In the Matter of:

DAVID O. ROBERTS, **ARB CASE NOS. 03-071**
03-095

COMPLAINANT, **ALJ CASE NO. 02-STA-35**

v. **DATE: August 6, 2004**

MARSHALL DURBIN COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
David O. Roberts*, pro se, Moody, Alabama*

For the Respondent:
Elmer E. White, III, Esq., and F. Daniel Wood, Jr., Esq., *The Kullman Firm, Birmingham, Alabama*

FINAL DECISION AND ORDER

David O. Roberts filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), alleging that his employer, Marshall Durbin Company (M-D), terminated his employment because he refused to drive two trucks in violation of DOT requirements. On March 6, 2003, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) finding that M-D had discriminated against Roberts because he engaged in conduct protected by the STAA, and ordered reinstatement, backpay, and compensatory damages. On April 30, 2003, the ALJ issued a Recommended Supplemental Decision and Order (R. S. D. & O.) awarding attorney's fees. The R. D. & O. and R. S. D. & O. are now before the Administrative Review Board (ARB) pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2003).

BACKGROUND

Roberts went to work in the trucking industry in 1978 as a mechanic on tractor-trailers. TR at 21-22. He eventually earned certification as a driver and started working for M-D in 1997. TR at 22-23. He became a driver trainer and then took over a route in late 2000, compiling a clean driving record. *Id.* at 24-27.

At 4:00 a.m. on Monday, September 17, 2001, Roberts checked out his assigned tractor, Truck No. 1, but found a mileage inaccuracy on the post-trip inspection report.[1] According to Roberts, this led him to believe that the previous driver had not physically inspected the truck before completing the report. TR at 27-29. Roberts informed Lily Jeffcoat, M-D's training manager, of his concern. Jeffcoat called the operations manager, James Jamison, and then inspected Roberts's truck. She found a leak in the air brakes and marked the truck out of service. *Id.*at 30-32, 109-10; CX 1-2.

Roberts also marked the truck out of service on his pre-trip inspection report and called Penske's SOS Road Service, which had contracted to repair M-D's trucks. TR at 32, 11-12; CX 3. Penske's repairman, Roy Morrison, came to M-D's depot, but could not find the leak. He certified the truck as road-worthy. TR at 141-45. However, Roberts and Jeffcoat tested the brakes after Morrison's visit, again found the leak, and Jeffcoat put the truck out of service. *Id.* at 33-34; CX 15 at 341. Later that day, Penske replaced some brake couplings on the truck. TR at 146-47, 151-52, 168.

Meanwhile, Jamison arrived at work and told Roberts to take another, older tractor, and make his deliveries. TR at 35. Roberts checked out Truck No. 2, but informed Jamison that its post-trip report was missing and the windshield wipers looked defective. *Id.* at 38. Jeffcoat found the post-trip report, dated September 5, 2001, under the driver's seat, but Roberts pointed out a nine-mile discrepancy between the "finish" mileage and the odometer reading. CX 5, RX 3; TR at 38. Roberts also was given another post-trip report, signed by Jamison and dated September 10, 2001, which covered the missing nine miles.[2] Jamison instructed Roberts to do the pre-trip inspection. TR at

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[1] Post-trip inspection reports, or driver vehicle inspection reports (DVIRs), are required under the Federal Motor Carrier Safety Regulations (FMCSRs), 49 C.F.R. § 396.11; CX 4.

[2] The circumstances under which the second post-trip report was created and given to Roberts are unclear. Roberts testified that Jamison signed the report in front of him and gave it to him. TR at 39. Jamison testified that the report bore his signature but he did not recall completing it. *Id.* at 192-95. Jeffcoat testified that she found both reports in the truck and that she had earlier written in the date and other identifying information on the second report. She further testified that she did not complete it because the truck's taillights were defective and the truck therefore was unsafe to drive, and that Jamison could not have lawfully driven the truck nine miles because he didn't have the required license. *Id.* at 125-28, 132-35.

39. Roberts obeyed, moved the truck across the parking lot, and tested the wipers. *Id*. at 40. He then reported to Jamison that they weren't working properly and suggested that Jamison call Penske to come and repair them. *Id.* at 40-41, 168-70.

Jamison directed Roberts to take the truck to Penske, nine miles away, and have the wipers replaced. *Id.* at 41-44, 169; CX 15 at 345.[3] Roberts refused and took the second truck out of service at which point Jamison told him to go home. TR at 41-45, 169-70. Later, another driver took the second truck to Penske for repair of the wipers, the emergency flashers, a brake light, and the fifth wheel. *Id.* at 42-44, CX 8.

That same day, Roberts telephoned state and federal motor vehicle safety agencies to complain about M-D's practices and seek an investigation. TR at 46-49, Respondent's Post-Hearing Memorandum of Law at 7. The next day, Jamison called Roberts and asked him to come in for a meeting to discuss the previous day's events. TR at 51. Roberts went to the meeting at M-D with a tape recorder. *Id.* at 52-53. Attending were Barry Hildegardner from M-D's human resources department, Roy Montgomery, chief operations manager, driver Marcus Williams, Jamison, and Roberts. *Id.* at 52; CX 15.

Roberts insisted on recording the meeting and, at its outset, told the managers that he had contacted the Department of Transportation (DOT). CX 15 at 327. Jamison stated that M-D's consultants (Federal Motor Carrier Consultants, Inc.) had told him that if a post-trip was missing or inaccurate, a pre-trip would take care of any problem because that's what the pre-trip was for. CX 15 at 338-40; TR at 179-80. Roberts responded: "That's not what is in the regulations." He explained that the driver has to review the post-trip and also be satisfied that the truck is safe to drive. CX 15 at 339; TR at 76-82. After a protracted exchange on whether Roberts would comply with M-D's policy regarding post-trip inspection reports, Hildegardner fired Roberts. TR at 55; CX 15 at 346-60.

ALJ 'S DECISION

Roberts sought an ALJ hearing after the Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) dismissed his complaint for lack of merit. ALJX 1-2. In his R. D. & O., the ALJ summarized the testimony of Roberts, Jeffcoat, Morrison, Jamison, and Jimmy Ramia, M-D's office manager. R. D. & O. at 3-21.

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[3] Testimony differs as to whether Jamison initially directed Roberts to drive his regular route with the defective wipers; however, it is uncontested that Jamison told Roberts to take the truck to Penske to have the defective wipers repaired, and that Roberts refused to do so.

Credibility of the Witnesses

Based on both demeanor and plausibility, the ALJ found Roberts's testimony to be impressive, forthright, sincere, and consistent. R. D. & O. at 22. He found that, by contrast, Jeffcoat's "demeanor belied her testimony in crucial areas," such as her failure to recall the September 17, 2001, conversation between Roberts and Jamison or her telephone call to Roberts the next day, warning him about the meeting and suggesting he bring a tape recorder. *Id.* He also found that Jamison was not sincere, and his statements about the post-trip inspection report he signed on September 10, 2001, were "incredulous" (sic), which "tempered" the ALJ's view of his other testimony. *Id.* The ALJ found that Ramia's testimony was a "catalogue of non-recollection" (as to whether Roberts informed him that he had made complaints to federal and state safety agencies prior to the September 18, 2001, meeting, TR at 153-59) and was therefore unpersuasive.[4]

Protected Activity

Complaints

The ALJ concluded that Roberts made both internal and external complaints that M-D was not enforcing its own rules and those of DOT requiring drivers to complete post-trip inspection reports. R. D. & O. at 26-27. Noting that only internal concerns to Jamison were alleged in Roberts's initial complaint, the ALJ found that Roberts alleged external complaints at the hearing as additional protected activity. *Id.*

Refusal to Drive Truck No. 1

The ALJ found that Roberts correctly refused to drive Truck No. 1, initially because of an inaccurate post-trip inspection report which, he determined, violated DOT regulations. 49 C.F.R. §§ 396.11 and 396.13. The ALJ also found that Roberts constructively refused to drive Truck No. 1 when he put it out of service because of defective air brakes, pursuant to 49 C.F.R. § 392.7. The ALJ concluded that Roberts therefore engaged in protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i),[5] R. D. &

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[4] Also unpersuasive was M-D's argument that Hildegardner, the manager who fired Roberts, was unaware of his protected activities and thus could not have discriminated against him. The ALJ found that Roberts announced his contact with DOT at the start of the September 18, 2001, meeting and that M-D's failure to call Hildegardner as a witness "diminished" the strength of its alleged legitimate business reasons for firing Roberts. R. D. & O. at 22.

[5] This section prohibits discharge, discipline, or discrimination against an employee regarding pay, terms or privileges of employment because the employee refuses to operate a vehicle in violation of a federal commercial motor vehicle safety requirement.

O. at 30. However, the ALJ found that Roberts failed to qualify for protection under subsection (B)(ii), 49 U.S.C.A. § 31105(a)(1)(B)(ii),[6] because he sought and obtained correction of the unsafe condition. 49 U.S.C.A. § 31105(a)(2), R. D. & O. at 30.

Refusal to Drive Truck No. 2.

Similarly, the ALJ found that Roberts properly refused to drive Truck No. 2 because the post-trip inspection report was initially missing, and the two reports that were subsequently found were inaccurate or fasified -- the one dated September 5, 2001, showed a finish mileage of 457,533, which was nine miles fewer than the odometer reading. RX 3; TR at 116, 125; the second was completed by Jamison after Roberts reported the mileage discrepancy. Jamison signed the second report, dated September 10, 2001, that had the correct mileage, but did not physically inspect Truck No. 2. CX 5; TR at 38-39, 192-97. The ALJ found that the first report was inaccurate and that Jamison falsified the second report. He determined that Roberts refused to drive when it violated 49 C.F.R. §§ 396.11 and 396.13. R. D. & O. at 30-32. Roberts therefore engaged in a refusal to drive protected under 49 U.S.C. §31105(a)(1)(B)(1).

The ALJ concluded that Roberts also had engaged in protected conduct by refusing to drive Truck No. 2 because it had defective windshield wipers. During his pre-trip inspection of the vehicle, Roberts found defective windshield wipers with "the rubber . . . coming off the blades and the metal . . . rubbing the window." R. D. & O. at 31; TR at 40. The ALJ credited Roberts's testimony that, after he reported this information, Jamison "got real aggressive" and told him to "just drive the damn vehicle or go the hell home." TR at 40, 169. The ALJ also found that Jamison told Roberts to drive the truck to Penske, the repair contractor, to get the wipers repaired. R. D. & O. at 31.

The ALJ concluded that Jamison's order to drive the truck with defective windshield wipers was "contrary to the literal requirements" of the DOT regulation which provides that no motor vehicle shall be driven unless the driver is satisfied that the "following parts and accessories [which include windshield wipers] are in good working order." 49 C.F.R. § 392.7. Thus, Roberts's refusal to drive Truck No. 2 because of an inaccurate or falsified post-trip inspection report and defective wipers was protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i). R. D. & O. at 32. The ALJ also found protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(ii) because Roberts asked Jamison

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[6] This section prohibits discharge, discipline, or discrimination because a driver refuses to drive based on his or her reasonable apprehension of serious injury to self or the public because of the vehicle's unsafe condition. Section 31105(a)(2) defines such apprehension as a reasonable individual's conclusion in the circumstances that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. 49 U.S.C.A. § 31105(a)(2). To qualify for protection, the employee must have sought, and been unable to obtain, correction of the unsafe condition.

to have Penske come to the depot and repair the wipers, but Jamison refused and ordered Roberts to drive the truck to Penske or go home. *Id.*

Adverse Action and Pretextual Company Explanation

The ALJ found that being sent home and being discharged were adverse actions motivated, at least in part, by Roberts's protected activities. The ALJ dismissed M-D's argument that it fired Roberts only because he repeatedly refused to conform to company policy at the September 18, 2001, meeting. R. D. & O. at 33. The ALJ found that the meeting was merely a formality which M-D used to justify its termination of Roberts's employment. *Id.* at 36. Further, he determined that M-D's reason for discharging Roberts was neither legitimate nor non-discriminatory because its policy permitted adverse action against an employee for adhering to the DOT regulations. *Id.* at 37.

The ALJ concluded that Roberts's operation of either truck would have violated the regulations covering post-trip inspections reports and safe equipment, that his safety complaints related to the defective wipers and post-trip reports motivated M-D's decision to terminate his employment, and that the temporal proximity between his protected activities and his termination established a causal connection that he was fired because of those activities. R. D. & O. at 38.

Relief

The ALJ ordered immediate reinstatement and back pay from June 3, 2002, onward, finding that Roberts did not seek to mitigate damages until then, although he had incidental earnings of $1,175.00 in sporadic contract work for several individuals. R. D. & O. at 39-40; CX 16, TR at 57. M-D failed to prove that Roberts did not mitigate his damages thereafter because it did not establish that comparable jobs were available and that Roberts did not seek them. *Id.* The ALJ calculated the amount due as $23,289.95, which included an offset for the incidental contract earnings. R. D. & O. at 41.

The ALJ also determined that M-D should provide accrued vacation pay and a safety bonus, totaling $2,080.00, expunge any negative references on his work record, and post a notice to all employees about the decision. *Id.* The ALJ awarded $10,000.00 in compensatory damages, based on Roberts's testimony about his embarrassment, humiliation, and emotional stress. *Id.* at 42. The ALJ found that Roberts had never been terminated before and that the firing strained his marriage and affected his ability to provide for his wife as he had customarily done. *Id.; see* TR at 58-61.

STANDARD OF REVIEW

Under the STAA, the ARB is bound by the factual findings of the ALJ if supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

Substantial evidence does not, however, require a degree of proof "that would foreclose the possibility of an alternate conclusion." *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998). Also, 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, (10th Cir. Feb. 19, 2003), mem., 2003 WL 356780 at 445.

In reviewing the ALJ's conclusions of law, the ARB, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

ISSUES PRESENTED

Whether Roberts timely raised the issue of protected activity pursuant to 49 U.S.C.A. § 31105(a)(1)(A).

Whether substantial evidence supports the ALJ's determination that M-D fired Roberts in retaliation for protected activities.

Whether substantial evidence supports the ALJ's award of compensatory damages.

DISCUSSION

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 there is a causal connection between the protected activity and the adverse action. *BSP Trans, Inc.*, 160 F.3d at 47; *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003).

After reviewing the record, we conclude that substantial evidence supports the ALJ's ultimate conclusion that M-D discriminated against Roberts by firing him because of his protected activity. However, we affirm the ALJ's recommended decision on a narrower basis.

The ALJ's Credibility Findings Are Supported by Substantial Evidence

Initially, M-D attacks the ALJ's credibility determinations, stating that he offered "little more than perfunctory descriptions of the basis" for his findings. Respondent's Memorandum of Law at 11. Based on the witnesses' demeanor and the plausibility of their testimony, the ALJ credited Roberts's veracity over that of Jamison, Jeffcoat, and Ramia. R. D. & O. at 21-22.

While we do not think part of Jamison's testimony was necessarily "incredulous (sic)," we conclude that substantial evidence supports the ALJ's assessment of the witnesses' credibility. First, the ARB accords special weight to an ALJ's credibility determination based on witness demeanor. *KP&L Elec. Contractors, Inc.*, ARB No. 99-39, ALJ No. 96-DBA-34, slip op. at 4 n.2 (ARB May 31, 2000). Unlike the ALJ, the ARB looks only at the documentary record and has no opportunity to observe the testifying witness and thus no way to gauge his or her truthfulness. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21, slip op. at 8 (ARB July 31, 2001).

In this case, the ALJ based his credibility findings on his direct observation of the five witnesses at the hearing who provided contrary versions of the events of September 17 and 18, 2001. The transcript of Roberts's testimony supports the ALJ's conclusion that Roberts was a sincere, believable witness who did not equivocate. TR at 20-60. Particularly forthright are his answers to the questions posed by M-D's counsel concerning Roberts's failure to seek work, his knowledge of what the regulations require, and his understanding of M-D's policy regarding post-trip inspection reports. *Id.* at 62-69, 75-90.

By contrast, the cross examinations of Ramia and Jamison, plus some direct questioning by the ALJ, are marked by failures to recall and some equivocation as to the events of September 17 and 18, 2001. For example, Ramia failed to recall if Roberts called him on Tuesday, September 17, could only "guess" if Jamison was upset over Roberts's refusal to drive the second truck, and didn't recall whether he had any conversation with Roberts about his complaints to OSHA and other agencies or the telephone number for Motor Carrier Consultants. *Id.* at 153-59. Although Jeffcoat testified that she remembered Roberts describing Morrison's behavior in checking out Truck No. 1, she couldn't remember whether Roberts had told her that Jamison told him to drive the truck or "go the hell home." *Id.* at 113-17.

Jamison's responses to the ALJ's questions about the September 10, 2001, post-trip inspection report reflect a surprising lack of knowledge. He admitted he signed the September 10, 2001, report "for whatever reason," but didn't recall "ever filling one out." *Id.* at 192-95. On cross-examination, Jamison's responses to questions about the transcript of the September 18, 2001, hearing and about the regulations themselves were equivocal. CX 15, TR at 180-88.

Contrary to M-D's arguments, we conclude that the ALJ's assessment of the four witnesses' credibility is sufficiently specific to withstand scrutiny and is supported by substantial evidence. We therefore affirm his credibility findings. *Poll v. R. J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 1996-STA-35, slip op. at 8 n.3 (ARB June 28, 2002). *Cf. Ertel v. Giroux Brothers Transportation, Inc.*, ALJ No. 88-STA-24, slip op. at 21 (Sec'y Feb. 16, 1989) (Secretary rejects ALJ's credibility findings because he failed to discuss Complainant's account of the conversation and chose to accept the account of Respondent who was not even present during the conversation.)

Was the Issue of External Complaints Timely Raised

The ALJ found that Roberts's protected activities were both internal and external because, while the complaint itself alleged only internal activities, Roberts lodged external complaints with state and federal agencies and advanced these at the hearing. R. D. & O. at 26. M-D argues on appeal that Roberts failed to allege any complaints under 49 U.S.C.A. § 31105(a)(1)(A) and that the ALJ's findings for Roberts hereunder denied M-D due process. Respondent's Memorandum of Law at 18-19; *see* R. D. & O. at 33.

The fundamental elements of procedural due process are notice and an opportunity to be heard. *Yellow Freight Sys., Inc., v. Martin*, 954 F.2d 353, 356 (6th Cir. 1992) citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Administrative Procedure Act mandates that the parties shall be timely informed of (1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. 5 U.S.C.A. § 554(b).

Respondents in STAA cases have the right to know the theory on which the agency or a complainant will proceed. The Sixth Circuit held in *Yellow Freight* that the company had been deprived of due process because the Secretary decided the case under a section of the STAA that was neither charged in any notice given Yellow Freight nor tried by the express or implied consent of the parties. 954 F.2d at 357-359. However, due process is not offended if the parties have fairly and fully litigated an issue—the test is fairness under the circumstances of the case. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. 29 C.F.R. § 18.5(e).

In this case, Roberts's September 26, 2001, complaint to OSHA focused only on his refusals to drive pursuant to 49 U.S.C.A. § 31105(a)(1)(B). ALJX 1. In response to the ALJ's Notice of Hearing and Pre-Hearing Order, which required "a detailed Complaint alleging the nature of his protected activities, each and every violation against Respondent claimed, as well as the relief sought," ALJX 2, Roberts filed another complaint again alleging only protected activities under subsection (B). ALJX 3.

However, in his opening statement at the hearing Roberts's counsel clearly set forth the theory that Roberts made complaints to the company and to federal officials concerning unsafe practices at Marshall Durbin and was fired as a result. TR at 12-13. Counsel specified that Roberts contacted OSHA and the "Federal Motor Carrier Safety people" and asked them to investigate whether he had properly refused to drive without post-trip inspections "and that they failed to meet safety carrier regulations." He also stated that on Tuesday, at about 1 p.m., Roberts informed Ramia that he had complained to federal and state agencies about M-D's safety practices. *Id.* at 14. Counsel concluded his opening remarks by stating that M-D terminated Roberts's employment "solely" because he complained to the federal government and rightfully refused to drive a truck that did not meet federal requirements. *Id.* at 15. M-D's counsel did not object or otherwise respond to these statements at that time.[7] *Id.* at 16-19. Roberts then testified that he informed state and federal agencies of his safety concerns and asked them to investigate. *Id.* at 46-49.

At the hearing, M-D's counsel questioned its witnesses about Roberts's statements that he contacted federal agencies and informed M-D employees and managers about his concern that M-D's practices violated federal safety requirements. Most significantly, M-D called Ramia as its witness to dispute Roberts's testimony that on Tuesday he informed Ramia that he had complained to state and federal agencies about M-D's violations of safety requirements. *Id.* at 48-51. Ramia testified that he could not recall Roberts telling him that Roberts was in the process of filing safety complaints against M-D. *Id.* at 154-59. M-D's whole purpose in calling Ramia as a witness was to counter Roberts's testimony about contacting state and federal agencies and filing a complaint.

In addition, Roberts testified that he told Jamison on September 17 that he intended to investigate Jamison's opinion about pre-trip reports overriding post-trips, and was told to go home. *Id.* at 41. Jamison later denied that Roberts said anything about an investigation of Jamison's actions. *Id.* at 170, 179-84. Further, Jeffcoat testified that she did not hear Roberts tell Jamison that his actions would be investigated. *Id.* at 117. Moreover, Jamison was questioned about Roberts's statements at the meeting that he intended to follow the DOT regulations. *Id.* at 176-88. Again, the testimony elicited by M-D's counsel was directed at countering Roberts's allegations of external and internal complaints and M-D's knowledge of those complaints.

We conclude that although Roberts's complaint did not specifically address the safety complaints he made to federal officials, M-D knew from the opening statement made by Roberts's counsel that Roberts intended to try the case on the theory of retaliation for making such protected complaints. M-D made no objection and instead affirmatively defended against that theory by calling a witness (Ramia) whose sole

[7] Nor does the transcript reflect any subsequent objections to trying the case on that theory.

testimony on direct addressed whether M-D had knowledge of those complaints prior to the meeting at which Roberts was fired. M-D also questioned other witnesses (Jamison and Jeffcoat) about conversations related to that theory of the case. We therefore conclude that M-D consented to try the issue, and may not now object that it was not timely raised.

Requirements of the STAA

Section 405 of the STAA 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).

Roberts Engaged in Conduct Protected by the STAA

Violation of Safety Requirements: The defective windshield wipers

Section 392.7 of the implementing regulations provides: "No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories [including windshield wipers] are in good working order . . . ." 49 C.F.R. § 392.7. We agree with the ALJ's conclusion that had Roberts obeyed Jamison's instruction to drive Vehicle No. 2 to Penske he would have violated the literal requirement of section 392.7 that the vehicle not be driven unless the wipers are in "good working order." R. D. & O. at 31. Manifestly, the wipers were not -- they were torn and dry-rotted, and the metal was scraping the glass; further, their defective condition was not contested.[8] CX 7; TR at 40. *See* 49 C.F.R. § 393.78(a)("Every…truck, and truck tractor, having a windshield, shall be equipped with at least two automatically-operating windshield wiper blades, one on each side of the centerline of the windshield, for cleaning rain, snow, or other moisture from the windshield and which shall be in such condition as to provide clear vision for the driver.")[9]

Jamison testified that even though the regulation (49 C.F.R. § 392.7) was clear, "we can all use common sense on something like that." TR at 175-78. While Monday, September 17, 2001, was a sunny day with not "a cloud in the sky," TR at 136, and Roberts was asked to drive only nine miles to get the wipers repaired, nothing in section 392.7 or the Interpretations sanctioned by the Department of Transportation (DOT) appears to give the driver discretion to drive under such circumstances. In fact, Appendix G of the regulations requires that windshield wipers be "operative at all times." *See* Appendix G to Subchapter B—Minimum Periodic Inspection Standards, Comparison of Appendix G and the new North American Uniform Driver-Vehicle Inspection Procedure at 387 (Feb. 2002); RX 6.

M-D argues that Appendix A of the *North American Standard Vehicle Out-of-Service Criteria* specifically provides that a vehicle shall be placed out of service due to faulty windshield wipers "only in inclement weather requiring use of windshield wipers."

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[8] The record is unclear whether one or both windshield wipers were defective. Jamison refers to the "passenger side" wiper, CX 15 at 346, while Roberts indicates more generally that the wipers were defective, TR at 40. *See* 49 C.F.R. § 392.7, referring to windshield wiper or wipers. Regardless, it is undisputed that they needed repair, and were repaired. CX 7-8.

[9] Under this section, one wiper blade suffices when the vehicle is driven in a driveaway-towaway operation, is part of the property being transported, and has provision for only one blade. There is no indication in the record that the truck in question met those conditions.

Thus, M-D contends, it properly sent Roberts home for refusing to drive Truck No. 2. Respondent's Memorandum of Law at 21.

The definitions of "Out of Service Order" in 49 C.F.R.§§ 383.5 and 390.5 refer to those criteria. They are a reference guide developed and maintained by the Commercial Vehicle Safety Alliance—an association of state, local, provincial, and federal officials—to assist enforcement personnel in deciding whether to a allow a driver, found in violation of the law, to continue in commerce. Thus, they apply only to authorized safety inspections of vehicles on the road. Further, the Supplementary Information guidance states that the out-of-service criteria "are usually less stringent" than the regulations in that they allow a violation of a regulation to continue if it presents no immediate or undue threat to public safety. 63 Fed. Reg. 38792 (1998). *See* Appendix A, *North American Standard Vehicle Out-of-Service Criteria*, Policy Statement (Handbook Edition, 2002).

In this case, neither truck was on the road and enforcement personnel were not involved in Roberts's decision to take Truck No. 2 out of service. Therefore, the out-of-service criteria do not apply. Because it is undisputed that the windshield wipers were not in good working order, and operating the truck would have violated section 392.7, we find that Roberts's refusal to drive Truck No. 2 was protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i) and that M-D had knowledge of that activity through Roberts's interactions with Jamison, Jeffcoat and Ramia.

Violation of Safety Requirement:The defective brakes

Substantial evidence supports the ALJ's finding that the brakes on Truck No. 1 were defective (the testimony of Roberts and Jeffcoat). TR 30-34, 109-113. It clearly would have been a violation of DOT regulations to drive with defective brakes. 49 C.F.R. § 392.7. Roberts therefore engaged in protected conduct when, by taking Truck No. 1 out of service, he refused to drive.

The Inaccurate Post-Trip Reports

The ALJ also found that Roberts engaged in protected activity under subsection (B)(i) by refusing to drive Truck No. 1 because the post-trip report was inaccurate and by refusing to drive Truck No. 2 because the September 5 post-trip report was inaccurate and the September 10 report was "falsified." R. D. & O. at 31-32. He found that the post-trip reports "failed to conform [to] and thus violated" 49 C.F.R. §§ 396.11 and 396.13. R. D. & O. at 32. Our reading of sections 396.11 and 396.13, covering post and pre-trip inspections and reports, does not convince us that an incomplete or inaccurate post-trip report alone necessarily justifies a refusal to drive under 49 U.S.C.A. § 31105(a)(1)(B)(i).

Under section 396.11, every motor carrier shall require its drivers to prepare a written report at the completion of each day's work covering vehicle parts and accessories, including windshield wipers, and identify any defect or deficiency that would affect the safety of operation of the vehicle or result in mechanical breakdown. 49 C.F.R. § 396.11(a)-(b). Prior to requiring or permitting a driver to operate the vehicle,

the carrier shall repair any defect or deficiency listed on the report "likely to affect the safety of operation of the vehicle" and certify on the report that the repairs have been made or are unnecessary. 49 C.F.R. § 396.11(c)(1).

Section 396.13 provides that, before driving a motor vehicle, the inspecting driver shall be satisfied that it is in safe operating condition, review the last driver vehicle inspection report, and sign the report if defects and deficiencies noted by the previous driver were certified to have been repaired. 49 C.F.R. § 396.13(a)-(c).

Neither regulation addresses inaccurate or incomplete post-trip reports. At the hearing, Jamison indicated that a short drive and a pre-trip inspection could "override" an incomplete or inaccurate post-inspection report and "would suffice." TR at 179. Jeffcoat explained that she routinely did "in-house" inspections for M-D's drivers when post-trip reports were missing. *Id.* at 136-39. And Roberts admitted that he had previously operated a truck with an inaccurate mileage recorded on the post-trip report after doing a short drive and pre-trip inspection, and that he would have driven Truck No. 2 if it had not needed the wipers repaired. *Id.* at 75-77, 85-87.

DOT has issued an interpretation of the regulations which specifically permits a substitute post-trip report to be created when, in unusual circumstances, the post-trip report is missing. U.S. DOT Interpretations, Part 396, Question 14 at 462 (May 4, 1997); RX 4 at 3. Thus, it is questionable whether Roberts engaged in protected activity by refusing to drive because the post-trip reports he reviewed were inaccurate. However, as noted above, because the refusals to drive were justified based on the defective wipers and brakes, we uphold the ALJ's determination that Roberts engaged in protected refusals to drive the trucks.

Reasonable Apprehension of Serious Injury

We also disagree with the ALJ's finding that Roberts engaged in protected activity pursuant to 49 U.S.C.A. § 31105(a)(1)(B)(ii). The ALJ found that Roberts had a reasonable apprehension of serious injury to himself or the public "because of the unsafe condition of Truck No. 2" and was unable to obtain correction of the unsafe condition. R. D. & O. at 32.

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. 49 U.S.C.A. §31105(a)(2). Not only must a complainant prove that he had an apprehension of serious injury due to his truck's unsafe condition, but also he must show that a reasonable person in his position would have concluded that the condition of the truck was a real danger to himself or the public. Thus, the reasonable apprehension provision requires that the complainant's apprehension be objectively reasonable. *Dalton v. Copart, Inc.*, ARB No. 01-020, ALJ No. 1999-STA-46, slip op. at 6 (ARB July 19, 2001). Further, to be protected under the STAA, an employee's refusal to drive because of a reasonable apprehension of serious injury must be based on the information available

to the employee at the time of the refusal. *Helgren v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 00-STA-44, slip op. at 3 (ARB July 31, 2003).

The ALJ did not explain the basis for Roberts's apprehension, and we can find no evidence in the record to substantiate a reasonable apprehension. In this case, aside from the post-trip reports, the only information available to Roberts when he refused to drive Truck No. 2 to Penske was that the windshield wiper was rotted out. CX 15 at 344-45. Because he was sent home and did not finish his pre-trip inspection of Truck No. 2, he was unaware of other deficiencies found later—inoperable tail and brake lights and lack of grease on the fifth wheel. CX 8, TR at 43. Roberts maintained that the defective wipers involved safety, but the record contains no evidence that under the circumstances the defective wipers alone presented any threat of serious injury to Roberts or the public. CX 15 at 345-46. In fact, it is undisputed there was no threat of rain on September 17, 2001. Further, Roberts produced no evidence (testimonial or otherwise) that driving the truck to Penske (only nine miles away) with defective wipers on a sunny day when there was no threat of rain would present any threat of serious injury to himself or the public. Because substantial evidence does not support the ALJ's finding under subsection (B)(ii), we reverse it. 49 U.S.C.A. § 31105(a)(1)(B)(ii).

Internal and External Complaints

Substantial evidence supports the ALJ's findings that Roberts made internal and external complaints related to violation of safety requirements and that M-D had knowledge of that protected activity. Roberts testified that he contacted state and federal agencies and advised them that, contrary to federal requirements, M-D was failing to require its drivers to complete post-trip reports, and that, further, he had been directed to drive a vehicle with defective wipers. TR at 46-48. Roberts also made Jeffcoat and Jamison aware of his complaints. *Id.* at 35-42. In addition, he told Ramia of his complaints to federal authorities. *Id.* at 49-51. Further, at the outset of the September 18, 2001, meeting with M-D managers, Roberts specifically talked about his complaints to DOT. CX 15 at 326-27.

Adverse Action and Respondent's Alleged Legitimate Reason for Termination

Initially, we affirm the ALJ's determination that M-D took adverse action in discharging Roberts on September 18, 2001. R. D. & O. at 33.[10] The pivotal question is whether this action was motivated, even in part, by Roberts's protected activities.

[10] There is no evidence that being sent home resulted in any loss of pay or otherwise adversely affected the terms or privileges of his employment. Roberts's case focused solely on the claim of wrongful discharge. Complaint at 1, TR at 12.

M-D contends that it fired Roberts because he repeatedly refused to adhere to the company's policy regarding post-trip inspection reports. Respondent's Memorandum of Law at 23. The ALJ found this reason to be a pretext and not worthy of credence, based on his findings that "confusion" existed over the actual policy and that Hildegardner had decided to fire Roberts prior to the discussion about company policy at the meeting on September 18. R. D. & O. at 34-37.

The ARB has held that, in a case tried fully on the merits such as this, the relevant inquiry is whether the complainant established by a preponderance of the evidence that the reason for his discharge was his protected activity. *Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 98-STA-35, slip op. at 2 (ARB Aug. 10, 1999). *See also Johnson v. Roadway Exp.*, ARB No. 99-111, ALJ No. 99-STA-5, slip op. at 7 n.11 (ARB Mar. 29, 2000). Thus, a complainant must prove that respondent's proffered reasons for taking adverse action were a pretext for discrimination. *See Yellow Freight Sys.*, 27 F.3d at 1138 (adapting *McDonnell Douglas* burden-shifting rules to the STAA).

"[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation . . . . Thus, a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000).

Substantial evidence, including the following, supports the ALJ's conclusion that M-D fired Roberts, at least in part, in retaliation for his protected activities.[11] The transcript of the September 18, 2001, meeting supports the ALJ's finding that Hildegardner was predisposed to fire Roberts from the outset. R. D. & O. at 36-37; CX 15 at 328, 334, 347-49, 352-53. Roberts adverted to his contact with DOT at the outset of the meeting, and the meeting itself was set very shortly after Roberts advised Ramia that he had contacted federal officials regarding safety violations at M-D. CX 15 at 326-27, TR at 5052. In addition, Roberts's refusal to drive based on defective wipers was specifically complained about at the meeting by M-D. CX 15 at 345-46. Throughout the meeting Roberts cited the specific federal requirements he believed M-D was violating, and M-D never explicitly stated that its policy met those requirements. *Id.* at 339-456, 351, 353-60. We therefore must adopt the ALJ's finding that Roberts was fired, at least in part, because he engaged in activity protected under the STAA.

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[11] In making this determination we consider only the activities we found protected above, with the exception of Roberts's refusal to drive Truck No. 1 because it had defective brakes. The ALJ made no finding that any adverse action resulted from Roberts's refusal to drive Truck No. 1 on that basis. The record is clear that M-D did not request or demand that Roberts drive the truck, and there is no evidence that M-D considered Roberts's actions with respect to the defective brakes when it terminated his employment.

Award of Damages and Back Pay

Compensatory damages

The ALJ awarded Roberts $10,000.00 in compensatory damages, based on his finding that Roberts's testimony regarding his humiliation and emotional stress was unrefuted, credible, and persuasive. R. D. & O. at 42. M-D argues that Roberts offered no evidence supporting his bare allegations, and the ALJ erred in awarding damages. Respondent's Memorandum of Law at 28.

An employer that has violated the employee protection provision may be ordered to abate the violation, reinstate the employee, and pay compensatory damages and lost wages. 49 U.S.C.S. § 31105(b)(3). In this case, the ALJ evaluated the complainant's testimony regarding emotional distress and provided a rationale that is supported by substantial evidence. R. D. & O. at 42.

Back Pay

The ALJ found that Roberts made no effort to seek employment from the day of his discharge until June 3, 2002, and was therefore not entitled to back pay for that period. R. D. & O. at 40. The ALJ awarded back pay from June 3, 2002, until March 6, 2003, for a total of $23,289.85, which included an offset for his interim, incidental earnings, and found Roberts entitled to $646.25 per week until reinstatement. R. D. & O. at 41, CX 16.

MD argues that the ALJ's award of back pay violates the requirement that a complainant must make a reasonable effort to obtain employment and fails to address Roberts's subsequent, part-time earnings. Respondent's Memorandum of Law at 25-27. Roberts contends that he should have received back pay from September 18, 2001, the date his employment terminated. Complainant's Brief at 2.

A wrongfully terminated employee is entitled to back pay for the period after the termination of employment. 49 U.S.C.A. § 31105(b)(3) (2004). The employee has a duty to exercise reasonable diligence to attempt to mitigate damages. *Griffith v. Atl. Inland Carrier*, ARB No. 04-010, ALJ No. 02-STA-034, slip op. at 70 (ARB Feb. 20, 2004). However, the employer bears the burden of proving that the employee failed to mitigate. *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1101 (3d Cir. 1995). The employer can satisfy its burden by establishing that "substantially equivalent positions were available [to the complainant] and he failed to use reasonable diligence in attempting to secure such a position." *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 90-ERA-30, slip op. at 50 (ARB Feb. 9, 2001). A "substantially equivalent position" provides the same promotional opportunities, compensation, job duties, working conditions, and status. *Id.*

In this case, substantial evidence supports the ALJ's conclusion that Roberts made no effort to seek employment until June 2002. Roberts admitted as much, explaining that

he was working on his OSHA complaint rather than looking for work. TR at 67-70. We therefore reject Roberts's contention that he is entitled to back pay for the period preceding June 3. Moreover, therefore, M-D did not need to prove the availability of substantially equivalent positions between September 19, 2001 and June 3, 2002. After that, Roberts applied to four companies but was able to obtain only a part-time, on-call position as a driver. *Id.* at 92-95. At that point, M-D had the burden of showing that Roberts was not diligently seeking full-time work by demonstrating the availability of jobs substantially equivalent to the one Roberts had and showing that he made no effort to obtain them. *Johnson v. Roadway Express, Inc.*, ARB No. 01-13, ALJ No. 99-STA-5, slip op. at 4 (ARB Dec. 30, 2002); *see Weaver V. Casa Gallardo, Inc.*, 922 F.2d 1515, 1527 (11th Cir. 1991).

M-D argued that Roberts made no effort to find substantially equivalent employment despite the fact the experienced drivers such as he were "in great demand." Respondent's Memorandum of Law at 25. M-D contends that Roberts's decision to "avoid regular work" relieves it of its burden to prove that substantially equivalent work was available. *Id.* at 26. Also, the ALJ failed to consider Roberts's earnings subsequent to the hearing on August 20, 2002. *Id.*

We disagree that M-D was relieved of its burden to show the availability of substantially equivalent work. Roberts's alleged lack of diligence in seeking full-time work after he obtained a part-time job in June 2002 did not shift the burden away from M-D. Rather, the burden remained with the employer for the entire time. The ALJ determined that M-D met its burden until June 3, 2002, because Roberts admitted that he was not exercising due diligence in seeking jobs.

After that time, M-D introduced no evidence showing either that Roberts was not seeking a full-time job or that substantially equivalent jobs were available. In fact, Roberts testified that his present employer was trying to provide him full-time work and that he was still doing some contractual work. TR at 94. All M-D did regarding substantially equivalent work was to ask the ALJ to take "judicial notice that there is a great need for truck drivers and finding jobs as a truck driver, if you have a proper license, is not a problem." TR at 19. This is not evidence of the availability of substantially equivalent employment. Therefore, for the period after June 3, 2003, M-D did not meet its burden of proving that Roberts failed to mitigate damages. Accordingly, Roberts is entitled to back pay after June 3.[12]

[12] Roberts's entitlement to back pay after June 3, 2002, must, of course, be offset by any earnings from then until he is reinstated. We note that M-D does not challenge the lump sum award of back pay, which was offset by his interim earnings during the period leading up to June 3, 2002, and the restoration of other benefits.

Attorney's Fees

On April 30, 2003, the ALJ issued a Supplemental Decision and Order recommending an award of attorney's fees in the amount of $35,412.50, plus litigation expenses of $825.39, for a total of $36,237.89. M-D's counsel, The Kullman Firm, has paid this amount to Roberts's counsel. Roberts informed the ARB by letter dated May 19, 2003, that he had no objection to the payment of fees to his attorney. M-D has not filed any objection to the amount of attorney's fees awarded. Therefore, we affirm the ALJ's recommended award of attorney's fees.

CONCLUSION

For the above stated reasons, we affirm the ALJ's conclusion that M-D violated the employee protection provision of the STAA by firing Roberts in retaliation for his protected activity pursuant to 49 U.S.C.A. § 31105(a)(1) (A) and (B)(i). We reverse his finding pursuant to subsection (B)(ii), because it is not supported by substantial evidence. In all other respects, we approve the ALJ's recommended decision and order, with the clarification that any earnings Roberts received following the hearing date are also to be deducted in calculating the amount of back pay due until reinstatement or bona fide offer of reinstatement.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge