



Issue Date: 18 August 2010

Case No.: **2009-STA-00007**

In the Matter of:

MICHAEL BUTLER,
Complainant,

v.

MIDNIGHT FLYER
AKA RW TRANSPORT,
Respondent.

APPEARANCES: Ellen M. Corcella, Esq.
For Complainant

Vincent Taylor, Esq.
For Respondent

BEFORE: Daniel A. Sarno, Jr.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim under the Surface Transportation Assistance Act (“STAA” or “the Act”), 49 U.S.C. § 31105 (2007), and the implementing regulations found at 29 C.F.R. Part 1978 (2008). The Act provides protection, from retaliatory acts of discharge, discipline, or discrimination, to covered employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules.

On August 13, 2008, Michael Butler (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that Midnight Flyer (“Respondent”) violated the employee protection provisions of the STAA, by firing him for reporting an unsafe steer tire and refusing to drive the truck. On October 27, 2008, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, Region IV, found that the Complainant’s claim had no merit. On November 17, 2008, the Complainant filed objections to the Administrator’s findings and requested a hearing before an Administrative Law Judge.

A formal hearing was held in Indianapolis, Indiana on March 16, 2010, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. At the hearing, the Complainant submitted exhibits ("CX") 1 through 24; however, CX 9 and CX 10 were withdrawn and exhibits CX 12 and CX 13 were rejected as evidence. Transcript ("TR") at 19-25, 27-30, 38. Respondent submitted exhibits ("RX") A through J, but exhibits RX E and RX G were withdrawn as evidence. TR at 40-44, 46, 48-51, 54, 56, 213, 236.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

ISSUES

1. Whether the Complainant engaged in activity protected under the Act, and if so,
2. Whether the protected activity was a substantial factor in the adverse employment action against the Complainant, and if so,
3. Whether the Respondent's reason for the adverse employment action against the Complainant was a pretext for discrimination, and if so,
4. Whether the Complainant is entitled to damages.

STIPULATIONS

1. Respondent is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31101;
2. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101;
3. Respondent is engaged in transporting products on the highways via a commercial motor vehicle with a gross weight rating of ten thousand and one pounds or more;
4. Respondent maintains a place of business in Bloomington, Indiana;
5. Complainant was a truck driver moving various goods on interstate highways through the United States;
6. In the course of the employment, Complainant directly effected commercial motor vehicle safety;
7. Complainant filed a timely complaint on August 13, 2008, with the Secretary of Labor, which was within 180 days of the alleged adverse action on August 8, 2008; and

8. Complainant's exhibit two, the phone records of Midnight Flyer's office, only represents outgoing calls, and does not show incoming calls.

TR at 8-9, 150.

SUMMARY OF THE EVIDENCE

I. Testimony of Gary Burton

Gary Burton is the owner of Hoosier Tire and Retreading, Inc. TR at 61. Mr. Burton testified that his business has been in operation for twenty years and that he has had a business relationship with the Midnight Flyer, the Respondent, for seven to eight years. TR at 62. Mr. Burton testified that he takes care of the Respondent's new tires, retreading, and rim reconditioning and that he usually deals directly with Brandan Williams at Midnight Flyer for pick-up and delivery of the tires. TR at 63. He stated that Midnight Flyer is a weekly customer. *Id.*

Mr. Burton explained that CX 11 is an invoice from Hoosier Tire to Midnight Flyer. TR at 65. Mr. Burton testified that the invoice was for two new truck tires, the balancing of the tires, and a State Tire Fee. TR at 67-68. Mr. Burton testified that according to the invoice, work for unit M-21 was performed on August 12, 2008. TR at 65-66. However, Mr. Burton testified that he does not have any first knowledge of the transaction reflected in the invoice because it was written by one of his salespeople. TR at 68.

Mr. Burton testified that the tires noted in the invoice that were taken off the truck were returned to Midnight Flyer. TR at 69. He stated that the tires were loaded on his truck, taken back to the facility and placed in their garage for retreading purposes. TR at 70-71. He explained that retreading involves putting a new tire on an old casing. TR at 83. Mr. Burton stated that the tires that were removed from M-21 on August 8 were still retreadable or usable, but not necessarily on the front of the truck as steer tires. TR at 75, 77. He explained that state law requires front tires to be at 4/32nds of measurable tread depth at the point that they can be retreaded. TR at 75. However, he testified that front steer tires are not retreaded for steer tire application; rather, he stated that the tires would have been used for drive or trailer application. TR at 83.

Mr. Burton made it clear that a tire is not retreadable if steel cords are showing. TR at 76. Under such circumstances, Mr. Burton stated that the tire would be considered a junk tire. TR at 76-77. If the tires from the M-21 truck were considered junk tires, there would have been a disposal fee on the invoice. TR at 74. He further explained that because there was no disposal fee on the invoice, it meant that the casings on the tires were still retreadable. *Id.*

Mr. Burton admitted that he had no personal recollection of the condition of the tires other than that they were taken back to Midnight Flyer to be retreaded. TR at 76. However, he testified that generally when Midnight Flyer brings in steer tires to be repaired the tires are not in

very bad shape. TR at 78. He stated that Brandan Williams is pretty good about keeping up the maintenance on the company's trucks. *Id.*

II. Testimony of Michael Butler

Michael Butler, the Complainant, explained that his family owned a trucking company and he has been around trucks since he was approximately seven years-old. TR at 92. He stated that his father taught him to drive a semi-truck on private property when he was between 10 and 12 years old. TR at 92. He also noted that his father and the mechanics at his family's business taught him how to repair semi-trucks. TR at 93.

Mr. Butler stated that he is familiar with the safety requirements for tires and he listed several tire conditions that would violate the safety regulations: uneven wear, tire that will not hold air pressure, steel cords that are showing or a tread depth below 4/32nds. TR at 93. He explained that once a tire tread depth hits 4/32nds it needs to come off the steer axle. TR at 93-94. He also stated that if a tire has uneven wear it should come off right away because it could explode or come apart, causing the truck to turn over. TR at 94. He further explained that uneven wear will cause the steel cords to show through the tire, and that a tire is not retreadable once the cords are showing. *Id.*

On February 21, 2008, Ronald Williams, the president and owner of Midnight Flyer, hired Mr. Butler to be a truck driver. TR at 96-97. Mr. Butler stated that while working for Midnight Flyer, Brandan Williams assigned him a truck to drive and he would drive the assigned truck unless he was told to change trucks. TR at 97-98. The Complainant noted that Brandan Williams is Ronald Williams' son and the shop foreman in charge of maintenance. TR at 98. He further testified that Jason Argeropolos is Ron Williams' son-in-law and the company's dispatcher. TR at 98-99. Mr. Butler explained that he believed Ronald Williams was in charge of hiring and firing employees, Brandan Williams supervised the maintenance of the vehicles and Jason Argeropolos assigned routes to the drivers. TR at 99-100.

On Friday, August 8, 2008, Mr. Butler's route was from his home in Gosport, Indiana to Kentland, Indiana, from Kentland to Louisville, Kentucky, and then back to drop his truck off at the shop. TR at 104. Mr. Butler testified that, at the time, he was driving truck M-21 and had been using that truck for roughly 30 days. TR at 105. He noted that prior to driving his truck that day, he did a visual inspection of the truck and then he did a second inspection when his truck was being loaded in Kentland. TR at 104. He stated that he did not notice anything unusual about the truck during either inspection. TR at 105.

The Complainant next delivered his load in Louisville, Kentucky, and did a third inspection of the truck. TR at 114. This time, Mr. Butler noted that his tires were turned sharply to the right and he was able to see bald areas with the steel cords showing on the right inside steer tire. TR at 116. Mr. Butler testified that a truck should not be operated when the steel cords are showing, so he called Jason Argeropolos, the company's dispatcher, at 3:19 P.M., to explain the condition of the tire. TR at 117, 133-135. He stated that he told Mr. Argeropolos that it would not be safe to leave Louisville with the tire in its current condition. *Id.* Mr. Butler

testified that Mr. Argeropolos told him that he would need to call Brandan Williams because he was in charge of maintenance issues. TR at 118, 151.

Mr. Butler stated that, although his truck was unsafe to drive, he could not stay at the GE plant since GE has a strict policy against trucks sitting on their property. TR at 119-120. The Complainant explained that once he left GE and was on the road, there was nowhere to pull the truck over since he was by railroad tracks. TR at 120. He stated that there was a slight shoulder next to one stretch of road, but it was too dangerous to be on the side of the road with cars coming. *Id.*

Mr. Butler testified that he immediately after he spoke to Mr. Argeropolos, he called Brandan Williams at 3:49 P.M. TR at 118, 139-140, 196. While the phone records show that the Complainant spoke with Ronald Williams at 3:46 P.M., the Complainant claimed that his phone records were inaccurate and that he called Ronald Williams earlier in the day, before he noticed the problems with the tires. TR at 155-156, 196. Mr. Butler stated that, at that time, he told Ronald Williams that he needed to get his belongings out of another truck he had been driving because he was worried about someone taking his things. TR at 136-137, 155-156.

Mr. Butler explained that he called Brandan Williams to tell him that the tire was showing steel cords and bare spots that needed to be fixed right away. TR at 121-122. He further stated that he told Brandan Williams that the truck was very overdue for service, that it was unsafe and that he would not operate the vehicle until it was fixed. TR at 22. He also claimed to tell Brandan Williams that, if the tire could not be fixed because it was Friday night, then he needed to be assigned to another vehicle. TR at 122, 156. Mr. Butler stated that Brandan Williams responded by yelling at him and telling him that he was done with him, that he was tired of dealing with the problems with the trucks and that Mr. Butler could either drive the truck or go home. TR at 122, 156. Mr. Butler also testified that Brandan Williams said he should have brought the truck in for maintenance already. TR at 122-123. Mr. Butler testified that he then explained to Brandan Williams that the truck was already overdue for maintenance when he picked it up. TR at 23. He stated that Brandan Williams replied that he knew when the maintenance was due, that he kept records and that he would do the maintenance when he was ready to do it. *Id.* Mr. Butler testified that Brandan Williams hung up on him and did not offer to come down or authorize a tire replacement. TR at 122, 129.

The Complainant testified that after speaking with Brandan Williams, he called Ronald Williams at 3:51 P.M. to explain the situation. TR at 140, 157. He testified that he left the following message on Mr. Williams' phone:

Ron, this is Michael, I said, I have a tire issue with the truck, it's showing steel cords, it's bare, I just noticed it, it's unsafe, and I explained this to Jason. ... [H]e said to call Brandan, I had called Brandan and started to explain this to Brandan, he started yelling at me and told me that he was tired of dealing with me, he was tired of dealing with the trucks, it was late Friday evening, to either drive the truck or go home and that he was screaming at me like he has done in the past and that he hung up on me and left me stranded on the side of the road with, you

know, a semi ... And I said, you need to call me right away because I don't want to operate this truck like this.

TR at 124.

Mr. Butler explained that after he left the message for Ronald Williams, he called Mr. Argeropolos again at 3:56 P.M. TR at 141. He testified that he told Mr. Argeropolos that he felt like he was expected to drive on a bad tire. TR at 130. He further felt, because of Brandan Williams' tone of voice, that he had been fired and that Mr. Argeropolos needed to talk with Ronald and Brandan Williams to see what they were going to do if they wanted him to continue his route. *Id.* He also stated that he explained to Mr. Argeropolos that he would not run the weekend load unless the tire was fixed or he was authorized to drive another truck. TR at 130-131.

Mr. Butler stated that at 4:25 P.M., he received a voicemail from Ronald Williams telling him that there would be no issue getting his belongings out of the truck and that if there were any problems he should call him back. TR at 126, 142-143, 159. Mr. Butler stated that he thought the message meant that he was fired and that he should get his things and move on. TR at 143.

The Complainant testified that he told both Mr. Argeropolos and Ronald Williams that he believed he had been fired. TR at 124-125. He stated that he believed that he was fired by the tone of Brandan Williams' voice during the conversation they had while he was in Louisville, Kentucky. TR at 128. He explained that he believed that if he did not drive on the unsafe tire, then he was fired right then or was going to be fired as soon as he got back. *Id.* However, Mr. Butler admitted that Ronald Williams never directly told him that he was fired. TR at 182-183.

Mr. Butler asserted that, although he did not want to drive the truck in an unsafe condition, he continued to drive it back because he felt like he was going to be fired if he did not bring it back. TR at 125, 127. He testified that there was no place to get over to the side of the road, and even if he could, he did not know what to do because he had not been given instructions from Brandon or Ronald Williams. TR at 125. Mr. Butler explained that on his way back to Midnight Flyer from the GE plant there are no truck stops, gas stations or rest stops to pull into. TR at 188. When he got back, Mr. Butler testified that he parked the truck in front of the garage, removed his things from the truck, and went home. TR at 127-129. He stated that he had no additional conversations with anyone from Midnight Flyer that night. TR at 129-130.

Mr. Butler testified that while he was working on August 8, his fiancée received work orders for him to deliver a load on Sunday, August 10. TR at 161-162. Mr. Butler explained that he usually starts driving his load for Sunday on Saturday afternoon or evening. TR at 162. Mr. Butler testified that on Saturday, August 9, he returned to the shop at 1:10 P.M. to see if the tire was fixed on his truck. TR at 161. He stated that the truck was loaded, but the same tire was still on the truck and no one was working in the shop. TR at 162, 168, 173. Mr. Butler indicated that when he realized that the truck was not fixed, he turned in all the paperwork for the Sunday load to the office and did not make the Sunday run. TR at 164. The Complainant asserted that he refused to drive because the truck was not fixed. TR at 164. He testified that he did not call

Ronald Williams after noticing that the truck had not been fixed because he felt that he had already made it clear that he would not drive the truck if it was not fixed. TR at 202-204.

Mr. Butler stated that Ronald Williams called him on Sunday night at 9:25 P.M. and left a voicemail asking why he was not working. TR at 165, 205. The Complainant claimed that he did not get the message until mid-day on Monday, after he had gone to the unemployment office to report that he had been fired for refusing to drive the truck. TR at 165, 207.

III. Testimony of Amanda Brown

Amanda Brown is Mr. Butler's fiancée. TR at 216. She testified that on August 8, 2008, she went to Midnight Flyer's office to pick up Mr. Butler's paycheck and paperwork for a Sunday load. TR at 216-217. She stated that she picked up the papers from Mr. Argeropolos between 2:30 and 3:30 P.M. TR at 217. Ms. Brown testified that, later in the day, she picked Mr. Butler up from Midnight Flyer and he showed her the tire at that time. TR at 218-219.

Ms. Brown testified that on August 9, 2008, Mr. Butler called to the Respondent's shop to see if the tire had been fixed, but no one answered. TR at 217. She stated that around 10:00 A.M., she drove Mr. Butler to Midnight Flyer so that he could work. TR at 217-219, 223. She testified that when they got to Midnight Flyer the truck was in the same position and the tire was in the same condition as it had been when Mr. Butler dropped it off on Friday. TR at 218. She explained that she could see little steel wires hanging out of the front passenger-side tire. *Id.* She testified that after they saw that the tire was not fixed and that there were no instructions or keys to another truck, she told Mr. Butler to put all the paperwork back in the slot because he was obviously fired. TR at 219. Ms. Brown stated that they returned to Midnight Flyer around 1:00 P.M. to make sure no one had fixed the tire. TR at 219-220.

Ms. Brown stated that Ronald Williams called on Sunday and left a voicemail. TR at 224. Since Mr. Butler was already asleep, she listened to the voicemail. *Id.* She testified that Mr. Williams asked, "Mike, where are you?" TR at 225. She explained that she told Mr. Butler about the voicemail on Monday, but that he did not call Mr. Williams back because he assumed he had been fired. TR at 226.

IV. Testimony of Ronald Williams

Ronald Williams is the owner of Midnight Flyer. TR at 228. He started the business in 1978 and it was incorporated in the 1990s. TR at 228-229. As president of the company, he is the only one in charge of hiring and firing employees. TR at 229. Ronald Williams testified that he hired Mr. Butler and that Mr. Butler worked for Midnight Flyer for approximately five months. TR at 229-230.

Ronald Williams explained that on August 8, 2008, he was not at the office because he was getting ready for a family wedding on August 9, 2008. TR at 237. However, he remembered that Mr. Butler called his cell phone at 3:46 P.M. and left a message about needing to get some of his things out of another truck that he had been driving. TR at 238. Ronald

Williams stated that Mr. Butler's voicemail did not mention a problem with a tire or an argument with Brandan Williams or Mr. Argeropolos. TR at 239.

Ronald Williams testified that, about a half-hour after he received the voicemail from Mr. Butler, he received a call from Mr. Argeropolos. TR at 240. Mr. Argeropolos told him that Mr. Butler had an argument with Brandan Williams and had refused to move his truck until he talked to Ronald Williams about the situation. *Id.* Ronald Williams stated that, after speaking with Mr. Argeropolos, Mr. Butler tried to call him again, but he was not sure whether Mr. Butler left another message. *Id.* Ronald Williams testified that he called Mr. Butler back and left a message asking him what was going on and to call him back, but he stated that Mr. Butler never called him again. *Id.* Ronald Williams explained that none of the messages from Mr. Butler mentioned having a tire problem. *Id.* Ronald Williams testified that he called Mr. Butler again on Sunday evening at 9:25 P.M. to find out whether Mr. Butler was going to do his work scheduled for Monday. TR at 241.

Ronald Williams explained that if someone told him that a tire had cords showing, he would direct them to Brandan Williams because he is the head of the shop and maintenance. TR at 241. He stated that Brandan Williams would call the tire shop, which could take care of the tire. *Id.* He testified that the tire shop replaces tires anytime day or night. *Id.* Ronald Williams asserted that he would not expect anyone to drive on a tire with cords showing because it has the potential of blowing out and killing someone. TR at 241-242.

Ronald Williams testified that a lot of the company's drivers do Sunday runs to Hopkinsville, Kentucky for extra money because it does not interfere with their regular weekly work. TR at 245. He stated Mr. Butler was dispatched to do the run on Sunday, but he did not do it. TR at 245-246. So, the run had to be postponed until Monday. *Id.* Ronald Williams testified that no one realized that Mr. Butler was not going to do the run. TR at 246.

Ronald Williams explained that shop employees do not work on the weekends, but there are spare trucks that can be used. TR at 261. He testified that if a truck needs something that cannot wait, the driver can use a different truck until the regularly assigned truck is fixed on the next working day. *Id.* Therefore, it was not mandatory that Mr. Butler take the truck with the bad tire and he could have taken another truck for the Sunday run. TR at 261-262.

V. Testimony of Jason Argeropolos

Jason Argeropolos has been Midnight Flyer's dispatcher for seven years. TR at 264. He stated that his job is to assign freight to the drivers and to coordinate their schedules. *Id.*

Mr. Argeropolos testified that on the afternoon of August 8, 2008, he overheard part of a conversation between Brandan Williams and Mr. Butler. TR at 266. He stated that at the end of the conversation he heard Brandan Williams give Mr. Butler the choice to cooperate or park the truck and be done. TR at 266. He explained that Brandan Williams sounded upset at the time. *Id.* However, he could not hear Mr. Butler on the other end. TR at 267.

Mr. Argeropolos stated that Mr. Butler had called him earlier in the day because the drivers call in to the dispatcher about once a day. TR at 267. However, he did not recall Mr. Butler discussing tire problems at that time. *Id.* Mr. Argeropolos testified that, after the conversation between Brandon Williams and Mr. Butler, he received another call from Mr. Butler. TR at 267-268. He stated that Mr. Butler told him that he was frustrated with the way that Brandon Williams had treated him and talked to him on the phone. TR at 268. He recalled that Mr. Butler had said that he did not know if he was going to run the weekend load. TR at 268. Mr. Argeropolos further testified that Mr. Butler said that he had told Ronald Williams the same thing about Brandon Williams and that he was not going to move the trailer until he heard back from Ronald Williams. TR at 268.

Mr. Argeropolos testified that he responded by saying that he could not get involved in Mr. Butler's relationship with Brandon Williams, but that he needed to know whether Mr. Butler was going to do the weekend load. TR at 268-269. Mr. Argeropolos stated that he never got a definitive answer from Mr. Butler regarding the weekend work. TR at 269. Mr. Argeropolos explained that he spoke with Mr. Butler later, but Mr. Butler had not heard from Ronald Williams and he still did not know whether he was going to work that weekend. TR at 269-270. He testified that if he had known that Mr. Butler was not going to take the load, he would have needed the paperwork back from Mr. Butler in order to make other arrangements for it to be delivered. TR at 270. He stated that Mr. Butler did not tell him that he had been fired. TR at 273.

VI. Testimony of Bob McCoy

Bob McCoy stated that he started working for Midnight Flyer as a full-time truck driver in 1992, but has worked part-time since 2002. TR at 278-279. Mr. McCoy testified that while working for Midnight Flyer, he has never had trouble having the trucks maintained. TR at 279, 281.

Mr. McCoy testified that if he needed maintenance done, he would come in and tell the mechanic. TR at 280. He explained that if he was on the road, he would call Midnight Flyer to tell them what he needed done and they would tell him where to go to get his tires repaired or replaced. TR at 280, 284. He stated that if a tire was unsafe, he would not buy a new one without consulting Midnight Flyer, but he would expect them to tell him to replace the tire after he reported the problem. TR at 285.

Mr. McCoy stated that he is familiar with the GE plant in Louisville, Kentucky. TR at 282. He testified that if he had a problem with a truck while at the plant, he could park the truck there or stop at a full-service truck stop 16 miles up the road on Interstate 65. TR at 282-283. He recalled an instance where he went with another driver to pick up a truck that had been parked at GE for two or three days. TR at 285.

VII. Testimony of Brandon Williams

Brandon Williams has worked for Midnight Flyer for 15 years as the maintenance supervisor. TR at 286. He testified regarding the regular maintenance that each truck receives.

He explained that every 15,000 miles, “A service” is performed on the trucks. TR at 288, 290. “A service” requires completing a checklist of approximately twenty (20) inspection items, including measuring the tread depth of each tire, on the truck. TR at 288. After “A service” is completed, a sticker is placed in the windshield of the truck with the date of the previous service and the mileage when the next service is due. TR at 288-289. Brandan Williams testified that drivers are to tell him when a truck gets within 1,000 miles of being due so that he can make arrangement for the service to be performed in the shop. TR at 288-289, 293. If necessary, he would put the driver in a different truck for a day while service was being done on his issued truck. TR at 294. He stated that he has a record of what maintenance has been performed on each truck going back to the mid-nineties. TR at 290.

Brandan Williams testified that Mr. Butler drove truck M-21 between July 3 and August 8, 2008, and the maintenance records show that truck M-21 did not receive any maintenance during that time. TR at 291. He explained that truck M-21 received its “A-service” at 240,000 miles and Mr. Butler was assigned the truck when it was at 246,300 miles. TR at 292. Therefore, the truck had another 9,700 miles to go before maintenance was due again. *Id.*

Brandan Williams stated that on August 8, 2008, Mr. Butler called him around 3:40 P.M. and told him that the truck was due for service. TR at 294. Brandan Williams testified that he asked Mr. Butler for the mileage of the truck and was told that the truck was 5,000 miles overdue for service. *Id.* He explained that he became aggravated with Mr. Butler because a couple months earlier they had the same conversation regarding another truck that was overdue for service. TR at 294-295, 297.

Brandan Williams testified that, as a result of the overdue maintenance, he gave Mr. Butler an ultimatum. TR at 298. He said that he told Mr. Butler that he could bring the truck in for maintenance, or, if he was unwilling to do that in a responsible manner, he could bring the truck back and be done. *Id.* However, Brandan Williams testified that he does not have the authority to fire anyone and it would ultimately be Ronald Williams’ decision whether to let him go. TR at 298-299. He noted that it was likely that Mr. Butler would have received a warning letter instead of being fired. *Id.*

Brandan Williams testified that, during the conversation, Mr. Butler mentioned, as an aside, that a tire needed to be looked at and was starting to wear on the edge. TR at 295, 314. However, Brandan Williams stated that the tire was not the main point of the conversation and that Mr. Butler did not mention that the tire had cords showing or was down to the point of having slick spot of any kind. TR at 296, 313. Brandan Williams asserted that, if Mr. Butler had mentioned steel cords, he would have had the tire replaced immediately. *Id.* Brandan Williams testified that he could have called one of 15 vendors near GE, one of which he deals with on a regular basis, to come replace the tire and it would not have been more expensive than replacing the tire with a local dealer. TR at 308-309. He explained that if the truck had been stopped with exposed steel cords then the company would have been given a ticket and the truck would have had to be taken out of service and they would have had to pay a service truck to come and change the tire. TR at 296. He also noted that there are many places close to the GE plant where a driver could stop to get a tire looked at or replaced, including a gas station with truck parking across the street from the GE plant, two truck stops a few miles down the road, a rest stop about

20 miles away and a truck stop with a tire shop in Seymour, Indiana. TR at 309-310. Brandan Williams stated that, at the end of the conversation, Mr. Butler had not made a claim that the tire was too bad to drive on. TR at 300. Furthermore, Brandan Williams testified that Mr. Butler never mentioned refusing to drive the truck because of the tire. TR at 327.

Brandan Williams testified that he did not have any further communication with Mr. Butler that day. TR at 297. He stated that he called Mr. Butler at the end of the day, but he did not get an answer and he did not leave a message. TR at 297, 300. Mr. Williams explained that he did not try to correct the tires for Mr. Butler's next load, but stated that, if a problem with the truck had been communicated to him, he would have had Mr. Butler switch trucks for that load. TR at 319-320.

Mr. Williams stated that on Monday the truck was taken to the shop to have service done. TR at 300. He explained that a couple things were found wrong with the truck and were fixed. *Id.* He also noted that one of the tires was close to needing to be replacement, but that no part of the tire was to the point of being illegal. TR at 300-301. However, they replaced the tire instead of waiting another 15,000 miles until the next service. TR at 301.

Mr. Williams testified that the code allows for some irregular wear on the edge of a steer tire and he read the following from page 549 of the Federal Motor Carrier Safety Regulations Handbook § 393.75(b):

Any tire on the front wheel of a bus, truck or truck tractor shall have a tread groove pattern depth of at least 4/32nds of an inch when measured at any point on a major tread groove. The measurement shall not be made where tire bars, humps or fillets are located.

TR at 301; CX 16. He explained that tie bars, humps or fillets are a description of the rippled effect around the edge of tire. TR at 301-302. He stated that the effect is called a decoupling groove and is designed so that the side of the tire will absorb wear. TR at 302.

VIII. Phone Records (CX 1-CX 4)

The Complainant submitted the following phone records to show the calls that were made between the parties from August 8, 2010, through August 10, 2010.

A. Phone Records of Michael Butler (CX 1)

On August 8, 2010 the following calls were shown on Michael Butler's phone records:

- 3:19 P.M.: Michael Butler called the office.
- 3:46 P.M.: Michael Butler called Ronald Williams
- 3:49 P.M.: Michael Butler called Brandan Williams
- 3:51 P.M.: Michael Butler called Ronald Williams
- 3:56 P.M.: Michael Butler called the office

B. Phone Records of the Midnight Flyer's Office (CX 2)

The parties stipulated that Midnight Flyer's phone records show outgoing calls, but does not show incoming calls. TR at 150. On August 8, 2010, the following outgoing calls were recorded:

- 4:57PM: a call was made to Michael Butler
- 6:04PM: a call was made to Michael Butler

C. Phone Records of Brandan Williams (CX 3)

On August 8, 2010, the following calls were shown on Brandan Williams' phone records:

- 3:49PM: Brandan Williams received a call from Michael Butler
- 5:26PM: Brandan Williams called Michael Butler

D. Phone Records of Ronnie Williams (CX 4)

On August 8, 2010, the following call was shown on Ronald Williams' phone records:

- 4:23: Ronald Williams called Michael Butler

On August 10, 2010, the following call was recorded:

- 9:25PM: Ronald Williams called Michael Butler

IX. Letters

A. Letter from Ronald Williams to Michael Butler (RX A)

You were dispatched on a load Friday afternoon, and also a load for Sunday. You were given all the information for these loads at that time. Also at that time your significant other was given the paperwork and the gate pass for your Sunday load. You were well aware of your pick up times and delivery times and destinations. Repeated attempts were made to get ahold of you. Our messages were not returned, as you have not returned any of our calls, we assume you have quit your job.

B. Letter from Ronald Williams to Michael Butler dated July 16, 2008 (RX B)

We have received several reports of unsafe driving on your part. These complaints have come from legitimate sources, we received one in February, one in June and two more this month already! These are report that you are excessively speeding, tailgating cars, cutting in and out of traffic, and not being a courteous driver.

From our end it seems as though you have been doing a good job, but a big part of your job is to be a safe and careful driver. If you are running late for somewhere, call the office so we

can let your pick up or delivery know. There is no reason to be driving this recklessly, if this continues, it is just a matter of time before you have a serious accident. If we receive more legitimate complaints about your driving, we will have to terminate your employment. Please make a conscientious effort to drive more cautiously.

C. Letter dated August 27, 2008 from Ronald Williams, Brandon Williams, and Jason Argeropolos (RX C, CX 21)

Driver, Mike Butler called Brandon Williams on 8/8/08 to report that his truck was 5000 miles (approximately two weeks) overdue for a scheduled service, and that he had a steer tire that was going to need to be replaced. There is a sticker in the window that he had been told before he took the truck that it is his responsibility to let Brandon know when the truck was within 1000 miles of being due for service. This is not the first time Mr. Butler did not let us know it was due for a service.

Mr. Butler was allowed to take the truck home nightly as a convenience, and to save him gas money on commuting. Brandon told him that if he couldn't get the truck into the shop when it was due for service, and for routine maintenance, then he would not be allowed to take the truck home at night, he would have to leave it at our shop nightly. This being the only way we can make sure the truck is being properly maintained. At this point Mr. Butler continued arguing that this is not his responsibility. Brandon told him he was not going to argue with him about it. **If he refused to cooperate** with this request then, he could just bring the truck in and park it. That was the end of the conversation between Brandon and Mr. Butler.

At the point of this conversation Mr. Butler was down in Louisville, KY with a trailer loaded with returns that were to be taken back to Kentland, IN Monday morning. This is a load that Mr. Butler normally did 4 times a week. He had already picked up his trailer in Louisville, knowing that it was to be delivered to Kentland Monday morning for a reload. He had a set appointment at 9:00 a.m. Monday morning.

At this point, he had also been dispatched on a load he was to run on Sunday. He was going to leave hi Kentland trailer at our yard while he ran a separate load on Sunday. On Friday his fiancée came to the office to pick up his check, and asked to pick up the paperwork for this load, and the gate pass.

After this Mr. Butler called Jason Argeropolos, the dispatcher, and told him that he was not putting up with this anymore from Brandon. He then said he was going to pull over and wait until Ronnie called him. He asked him if he was going to do the weekend load, and if he wasn't he needed to let him know so that he could get the paperwork and gate pass back, so we could have someone else get the Sunday load picked up. He never responded either way and that was the end of their discussion.

Ronald F. Williams then tried to call him, with no response.

Brandon Williams tried to call him back, with no response.

Jason Argeropolos tried to call him back, and left him a message that if he was not going to do these loads he needed to let him know, so that he could get someone else to do them.

At this point, we assumed since we had not heard from him, he had calmed down and was going to finish his loads, as already planned.

No more contact or conversations were exchanged with Mr. Butler. We all left the office Friday evening, after business hours were over. Monday morning Jason and Brandan came in to find Mr. Butlers truck emptied out, and the gate pass and bills for his Sunday load slipped through the opening in the door.

DISCUSSION

The STAA employee protection provision prohibits disciplining or discriminating against an employee who has made protected safety complaints or refused to drive in certain circumstances:

(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 refuses 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. § 31105(a).

In order to prevail on an STAA complaint, a complainant must make a *prima facie* case of discrimination by showing that: (1) he engaged in protected activity, (2) the employer was aware of his activity, (3) he was subject to adverse employment action, and (4) there was a causal link between his protected activity and the adverse action of his employer. See *Clean Harbors Env'tl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987). Under the STAA, the ultimate burden of proof usually remains on the complainant

throughout the proceeding. *Byrd v. Consol. Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, slip op. at 5 n.2 (May 5, 1998).

The employer may rebut the *prima facie* case by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The employer must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse action. The explanation provided must be legally sufficient to justify a judgment for the employer. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995). Once the employer produces evidence sufficient to rebut the “presumed” retaliation raised by the *prima facie* case, the inference simply “drops out of the picture,” and the trier of fact proceeds to decide the ultimate question. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-11 (1993).

The complainant then has the opportunity to prove, by a preponderance of the evidence, that the employer's reason for the adverse action was mere pretext for discrimination. *Burdine*, 450 U.S. at 253. Specifically, complainant must establish that the proffered reason for the adverse action is false and that his protected activity was the true reason for the adverse employment action. *St. Mary's Honor Center*, 509 U.S. 502, 507-508 (1993); *see also Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995) (holding that the complainant must “establish that the employer's proffered reason is pretextual by establishing either that the unlawful reason, the protected activity, more likely motivated the [employer] or that the employer's proffered reason is not credible and that the employer discriminated against him.”). Although the burden of production shifts, the ultimate burden of persuasion remains with the complainant to show that the employer intentionally discriminated against him. *St. Mary's Honor Center*, 509 U.S. at 507-508. If the proof establishes that the adverse action was undertaken for both discriminatory and nondiscriminatory reasons, i.e., “mixed motives,” the employer must show by a preponderance of the evidence that it would have taken the same adverse action absent the complainant's protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

I. Complainant's *Prima Facie* Case

To prevail on the allegation that Midnight Flyer violated the STAA, the Complainant must prove: (1) that he engaged in protected activity as defined in the STAA and that Midnight Flyer was aware of the protected activity; (2) that Midnight Flyer discharged, disciplined or discriminated against him; and (3) that there is a causal connection between the protected activity and the adverse employment action. *BSP Trans., Inc. v. United States Dep't Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (*Clean Harbors*); *Yellow Freight Systems, Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987).

A. Protected Activity

Subsections (A) and (B) of the quoted provision are referred to as the “complaint” clause and the “refusal to drive” clause, respectively. *LaRosa v. Barcelo Plant Growers, Inc.*, ALJ Case No. 96-STA-10, slip op. at 1-3 (ARB Aug. 6, 1996). The Act protects three types of activities:

filing a complaint, refusing to operate a vehicle because of an actual violation or refusing to operate a vehicle because of a reasonable apprehension that the vehicle is unsafe. The Complainant's claimed protected activities consist of (1) reporting a tire that was in violation of safety regulations and (2) refusing to operate a vehicle because the tire was in violation of safety regulations.

1. *Filing a Complaint*

Although the Complainant never filed a formal written complaint regarding the steer tire, under the STAA, a complainant's safety concerns can be oral rather than written. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that the driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors); see *Clean Harbors Env'tl. Serv. Inc. v. Herman*, 146 F.3d 12, 20-22 (1st Cir. 1998). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. *Clean Harbors Env'tl. Serv.*, 146 F.3d at 20-22 (1st Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance). The Court further stated:

We recognize [the Employer's] legitimate due process concerns that the internal communications to the employer must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. In the absence of such notice, the beneficial purposes of the act cannot be accomplished. Clearly there is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. The risk of inadequate notice to an employer that the employee has engaged in protected activity is greater when the alleged protected complaints are purely oral.

Id.

The Complainant testified that on August 8, 2008, he called the dispatcher, Jason Argeropolos, and told him that steel cords were showing on a steer tire. He stated that Mr. Argeropolos told him he would need to talk to maintenance supervisor, Brandan Williams. Complainant testified that he immediately called Brandan Williams and complained that steel cords were showing on a steer tire on the truck and that the tire needed to be taken care of right away. He asserted that Brandan Williams became agitated with him, yelled at him and told him to either drive the truck or go home.

Mr. Butler further testified that he then called the owner of the company, Ronald Williams, and left a message on his voicemail saying the following:

Ron, this is Michael, ... I have a tire issue with the truck, it's showing steel cords, it's bare, ...it's unsafe, and I explained this to

Jason. ... [H]e said to call Brandon, I had called Brandon and started to explain this to Brandon, he started yelling at me and told me that he was tired of dealing with me, he was tired of dealing with the trucks, it was late Friday evening, to either drive the truck or go home

However, the evidence does not correspond to the Complainant's testimony. First, Mr. Argeropolos testified that he spoke with Mr. Butler earlier in the day, but he did not recall Mr. Butler mentioning a tire issue. Second, Brandon Williams asserted that Mr. Butler called him and mentioned that a steer tire needed to be looked at, but never stated that the steel cords were showing or that the tire was unsafe to drive on. Brandon Williams said that, if he had realized that the tire was unsafe, he would have had the tire changed immediately. Brandon Williams also testified that Mr. Butler reported that the truck was 5,000 miles overdue for maintenance. Brandon Williams explained that he became irritated with Mr. Butler because the maintenance was overdue and told him that he could either cooperate by bringing the truck in for maintenance or he could go home. Finally, Ronald Williams testified that he received a message from Mr. Butler at 3:46 P.M. in which he requested to get his things out of another truck, but did not mention a bad tire. Ronald Williams explained that he then received a call from Mr. Argeropolos, who told him that Mr. Butler and Brandon Williams had gotten into an argument and that Mr. Butler was refusing to move until he heard from Ronald Williams. Ronald Williams testified that he called Mr. Butler back, but did not get through, and that he did not receive any other calls from Mr. Butler.

Furthermore, the phone records do not correspond with Mr. Butler's version of events. Mr. Butler testified that he called Mr. Argeropolos regarding the tire, and then immediately called Brandon Williams because the tire was unsafe to drive on. However, the phone records show that Mr. Butler called Mr. Argeropolos at 3:19 P.M. and then called Ronald Williams at 3:46 P.M. Both Mr. Butler and Ronald Williams testified that the call to Ronald Williams at 3:46 P.M. was regarding items that Mr. Butler left in another truck and that Mr. Butler did not mention a tire problem. The phone records show that Mr. Butler did not call Brandon Williams until 3:49 P.M., a half hour after his initial call to Mr. Argeropolos and after he left Ronald Williams the voicemail unrelated to the tire problem. Mr. Butler's testimony suggests that he was urgently trying to get his tire fixed. However, if Mr. Butler had noticed an unsafe tire that needed to be immediately fixed and he was desperately trying to get instructions on how to get it fixed from his supervisors, he would not have made an unrelated call to the owner, Ronald Williams, in which he did not mention the tire or wait half an hour to call the maintenance supervisor, Brandon Williams. Such behavior is not consistent with the urgent need for immediate action described in Mr. Butler's testimony.

The burden of proof remains with the Complainant to prove that he filed an oral complaint. With the conflicting testimonies and phone records, the Complainant's testimony is insufficient to satisfy his burden of proof. Based on the testimonies and phone records, I find that neither Mr. Argeropolos nor Ronald Williams was aware of a bad steer tire. Furthermore, I find that Mr. Butler and Brandon Williams did engage in an argument over bringing the truck in for maintenance and that Mr. Butler mentioned that the steer tire needed to be look at. However,

I find that Mr. Butler has not sufficiently proven that his statements to Brandan Williams regarding the steer tire clearly communicated that a safety complaint was being made.

2. *Refusing to Operate a Vehicle*

Section 31105(a)(1)(B) of the STAA also prohibits discriminatory treatment of employees in either of two “work refusal” circumstances. First, an employee may not be disciplined for refusing to operate a vehicle because “the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health.” Second, an employee may not be disciplined for refusing to operate a vehicle because “the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.” This second ground for refusal carries the additional requirements that (1) the unsafe condition causing the employee’s apprehension of injury must be such that a reasonable person, under the circumstances, would perceive a bona fide hazard and (2) that “the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.” 49 U.S.C. § 31105(a)(2).

Mr. Butler contended that he refused to operate his vehicle for the weekend load because the tire on his truck was in violation of federal safety standards. Specifically, he testified that the steel cords were exposed on the tire. The parties agreed that if the cords were in fact exposed on the tire, the truck would have been in violation of safety standards. However, the parties disagree on whether the cords were actually exposed on the tire.

Mr. Butler argued that the fact that the Respondent had the tire changed a few days later shows that something was wrong with the tire. He further presented his fiancée’s testimony that she had seen exposed wire cords on the tire when Mr. Butler returned the truck on Friday.

In response, the Respondent argued that the tire was not in violation of any federal safety standard, but was preemptively replaced. Brandan Williams testified that the tire was not showing steel cords, but was replaced as part of the truck’s 15,000 mile scheduled maintenance. He explained that the company’s trucks receive routine maintenance every 15,000 miles, and, although the tire was not in violation of safety regulations, it was too worn to last until the next 15,000 mile maintenance. The Respondent submitted the purchase order for the new tire and testimony from Gary Burton, the owner of Hoosier Tire & Retreating, in support of their position. Mr. Burton explained that if a tire has steel cords showing when it is brought into the shop for replacement, the tire cannot be retreaded and must be disposed. He further stated that if a tire has to be disposed, then a disposal fee is charged on the invoice for the new tires. However, if the tire is still within regulations, then the tire may be retreaded and the company is not charged a disposal fee. The invoice for M-21 dated August 12, 2008 does not contain a disposal fee.

I find that Mr. Burton’s testimony and the invoice are the best objective evidence as to the state of the tire. Both indicate that the steel cords were not showing and the tire was capable of being retreaded. Without exposed steel cords, it is not clear that the tires violated the regulations. Nor has the Complainant shown that a reasonable person would have perceived a bona fide hazard in driving on the tire.

Furthermore, if the Complainant believed the tire was a safety risk to himself or others, he did not provide the Respondent with an opportunity to correct the problem. As discussed above, I found that Mr. Argeropolos and Ronald Williams were not aware of a bad steer tire and Mr. Butler did not express to Brandan Williams that the tire was unsafe to drive on. According to Brandan Williams' testimony, Mr. Butler mentioned, in passing, that the steer tire should be looked at, not that it was a safety concern. Mr. Butler also failed to contact his employer over the weekend, when he actually refused to drive the truck, to explain that he believed the tire to be unsafe. Nor did Mr. Butler respond to Ronald Williams when he called to find out why the Complainant was not at work.

Based on the foregoing, I find that the Complainant's refusal to drive was unreasonable.

3. Subject to Adverse Employment Action

The employee protection provisions of the STAA provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). The Complainant claims that he was terminated as a result of his protected activity when he made safety complaints and refused to operate his truck on an unsafe tire. However, the Complainant has not submitted any evidence showing that he was actually terminated from his employment.

The evidence shows that during an argument on August 8, 2008, with the Complainant, Brandan Williams gave the Complainant an ultimatum. Mr. Williams testified that he told Mr. Butler to bring the truck in for maintenance in a timely manner or park the truck and go home. Mr. Butler argued that the ultimatum was to either drive the truck with the bad tire or he was fired. For that reason, Mr. Butler believed that when he refused to drive the truck on Saturday, he was fired. However, even assuming Mr. Butler's version of the ultimatum is correct, I find that Brandan Williams' statement did not terminate the Complainant's employment.

First, Mr. Butler testified that he drove the truck back to Bloomington on August 8, 2008, with a bad tire because he felt like he was going to be fired if he did not. Since the ultimatum, per Mr. Butler, required him to drive the truck or be done, the fact that Mr. Butler did drive the truck back on August 8, as instructed by Brandan Williams, would indicate that he was not fired.

Furthermore, Brandan and Ronald Williams testified that Brandan Williams does not have the authority to fire employees. Mr. Butler also testified that Ronald Williams hired him for the job and that he understood that if he was going to be fired from Midnight Flyer, Ronald Williams would be the one that would fire him. Therefore, if Brandan Williams did not have the authority to fire Brandan, his ultimatum could not have resulted in the termination of Mr. Butler's employment. Further, if Mr. Butler knew that Ronald Williams was the one who hired and fired employees, it would have been illogical for him to assume he was fired based on an ultimatum from Brandan Williams.

Second, Mr. Butler testified that, although he drove the truck back because he wanted to keep his job, he clearly told Brandon Williams and Mr. Argeropolos on Friday, that he would not work further unless they fixed the truck. He stated that he assumed that he was fired on Saturday morning when the truck was not fixed. However, Mr. Butler's reasoning is contrary to the evidence. The evidence shows that Ronald Williams called the Complainant on Sunday evening and asked the Complainant where he was and why he was not working. A boss who had recently fired an employee would not thereafter call and inquire why an employee was not working. Therefore, even if Mr. Butler had previously thought he was fired, the voicemail from Mr. Ronald Williams should have indicated to him that he was not.

Finally, Ronald Williams sent a follow-up letter to Mr. Butler stating that since he had stopped coming to work and they were unable to get a hold of him, Midnight Flyer assumed that he had quit his job. There was no indication in the letter that Mr. Butler had been terminated. The evidence shows that Mr. Butler was not terminated. Rather, he stopped going to work and stopped returning phone calls from his work, which would lead a reasonable employer to believe that the employee had quit his job. Therefore, I find that Mr. Brandon Williams' ultimatum did not amount to a termination and that there is no indication in the record that Mr. Butler was actually terminated from his employment at Midnight Flyer. Nor is there evidence in the record of any other adverse employment action.

Accordingly, I find that Mr. Butler has not established his *prima facie* case showing that he engaged in protected activity or that Midnight Flyer subjected him to an adverse employment action. Therefore, his claim must be denied.

RECOMMENDED ORDER

For the foregoing reasons, I hereby **RECOMMEND** that Michael Butler's claim be **DENIED**.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/bdb/ahk
Newport News, Virginia

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.