the reason for his removal.

Finally, we address the three arguments Jackson makes to us on appeal. First, Jackson contends that the ALJ violated his right to a fair hearing because the witnesses were not sworn in. Letter of December 2, 2003, para. 1. He does not say that he gave erroneous testimony at the December 19, 2000 hearing, he did not make any complaint about the August 8, 2003 hearing procedure at the time of that hearing, and for our decision we have relied on the sworn testimony at that hearing.

Next, Jackson objects to the admission of Wyatt's exhibits that he had seen before but for which Wyatt had apparently not sent a timely certificate of service. Letter of December 2, 2003, para. 2. However, Jackson clearly withdrew that objection at the time of the hearing. T. at 22.

If we understand Jackson's third point, it is that Wyatt's insurance agent is not licensed to issue insurance in Virginia. Letter of December 2, 2003, para. 3. However, the role of an insurance agent is not to issue insurance, but to purchase insurance from an insurance carrier. Wyatt's agent told Chewning that Jackson and the other driver presented too high a risk to the insurance carrier. "My carriers react most strongly to . . . Reckless Driving and Providence Washington advises none [of the driving offenses] is acceptable within 3 years." RX at 3, Letter from Nansemond Insurance Agency, Inc., January 10, 2001. Thus, Jackson did not show discrimination.

## CONCLUSION

Relying on the testimony and exhibits from the August 8, 2003 hearing, we hold that Jackson failed to prove that he was discriminated against in violation of the STAA. We **DENY** his complaint.

**SO ORDERED.**

**WAYNE C. BEYER**
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**