



**Issue Date: 27 February 2009**

CASE No.: 2008-STA-00001

In the matter of

JOSHUA ISRAEL,

Complainant,

v.

BRANRICH, INC.,

Respondent,

**RECOMMENDED DECISION AND ORDER**

This proceeding arises under the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (formerly 49 USC app. § 2305) and its implementing regulations 29 C.F.R. Part 1978. (“STAA” or “the Act” collectively). The regulations that govern STAA aspects of the hearing in this matter appear in 29 C.F.R. Part 1978, as well as in the general hearing provisions 29 C.F.R. Part 18.

**STATEMENT OF THE CASE**

Mr. Israel (“Israel” herein) filed his initial complaint of discrimination with the Secretary of Labor against BranRich, Inc. (“BranRich” herein), alleging that BranRich discriminated against him, in violation of the Surface Transportation Act 49 U.S.C. § 31105. The complaint was received by the Department of Labor, Occupational Safety and Health Administration, (OSHA) on April 20, 2007. Pursuant to the investigation, the Secretary of Labor, acting through her agent, the Regional Administrator for OSHA found that Israel’s claim had no merit and dismissed his complaints, concluding that Israel could not establish by a preponderance of the evidence that he suffered adverse employment action in retaliation for alleged protected activity under 49 U.S.C. § 31105. On October 2, 2007, Mr. Israel filed a timely appeal of the OSHA determination, and requested a formal hearing with an Administrative Law Judge. A hearing was held on October 29, 2007, in St. Paul, Minnesota.

**ISSUES**

The following issues are presented for adjudication:

1. Whether Mr. Israel engaged in protected activity pursuant to the STAA, when expressing concerns over BranRich’s alleged violations of safety regulations over operating a noncommercial motor vehicle, and/or his

refusal to fly on return trips after delivering various specialty vehicles, under his employment contract.

2. Whether BranRich breached its employment contract with Mr. Israel as an adverse employment action, under the STAA, when BranRich did not reimburse him for travel expenses incurred on a return trip after the completion of a load assignment.
3. Whether BranRich subjected Mr. Israel to adverse employment action, under the STAA, by not assigning him to the loads he desired, by changing the terms of travel plans for return trips, and by ultimately terminating his employment with the company.
4. Whether there is a causal connection between the alleged protected activity engaged in by Mr. Israel and the alleged adverse action taken by BranRich.

### **FINDINGS OF FACT**

#### **Stipulations:**

The parties have stipulated and I find that:

1. The Office of Administrative Law Judges, U.S. Department of Labor has jurisdiction over the parties and the subject matter of this case.
2. Respondent, BranRich, Inc., is engaged in interstate trucking operations and is an employer subject to the Surface Transportation and Assistance Act, hereinafter, STAA of 1982 (49 U.S.C. § 31.105).
3. Complainant, Joshua Israel, is now, and all times material herein, an employee, and an independent contractor as defined in 29 C.F.R. § 1978.101(b) (1).
4. Complainant was an employee of Respondent during the applicable periods in which he was employed as a driver of a commercial vehicle, having a gross vehicle weight rating of ten thousand or more pounds, which was used on the highways in interstate commerce to transport cargo.
5. Pursuant to 29 C.F.R. 1978.102 Complainant filed a complaint with the Secretary of Labor, alleging that Respondent discriminated against him, in violation of § 31.105 of the Surface Transportation Act 49 U.S.C. § 31.105.
6. The original complaint filed with the Secretary was timely.

7. Following an investigation, the Regional administrator, Occupational Safety and Health Administration, issued findings on the complaint dated September 19, 2007.

8. Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on October 2, 2007.

9. The appeal of the complainant satisfied the 30-day time constraints provided by 29 C.F.R. § 1978.105(a).

### Testimony and Evidence of Record

#### *Testimony of Mr. Joshua Israel*

Mr. Israel testified that he began working at BranRich, Inc. on March 14, 2007, as an independent contractor. BranRich is a company that contracts with drivers to deliver new special purpose commercial motor vehicles on one-way routes. Mr. Israel testified that he attended the company's orientation class for new drivers on March 13, where he informed Mr. Hartwig, BranRich's general manager/dispatcher, that he suffered from motion sickness when flying.<sup>1</sup> Mr. Israel testified that at the orientation meeting, Hartwig informed him that his motion sickness problem that he suffered from when flying would not be a problem, and that rental cars are sometimes used for the return trip back to the driver's point of origin. Additionally, at orientation, complainant was informed by Hartwig that BranRich expected its drivers to drive at least 600 miles per day. Complainant did not raise an objection as to the BranRich's expectation of 600 miles per day for its drivers at that time.

On March 14, Mr. Israel left at about eight o'clock a.m. on his first "load assignment," in which he drove a cement mixer to Raleigh, North Carolina. Israel traveled alongside another vehicle driven by another contract driver, Darwin Johnson, who was also on a "load assignment" to the same destination.<sup>2</sup> After leaving the BranRich facility, complainant noticed that Johnson was exceeding the speed limit of 65 miles per hour. Complainant testified that Johnson was instead driving at a speed of 70 miles per hour, stating "that's pretty much maxed out on the truck," and that one would have to push the driving peddle all the way to the floor in order to drive at that speed. Complainant traveled alongside Johnson until they reached Illinois, where Israel decided to decrease his speed, and he believed Johnson continued to travel at a speed of 70 miles per hour, while traveling through Illinois. As a result, Israel almost lost Johnson, but was able to meet up with him again at a rest stop, where Israel informed Johnson that the state police do ticket drivers in Illinois for exceeding the speed limit, and that he has had a problem with the state police, there, in the past. Israel testified that he told Johnson that they were going to pass many state troopers while traveling through Illinois, and that he did not want to be pulled over for speeding.<sup>3</sup> After leaving the rest stop, Israel testified that he was traveling at a speed of about

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<sup>1</sup> BranRich's usual policy is to provide airfare for drivers to return to their point of origin after making a delivery.

<sup>2</sup> When BranRich dispatches an independent contractor for the first time, it is their policy to send a senior driver, in this case Darwin Johnson, with the new driver in order to complete their orientation. (T 137).

<sup>3</sup> Hartwig testified that Johnson did not tell him about any of the safety concerns that Israel allegedly expressed to Johnson concerning complainant's first assignment. (T 153).

55 miles per hour, and that Johnson was ahead of him, stating that it appeared Johnson was speeding while driving throughout Illinois.<sup>4</sup>

While on the load assignment to Raleigh, NC, both Mr. Johnson and Mr. Israel had minor mechanical issues with their vehicles, and so informed the buyer/customer, who directed them through Mr. Hartwig to travel to Villa Rica, Georgia in order for the trucks to receive maintenance care. Therefore, Villa Rica, GA became their end destination point. From there they would have to travel back to their point of origin, which was the BranRich facility in Rochester, Minnesota.

While on the Raleigh trip, Israel talked to Hartwig concerning the motion sickness he suffered from when flying, and he told him that he would not be able to fly back. Hartwig then informed Israel that instead of flying he would be able to pick up a car and that he would only have 24 hours to use it.<sup>5</sup> Israel responded that “there was no way” for him to drive all day, then pick up the rental car and drive all the way back to the BranRich facility, located in Rochester, MN, in 24 hours.<sup>6</sup> He also informed Hartwig that after he drove all day, (referencing his trip from Raleigh, NC to Villa Rica, GA) he would need to rest before he began his return trip back to the BranRich facility, and that Hartwig agreed to a 48-hour car rental and also agreed to pay for one night stay in a motel.<sup>7</sup>

After arriving in Villa Rica, GA, Johnson and Israel took a taxi to the Atlanta airport where Israel picked up a rental car, while the other driver took a flight back to the BranRich facility.<sup>8</sup> After his arrival, Israel testified that Hartwig told him that since he suffered from motion sickness when flying, Hartwig would have to limit him to one-day runs.<sup>9</sup> While he consented to being placed on one-day runs by Hartwig, (T 72) Israel testified that he believed Hartwig had responded negatively towards this conversation, since he was sometimes given two-day assignments in which he believed the terms of the assignments were changed on him. (T 73).<sup>10</sup>

On April 4, 2007, Mr. Israel testified that he received his “settlement,” or “paycheck stub” that itemizes an employee’s reimbursements and non-reimbursement items. He then became aware that he was not being reimbursed for certain items that he believed should have been reimbursed by BranRich. Israel then called BranRich’s accountant, Jen McSweeney, to

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<sup>4</sup> Upon cross examination, Israel conceded that he did not bring up any concerns over Mr. Johnson’s excessive speed throughout the trip with BranRich management while on the trip. (T 80.)

<sup>5</sup> Hartwig testified that he does not recall ever giving Israel a deadline by which he had to return the rental car. (T 154).

<sup>6</sup> Israel testified that the drive from Raleigh, NC to Villa Rica, GA was approximately 380 miles and that the drive would take all day.

<sup>7</sup> Upon cross examination, Israel conceded that the rental car he used on his departure trip back to Rochester, MN, cost more than if he would have used airfare. (T84).

<sup>8</sup> Israel testified that he had informed Hartwig earlier at the orientation meeting, that he suffered from motion sickness while flying, and that Dramamine (a pill to lessen motion sickness) made him “a little screwed up in the head” and that as a driver he was uncomfortable taking it, because it would lessen his ability to drive safely. Hartwig then informed Israel that there was a two-day limit on rental cars.

<sup>9</sup> One-day runs would mean Israel would travel for one day, pick up a rental car and take one day getting back.

<sup>10</sup> Israel testified that when he received two-day assignments from Hartwig, Hartwig would “change the terms” of the assignment once he would reach his end destination, and that this has occurred more than once.

discuss the matter, asking her if he was reimbursed for the motel he stayed at on his return trip from Villa Rica, GA. McSweeney responded that “Hartwig had submitted a note in the trip packet” directing her to deny the reimbursement for the hotel stay on March 17, 2007, the day that Israel was driving back from Villa Rica, GA to Rochester, MN.<sup>11</sup> Israel stated that if the company would not reimburse him for his last motel stay for the return trip, Hartwig was therefore implying that he expected Israel to drive straight to Rochester, MN from Villa Rica, GA without rest,<sup>12</sup> which would be<sup>13</sup> “terribly unsafe,” adding that “you can’t even expect for me to even think about doing that.” McSweeney told Israel that since she received a note from Hartwig in the trip packet to deny reimbursement, she was not allowed to reimburse Israel for the last motel stay. Israel further testified that McSweeney told him that he should not speak to Hartwig concerning the matter and that she would “handle it.”

Mr. Israel testified that Ms. McSweeney never got back to him on this matter. On April 12, 2007, Israel asked her if she had heard anything from Hartwig concerning the matter. He testified that she had not; that she said she would send another email to Hartwig. Instead of discussing matters with Hartwig, Israel again talked to Ms. McSweeney, believing her to have some authority to handle the issue. Israel testified that he then informed McSweeney that he was “experiencing more problems,” and that Hartwig was “breaching all the agreements” that he made with him and “all the arrangements that he made with me about the return trip home.”<sup>14</sup> Furthermore, Israel testified that he stated to her that “every time I make an agreement with Hartwig about returning in the rental car or any arrangement for the return trip he always changes it.” (T 53).<sup>15</sup>

On April 25, about two weeks after Israel’s conversation with Ms. McSweeney, Israel raised the motel reimbursement issue, which concerned the Raleigh/Villa Rica trip, with Hartwig. During the conversation, Hartwig asked Israel, “What’s this really all about,” for which Israel responded that he was “being discriminated against” by the company. Before ending the conversation, Hartwig told Israel to call Stanley “about this matter.” Israel then contacted

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<sup>11</sup> Israel testified that he only received \$85.10 in reimbursement for hotels and believed that he should have received more since he stayed at three motels on the load assignment to Villa Rica, GA.

<sup>12</sup> The amount of the hotel stay that is in controversy is \$50.86.

<sup>13</sup> Mr. Israel testified that the drive from Raleigh, NC to Villa Rica, GA would be about ten hours.

<sup>14</sup> Mr. Israel testified that he had issues with two other load assignments; one to Leland, Mississippi and one to Missoula, Montana. Israel testified that when arriving to Leland, MS the rental car that was arranged for him was only scheduled for a 24-hour period; that he then contacted Hartwig to inform him that he needed rest before making the trip back to Rochester, MN, and that Hartwig arranged for Israel to pick up the rental car the next morning in order for complainant to rest. (T 60). Additionally, Israel’s other issue with the load assignment to Missoula, MT, was that before reaching his destination, Israel was informed by Hartwig that there would be a rental car for Israel to drive back to his point of origin. Upon reaching his destination, Israel was informed by Hartwig that no rental cars were available and instead Hartwig arranged for Israel to take the bus. Israel then called rental car companies at the airport to learn if any rental cars were available, and upon learning that there were rental cars available, Israel then contacted Hartwig to inform him of this. However, Mr. Hartwig told Mr. Israel that he would have to use his own funds to rent a car. Israel testified that he had to wait four hours in the cold before his bus arrived. Upon cross examination, Israel was surprised to learn that it was difficult to get one-way rental cars from the western states because it is difficult for the rental companies to get their cars back. Israel testified that he had rented cars from western states about twice prior to his employment with BranRich, and conceded that the bus fare from Missoula, MT was \$140, while the rental car from Villa Rica, GA cost almost \$270.

<sup>15</sup> Israel testified that he believed that McSweeney would email Hartwig to inform him of Israel’s concerns. He did not testify that he told McSweeney about this expectation.

Stanley to tell him that Hartwig had assigned him to a load assignment and then took it away from him and assigned it to someone else.<sup>16</sup>

Israel had also raised a concern of not wanting to drive in a rental car with Andy O'Neil, whom he was not familiar with, because he did not know if O'Neil was a smoker, and complainant was allergic to cigarette smoke.<sup>17</sup> At this point, Stanley gave Israel the driver's cell phone number so he would be able to contact him to discover if the man smoked. After Israel called the driver and was unable to reach him, he called Stanley to inform him that he believed that Hartwig was discriminating against him.<sup>18</sup> (T 56). Israel testified that Stanley responded by saying "If I hear you say that word (referring to the word "discrimination") one more time I'm going to – I'm going to – I say I swear I'm going to terminate this contract."<sup>19</sup> (T 56). **[This was an unfortunate statement on the part of Stanley, which I finally do not construe, as a statement which admits discrimination for the following reasons ....** Even if stated as perceived by Israel the sudden outburst by Stanley to Israel, in which he testified that Stanley yelled at him that he did not want to hear that word "discrimination" again, was just that, an "outburst," directed at Israel, without any other such outburst, after which Stanley told Israel that he wanted Israel to go and speak with Hartwig about the issue. There is no other testimony regarding Stanley's outburst, I find that however warranted or unwarranted, this outburst was isolated, and he did not refer Israel to Hartwig rather than act on it himself, and thereby avoided what might have constituted an "adverse action" if protected activity had been established. However, even if so found, I find the outburst to have been de minimis. After Israel spoke to Stanley, Israel gave the phone to Hartwig who then had a brief conversation with Stanley. After speaking to Stanley, Hartwig went into the office and returned about 5 to 10 minutes later to ask Israel for the license plates and the permits that the company had issued to him. Hartwig then printed up a contract termination letter for Israel, which both men signed.

Back on April 3, 2007, when Israel returned to Rochester, MN after completing a load assignment, Jeff Stanley, BranRich's safety manager and Vice President, picked Israel up from the airport in order to drive him back to the BranRich facility in Dodge Center, MN. They discussed several issues while on the drive back to the BranRich facility. Israel expressed some of his safety concerns to Stanley, including the "driver fatigue issue and the driver speed issue,

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<sup>16</sup> Here, Israel is referring to a load assignment that was assigned to him going to Bloomington, Illinois, but then was given to Mr. O'Neil, another driver that BranRich employed. Mr. Israel conceded that he was assigned to another load assignment that had lower miles and lower pay than the one that he was previously told he would run. (T 109). The shorter assignment was to the destination of Itala, Illinois instead of Bloomington, IL. During the testimony of Mr. Richardson, BranRich's president, Richardson testified that the mileage for the Bloomington, IL trip was 420 miles, while the trip to Itala, IL was only 370 miles. (T 197). Mr. Richardson further testified that the difference in pay between these two runs was about \$9.20. (T 197).

<sup>17</sup> Mr. Israel is referring to the shorter load assignment that was assigned to him rather than the Bloomington, IL assignment that was given to O'Neil. Upon cross examination, Mr. Israel conceded that he was aware that when he refused to take the load assignment, BranRich was trying to get a driver for that truck immediately. (T 107).

<sup>18</sup> Mr. Israel testified that the alleged discrimination he was subjected to was due to his protests over the unsafe conditions that he brought up with BranRich management. Also, Mr. Israel testified that the "unjust discrimination" which he alleges he suffered was from not being reimbursed for trip expenses that he feels he was entitled to. (T 67).

<sup>19</sup> Mr. Stanley testified that he did not tell Mr. Israel that if he said the word "discrimination" one more time, Israel's contract would be cancelled. (T 190). Instead, Mr. Stanley testified that he told Israel, "Okay, I understand what you're talking about with discrimination. Let's get past that point and let's, you know, we need to work and try to figure out how we can make this work together." (T 191).

and the six hundred mile per day schedule.” He told Stanley that the state police do ticket drivers who speed through Illinois; that it would be best for them not to speed, and that he had received a ticket in the past for speeding, there.<sup>20</sup>

Upon cross-examination, Israel testified that he was aware and remembered signing his employment contract with BranRich that states on the first page, “The contractor agrees to personally pay all necessary<sup>21</sup> expenses which may be incurred.”<sup>22</sup> Additionally, at orientation Israel learned that a BranRich driver will typically fly back to his point of origin after completing an assignment.<sup>23</sup> At this time, Israel did not raise the issue of wanting to drive back in a rental car from a load assignment until after arriving at his first trip destination of Raleigh, NC.<sup>24</sup> Israel also testified that on his first assignment, he logged only 578 miles for one day, which was below the average 600 miles per day that BranRich expects from its drivers, and that Israel did not receive a warning from BranRich for falling below the average mile per day expectation. Also, upon learning that BranRich would pay for a rental car for up to 48 hours, Israel conceded that he was aware that he was able to keep the rental car longer than 48 hours, but that he would have to pay for it out of his own expenses.

Mr. Israel testified on cross-examination that the driver fatigue issues he was having concerned his use with personal motor vehicles that he had to drive after completing his load assignments in order to make the trip back to the BranRich facility. Israel believed that if he were to drive a commercial motor vehicle for BranRich for an entire day and then drive a rental car for the next 24 hours without any rest in between, he would be in violation of the hours of service rules.<sup>25</sup>

He testified that he had an issue with the 600 miles per day expectation that BranRich’s drivers were encouraged to adhere to, since Israel thought that he would have to speed in order to meet this expectation. However, upon cross-examination Israel was surprised to learn that the majority of interstate roads have a speed limit of at least 65 miles per hour, and if one were to

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<sup>20</sup> Israel testified that he raised his concerns about driver fatigue, motel reimbursement and driving over 55 miles per hour through Illinois and Ohio, with Stanley who responded that return trips have specific limitations on costs that cannot be exceeded. Israel also testified that Stanley told him that a commercial driver can drive “650 miles per day legally.” (T 58).

<sup>21</sup> I find that this contract term necessarily implies “reasonable” expenses, not every expense that might be expended by a person who is a party to the contract. Claiming an inclusion of a double car rental payment from the same location because one driver would not drive with another driver who smoked cigarettes, thus, causing two cars to be rented for the return trip from the same city or location, would be a contract issue, and not subject to determination in this proceeding.

<sup>22</sup> “Such expenses shall include but not be limited to fuel transportation costs to and from origin and/or destination, meals, lodging, ground or air travel, and any other expenses whatsoever, except for vehicle breakdowns.” (T 74).

<sup>23</sup> BranRich’s usual standard of practice is to have their drivers fly back to their point of origin. Israel conceded that Hartwig did inform him that normally a driver will fly back to his point of origin. However, Israel was also told by Hartwig that sometimes rental cars are provided for drivers for up to 48 hours for the return trip back. (T 75).

<sup>24</sup> Additionally, Mr. Israel testified that he did not raise his driver fatigue concerns with BranRich until after completing his load assignments. Israel’s only concerns with driver fatigue concerned him operating a personal motor vehicle (a rental car), as opposed to a commercial motor vehicle provided by BranRich.

<sup>25</sup> Department of Transportation (DOT) regulations state that no motor carrier shall permit or require a driver to drive “[m]ore than 11 cumulative hours following 10 consecutive hours off duty; or...[f]or any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty...” 49 C.F.R. § 395.3 (2005) (as amended 68 Fed. Reg. 22,516, Apr. 28, 2003).

drive for eleven hours a day, one would be able to drive more than 600 miles per day legally. Israel conceded that this could be done but that there were factors that could slow a driver down, such as road construction and also minor traffic slowdowns. Additionally, Israel was surprised to learn that one would only have to drive an average speed of 54.54 miles per hour to travel 600 miles in eleven hours. (T 86).<sup>26</sup>

Additionally, Mr. Israel conceded that he was given twelve load assignments after his load assignment to Villa Rica, GA before his termination with the company. However, when asked if his load assignments were regularly scheduled, Israel answered that his load assignments were not scheduled regularly, by giving an example of a time when he asked for a load assignment, and BranRich could not assign one due to slow business.<sup>27</sup> Also, one of Israel's twelve load assignments given by BranRich was a roundtrip load assignment, which meant that a driver was paid going to and from the end destination point. Upon cross examination, Israel conceded that companies give such preferred runs to their loyal employees. Additionally, Israel testified that he usually arrived at work at 7 a.m., and was given load assignments that went out at this time. Upon being asked if it was reasonable for the company to assign load assignments that needed to go out earlier than 7 a.m. to drivers that arrived at work around 3 and 4 a.m., Israel conceded that it was reasonable for a company to make this decision. (T 105).

#### *Testimony of Mr. Charlie Hartwig*<sup>28</sup>

Charlie Hartwig confirmed that he was employed as BranRich's general manager/dispatcher, that he ran the orientation class that Israel attended, and that he said in the orientation that the standard of practice at BranRich was for drivers to typically fly back to their point of origin. He said that Israel responded that "he didn't like to fly;" (T 119) that he suffered from motion sickness when flying; that Hartwig did not believe that Israel had a condition that prevented him from flying; and that he believed Israel could still get on a plane. Hartwig testified that he never had a driver refuse to fly on a plane before; that it had never come up, so that he did not know how to immediately handle the situation. Hartwig then called his manager in Wisconsin, who informed him to rent a car for Israel instead of the usual airfare travel for drivers.<sup>29</sup> On his return, Hartwig discussed the situation with Ms. McSweeney and developed a policy regarding reimbursements for return trips when airfare is available,<sup>30</sup> limited to the amount that airfare would have cost for the same trip. (T 122).

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<sup>26</sup> Israel conceded that he did not receive any pay dock or any issues along these lines from not meeting BranRich's 600 mile per day expectation. (T 87).

<sup>27</sup> This incident took place about one week prior to Israel's termination. (T 90).

<sup>28</sup> Overall, I credit Mr. Hartwig's testimony, after observing his demeanor and consistent review of the facts, although clearly annoyed at Israel for his constant objections and other arrangements due to his inability to fly. This is not an ADA, public accommodations case and that standard is not required.

<sup>29</sup> The usual standard of practice at the BranRich facility is to have the drivers fly back to their point of origin from a load assignment. However, Hartwig testified that there are situations in which the company finds it economically preferable to have the drivers rent a car instead; these load assignments are typically the shorter trips, specifically trips to Ohio and Illinois, because the company cannot find affordable airfare out of those areas. (T 128).

<sup>30</sup> Hartwig testified that a driver had never refused to fly back from a load assignment completion until Israel refused to do so. (T 121).

Mr. Hartwig testified that he did not give Israel a set period of time in which he had to be back from a load assignment, that he continued to dispatch Israel on runs after the Villa Rica, GA load assignment and that they were load assignments which would make it easier for Israel to take a rental car back rather than an airplane. Additionally, when Israel wanted to stay overnight at a motel before picking up a rental car, Hartwig would accommodate him by reserving the rental car for the morning after a load assignment. He testified that Israel never brought up the 600 miles per day expectation, nor did he express any speeding concerns with Hartwig.

Mr. Hartwig testified that he purchased a bus ticket for Israel after the Missoula, MT load assignment because at the time there were no car rentals available and it was an economically feasible option since western states rentals were usually more expensive than back east. On cross-examination, Hartwig testified that when Israel accepted the load assignment to Missoula, MT, Hartwig did not make any arrangements with a rental car company to reserve a car for Israel's return trip prior to Israel's departure.<sup>31</sup> However, before Israel left on the load assignment, Hartwig told Israel that he would be returning in a rental car, but Hartwig was unable to find an available rental car. Additionally, Hartwig testified that he did not recall Israel calling him to inform him that rental cars were available at the airport when Israel reached his destination.

As for the Bloomington, IL load assignment, for which Israel felt was taken away from him, Hartwig testified that he assigned it to O'Neil, because he usually arrived at work around 3 to 3:30 a.m., as opposed to Israel who usually came in around 7 a.m. Since the load assignment's destination was farther away (Bloomington, IL) than the load assignment now assigned to Israel going to Itala, IL, O'Neil would be able to reach his end destination in time to obtain a rental car, travel to Itala in order to pick Israel up, and then drive back to the BranRich facility together. Hartwig felt that this was an economically sound decision for the company to have two drivers, traveling to close locations, to share a rental car on the drive back to the BranRich facility. (T 128). **[I find that these are reasonable, non-discriminatory reasons for Respondent's actions on those matters.]**

Mr. Hartwig testified that on April 26, he and Stanley decided to terminate Israel's employment contract with BranRich based primarily on the fact that they did not receive an answer from Israel as to whether he would accept a load assignment.<sup>32</sup> Instead of responding

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<sup>31</sup> Hartwig testified that there is no requirement by BranRich to give a driver information on what type of transportation vehicle he will be traveling back in prior to the driver's departure on a load assignment, because Hartwig may not know at that time what type of transportation is available. (T 139).

<sup>32</sup> The load assignment that Hartwig is referring to concerns the shorter assignment that Israel did not respond to as to whether he would accept. The shorter assignment was offered to Israel after Hartwig assigned the Bloomington, IL load assignment that was first offered to Israel, but given to Mr. O'Neil, who arrived earlier to work than Israel. Israel would not respond as to whether he would accept the shorter load assignment, because he did not know whether or not O'Neil was a smoker, and therefore refused to ride in a rental car with a driver who could possibly be a smoker. Hartwig testified that Israel's concern over O'Neil's possible smoking habit was only raised on April 25 by Israel, the day of his termination with the company. Hartwig testified that he did not treat Israel any differently than he would another driver who behaved the same way as Israel did when he would not respond to Hartwig's question as to whether Israel would accept the shorter load assignment. **[I find no discriminating or retaliatory motive in this action.]**

with an answer as to the acceptance or refusal of the load assignment Hartwig was trying to assign him, Israel responded that Hartwig was discriminating against him. (T 130). Israel further stated that he felt he was being discriminated against, because Hartwig “wanted him to fly and he couldn’t.” (T 131). Israel did not give Hartwig any other reason for why he felt that Hartwig was discriminating against him.<sup>33</sup>

On cross-examination, Hartwig testified that BranRich pays for most of a driver’s travel expenses, except for the driver’s food expenses. Hartwig also testified that BranRich requires its drivers to take the mandatory “DOT break” after completing 14 hours of service, and that it takes the hours of service rules regulations very seriously.<sup>34</sup> If a driver violates the hours of service rules, then the company would resort to termination of that driver. Hartwig also testified that he never expected Israel to violate the hours of service rules on his return trips back to the BranRich facility, while driving in rental cars. Additionally, when asked if Hartwig would be opposed to having Israel return to BranRich for employment, or for Israel to be reinstated as an independent contractor for BranRich, Hartwig responded that he would be opposed to either because, as he stated “with Joshua Israel it’s, every trip is a task far above and beyond what it should be.” (T 149).

*Testimony of Mr. Jeff Stanley*

Mr. Stanley testified that on April 3, while picking Israel up at the airport to take him back to the BranRich facility, Israel expressed his concerns over not being placed on long runs, and also expressed his belief that the company was discriminating against him because he was unable to fly. (T 160). When deciding to assign longer runs to its drivers, Stanley testified that there were many reasons why it would be preferable for the company to assign shorter runs to Israel, including the fact that liability for the company is greater when its drivers use rental cars on the return trip. Furthermore, he stated that drivers who use airfare to return do not need as much rest as drivers who use rental cars to return; and, therefore, the company can assign more runs to the drivers who need shorter rest periods than the drivers who need longer rest periods. (T 160).<sup>35</sup>

In the April 3 conversation, Israel told Stanley that the trucks that he had to drive should only be running at 43 miles per hour. Stanley informed Israel that the BranRich trucks do not have to run at 43 miles per hour and that the “DOT regulations” do not pertain to these trucks.<sup>36</sup> Furthermore, Stanley testified that unless there are construction problems or traffic accidents, the trucks that BranRich delivers can reach an average speed of 55 to 60 miles per hour.<sup>37</sup> Also, Stanley conceded that he was responsible for creating the 600 miles per day expectation for its

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<sup>33</sup> Hartwig testified that Israel never mentioned that he was being discriminated against for having issues involving safety concerns, hours of service issues, or the miles a driver was expected to drive per day.

<sup>34</sup> See 49 C.F.R. § 395.3 (2005) (as amended 68 Fed. Reg. 22,516, Apr. 28, 2003).

<sup>35</sup> Stanley testified that long runs are usually around 900-1,000 miles, and Stanley gave the examples of the trip to Villa Rica, GA, which was 1,084 miles and the trip to Leland, MS, which was 1,200 miles as “long runs.” (T 163).

<sup>36</sup> I.e., see p. 13, *infra*. Stanley testified that he has been with the BranRich company for eight years, and that he has been specifically assigned to the safety and training areas of the company for five to six years, (T 158) accumulating a great amount of time studying regulations and safety issues for the company.

<sup>37</sup> Stanley indicated that the speed does depend on what state in which the driver is traveling. (T 164).

drivers, which actually averages out to be around 500 to 550 miles per day.<sup>38</sup> Israel also mentioned to Stanley that he had an issue with the runs Hartwig was assigning him, because Israel felt he was not being given the runs that he wanted. Also, Stanley indicated that there were times when Hartwig would assign runs to Israel, and Israel would arrive late to start his run.<sup>39</sup>

Stanley testified that BranRich takes safety issues very seriously, and as the safety officer for the company, he inquires as to every safety issue that arises, including possible hours of service violations, and also complaints regarding possible reckless driving of a BranRich driver. Except after the conversation on April 3, and on the date of Israel's termination, April 26, he did not recall any other time that Israel confronted him with any problems he was experiencing, such as the alleged speeding issues that Israel noticed on his first run with Johnson, or on the issue that Israel expressed over the hours of service rules. (T 171).

On April 26, the day of Mr. Israel's termination, Israel contacted Stanley to inform him that he felt he was being discriminated against because he could not fly, and therefore he was not receiving runs that he wanted. However, Stanley told Israel to deal with the load assignment issue with Hartwig, because Hartwig was the dispatcher, and Stanley did not want to undermine Hartwig's authority. After ending the conversation with Stanley, Israel talked to Hartwig, which ended with Israel returning his license plates to Hartwig and signing a termination contract.

#### *Testimony of Gary Richardson*

Mr. Gary Richardson, the President of BranRich, testified without contradiction that there was a DOT audit that was performed last year on the company and that the result of the audit was satisfactory, which is the highest rating that the Federal Motor Carrier Safety Administration gives. The auditors look at the company's business documents, such as driver logs, and any violations or write-ups, when assessing their rating of the company as to compliance with federal regulations. Richardson testified that the company did not receive any comments from the auditors regarding the information or the perception of the information that they reviewed, and among the reviewed information were records that indicated the trips Israel was assigned. Richardson testified that the length of Israel's trips varied, and included short runs, long runs and the "extremely" coveted "rounders," which are the roundtrip runs that allows a driver to deliver a truck to a location and bring another truck back to the origination, thus getting paid for both trips.<sup>40</sup> (T 196). I credit Mr. Richardson's testimony on this matter.

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<sup>38</sup> Stanley testified that if a driver drove eleven hours at the average speed of 55 miles per hour, a driver would easily average 550 to 600 miles per day, depending on the vehicle. (T 165). Stanley also testified that most drivers at BranRich average the 600 miles per day expectation.

<sup>39</sup> Stanley testified that sometimes a customer would want a truck as soon as possible, and as a business, BranRich would have to assign another driver to the load if Israel arrived late to work in order for it to arrive on time for the customer. Stanley testified that Israel's late arrival would thus adversely affect which runs he was assigned to drive. (T 170). Upon cross-examination, Stanley conceded that there was no documentation showing Israel arriving late to work. (T 193).

<sup>40</sup> Richardson testified that Israel was given eight long runs and four short runs, and compared to other drivers, the runs given to Israel do not seem to be "out of the ordinary." (T 200).

## CONCLUSIONS OF LAW

### **Whether Mr. Israel engaged in protected activity pursuant to the STAA.**

For Mr. Israel to prevail in a discrimination suit under the STAA, an employee has to prove that he engaged in protected activity. Usually, protected activity under the STAA involves filing complaints regarding violation of a commercial motor vehicle safety regulation, standard or order. 49 U.S.C.A. §31105(a)(1)(A)(i)(2007). Or, under subsection B, a plaintiff may also engage in protected activity by refusing to operate a vehicle because it would constitute violation of U.S. regulation, standard or order regarding commercial motor vehicle safety, health or security. Mr. Israel alleges that he engaged in protected activity pursuant to the Surface Transportation Act, by refusing to operate a vehicle due to possible violations of safety regulations. Mr. Israel testified<sup>41</sup> that he informed Stanley, a safety officer within BranRich, that BranRich's 600 miles per day expectation causes a driver to exceed a 55 mph speed limit. Mr. Israel also testified that Hartwig scheduled the use of a rental car directly after Israel would complete a load assignment, which would violate the hours of service regulations by requiring Israel to forgo a mandatory resting period. However, Israel conceded that when Israel expressed these concerns with Hartwig, Hartwig would change the rental car schedule to accommodate Israel. More importantly, Mr. Israel's only driver fatigue issues concerned using a rental car, which is a noncommercial vehicle.

BranRich alleges that Israel has not engaged in protected activity, because pursuant to the STAA, a complaint regarding violation of a motor vehicle needs to involve a "commercial" motor vehicle. 49 U.S.C.A. §31105(a)(1)(A)(i) (2007). A "commercial" motor vehicle is defined as "any self-propelled vehicle used on the highways in commerce principally to transport passengers or cargo" with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. app. § 2301(1). Additionally, under Subsection B, the STAA protects a person who refuses to operate a vehicle if such operation would violate a "commercial" motor vehicle standard. *See Harrison v. Administrative Review Board, U.S. Dept. of Labor*, 390 F.3d 752, 757 (2nd Cir. 2004). BranRich states that Israel's complaint concerning driver fatigue only arose when Israel was operating a rental car, after completion of a load assignment. Additionally, Mr. Israel never made complaints to Stanley or Hartwig concerning driver fatigue when operating a "commercial" motor vehicle. (T 82).

The STAA prohibits an employer from discharging an employee for refusing to operate a vehicle in violation of a Federal regulation, 49 U.S.C. § 2305(b), including the hours of service regulations at 49 C.F.R. Part 395. *See Hamilton v. Sharp Air Freight Service, Inc.*, 91-STA-49 (Sec'y July 24, 1992), slip op. at 1-2. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Aug. 31, 1992). However, the hours of service rules defines "vehicle" as a "commercial" motor vehicle having a gross vehicle weight of 10,001 pounds or more. 49 C.F.R. § 350.105 (2007); 49 C.F.R. § 395.3(a) (2007). Therefore, a rental car that Israel operated on a return trip does not constitute a "commercial" motor vehicle under the Federal hours of service regulations, because

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<sup>41</sup> While listening to Mr. Israel's testimony and observing his comportment and demeanor, I found his testimony to be direct, consistent, and generally truthful. At times it was somewhat jaded by incorrect interpretations of the law, particularly of the application of the STAA, which are set forth herein, and somewhat confused with possible breach of contract claims.

it does not have the requisite minimum weight. *See Kanavel v. U-Haul Company of Northwestern Ohio* 88-STA-9 (Sec'y Oct. 24, 1988). (finding that complainant failed to show that a truck owned and leased by Respondent, U-Haul was a commercial motor vehicle because of failure to present evidence as to the vehicle's weight). Additionally, BranRich states that driving time under STAA is defined as all time spent at the driving controls of a "commercial" motor vehicle. 49 C.R.R. §395.2 (2007). Therefore, Mr. Israel did not engage in protected activity pursuant to STAA, when making complaints concerning driver fatigue because his complaints concerned driving a noncommercial motor vehicle. Additionally, Mr. Hartwig never gave Israel a set time limit in which Israel had to return back to the BranRich facility, which shows that Israel could rest at anytime on a return trip, and, therefore, was not a safety hazard on the road. (T 154).

Mr. Israel also alleges that he engaged in protected activity because he informed Stanley that driving the 600 miles per day expectation would violate safety regulations since it would force a driver to exceed a speed limit of 55 mph.<sup>42</sup> Under the STAA, the Sixth Circuit has agreed with the Secretary's interpretation that Section 405(a) protection is not dependent on actually proving a violation of a federal safety provision. Rather, it is sufficient to show reasonable belief in a safety hazard. *See Yellow Freight System, Inc., v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). Israel testified that he did not achieve the 600 miles per day goal on several occasions. Moreover, he was never reprimanded by BranRich for not meeting the 600 miles per day expectation, and upon cross-examination, was surprised to learn that a driver could average a speed of 54.54 miles per hour and be able to travel 600 miles in eleven hours. (T 86). Also, Stanley credibly testified that one way that BranRich complies with safety regulations is by mandating that their drivers turn in their trip logs in order for BranRich to check drivers' compliance with Department of Transportation (DOT) requirements and hours of service regulations, like the 70-hour/eight-day rule, the ten-hour rest rule and the daily fourteen-hour rule. Additionally, BranRich is routinely audited by DOT, and the audits include review of drivers' logs. (T 165). BranRich was last audited in 2006 and received a satisfactory rating, the highest rating the Federal Motor Carrier Safety Administration gives. Israel provided no credible evidence to the contrary. Even though refusal to speed is considered protected activity under STAA, *see McGavock v. Elber, Inc.*, 86-STA-5 (Sec'y July 9, 1986), Israel's safety concerns were unreasonably founded because not only was BranRich in compliance with federal safety regulations, but the 600 miles per day expectation is legally attainable.

Mr. Israel has not been able to prove he engaged in protected activity. Any concerns of driver fatigue while operating a "noncommercial" vehicle was remedied by Hartwig by scheduling the rental car for a later pick-up time. Furthermore, Israel only complained of driver fatigue while operating a rental car, which is not covered under the STAA. Additionally, the 600

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<sup>42</sup> Mr. Stanley testified that Israel told him that the trucks BranRich transports should only drive at a maximum speed of 43 miles per hour. Stanley testified that he informed Israel that the DOT regulations pertaining to BranRich did not mandate a maximum speed of 43 miles per hour for the type of truck BranRich transports. Stanley indicated that he has studied safety regulations in the trucking business extensively and has never come across anything that indicates a truck of the style BranRich transports, should be driven a maximum speed of 43 mph. Contrary to Israel's belief, Stanley testified that a BranRich truck can average 55-60 miles per hour, depending on the state's speed limit that a driver is traveling through. (T 164). Additionally, Stanley testified that if a driver could travel at the speed of 55 miles per hour for eleven hours, a driver could easily travel 550 to 600 miles in a day depending on the vehicle. (T 165).

miles per day expectation that BranRich expects its drivers to meet, is not a required goal set by the company, and it is legally feasible to meet under the hours of service regulations. Therefore, I find that Israel's safety complaint concerning the 600 miles per day expectation to be unfounded.

**Whether BranRich breached its employment contract with Mr. Israel by not reimbursing travel expenses for a return trip.**

Mr. Israel alleges that BranRich did not reimburse him for motel expenses he incurred on the March 14-16, 2007 return trip back to the BranRich facility. However, Israel testified that he was aware that BranRich's policy was to limit reimbursement for rental car and associated expenses by the cost of the return airfare, should a driver choose not to fly back when air travel is available. Further, Israel acknowledged that, under language in his employment contract, he agreed to personally pay for all necessary expenses that might be incurred, including transportation costs, lodging, ground or air travel.<sup>43</sup> Israel was also refused reimbursement for one motel stay incurred on the return trip of March 17, because it exceeded the cost of available airfare. BranRich stated that even though Israel exceeded the cost of available airfare, it reimbursed him for the rental car and fuel, which alone exceeded the cost of available airfare. Also, Hartwig testified that he does not recall telling Israel that BranRich would pay for a one-night motel stay on the return trip, and that when speaking to Israel about the return trip, Hartwig informed him that it "would be his own expense." (T 121). Additionally, Hartwig testified that before Israel's refusal, a driver has never refused to fly back from a load assignment, and therefore he did not know how to immediately deal with the situation.

Based upon Mr. Hartwig and Mr. Israel's testimony, the expense reimbursements were made in accordance with BranRich's policy and terms of contract between the parties. However, the situation of having a driver refuse to fly back from a load assignment had never arisen, and therefore, BranRich's policy regarding expense reimbursements incurred on a return trip when a driver refused to fly, was newly implemented. Based upon Israel's testimony and the explicit words of his employment contract, Israel was aware of this policy and understood that he was responsible for extra travel expenses incurred on a return trip. Therefore, based upon the terms of the contract, BranRich has a reasonable defense for not reimbursing travel expenses incurred by Israel on the return trip in question. However, the issue of whether BranRich should have reimbursed Israel for travel expenses incurred on the return trip is based upon a breach of contract claim, and I find that BranRich's conduct here is not covered under the STAA.<sup>44</sup>

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<sup>43</sup> Mr. Israel signed his employment contract, which stated that he agreed to "personally pay all necessary expenses...[which] shall include but not be limited to: fuel, transportation cost(s) to and from origin and/or destination, meals, lodging, ground or air travel and any other expenses whatsoever, except vehicle breakdowns..." Contract, p. 1 ¶ 5, admitted as Respondent's Exhibit #1. Drivers would receive advances for use on authorized road expenses, with any remaining authorized expenses being considered upon the gross settlement at the end of the trip, which would include deduction of any such advance. Contract, p. 1-2, ¶¶ 5-6, admitted as Respondent's Exhibit #1.

<sup>44</sup> A pattern and practice of refusals to pay arguably reasonable expense reimbursement claims under such a contract could constitute adverse action in response to proven protected activity. See *Spearman v. Roadway Express, Inc.*, 92-STA-1 (Sec'y June 30, 1993). Under the STAA, such a circumstance has not been established by a preponderance of the evidence, here.

## **Whether BranRich subjected Mr. Israel to adverse action.**

For a plaintiff to prevail in a discrimination case, under the STAA, he must prove that defendant subjected him to adverse action. *Clean Harbors Envtl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).<sup>45</sup> The employer may then present evidence of a nondiscriminatory reason for the adverse employment action. The burden then shifts to the Complainant to prove, by a preponderance of the evidence, that the legitimate reason given by the employer is a mere pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In proving that the asserted reason is pretextual, the employee must prove not only that the asserted reason presented by the respondent is false, but also the discrimination was the true reason for the adverse action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

Mr. Israel alleges that he was subject to adverse action by BranRich, by not assigning Israel the desired load assignments, changing the travel plans for Israel's return trip, and ultimately terminating Israel's employment contract with the company. Israel testified that Hartwig assigned him a load assignment to Bloomington, IL, and then reassigned it to another driver, resulting in a shorter distance load assignment for Israel. However, BranRich alleges that this decision to assign Israel the shorter load assignment was based upon a reasonable business decision.<sup>46</sup> Hartwig testified<sup>47</sup> that because the other driver typically began his day around 3 a.m., while Israel usually came in around 7 a.m., it was more economically feasible and time efficient for the other driver to take the longer load assignment, with both returning via rental car together. (T 127). Additionally, Mr. Richardson, BranRich's president, testified that the longer load assignment was only a 50 miles greater distance, and paid \$9.20 more than the shorter load assignment offered to Israel. (T 197).

Upon cross-examination, Mr. Israel conceded that he realized that the load assignment was time sensitive, because both of the drivers needed to reach their destinations at a certain time in order for both of them to drive back in a rental car together. Also, prior to termination, Israel was assigned to thirteen load assignments, which included two "roundtrip" assignments that are coveted by drivers since it allows a driver to get paid double by delivering a truck to a customer and then bringing a truck back to the point of origin. When assigning load assignments, Stanley testified that there were many reasons why it would be preferable for the company to assign shorter runs to Israel, including the fact that liability for the company is greater when its drivers use rental cars on return trips. Furthermore, drivers who use airfare to return require less rest than drivers who return via rental cars, and therefore, the company can assign more runs to the drivers

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<sup>45</sup> The *Burlington Northern* "materially adverse" standard is applied to an STAA whistleblower case. The *Burlington Northern* "materially adverse" test is whether the employer action could dissuade a reasonable worker from engaging in protected activity. According to the Court, a "reasonable worker" is a "reasonable person in the plaintiff's position." See *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008).

<sup>46</sup> Mr. Stanley testified that Israel would arrive late to work to pick up a load assignment, which would adversely affect which runs he was assigned to, because customer satisfaction was of high priority to BranRich since many of its customers needed the truck at a set time. (T 170).

<sup>47</sup> Overall, I credit Mr. Hartwig's testimony, after observing his demeanor and consistent review of the facts, although clearly annoyed at Israel for his constant objections and other arrangements due to his inability to fly. This is not an American with Disabilities Act, public accommodations case and that standard is not at issue in this case.

who need shorter rest periods than the drivers who need longer rest periods. (T 160). Also, the assignment loads were made by Hartwig, with whom Israel never discussed concerns regarding the hours of service issue, the 600 miles per day expectation, or any other safety issues prior to Israel's termination. (T 131). Therefore, I find that the decisions made concerning assignment of loads were based upon business decisions that took into account time efficiency and driver feasibility, and were not based upon the result of discrimination and/or retaliation against Israel for alleged safety issues he raised.

Additionally, Israel alleged that Hartwig would change the terms of the return trips that were agreed upon prior to Israel's departure. Israel gave the example of the Missoula, MT load assignment, where Israel returned via bus, instead of by rental car. Upon reaching Missoula, MT, Hartwig informed Israel that he would be returning by bus, instead of by rental car, which was the discussed return transportation prior to Israel's departure. Hartwig testified that he reserved bus fare for Israel because at the time, there were no rental cars available. Also, Hartwig testified that BranRich was not required to give a driver information on what type of transportation vehicle he will be traveling back in prior to the driver's departure, because Hartwig may not have known at that time, what type of transportation was available. (T 139). Additionally, Hartwig considered bus fare to be a more economically feasible option for the company, because it was usually expensive to rent a car from a western state in order to drive it back east.

Mr. Israel testified that upon learning that Hartwig arranged bus fare for him, he contacted the airport to learn if rental cars were available, and found that rental cars were available at the airport. He then contacted Hartwig, who informed Israel that he would have to pay for the rental car if he wanted to take one instead. Upon cross-examination, Israel conceded that the bus fare from Missoula, MT was only \$140 total, while the rental car from Villa Rica, GA cost a total of \$270. The decision to arrange bus fare for Israel instead of a rental car seems to have been made because lack of available rental cars at the time of calling, and also for economic considerations. Therefore, I find by a preponderance of the evidence that arranging bus fare for Israel was an act of managerial discretion and not an act of discrimination and/or retaliation for the alleged safety issues raised by Israel. Not only did the act stem from a logical business decision, but Israel never raised his safety concerns with Hartwig prior to Hartwig arranging the bus fare.

Lastly, Israel testified that he was ultimately terminated in retaliation for raising safety concerns. Mr. Hartwig and Mr. Stanley decided to terminate Israel's employment contract with BranRich on April 26, 2007, based primarily on the fact that Israel never answered as to whether he would accept the load assignment going to Itala, IL. Israel acknowledged that this was time sensitive, and that, instead of answering Hartwig as to the acceptance of the load assignment, Israel informed Hartwig he was being discriminated against, because Hartwig "wanted him to fly and he couldn't." (T 131). Furthermore, Hartwig testified that Israel never mentioned that he thought he was being discriminated against for the safety issues he raised. Hartwig, with knowledge of Israel's aversion to flying, would accommodate his situation by assigning him load assignments he thought he could manage, and also by reserving rental cars for Israel's return trips. As discussed previously, Hartwig was unaware of any safety concerns Israel had, and therefore, could not have based his decision to terminate Israel on anything but Israel's inability

to respond to the load assignment offer, which Israel knew was time sensitive. Therefore, I find that the action taken to terminate Israel was based upon Hartwig's not receiving an answer from Israel as to whether he would accept a load assignment, rather than in retaliation for the alleged safety concerns Israel raised.

**Whether there is a causal connection between the alleged protected activity engaged in by Mr. Israel and the alleged adverse action taken by BranRich.**

Finally, Mr. Israel must prove a causal connection between the alleged protected activity he engaged-in and the adverse action he alleges he was subjected-to by BranRich. Israel has not been able to satisfy this element, since none of the adverse action he allegedly suffered was the result of any particular complaint he raised that constituted protected activity under the STAA. Instead the actions taken by BranRich were based upon non-related, legitimate business decisions taken to reduce business costs, promote worker efficiency and meet customer satisfaction. First, regarding the reimbursement denial of the motel expenses for Israel's first return trip as a BranRich contractor, Israel was aware that travel expenses he incurred on his return trip are limited by the cost of airfare. Also, Israel acknowledged that by signing his employment contract, he agreed to pay all necessary expenses that may have been incurred, including transportation costs, lodging, ground or air travel. Therefore, Israel's denial for reimbursement did not stem from an act of retaliation for the safety issues he raised, but instead was pursuant to BranRich's policy of limiting reimbursement by available airfare. In addition, Israel did not raise any safety concerns with Hartwig prior to his termination. Therefore, I find that BranRich's denial of reimbursement for the total cost of his return trip was not a result of discrimination and/or retaliation for alleged complaints regarding safety issues, but rather was based on BranRich's policy of limiting return trip expense by the amount of airfare available, and, at best, subject to state court jurisdiction.

Second, Mr. Israel claimed that he did not receive the load assignment to Bloomington, IL because of the alleged safety complaints he raised. However, Hartwig was in charge of assigning load assignments, and he was never informed by Israel of possible safety issues he had with the company. Therefore, it is unlikely that Hartwig based his decision to assign Israel the shorter distance load assignment on anything but a legitimate business decision. As to Israel's complaint regarding Hartwig changing travel arrangements agreed upon on prior to Israel's departures, Hartwig would not have done so in retaliation to safety concerns raised by Israel because, again, Israel never informed Hartwig of the safety issues that he had. Also, based upon his credible testimony, Hartwig based his decision to assign bus fare to Israel because it was the best economic option for the company; car rentals were then unavailable, and even if one was available, it would have cost the company a substantial amount of money, more than the rental.

Lastly, and most importantly, the decision to terminate Israel was based upon his refusal to answer Hartwig as to whether he would accept a load assignment offer that Israel acknowledged was time sensitive, rather than in retaliation for alleged safety issues raised by Israel. Hartwig testified that he would have terminated any employee's contract, if such employee failed to respond to a load assignment offer such as Israel did. (T 151). Also, Hartwig notified Stanley that Israel would sometimes arrive late to work, thereby causing a late start, which would cause delay in customers receiving their vehicles, and would thus incur additional

business expenses. (T 190). Therefore, I find that Mr. Israel's termination was based upon legitimate business decisions in regards to his refusal to respond to a load assignment offer, and his poor performance at work.

**Whether Mr. Israel suffered discrimination and/or retaliation by BranRich for his refusal to fly.**

Mr. Israel seems to be alleging a wrongful termination claim, and/or breach of his employment contract, rather than a discrimination and/or retaliation claim that is covered under the STAA. Mr. Israel alleges he suffered discrimination and/or retaliation for refusing to fly on return trips that ultimately led to his termination from the company. However, refusing to fly due to the undesirability to fly, is not considered protected activity pursuant to the STAA. *See* 49 C.F.R. § 392.3; *Mace v. Ona Delivery Systems, Inc.*, 91-STA-10 (Sec'y Jan. 27, 1992) (holding that a prima facie case is not established where focus of complaints are not about safety). Rather, engaging in protected activity occurs when an employee files a complaint or has begun a proceeding related to a violation of a "commercial" motor vehicle safety regulation, standard or order; or the employee has refused to operate a "commercial" vehicle because such vehicle operation would violate a U.S. regulation, standard, or order regarding commercial motor vehicle safety, health or security. 49 U.S.C.A. §31105(a)(1)(B)(i) (2007).

However, assuming Mr. Israel could bring a retaliation claim against BranRich for his refusal to fly, he has failed to establish a causal connection between his termination from the company and his refusal to fly. Not only did Hartwig accommodate Israel's situation by assigning him load assignments he thought Israel could manage, which included one-day runs that would be easy for Israel to get there and get back, but Hartwig also set up car rentals at Israel's time preference to give him the resting period Israel requested.

As discussed earlier, I have found that Israel's termination from the company was based primarily on a legitimate business decision that took into account his poor performance at work, including his tardiness, and lastly, his refusal to respond to a load assignment offer. Also, BranRich did not have a mandatory policy that required its drivers to fly back to their point of origin; instead airfare was the usual way BranRich brought its drivers back. Hartwig testified that a driver has never refused to fly back before Israel's refusal, and that he tried to accommodate Israel's situation by the assignment of one-day runs and car rentals for his return trips. As mentioned earlier, Israel was aware of BranRich's policy to limit the travel expenses incurred on return trips by the amount of airfare available, which seems reasonable in light of BranRich's usual method of bringing drivers back by airfare. Therefore, I find that Israel has failed to prove a causal connection between his refusal to fly and his ultimate termination from the company, because the decision to terminate was based upon legitimate and non-retaliatory reasons.

CONCLUSION

In summary, after a review of the record and the statements of the parties, it is my determination that the issues raised by Complainant, Joshua Israel, in this proceeding are primarily contract issues subject to application of the terms of his independent contractor agreement or contract with Respondent, BranRich. Issues bearing on application of the DOT

Safety Regulations under the Surface Transportation Assistance Act were either raised and affirmed and resolved (i.e., mechanical difficulties of the two drivers in both vehicles on his initial trip) or denied (i.e., speeding issues which resulted in no adverse action; or Israel's contention concerning the ability of drivers to travel 600 miles per day which Hartwig demonstrated could be completed while traveling at 54.45 mph.).

As an independent contractor Mr. Israel's agreement with BranRich contains strict limitations on what expenses would and would not be reimbursed, as well as other matters. These "other matters" with Israel resulted from his belatedly disclosed fact that he could not or was unable to fly on the return trips for a unique trucking enterprise that thrived on one-way deliveries of specialty vehicles (e.g., Redi-Mix, fire engines, etc.). The return trip usually involved flying for the drivers, but also involved use of rental cars and buses, etc. In the end, these return trips were subject to interpretation of the independent contract or agreements. In other words, these amounted to issues concerning reimbursements subject to compliance with the terms of the independent contractor agreements. Such issues are usually left to resolution by the parties, and lacking resolution the correct forum involves the courts in the states in which the contracts are signed or referenced in the agreement, in breach of contract proceedings.

Mr. Israel's notice that he could not or would not fly was stated to be a unique experience for BranRich's officials whom, they testified, sought to accommodate his restriction. Initially, this involved reservations of return rental vehicles and sometimes buses. Officials determined that an appropriate limitation on their reimbursement of expenses would be governed by the cost of air flight tickets. As such, placing limits on the number of days in which to return and lodging arrangements became important. While the contract limited reimbursement for food, it appears that sometimes such expenses were reimbursed.

Mr. Israel raised various objections to some of these actual reimbursements which at times involved his arguments concerning his rental car, driving fatigue, rest time and consequential number of days for return trips. For these, and for the use of rental cars, he has sought protection under the STAA as "protected activity." Recognizing that under *U-Haul* and related cases, rental cars are not considered commercial vehicles within the purview of the STAA, I have determined that these disputes are disputes concerning application of the agreement subject to breach of contract actions rather than protected activity governed by DOT regulations and subject to the protections of the STAA.

As such, lacking protection as "protected activity," I find that under the STAA consequential actions resorted to by the employer in this case do not constitute "adverse actions" under the STAA. In particular, Mr. Israel's refusal to inform BranRich officials whether he would take a vehicle when another driver was available and the resulting termination of his contact involved a legitimate act of discretion on behalf of BranRich, which does not constitute a violation of the Act. As a consequence, I find that there has been no violation of the STAA by BranRich. Therefore,

IT IS ORDERED that Joshua Israel's complaint against BranRich be dismissed.

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THOMAS F. PHALEN, JR.  
Administrative Law Judge

**NOTICE OF REVIEW:** The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.