

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 02 June 2005**

CASE NO.: 2004-STA-00061

*In the Matter of:*

CHRIS MENTER,  
Complainant,

vs.

NORTH COUNTRY TRANSPORT,  
Respondent.

Appearances: Chris Menter, pro se

Corey Wright,  
For the Employer

Before: Jennifer Gee  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT**

**INTRODUCTION**

This matter is before me on a request by Chris Menter, the Complainant, for a hearing before the Office of Administrative Law Judges ("OALJ") under the employee protection provision of the Surface Transportation Assistance Act of 1982 ("Act" or "STAA"), 49 U.S.C. § 31105. The Complainant objects to findings issued by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA") on May 27, 2004, which dismissed a complaint he filed on May 21, 2002, alleging that the Respondent, North Country Transport, violated § 405<sup>1</sup> of the STAA by terminating him. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules. The OALJ has jurisdiction over this matter pursuant to 49 U.S.C. § 31105 and 29 C.F.R. § 1978.105.

I conducted a hearing in this matter in Bagley, Minnesota, on January 12, 2005. The Complainant and a representative for the Respondent all appeared and participated in the

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<sup>1</sup> Section 405 of the STAA was originally codified at 49 U.S.C. § 2305, but it was re-numbered to 49 U.S.C. § 31105 in 1994. References to Section 405 of the STAA will be to 49 U.S.C. § 31105.

hearing. At the hearing, ALJ Exhibits (“ALJ”) 1 through 3 were admitted, and the Complainant’s exhibits (“CX”) 1 through 12 were admitted. Respondent’s exhibits (“EX”) A through R and U through X were admitted, but exhibit S was excluded, and exhibit T was withdrawn.

For the reasons set forth below, the Complainant’s complaint is DISMISSED.

### ANALYSIS AND FINDINGS

#### Procedural Background

The Complainant filed a complaint with OSHA on May 27, 2004, alleging that Respondent had violated § 405 of the STAA. (ALJ 2.) On August 16, 2004, the Area Director for OSHA in Eau Claire, Wisconsin, notified the Complainant that his complaint had been investigated but that they had concluded that the Complainant did not engage in a protected activity. (ALJ 1.) The Complainant filed objections to the OSHA findings and requested a hearing on September 13, 2004. (ALJ 3.)

This matter was heard in Bemidji, Minnesota, on January 12, 2005. On February 14, 2005, the Complainant asked that a decision in his case be postponed until he obtained vehicle insurance information from the Respondent’s insurance carrier. He stated that it would take him a few weeks to obtain information from the insurance carrier about policy coverage for himself as a driver for the Respondent which he believed would support his claim that he was discharged by the Respondent. On February 15, 2005, I issued an order giving the Complainant until March 18, 2005, to submit these additional documents, and I provided that Respondent would be given until April 8, 2005, to submit any response to the Complainant’s submission.

On March 4, 2005, I received a letter from Frank Mabley, an attorney who said he had been engaged to help the Complainant obtain verification of the date the Complainant was removed as an insured driver from the Respondent’s insurance policies. He asked me to compel Respondent to produce the insurance verification the Complainant was seeking or to request that Respondent produce this verification. He stated that he had initiated the efforts to obtain those records but that he would not be able to meet the March 18, 2005, deadline.

In a March 16, 2005, letter, I informed Mr. Mabley that I cannot assist in obtaining the documents needed but extended the deadline to April 15, 2005. On April 12, 2005, the Complainant left a voice mail message informing my law clerk that he had been unsuccessful in obtaining any insurance documentation from the insurance companies to prove his termination date and that this case could proceed. I issued an order on April 13, 2005, memorializing the voice mail message and taking this matter under submission for decision.

#### Factual Background

The Complainant started working for the Respondent on September 8, 2003, as a commercial motor vehicle driver driving trucks with a gross vehicle weight rating of 10,001 pounds or more. (HT,<sup>2</sup> pp. 11, 13-14.) The Respondent, which maintains a place of business in

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<sup>2</sup> “HT” are references to pages of the Hearing Transcript.

Bemidji, Minnesota, is a commercial motor carrier engaged in interstate commerce transporting freight on the highways. (HT, p. 11.) The Complainant worked as a contract driver and was assigned to drive Unit 43, a red 1996 Kenworth T-800 truck on various trucking assignments. (HT, pp. 12, 53.)

The Complainant's Trips

The Complainant's Daily Logs show that between December 18, 2003, and March 28, 2004, the Complainant completed approximately 20 driving assignments, broken down as follows:

Trip No. <sup>3</sup>	Dates	Starting Point	Destination	CX 1 <sup>4</sup> pages
1	12/18/03 – 12/22/03	Anchorage, Alaska	Bemidji, Minnesota	1-5
2	12/23/03 – 12/26/03	Thief River Falls, Minnesota	Anchorage, Alaska	6-9
	12/27/03 – 1/6/04	Off Duty		10
	1/7/04 – 1/14/04	Anchorage, Alaska	Roseau, Minnesota	11-18
	1/15/04	Thorhult, Minnesota	Rosby, Minnesota	19
3	1/16/04 – 1/18/04	Bemidji, Minnesota	Dallas, Texas	20-22
	1/19/04 – 1/20/04	Fort Smith, Arkansas	Albert Lea, Minnesota	23-24
4	1/21/04	Fort Smith, Arkansas Albert Lea, Minnesota Emporia, Kansas	Albert Lea, Minnesota Emporia, Kansas Bemidji, Minnesota	25
5	1/22/04	Emporia, Kansas Bemidji, Minnesota	Bemidji, Minnesota Emporia, Kansas	26
	1/23/04	Bemidji, Minnesota Emporia, Kansas	Emporia, Kansas Bemidji, Minnesota	27
6	1/24/04	Emporia, Kansas Bemidji, Minnesota Albert Lea, Minnesota	Bemidji, Minnesota Albert Lea, Minnesota Bemidji, Minnesota	28
	1/25/04	Albert Lea, Minnesota	Bemidji, Minnesota	29
	1/26/04	Off duty		30
7	1/27/04 – 2/2/04	Royalton, Minnesota	Eagle River, Alaska	31-37

<sup>3</sup> These trip numbers were created by me to make it easier to determine when the Complainant should have been paid for his work. They are assigned based on Ms. Brown's description of how drivers were paid, the Complainant's trip logs, and a letter that Ms. Brown prepared, CX 4, detailing the payments made to the Complainant for his work.

<sup>4</sup> CX 1 is the Daily Logs that the Complainant maintained between December 18, 2003, and March 28, 2004. The page references are to pages in that exhibit.

	2/3/04 – 2/9/04	Off duty		38
	2/10/04 – 2/15/04	Anchorage, Alaska	Bemidji, Minnesota	39-44
	2/16/04 – 2/18/04	Off duty		45
8	2/19/04 – 2/21/04	Gully, Minnesota	Charlottesville, Virginia	46-48
	2/22/04	Gully, Minnesota Newport News, Virginia	Charlottesville, Virginia Eagan, Minnesota	49
	2/23/04 – 2/26/04	Newport News, Virginia	Eagan, Minnesota	50-53
9	2/27/04 – 3/3/04	Bemidji, Minnesota	Anchorage, Alaska	54-59
	3/4/04 – 3/7/04	Off duty		60
	3/8/04 – 3/11/04	Anchorage, Alaska McBride, BC	McBride, British Columbia Baxter, Minnesota	61-64
	3/12/04 – 3/16/04	McBride, BC	Baxter, Minnesota	65-69
10	3/17/04 – 3/29/04	Sikeston, Missouri	Anchorage, Alaska	70-82

On February 29, 2004, the Complainant was issued a permit to drive his truck through British Columbia on a trip from Bemidji to Anchorage. (EX X.) On March 1, 2004, while on the same trip, the Complainant was issued a single trip permit by the Yukon Highway and Public Works Department to drive his truck to Alaska. (EX W.)

On March 13, 2004, while driving through British Columbia, on the return leg of his trip to Anchorage, the Complainant was given approval to replace two of his tires. (HT, p. 178.) He replaced them in Bellingham, Washington, where he also sought medical care for back pain and stomach bleeding from the Veterans Administration Hospital. (HT, pp. 177-78; CX 3.)

Vic Hoskings Trucking was located at the same location where the Complainant had his truck tires replaced. While he having his tires replaced in Bellingham, he spoke with the owner of Vic Hoskings Trucking, who offered him a job. The Complainant responded that he would think about it since he had not been paid for a while by Respondent, but he filled out an application for employment with Vic Hoskings Trucking. (HT, pp. 179, 184.)

The Complainant returned to Minnesota after the tires were replaced and was dispatched to pick up a trailer in Missouri. (HT, p. 179; CX 1, p. 70.) He was instructed to drive to Missouri and pick up a 48 foot container which he was to return to Minnesota. In Minnesota, the trailer was to be loaded with supplies, and then the Complainant was to deliver the trailer to Alaska. (HT, p. 179.) During his stop in Bemidji after returning to Minnesota with the trailer, Corey Wright, who owned North Country Transport, assured the Complainant that he would be “paid upon delivery of this load.” (HT, p. 180.)

The Complainant delivered the load to Alaska on March 29, 2004. (HT, p. 180; CX 1, p. 82.) He parked his truck outside a fence at an equipment sales business in Anchorage, Alaska, called "Tiny's." (HT, pp. 181, 219.) He took his personal belongings out of the truck, and left the keys hidden in a pocket inside the door of the truck, but did not lock the truck because the lock on one door was broken. (HT, p. 219.) He told Mr. Wright that he had delivered the load and would like to be paid. (HT, p. 180.) Mr. Wright responded that he was "working on it." On April 1, 2004, after the conversation about getting paid, Mr. Wright called the Complainant at his home and asked if he was ready to return to work. The Complainant responded, "first of all, I need to get paid." (HT, p. 180.) Mr. Wright paused and responded "um, okay." (HT, p. 180.) The Complainant also said that his truck needed six more drive tires and that he would not return to work until the demands were met. (HT, p. 180.)

On April 3 or 4, 2004, the Complainant was contacted by Vic Hoskings Trucking and asked if he could team up with one of their drivers and do a run. (HT, p. 181.) The Complainant agreed to do that and drove down to Washington and back to Alaska for Vic Hoskings Trucking with another driver. When he returned to Alaska, he found his assigned truck inside the locked fence at Tiny's. (HT, pp. 181, 219-20.) He decided that the truck had been taken away from him and that he had been terminated. (HT, p. 181.) After finding his truck behind the locked fence at Tiny's, the Complainant did not contact anyone about getting access to his truck. (HT, p. 220.) He has not worked for Respondent since March 29, 2004, and currently works for Vic Hoskings.

Ron Muller started driving the Complainant's truck on April 18, 2004. (HT, pp. 152, 155.) He put another 50,000 to 60,000 miles on the truck before the tires were finally replaced in August or September 2004. (HT, p. 153.) Mr. Muller inspected the truck regularly while he was driving it and had no problems with the tires. While he was driving the truck, he drove at least one trip a day to and from Superior, Wisconsin, which was about 157 miles away. On these trips, he had to stop in each direction at a scale, where the truck was inspected. (HT, pp. 157-58.) During the inspections, the officers walked around the truck, checked the depth of the tires, checked the steering for linkage slot, and checked the brakes. (HT p. 159.) The truck passed inspection each time. (HT, p. 158.)

### Respondent's Payroll Problems

Respondent's payroll was authorized by Corey Wright, the owner, and Wendy Brown, a contract employee who handled Respondent's accounting and records. (HT, pp. 16, 31-32.) Under the payroll procedures, the Complainant was supposed to be paid for each round-trip run he completed, but he was not paid immediately after completing a run. His wages were delayed until after he completed the next run and returned to Bemidji.<sup>5</sup> (HT, p. 23, 38.) Generally, he was supposed to be paid each time he returned to Minnesota after a round-trip run, but the payment was for the preceding round-trip assignment, not the one he just completed.

The Complainant was paid for the trip he completed on December 22, 2003, on January 26, 2004, after he completed a trip between Emporia, Kansas and Bemidji, Minnesota. (CX 4.)

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<sup>5</sup> Ms. Brown provided an example. If the Complainant's first trip was to Florida, he would not be paid when he returned from the trip. If his next trip was to Alaska, after he returned from the Alaska trip, he would be paid for the Florida trip. He would not be paid for the Alaska trip until after he completed the next trip. (HT, p. 38.)

He was paid on February 27, 2004,<sup>6</sup> for the trip he completed on January 15, 2004. (CX 4.) He received this payment just as he was getting ready to leave for a trip to Anchorage. At the time he received this payment, Ms. Brown asked him to hold the check until after he arrived in Anchorage because she was not sure there would be funds to cover the check. (HT, p. 24.)

The Complainant has not been paid for any of the eight round-trip assignments he completed after January 15, 2004. (CX 4.)

### Applicable Law

Section 405 of the STAA was enacted to encourage employees in the transportation industry to report noncompliance with applicable safety regulations governing commercial motor vehicles and to protect these "whistle-blowers" by forbidding the employer from discharging or taking other adverse employment actions against the employee in retaliation for the employee's refusal to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for the filing of complaints alleging such noncompliance. *Brock v. Roadway Express, Inc.*, 481 U.S. 250, 255; 107 S.Ct. 1740, 1744 (1987); 49 U.S.C. § 31105. The STAA protects three distinct types of protected activities: (1) safety-related complaints (either internal or external), (2) refusals to operate a vehicle when the operation of the vehicle would violate Federal safety standards, and (3) refusals to operate a vehicle if (a) an employee has a "reasonable apprehension of serious injury to himself or the public" because of the unsafe condition of the vehicle and (b) the employee has unsuccessfully attempted to have his employer correct the unsafe condition. 49 U.S.C. § 31105(a)(1).

Under the STAA employee protection provision, in order to establish a *prima facie* case, a complainant must show by a preponderance of the evidence that he engaged in protected activity, that he was subjected to an adverse action, and that the respondent was aware of the protected activity when it took the adverse action. *Auman v. Inter Coastal Trucking*, 91-STA-32 (Sec'y July 24, 1992), slip op. at 2; *Dartey v. Zack Co. of Chicago*, 82-ERA-2 (Sec'y Apr. 25, 1983), slip op. at 7-9 (case under analogous provision of ERA). The complainant must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Dec. 15, 1992), slip op. at 2.

### The Complainant Did Not Engage In a Protected Activity

The Complainant asserts that he engaged in a protected activity when he refused to drive on unsafe tires. To show that he engaged in a protected activity, he must establish either that operation of his truck would violate a regulation, standard, or order of the United States related to commercial motor vehicle safety or health or that he had a reasonable apprehension of serious injury to himself or the public because of his truck's unsafe condition and was unsuccessful in his efforts to correct the situation. 49 U.S.C. § 31105.

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<sup>6</sup> The parties seem to be confused about when the Complainant actually received payment for this trip. Ms. Brown indicated in CX 4 that the Complainant was paid on March 1, but she testified that they went to the bank together on February 29, 2004. (HT, p. 24.) However, the Complainant's trip report shows that he left on February 27 for a trip to Anchorage. (CX 1, p. 54.) It appears more likely that he was paid on February 27, 2004, before he left for Anchorage.

### *Driving the Truck Would Not Have Violated A Federal Safety Standard*

The Complainant has not offered credible evidence to establish that his tires were in such poor condition that driving his truck after March 29, 2004, would have actually violated a regulation, standard or order related to commercial motor vehicle safety or health. *Yellow Freight System, Inc. v. Martin*, 983 F.2d 1195, 1199 (2<sup>nd</sup> Cir. 1993). In support of his allegation that his truck tires were unsafe, the Complainant offered copies of repair orders he turned in requesting new tires and the testimony of Mr. Just, another driver.

Mr. Just, who drove to Texas with the Complainant in the Complainant's truck in January 2004, testified that when he saw the tires on the Complainant's truck in January 2004, the tread was all gone and the cords were showing on some of them. (HT, pp. 47, 55.) He expressed the opinion that in January 2004, the drive tires on the Complainant's truck were already in violation of the federal motor carrier safety regulations because they did not have the 2/32 inches of tread required by the regulations. (HT, pp. 55-56, 73.) The Complainant also submitted copies of repair orders dated December 22, 2003, January 15, 2004, and February 15, 2004, in which he stated new tires were needed. (CX 2.)<sup>7</sup>

Mr. Hockenson, Respondent's mechanic, testified that though he didn't see the Complainant's repair orders, he was aware that the Complainant asked Mr. Wright to have his tires replaced on more than one occasion. (HT, pp. 88-89, 110.) He was also aware that Mr. Wright had denied the requests. However, Mr. Hockenson also testified that the Complainant's tires were "well within the limit" for wear. (HT, p. 90.) He added that because the Complainant's tires were virgins, tires that have not been recapped, there was no danger of them blowing even though they were thinner. (HT, pp. 111, 120.)

I am not persuaded that Mr. Just's assessment of the condition of the Complainant's tires in January 2004 was accurate. If he was correct, then the Complainant continued to drive the truck with bald tires with cords showing for two more months, and the drive tires would have been in even worse condition by the time they were replaced in March 2004. Mr. Hockenson testified that the two drive tires that were replaced on the Complainant's trucks in March 2004 were more worn than the Complainant's other tires, but he also said that despite the apparent damage<sup>8</sup> to the tires, the tires still held air and were actually sent out for recaps and used on other equipment after being recapped. (HT, pp. 110-11.) He acknowledged that the tires were "right at the limit," but he was adamant that the cords were not showing on the tires that the Complainant replaced because the tires could not have been recapped if the cords had been showing. (HT, pp. 88, 112, 115.)

Additionally, if the Complainant's tires, especially his drive tires, were bald and showing the cords in January, I find it unlikely that the Complainant would have been able to obtain

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<sup>7</sup> The Complainant alleges that his repair orders were never processed and that he found them in a waste basket in the office when he returned from his runs several weeks later. (HT, pp. 202-3.) It seems implausible that these repair orders would be conveniently at the top of the garbage in a waste basket on different occasions and several weeks after he turned them in. However, even if the repair orders were never processed, Respondent has never denied that it was aware of his requests for new tires.

<sup>8</sup> Mr. Hockenson testified that it appeared the tires had been "spun and damaged" on the Complainant's last trip. (HT, p. 110.)

permits to drive through British Columbia and the Yukon Territory in late February and early March, before those drive tires were replaced. More importantly, the authorizing officer who issued the Complainant's single trip permit on March 1, 2004, certified that the Complainant's truck, which still had the tires that Mr. Just said were bald back in January 2004, was safe to drive on the Yukon Highways. Also, Mr. Muller took over driving the Complainant's truck in April 2004 and put another 50,000 to 60,000 miles on the tires before they were finally replaced, and the Complainant's truck passed numerous safety inspections, including inspections of the tire tread while Mr. Muller drove the truck.

To establish a claim under this provision of the STAA, the Complainant must prove that driving his truck would have actually violated a regulation, standard, or order of the United States related to commercial motor vehicle safety or health. *Yellow Freight System, Inc. v. Martin*, 983 F.2d at 1199. I find he has failed to prove that the tires on his truck on April 1, 2004, when he refused to drive for Mr. Wright, were in such poor condition that driving his truck would have actually violated a commercial motor vehicle safety regulation or statute.

#### *The Complainant's About the Safety of the Tires Was Not Reasonable*

Though the Complainant has not established that driving on his tires would have violated a regulation, standard or order related to commercial motor vehicle safety or health, the Complainant can still establish that he engaged in a protected activity if he demonstrates that his refusal to drive the truck was based on a reasonable apprehension of serious injury to himself or the public because of his truck's unsafe condition and that he attempted unsuccessfully to have the situation remedied.

The Complainant, through his repeated requests for new tires, and his statement to Mr. Wright on April 1, 2004, that he wanted new tires before he would drive, clearly felt that his tires needed to be replaced. Though two of his tires were replaced, he felt they were all unsafe. However, to prevail under this provision of the STAA, he must show that his concern about the safety of driving the truck was a reasonable one. His concern is reasonable if a reasonable person under the same circumstance would conclude that there was a real danger of accident, injury, or serious impairment to health. 49 U.S.C. § 31105(a)(2); *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 99-STA-34, slip op. (ARB Dec. 29, 2000).

The Complainant described two incidents that he felt demonstrated how unsafe the tires were. He testified that there was an incident when he spun out on a hill in Northern Alberta on an icy and slushy highway. He attributed the spin out to lack of tire tread. (HT, p. 211.) He also spoke of an incident in a parking lot in Chickaloon, Alaska, when his tires spun out inside the chains that he had put on them. He attributed this to the lack of tread on the outside of the tire to grab onto the chains. (HT, p. 212.) Though the Complainant attributes these incidents to the condition of his tires, the weight of the evidence does not support his claim that the tires were bald and unsafe. The only corroborating evidence the Complainant offered about the alleged dangerous condition of his tires was the testimony of Mr. Just. As discussed above, I do not find Mr. Just's assessment of the condition of the Complainant's tires in January 2004 to be accurate.

It is also difficult to reconcile the Complainant's allegations about lack of tread on the tires with the testimony and evidence to the contrary offered by Respondent. Mr. Hockenson



testified that though the tires were at their limit on the tread depth, he felt the tires were safe to drive with. Mr. Muller agreed and actually drove the truck with the same tires for an additional 50,000 to 60,000 miles after March 29, 2004, and the tires passed numerous inspections while Mr. Muller was driving the truck. Moreover, a Yukon Highways and Public Works officer determined that the truck was safe to drive on the highways and authorized the Complainant to drive his truck to Alaska on March 1, 2004, with these tires which were allegedly unsafe.

The Complainant did not indicate when he had his two spin out incidents, and it is possible that there were other conditions that contributed to the spin outs. I also note that the Complainant's actions are inconsistent with his claims of concern for safety because of the poor condition of the tires. For instance, the Complainant was ticketed for speeding in this same truck on February 25, 2004, in Indiana. (EX V.) I would hope that the Complainant would not be speeding on the highway in a truck with bald tires that he felt presented a safety hazard to himself and the public when driven at normal speeds.<sup>9</sup>

Moreover, though the Complainant submitted repair requests indicating the possible need for tires, he did not report any tire problems in the daily logs that he prepared. The Federal Motor Carrier Safety Regulations require covered drivers to complete a driver vehicle inspection report at the end of each day documenting any defects or deficiencies that would affect the safety of the vehicle's operation or result in a mechanical breakdown. 49 C.F.R. § 396.11. The Complainant never identified any problems with his tires in any of the daily driver vehicle inspection reports he prepared and signed from December 18, 2003, to March 29, 2004. (HT, p. 188; CX 1.)

He claimed that he did not want to disclose the problems with the tires in his daily log because Mr. Wright asked him not to report his tire problems. (HT, p. 188.) After further questioning, he said that he did not report the tire problems because he was concerned that his truck might be taken out of service if he reported any tire problems, causing him to lose work, and because he did not want to jeopardize the Respondent's safety rating and wanted to make sure Respondent's trucks were kept on the road. (HT, pp. 189-90.) That is not a plausible reason for not reporting his alleged tire problems in his daily log. Reporting a tire problem did not necessarily mean his truck would be taken out of service. In all probability, he would be authorized to get new tires for his truck, which is what happened in March when he purchased replacement tires in Bellingham while he was on a run.<sup>10</sup>

After weighing all the evidence, I find that a reasonable person would not have concluded that driving the Complainant's truck on April 1, 2004, presented a serious danger of injury to the driver or the public because of the condition of its tires.

Thus, I find the Complainant did not engage in an activity protected by the provisions of 49 U.S.C. § 31105(a)(1)(B) on April 1, 2004, when he refused to drive his truck. He has failed to prove that the tires on his truck did not conform to Federal standards and that operation of his truck would cause an actual violation of a Federal commercial motor vehicle safety rule,

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<sup>9</sup> The Complainant did admit that his claim that his tires were unsafe meant that he was speeding while driving an unsafe truck. (HT, p. 193.)

<sup>10</sup> I do note, however, that though the Complainant apparently did have tire problems that were serious enough to have his tires replaced in March 2004, none of his March daily logs reported any tire problems.

regulation, standard, or order. *Yellow Freight System, Inc. v. Martin*, 983 F.2d at 1199; *Beveridge v. Waste Stream Environmental, Inc.*, ARB No. 97-137, ALJ No. 97-STA-15, (ARB Dec. 23, 1997). Furthermore, while he subjectively felt that the tires were unsafe to drive on, he has failed to prove that a reasonable person would have reached the same conclusion about the condition of his tires.

### The Complainant Was Not Terminated

Even if the Complainant had demonstrated that he engaged in a protected activity, he has not shown that he was terminated from employment. The Complainant claims that he was fired because of his insistence on new tires for his truck. Respondent, on the other hand, claims that he was not fired and that he quit and started driving for someone else.

The Complainant stated on cross-examination that he was never told he was terminated. (HT, p. 182.) The fact that he was never told that he was terminated is immaterial if Respondent used words or engaged in conduct that would create a reasonable inference for the Complainant that he had been terminated. *Pennypower Shopping News, Inc. v. National Labor Relations Board*, 726 F.2d 626, 629 (10<sup>th</sup> Cir. 1984). The test is whether a reasonable employee would believe he had been discharged because of the employer's conduct. *National Labor Relations Board v. Champ Corporation*, 933 F.2d 688, 693 (9<sup>th</sup> Cir. 1990).

The Complainant testified that he assumed that he had been fired because when he returned from his trucking assignment with Vic Hoskings Trucking, he found his truck behind a locked fence. He described no other conduct by Mr. Wright or anyone else associated with Respondent that gave him reason to believe he had been terminated. After finding his truck behind the locked fence, the Complainant did not call anyone to get access to the truck. (HT, p. 220.) He made no effort to get access to the truck or to even find out who moved it or why it had been moved. When the Complainant did call someone, he was concerned with finding out where his pay was, and he "wasn't really concerned about getting back to the truck until [he] was paid." (HT, p. 220.) The only employer action the Complainant relied on for his assumption that he had been fired was the fact that his truck had been moved from in front of the fence at Tiny's to behind the locked fence.

Respondent denies terminating the Complainant, and I find that a reasonable person in the Complainant's situation would not have concluded that he or she had been fired without more action or information. The Complainant left the truck unlocked, with the keys in it, in front of a locked fence. It was not unreasonable for Respondent to have the truck moved to behind the locked fence so that it could be secure, especially since the lock on one of the doors was broken, and that door could not be locked. The Complainant took it upon himself to assume he had been terminated without even trying to get access to it or checking to see why the truck was moved.

While the Complainant assumed he had been terminated, Respondent, on the other hand, assumed that the Complainant had quit, though the Complainant never actually said he had "quit." Ms. Brown testified that they believed that the Complainant quit and left to work for another company because the Complainant had told her he was driving for another company. (HT, pp. 163-64.) She felt it was understandable for the Complainant to quit because the

Complainant had not been paid consistently since he started working for the Respondent, and at one point, Respondent was two months behind in paying the Complainant. (HT, p. 23, 25, 38.)

The Complainant told Mr. Wright on April 1, 2004, that he would not drive until he was paid and until his tires were replaced. On April 3 or 4, 2004, just after refusing to drive for Mr. Wright, he accepted an assignment with Vic Hoskings Trucking, and at some time in April, he told Ms. Brown that he was driving for someone else. (HT, p. 164.)

The Complainant also gave Respondent the impression that he had essentially abandoned his job. Respondent's company policy manual states that "under no circumstances will any driver be allowed to leave the truck and trailer without authorization." (EX F.) After arriving in Anchorage on March 29, 2004, instead of parking his truck in his driveway like he normally did, the Complainant left it parked outside the fence at Tiny's, unlocked and with the keys in it, while he was driving for Vic Hoskings Trucking. (HT, p. 182.) He said he left the truck unlocked and removed his personal items because one of the doors was broken and could not be locked. (HT, p. 184.) While the broken door lock would explain his removal of his personal items from the cab of the truck so that they wouldn't get stolen, it does not explain leaving the keys in the truck, which made the truck, itself, vulnerable to theft.

The lack of funds caused by Respondent's failure to pay him promptly created severe hardships for the Complainant, including health problems for the Complainant during his March trip when he had to seek treatment at the VA Hospital. The Complainant complained to the VA doctor about generalized joint pain that had been worsening and attributed it to not eating right. He told the VA doctor that he could not afford to eat right and had not eaten for two days due to lack of funds. (CX 3, p. 2.) The VA doctor diagnosed him as suffering, in part, from poor nutrition. (CX 3, p. 3.) At one point, both his cell phone and his home phone service were stopped due to non-payment, forcing him to incur reconnect fees to resume the services. (HT, pp. 223-24; CX 8, CX 9.)

The Complainant testified that he refused to return to work after March 29, 2004, because he had not been paid for the trips that he made from January up until March 29<sup>th</sup> and was so far behind that he was unable to keep up with his bills and had a lot of financial stress. (HT, p. 177.) His wife had just had a baby and was on maternity leave. There was no income coming in except for his checks which were almost two months late for trips he completed the year before. (HT, p. 177.)

Respondent's abysmal record of payment of sums actually paid to the Complainant serves to emphasize the financial hardship Respondent created for the Complainant and his family. Under Respondent's payroll procedure the Complainant should have been paid on January 15, 2004, for Trip 1,<sup>11</sup> the trip he completed on December 22, 2003, when he completed his next run to Anchorage and returned to Rosby on January 15, 2004. However, he was not paid until January 26, 2004, after he completed Trip 6, which was four round-trips later, and actually five trips after he completed that run. (CX 4.)

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<sup>11</sup> The Trip number references are to trip numbers I assigned to the Complainant's completed driving assignments identified in the chart earlier in this decision.

Similarly, he should have been paid on January 20, 2004, for Trip 2, the round-trip run to Anchorage that he completed on January 15, 2004. Instead, he was not paid for this trip until over a month later, on February 27, 2004,<sup>12</sup> after he returned from Trip 8, over a month late. (CX 4.) He received this payment just as he was getting ready to leave for Anchorage. To compound the financial problems, at the time he received the payment, Ms. Brown asked him to hold the check until after he arrived in Anchorage because she was not sure there would be funds to cover the check. (HT, p. 24.) The payments for the Complainant's completed trips were delayed despite the fact that he turned in his paperwork for the trips in a timely manner. (CX 4.) At the time the Complainant refused to drive for Mr. Wright, he had not been paid for any of the eight round-trip assignments he completed after January 15, 2004. (CX 4.)

While I have concluded that a reasonable driver would not have been concerned about the condition of the Complainant's tires, I have no reason to doubt that the Complainant's concern about the safety of his tires was a sincere one. However, the concern about the tires was overshadowed by the financial problems caused by Respondent's failure to pay the Complainant the wages that were long overdue to him. By April 1, 2004, when the Complainant refused to drive, Respondent owed him wages for eight different trips that he had completed between January 16 and March 16, 2004, including the trip he had just completed for which he had been promised payment upon completion. It was undoubtedly apparent to him that despite Mr. Wright's promise that the Complainant would be paid for his March 17 to March 29 trip from Sikeston, Missouri to Anchorage, Alaska as soon as he delivered the load, he was not going to be paid. In answer to his first inquiry to Mr. Wright about being paid immediately after he delivered the load to Anchorage, Mr. Wright responded that he was "working on it," and then, when the Complainant asked about his pay during the April 1, 2004, telephone call about his readiness to drive, Mr. Wright responded "um, okay."

During the hearing, the Complainant made some statements that reveal the important role financial considerations played in his refusal to continue working for the Respondent. During discussion about the admission of an exhibit the Respondent was offering to show that the Complainant was not terminated, the following exchange took place:

Ms. Brown: ... he [the Complainant] remained on our door policy, and our T-Check for three months as, he was thought to be coming back, I guess. The reason I, we continued to have him there is because we thought he was going to drive. Even on –

Mr. Menter: That was, that was my intentions, until I was provided that I was paid, I just refused to return to work because of that.

(HT, p. 144.)

Later, on cross-examination, the Claimant said:

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<sup>12</sup> The parties seem to be confused about when the Complainant actually received payment for this trip. Ms. Brown indicated in CX 4 that the Complainant was paid on March 1, but she testified that they went to the bank together on February 29, 2004. (HT, p. 24.) However, the Complainant's trip report shows that he left on February 27 for a trip to Anchorage. (CX 1, p. 54.) It appears more likely that he was paid on February 27, 2004, before he left for Anchorage.

And I just could not work any longer for absolutely nothing, you know, keep going out there and having to spend some money out of my pocket for little odds and ends, for things like, you know, extra fuel because of wind resistance and I'm only, you know, given a trip advance of maybe four or five hundred dollars before I leave rather than 1,000 dollars to cover all the expenses, so I'm having to pay for some things out of my pocket. And my wife just having a newborn infant at home, there was just no money being drawn in.

(HT, p. 181.)

After considering all the evidence, I find the Complainant voluntarily stopped driving for Respondent because of Respondent's repeated failure to pay him wages that were long overdue, causing significant financial hardship to the Complainant and his family. There is no evidence in the record that the Complainant was terminated, and he admitted that he was never told he had been terminated. Thus, I find Respondent did not terminate the Complainant's employment, and, thus, did not take adverse action against him in violation of the STAA.

### CONCLUSION

In conclusion, I find the Complainant has failed to show by a preponderance of the evidence that he engaged in an activity protected under the employee protection provisions of the Surface Transportation Assistance Act. I further find that even if he had engaged in a protected activity, he has failed to show that the Respondent terminated him from its employ.

### ORDER

Accordingly, it is ORDERED that the Complainant's May 24, 2004, complaint alleging that the Respondent violated § 405 of the Surface Transportation Assistance Act of 1982 be DISMISSED.

A

JENNIFER GEE  
Administrative Law Judge

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