

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 February 2012

Case No.: **2011-STA-00020**

In the matter of:

JACK H. ALEXANDER,
Complainant,

v.

SOUTHEASTERN FREIGHT LINES, INC.,
Respondent.

Appearances: Paul Taylor, Esq.
For the complainant

Melissa Bailey, Esq.
For the respondent

Before: Daniel A. Sarno Jr.
District Chief Administrative Law Judge

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). Section 405 of the Act provides protection to covered employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules from retaliatory acts of discharge, discipline, or discrimination.

On October 25, 2010, Jack Alexander ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that Southeastern Freight Lines ("Respondent") suspended him on October 15 and then terminated his employment on October 25, 2010 in retaliation for refusing to pull a trailer he believed to be unsafe. On December 22, 2010, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, found that Complainant's protected activity was not a contributing factor in his suspension and termination. On January 10, 2011, Complainant filed a request for a formal hearing before an Administrative Law Judge.

A formal hearing was held in Newport News, Virginia on September 14, 2011, 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 following exhibits were admitted: Complainant's exhibits ("CX") 1 through 8 and 10 through 13 and Respondent's exhibits ("RX") 1 through 16 and 18 and 19. (TR 13-20).

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 Complainant engaged in activity protected under the Act, and if so,
2. Whether the protected activity was a contributing factor in the adverse employment action against Complainant, and if so,
3. Whether the Respondent would have suspended and/or fired Complainant in the absence of his protected activity, and if not,
4. Whether the Complainant is entitled to reinstatement, back pay, compensatory damages, and punitive damages.

SUMMARY OF THE EVIDENCE

A. Testimony of Complainant

Complainant, Jack Alexander, testified he has been a truck driver for approximately 31 years. (TR 45-46). He holds a Virginia commercial driver's license with endorsements for hazardous materials, doubles/triples, and tankers. He attended Superior Trucking School in 1986. (TR 46). He has had two moving violations 20 years ago and no DOT chargeable accidents. (TR 46-47).

He went to work for Southeastern Freight Lines in 1995 in Atlanta where he did local driving. (TR 48-49). He then transferred to the Roanoke terminal in 2005 or 2006 as a local pickup and delivery driver. (TR 49). On a typical day, Complainant stated he would clock in to work, go to the dispatch office to get his orders for the day and delivery receipts, and then go inspect his tractor and trailer. He explained, "I look at the electrical lines, air lines, check all tires, hoses, belts, everything is inspected. I pull away from the docks, check my lights and my fifth wheel, which is what holds the trailer to the tractor. I would check my connections by turning it to the right to get a good visual of that, and that's it." (TR 50).

Complainant said he followed his normal routine on October 14, 2010 after arriving at work between 8 and 8:30. (TR 51). He noticed that day a number of the lights on his trailer,

number 481029, were not working, including a taillight and all of the side lights. He reported the problem with the lights to Justin Largen, the inbound supervisor, and told him he would take the trailer to get the lights fixed. (TR 52). Complainant said he then delivered the freight that was on the trailer and when he finished went to Wood's Fleet & Truck Center ("Wood's"). (TR 53).

At Wood's, Complainant said he spoke with mechanic Barry Adams and asked him to fix the lights. Complainant said Mr. Adams started to fix the lights and he assisted by flashing the lights while Mr. Adams was looking at the front connections. (TR 54). Complainant said he then noticed the tandem axle pins so he got out of the truck to look at them more closely. (TR 54-55). He explained that there are four pins that hold the frame rail to the bottom of the trailer. "Those pins have to be engaged. They have to be protruding out past the frame rail to hold the trailer – the wheels to the trailer. There's pressure on all these pins from the spring." (TR 55). To engage the pins you pull a lever. Complainant said when he looked at the pins the lever was in the locked position but the two pins in the front were not protruding like they should have been. Complainant said he immediately asked the mechanics to look at the pins because he had never seen any that looked like that before. (TR 57). All three mechanics came over, including Mr. Adams and Ralph Campbell. Complainant said Mr. Adams got underneath the trailer to look at the linkage and Mr. Campbell pushed on the front pins with his fingers while the lever was still in the locked position. Complainant said at that point he knew he couldn't safely pull the trailer. (TR 58). "It's against DOT regulations. And it's very, very dangerous because the tandems, without those pins, they won't slide, they would just bust out from underneath the trailer if I pull my brake application going down the highway." (TR 61).

He said Mr. Adams told him there was something missing in the locking mechanism and a serious adjustment problem with the linkage underneath. Complainant said when he personally pushed on the pins they had no pressure and went back between the frames. He then noted the problem in the inspection report. (TR 59). Complainant then gave the Driver's Daily Vehicle Condition Report to Bob Isaacson, the shop manager. (TR 59-60). He then called either Mr. Largen or Bob "Butch" Dodd back at Southeastern Freight Lines to report the problem and they told him they would send someone to pick him up. (TR 60-61). Complainant said when Clint Wininger, the manager for the Roanoke terminal, arrived to pick him up Complainant took him back and demonstrated the problem with the pin sliding in and out with no pressure. (TR 62). Complainant said he then heard the mechanics tell Mr. Wininger that something was missing from the locking mechanism. (TR 62-63).

After he and Mr. Wininger returned to the terminal, Complainant was assigned another tractor and trailer by Mr. Dodd. (TR 65). Complainant said he was making a delivery when Mr. Dodd called him on the company two-way radio and told him to drop off the trailer he was carrying and then go to Wood's and pick up the trailer he had left there that morning. (TR 66-67). Complainant said he asked Mr. Dodd if the mechanics had signed off that the repairs had been made to the trailer and Mr. Dodd told him that they had not but it was okay to go get it. (TR 67). Mr. Wininger then came on the radio and stated that he had called Will Pitts, field engineer for Southeastern Freight Lines, and Mr. Pitts had said the trailer was okay to pull. (TR 67-68). Complainant said he asked Mr. Wininger how Mr. Pitts would know if the trailer was okay to pull when he was in North Carolina, but Mr. Wininger did not respond. (TR 68).

Complainant unloaded his trailer and returned to the terminal between 5:45 and 6 p.m. He said he went to clock out when Mr. Dodd asked whether he was going to go get the trailer from Wood's. Complainant said he responded that the mechanics had not signed off that the trailer was safe to pull. (TR 69). He told Mr. Dodd that the mechanics had said there was something missing in the locking mechanism and that the linkage was seriously unadjusted. (TR 70-71). He explained, "I had no reason to go over there because they had told me the mechanics did not sign off to show they had repaired that trailer." (TR 72). Complaint also pointed out to Mr. Dodd that Mr. Pitts had not seen the trailer. (TR 71).

Complaint testified he then called Mike Honeycutt, the company's regional safety manager, and explained that he was being asked to pull a trailer with tandem pins that were not engaging and that the mechanics at Wood's had said there was something missing in the locking mechanism. (TR 71). Mr. Honeycutt then spoke with Mr. Wininger and Complainant said that was the end of the conversation. (TR 71-74). Complainant said he went home around 6:30 that day. (TR 72). He stated that if Wood's had signed the green sheet that repairs had been made he would have gone and inspected the trailer and picked it up. (TR 103).

The following day Complainant said he arrived at work and Mr. Largen told him he had been suspended because he didn't retrieve the trailer from Wood's the previous day. (TR 75-76). Complainant then went to Wood's where he said Mr. Isaacson made a copy of the Driver's Daily Vehicle Condition Report for him. (TR 77). Complainant then called Tonya Gill in the Southeastern Freight Lines human resources department, explained what happened, and faxed her a copy of the green sheet. (TR 77-78).

Complainant was suspended for four days and returned to work on the 21st. (TR 79). When he returned Mr. Wininger told him he was being placed on final corrective action and would be terminated for another violation. (TR 80). He recounted the conversation: "And I told him, I said, Clint, you know that that trailer was unsafe to pull. You seen those pins. I showed them to you. And you know the mechanics told you something was missing in the locking mechanism. And he said, don't get technical on me. And, I told him that it was against the law, against federal regulations to pull that trailer. He said, do not get technical on me. That was it." (TR 80-81).

Complainant admitted in his testimony he refused to pull the trailer, explaining, "The two front pins were not locked in the wheel assembly to the trailer, they were not locking and they were not protruding out like the rest of the pins. The two back ones were protruding about that far, about an inch. The two front ones, one of them was flushed with the frame and the other one was barely protruding. It was very dangerous. It was a risk of killing somebody or having a bad accident... Because if that tractor tandem comes loose, those pins sheer, if that tandem is coming out from under the trailer, God knows what would happen." (TR 82).

On October 21 Complainant said Mr. Wininger called him into his office and told him he was suspended for failing to lock his trailer that morning as required by company policy. (TR 83-84). Mr. Wininger showed him photos of the unlocked trailer at the dock that morning. Complainant testified that he locked the trailer before leaving the yard that morning, pulling away from the docks to the left to go to the back of the yard and do a pre-trip inspection. (TR

84). He said he offered the same explanation to Ms. Gill when he talked to her after he was suspended. (TR 86). On October 25 Complainant said Mr. Winger called him and told him he was terminated. (TR 86).

B. Testimony of Justin Largen

Justin Largen, inbound supervisor, testified that he spoke with Complainant the morning of October 14 and examined the sliding tandems on the trailer. He agreed that three of the tandem pins were engaged and one was sticking out about 1/16th of an inch past the plate. (TR 156). All of the pins were through the holes. (TR 157). Mr. Largen stated that he offered Complainant an alternate trailer, but that Complainant said he would drive the one he was assigned and made three deliveries with it. (TR 158-59).

On October 21 Mr. Largen said he observed Complainant dummy lock his trailer, putting the lock only through the latch rather than the latch and the door. Mr. Largen told Mr. Winger who then took pictures of the lock. (TR 161-62). Mr. Largen testified he and Mr. Winger then watched Complainant make a right-hand turn towards the gate. He then stopped and checked his truck but did not lock the lock. He then drove out of the gate, up the hill, and onto the street. (TR 163). Mr. Largen stated that it would not have been possible for Complainant to return to the yard without him seeing him. (TR 164).

Mr. Largen testified Mr. Winger, the terminal manager, instructed him to suspend Complainant on October 15. (TR 154-55).

C. Testimony of Ralph Campbell

Ralph Campbell testified he has been a mechanic at Wood's for about 18 years. (TR 338). He said he inspected the trailer at issue, looking at the springs, the rods, and the lever, and found no problems. (TR 340-41). He said he pulled the lever for the pins to move in and out and it worked smoothly. (TR 341). "The only thing I saw was one of the pins was only sticking out about one inch, maybe a tad of an inch through the hole in the frame locking and the rest of them was sticking out just a little bit farther." (TR 340). He estimated that the other pins were sticking out almost two inches. He said such a discrepancy was not uncommon in his experience. (TR 341). He suggested reasons might be that one pin is shorter, the spring is weaker, or the frame has beefed up on one side. (TR 347). He said the springs on each of the pins on Complainant's trailer were visually checked and none of the pins could be pushed back through the frame. (TR 349). He said he did not push the pins with his fingers in and out of the frame or see anyone else do it. (TR 343-44). He noted there was some give in the pins if they were pushed on with a hand, but not enough to push them back through the frame. (TR 349).

Mr. Campbell testified he told Complainant that there was nothing wrong with the system and that the pins shouldn't come unlocked because the lever and the springs were intact. (TR 341-42). Later in the day he said he spoke with someone from Southeastern who called to ask whether the trailer was safe to drive and he said it was. (TR 342).

He stated that Wood's mostly works on trucks, but does do trailer work as well. With regards to tandems, he said the shop mainly works on releasing ones that are stuck and inspecting the systems. (TR 344-45).

D. Testimony of Robert Isaacson

As shop manager at Wood's Fleet & Truck Center, Robert Isaacson testified that he oversees the shop and handles planning, scheduling, and billing. (TR 318). The mechanics working at the shop are qualified to perform annual Department of Transportation inspections on tractors and trailers. (TR 319). Mr. Isaacson said it was common for him to talk to Mr. Pitts about equipment from Southeastern in for repair. (TR 320).

On October 14, Complainant filled out a green sheet on the trailer he brought in. Mr. Isaacson testified he typically would put the company name in the "repairs made by" space on the form once repairs are completed. (TR 321). He explained that he did so to show that the equipment had been looked at. (TR 324). Mr. Isaacson said he looked at the trailer along with multiple mechanics. (TR 322). He said the mechanics inspected the frame and rods and pulled the lever to see if the pins engaged and retracted. (TR 323). Mr. Isaacson testified he never saw anyone push on the pins with their fingers and have them move. (TR 326).

Mr. Isaacson said he spoke with Mr. Pitts about the protrusion of the pins and Mr. Pitts referred him to someone in the trailer shop. (TR 332-33). Mr. Isaacson said he made the call due to Complainant's persistence. (TR 336).

E. Testimony of William Dodd

William "Butch" Dodd, outbound supervisor and dispatcher, testified he took photos of the tandem pins on Complainant's trailer at the request of Mr. Wininger. (TR 174).

Mr. Dodd said that when he spoke to Complainant about picking the trailer up at Wood's, Complainant asked whether the trailer had been repaired. (TR 177). Complainant told him the mechanics had said something was missing from the tandem axle assembly and he would not pull it because it was not safe. (TR 181). Mr. Dodd said he called Wood's and was told no repairs were required on the trailer. (TR 179). He said the mechanic told him the trailer was safe to pull. (TR 191). He also told Complainant that Mr. Pitts had determined it was safe to pull the trailer. (TR 181). Mr. Dodd estimated he talked to Complainant for about 15 minutes but Complainant continued to refuse to pick up the trailer. (TR 192). He testified that he did not believe Complainant thought the trailer was unsafe that evening but that he didn't want to go get it because it was 6 p.m. (TR 196). Mr. Dodd said that in the past Complainant had told him he wanted to be off work by 5 or 5:30 and had been reluctant to do jobs that arose later in the day. (TR 197-98).

Mr. Dodd stated that a driver fills out a green sheet daily indicating whether their trucks are safe. They turn one copy in to the shop if it is being repaired or to Southeastern Freight Lines if it is not and leave another copy in the tractor. (TR 183). Company policy is that drivers only drive if the repair shop has signed off that repairs have been made. (TR 184).

After Complainant would not pick up the trailer, Mr. Dodd dispatched another driver, Julius Hudgins, to pick it up. (TR 184-85). Wood's had left the green sheet in the back of the trailer. (TR 185). Mr. Dodd said he described the situation with the tandems to Mr. Hudgins and told him if he saw anything wrong with the trailer not to pull it. (TR 194).

He agreed that some drivers pull their trucks away from the dock before conducting their pre-trip inspection, which allows them to walk around the entire trailer. (TR 175).

F. Testimony of Clint Winger

Clint Winger, service center manager of Southeastern Freight Lines at Roanoke, testified he spoke with Complainant on October 14 and Complainant told him he didn't feel it was safe to pull the trailer from Wood's because the pins weren't sticking all the way through the trailer. (TR 207-208).

Mr. Winger testified he did not look at the trailer when he went to Wood's to pick Complainant up, did not have a conversation with Complainant while at Wood's, and did not speak with anyone else while at Wood's that morning. (TR 209-10). He said after he picked Complainant up, Complainant told him there were problems with the lights on the trailer and the pins were not working properly. (TR 210). Complainant never showed him that the pins would move easily in and out of the frame or told him that was the case. (TR 213-14). He did say that three of the pins were protruding through the holes and one was not. (TR 214).

Later in the day Mr. Winger said he spoke with Bob Isaacson at Wood's and Mr. Isaacson told him there was nothing wrong with the trailer but a part was needed to fix the lights on the tractor. (TR 214). Mr. Winger then called Mr. Pitts to tell him a part was needed for the tractor to fix the lights and asked him to talk to Wood's about the tandem pins. (TR 210-11). His next conversation about the trailer was with Mr. Dodd in which he told Mr. Dodd the mechanics at Wood's and Mr. Pitts agreed the trailer was safe to pull. (TR 216).

The evening of October 14 Mr. Winger said Mr. Dodd called him and put Complainant on the phone. He recounted the conversation: "I told Mr. Alexander he need to go pick up the trailer at Wood's, there was nothing wrong with the trailer. Mr. Alexander stated that, you know, he wasn't going to pull a trailer that was unsafe. I told Mr. Alexander that, one, Wood's deemed the trailer was safe to pull and Will Pitts said the trailer was safe to pull and go get the trailer, and ... he said he was not going to go." (TR 212). He said he told Complainant to go look at the trailer and if there was a green sheet and he felt comfortable, to pull it back. (TR 218). "He kept arguing that the trailer wasn't safe to pull and I said to Mr. Alexander again, that if you go over to Wood's and the green sheet is not signed or there's not one in the back of the trailer, then you don't have to pull it, but you can go over there and check and if there is, you can bring the trailer back." (TR 218).

Mr. Winger said he believes the mechanics at Wood's know what they are doing. (TR 216). None of them ever told him something was missing from the tandem system or that the

pins moved easily. If they had, Mr. Winger said he would have agreed the trailer was not safe. (TR 220).

Mr. Winger stated that the trailer has been in operation since October 14. (TR 220). There have been no repairs to the tandem pins and no driver has noted a problem with the pins. (TR 221).

On October 21, Mr. Winger said Mr. Largen came to his office and told him Complainant had dummy locked his trailer. Mr. Winger said he went to the dock to look and took photos of the lock. (TR 221). He explained that trailers have to be properly locked under Transportation Security Administration regulations so Southeastern can maintain its certification. (TR 222). Mr. Winger said he watched Complainant pull away from the dock with his trailer dummy locked, get out of his truck and perform a partial pre-trip, get back in his truck and sit for a few minutes, and then drive out of the gate with his trailer still dummy locked. (TR 223). He watched him drive up the hill and onto the street from the office. He did not come back into the terminal. (TR 224). Mr. Winger said he confronted Complainant about the lock later that day and Complainant first said it wasn't his truck, then suggested a dock worker did it, and finally said he locked the truck when he went to the back of the yard to do his pre-trip inspection before leaving the terminal. (TR 225).

Mr. Winger testified Complainant had requested numerous times to be off of work before 5:30. (TR 226). He also stated that he found him to be dishonest and reluctant to take responsibility for making mistakes. (TR 227-28).

G. Testimony of Will Pitts

Will Pitts, field engineer for Southeastern Freight Lines, testified he is in charge of 13 service centers and the maintenance on the equipment at each. (TR 277). As part of his job he performs the annual Department of Transportation inspections on the tractors and trailers. He explained that the inspection includes inspecting the pins, springs, release arm, slide, tandem slides, and all the mechanical mechanisms with the slide. To check it, he unlocks and relocks the slide. (TR 278).

Mr. Pitts stated that it is usual for some tandem pins on a system to extend further through the frame than others. In inspecting a trailer he said he looks only for the pins to protrude through the slide holes and that he does not expect all of them to extend an inch or more. (TR 280). He stated that 1/16th of an inch would be acceptable. (TR 296).

On July 30, 2010 Mr. Pitts said he performed the annual DOT inspection on the trailer at issue. He found the tandem pins to be protruding through the holes of the slide rail and no problems with the springs, rods, or lever to engage and retract the pins. (TR 283-84).

Mr. Pitts testified that on October 12, 2010 the trailer had undergone routine preventative maintenance at the Greensboro maintenance facility. (TR 284). As part of that maintenance Mr. Pitts said it would have been routine practice to inspect the suspension system to make sure it locked and unlocked properly, including insuring the pins engaged and retracted. The mechanic

determined the system was operating properly at that time. (TR 285). The only repair that was made was to straighten the lever that engages and retracts the pins because it was slightly bent. (TR 286).

Mr. Pitts also stated that the trailer had undergone a required Department of Transportation inspection since October 12 and no defects were found at that time. (TR 286). No repairs have been made to the tandem pins since October 14 and no driver has noted a problem on the green sheet. (TR 287).

Mr. Pitts said he is satisfied that the mechanics at Wood's Fleet & Truck Center can evaluate trailers and diagnose problems, which is why he hired the company as the outside vendor for servicing Southeastern's tractors and trailers. (TR 288). He said he talks to the mechanics at Wood's weekly. (TR 289).

On October 14, Mr. Pitts testified he spoke with Bob Isaacson and Ralph Campbell at Wood's. (TR 290-291). Both men told him no defects were found on the trailer after a visual inspection and manually unlocking and locking the tandem system. (TR 291). Mr. Pitts said he told them that the front pins on a Hutchens system do not extend as far as the rear pins. (TR 293). Mr. Pitts said he would expect a driver to have seen multiple sets of tandem pins where the front pins don't extend out as far as the rear pins. (TR 308).

Looking at the photographs taken by Mr. Dodd, Mr. Pitts said he could see no problem with the front two tandem pins. (TR 294). He confirmed that he did not look at the trailer in question on October 14 or 15. (TR 306-307). He agreed a person should not be able to move a pin that is engaged in the locked position. (TR 301-302). He also agreed that if the pins were not protruding through the slide rail it would have been unsafe to operate. (TR 307).

H. Testimony of Julius Hudgins

Julius Hudgins testified he has worked as a driver for Southeastern for just over a year and been driving trucks since 1984. (TR 310). On October 14 at around 5:30 or 6 p.m., Mr. Dodd asked him to go pick up a trailer from Wood's. He told him to inspect it and pull it back if he felt it was safe. (TR 311-12). Mr. Hudgins testified the tandem pins looked normal to him, "but they had three pins fully through and one pin was not as far through as the other ones but it was through. It was less than the rest of them. I've seen that on other trailers." (TR 312). He estimated the fourth pin was extending about "a quarter of an inch, maybe a little more." He said the tapered end of the pin was on the outside of the tandem hole. (TR 315).

He said he found the green sheet in the back of the trailer. (TR 313). When he returned to the yard he signed the sheet that he had inspected the trailer and felt it was safe. (TR 314).

I. Testimony of Tonya Clayton¹

Tonya Clayton, regional human resources manager for Southeastern Freight Lines, explained that the company uses progressive discipline known as the corrective action process.

¹ Maiden name Tonya Gill. (TR 119).

(TR 120). The process contains four categories of corrective action (job performance and conduct, attendance and tardiness, safety, and hours of service) with discipline typically progressing from a counsel to first level to second level to a final. Terminal management is required to confer with her before giving someone a final corrective action, suspending them, or discharging them. (TR 121). Before issuing a final corrective action she explained she would do an investigation. (TR 122). In the Complainant's case she spoke with him, Mr. Wininger, Mr. Largen, Mr. Dodd, and Mr. Honeycutt. (TR 124-25).

Ms. Clayton explained that the Complainant's final corrective action was a contributing factor in her decision to terminate him. (TR 132). She agreed that she had stated in her deposition that Complainant "probably" wouldn't have been terminated for failing to lock his trailer if he hadn't received a final corrective action on October 21. (TR 134). She noted that a final corrective action was not required under the company's policy before an employee could be terminated. (TR 135).

Ms. Clayton testified that she had spoken with Complainant a half dozen to a dozen times before this incident and his major concern in those calls was that he get off of work between five and 5:30, something she explained was not realistic. (TR 137-38). She noted he was given a second level corrective action on August 12, 2009 for his truck separating from his trailer because the fifth wheel wasn't hooked correctly and another second level corrective action on July 2, 2010 because he left his truck running in the yard while he was inside the dispatch office. (TR 143-44).

In speaking with Mr. Honeycutt before deciding to issue a final corrective action, she said Mr. Honeycutt indicated there was nothing wrong with the tandem pins on the trailer. (TR 142). She said it would have changed her recommendation regarding discipline if Complainant had gone to Wood's to inspect the trailer and green sheet rather than refusing to go look at it. (TR 151).

J. Testimony of Jeffrey Shultz

Jeffrey Shultz testified he is the owner and sole employee of Shultz Mobile. (TR 235). As such he does mechanical work on trucks and trailers and is familiar with tandem axle positioning pins. Prior to starting his own company he worked as a mechanic and supervisor for United Parcel Service. (TR 236).

Mr. Shultz explained that tandem axle pins are spring loaded. (TR 238). He stated that the pins should go through the frame on average two inches. (TR 239). He would not consider one that was 1/16th of an inch through the frame to be engaged. (TR 240). If the tandem pins come loose while a driver is driving, the box can come off the trailer. (TR 241). If one pin is not fully engaged it would put movement in the tandem, which would put more stress on the other three pins. If that happens with a heavy trailer there's a risk of popping the other three pins and dropping the axle. (TR 242). He opined that a driver should not operate a truck without all tandem axle pins fully engaged because there's a risk of losing the tandem from underneath the truck. (TR 245-46).

If the lever is in the engaged position, the pins should not be able to be moved by hand. (TR 242-43). If they can be moved, something is probably wrong with the spring. (TR 243).

Looking at the photos taken by Mr. Dodd of the pins on Complainant's trailer, Mr. Shultz opined that it was hard to tell from the picture but it did not look like the pin protruded a sufficient amount. (TR 244). He admitted he did not know the manufacturer of the particular trailer nor how far the manufacturer recommended the pins protrude. (TR 247). He also had not seen the pin in person or spoken to anyone who had inspected the pins, other than Complainant. (TR 247).

K. Testimony of Michael Millard

Michael Millard testified he was a motor carrier safety specialist with the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, for 11 years and is presently employed with the Department of Energy advising the department of commercial vehicle safety regulations. (TR 259-61). He also worked as a safety inspector and port of entry officer doing roadside inspections and holds a commercial driver's license. (TR 261-62).

Mr. Millard opined that a tandem axle pin that protrudes outside of the frame rail 1/16th of an inch is not fully engaged. "Tandem pins are typically two to three inches long and if they're only going through 1/16th of an inch, something is either prohibiting it from going through the frame the way it should or the pin was never its original dimensions." (TR 263). He opined that a pin going through 1/16th of an inch would be a safety hazard, explaining "The pins are the piece that holds the suspension in place. You only have four pins to do that. If the pins aren't doing their job, it's a possibility they can become disengaged and the entire assembly system can come from out underneath the trailer and end up on the side of the road." (TR 264). He stated that typically a fully engaged pin extends through the frame rail one inch. (TR 269).

Mr. Millard also opined that pins that can be moved by hand when the lever that engages them is in the engaged position are not engaged. (TR 264).

He said he would be concerned if two of the four pins extended further through the frame than the other pins. "There would be something that was either prohibiting the pins from fully engaging which is a misaligned frame rail assembly or something else is wrong. All the pins should be basically equal all the way around." (TR 265).

Mr. Millard opined that there was no way to tell from looking at the photograph taken by Mr. Dodd whether the pins were fully engaged. (TR 268). He admitted he did not know who the manufacturer of the pin system was and did not speak to the mechanic that examined the trailer. (TR 269, 272). He stated that he did not think a driver should pull a trailer if a tandem axle pin was extending 1/16th of an inch while the others were extending further and no repairs were made. (TR 275).

L. HR Summary of Incident

After speaking with Complainant and others Ms. Clayton summarized the October 14 incident as follows:

On Thursday, October 14, 2010, Jack was doing his pre-trip inspection when he noticed several lights out on his trailer. He also questioned the tandem pins on the trailer. He had Justin (Inbound Supervisor) to look at the lights and pins and Justin felt that it would be o.k. Justin offered another load to Jack but Jack said it was o.k. he would take it; and after he made the 3 stops, he would take it by Wood's (Wood's Fleet & Truck Center) to have it fixed.

Jack filled out a "Driver's Vehicle Condition Report". He listed as items for repairs: exhaust leak/defrost filter tractor, and the lights and pins on the trailer. He showed several mechanics the tandem pins. They made the comment they felt something was "missing" from the pins. Jack stated that he could move them when pushed on.

Since Wood's is a tractor repair shop and does not do a lot on trailer repair, a mechanic from Wood's called the Charlotte Maintenance Shop and talked to Will Pitts to find out how the pins are supposed to look at move. Once this had been done, it was determined that the pins were fine and working properly. Wood's called Clint Winninger to let them know the trailer was ready for pick up.

Later in the day, Jack was taking a trailer to a company Security Transport to drop. Butch Dodd radioed Jack that once he dropped that trailer to pick up the trailer he had taken to Wood's. Jack asked if it had been fixed. Butch said it was o.k. They had looked at it and it was fine. Jack said that the mechanics had told him that something was wrong with it and something was missing. Butch told him that the head mechanic had called Clint to pick it up and it was fine. When Jack got to Security Transport, a person was still there so Jack was able to unload it and didn't have to drop it. He called back to Butch to let him know what he was doing. At that time, Butch had already called Wood's himself and spoken with Barry, another mechanic, to make sure everything was o.k. and to hear it for himself. He told Jack then that he had just called and it was o.k. to pull. No other comments were made about picking it up or not. Since Jack was able to unload, he took that trailer back to the Service Center.

He returned at 5:45 pm. He went though the dispatch office and said I'm out of here and waved.

Butch: Woah, wait Jack. I still need you to go get the trailer at Wood's.

Jack: No I decided I'm not going to pull it because it's not safe.

Butch told him that Barry said it was fine. They talked to Will Pitts and he said it was fine.

Jack: The mechanics said there was something wrong. So you are telling me that I can pull that trailer?

Butch: I wouldn't tell you to do something that wasn't safe. Everyone said it's o.k. Just tell me if you are going to pull it or not.

Jack: No, it's not safe. Will can't make that decision, he didn't even see it.

Butch: So you are saying you are refusing to get it.

Jack: No I'm not refusing; I'm just saying I don't think it is safe. I'm going to call Safety.

This conversation went on about 20 minutes.

Jack did call Safety and talked to Mike Honeycutt and then also talked to Clint who had already left for the day. Clint told him to go get it that it was fine. Jack continued to debate. After 30 minutes Clint told him again to get it and then Jack told him he thought Butch had already sent someone else.

At some point in the conversation, Jack asked Butch to sign his "green sheet" to state that the trailer was safe. Butch said he would be glad to and proceeded to fill in the lines that the trailer had been deemed safe and ready for pick up, but Jack took the book back before Butch was finished. He said, well I'm not going to get it because it's not safe.

Butch also said to Jack, I will send someone else to do it. And Jack said, O.k. you do that. Butch replied, and that doesn't bother you for someone else to do it.

Butch then sent another driver to pick it up. He explained to the driver what was going on and to look at it when he got there. If he thought there was anything wrong to call and not bring it back. When the driver returned he said it was fine and he didn't have any problem.

I talked to Jack Alexander, Claudia Rowe (Outbound Support Clerk/Customer Service), and Butch Dodd (Outbound Supervisor). All three of the stories were pretty much the same. Claudia made the comment that she felt that Jack just was set on not getting it. Butch said he believes that for whatever reason Jack thought it was

unsafe but after being reassured he should have known it was o.k. to pick up.

Claudia said that neither Butch nor Jack was disrespectful to each other but the conversation was louder than normal and drivers and freight handlers knew something was going on. She did reiterate that neither was out of line and unprofessional.

(CX 6, RX 5)

M. Driver's Daily Vehicle Condition Report (Green Sheet)

The Driver's Daily Vehicle Condition Report Complainant filled out and signed on October 14, 2010 lists the following for the trailer: "80% of lights not working on trailer. Tandem on trailer not working properly. Pins not all the way out." (CX 3, RX 6). On the copy of the report signed by Julius Hudgins, the line for "repairs made by" reads "Wood's Fleet and Truck Center." (RX 6).

N. Wood's Fleet & Truck Center Estimate and Invoice

An estimate sheet numbered 153 and dated October 15, 2010 reads:

Green sheet referenced lights and brake lights not working. Slide axle pins not locking in properly- Contacted SEFL Charlotte terminal for advise [sic] on what to check. Was advised front pins should be free and easy to retract and will not extend out as rear pins will. Fond [sic] no bent rods and springs were in place as described. Lights not working properly contributed to failing module on tractor #: C-972, repairs are being performed to correct that problem. Invoice and description will be issued prior to month end unless requested.

(CX 4, RX 18). An invoice dated October 29, 2010 references the repairs made to the tractor's lights and air system and states that estimate sheet #153 should be referenced "for trailer slide pins noted on green sheet." (RX 19).

O. Corrective Action Final Notice

A Corrective Act Report dated October 21, 2010 indicates that Complainant was given a final action for "uncooperative attitude" and "failure to follow direction." (RX 4, CX 5). The letter accompanying the report relates that:

The purpose of this meeting is to advise you that you are being placed on a Corrective Action- Final Notice for Unsatisfactory Job Performance/Conduct.

On Thursday, October 14, 2010, you were given a direct order from your Outbound Supervisor, Butch Dodd, to go pick up trailer #481029, from Wood's Fleet & Truck Center that you had taken for repair that morning. Although you had been assured numerous times by Mr. Dodd as well as myself that the trailer had been looked at and deemed safe and road worthy by the chief mechanic at Wood's and Will Pitts, Regional Maintenance Manager, you continued to refuse to go pull the trailer back to the Service Center. Refusing to perform work directed by your Leadership and continuing to do so after being told the equipment was safe to pull is unacceptable conduct and will not be tolerated.

(RX 4, CX 5). Both documents note that Complainant would not sign them. (RX 4).

P. Corrective Action- Termination

On October 25, 2010 Complainant was terminated for "failure to properly perform procedure/policy." The Corrective Act Report states: "Jack after completing our investigation it has been decided to terminate your employment with Southeastern Freight lines based on the fact that after you received a final level corrective action, you failed to properly lock your trailer according to our safety and security guidelines and practices." (RX 1).

Q. Hutchens Sliding Suspension Warning

A warning placard for the Hutchens sliding suspension reads:

This trailer is equipped with a sliding suspension that must be securely locked prior to operation. The sliding suspension is locked when the main body of each lock pin extends through the holes in the rails. Before pulling the trailer, the sliding suspension must be carefully inspected to ensure it is properly positioned and the main body of each lock pin does extend through the hole in the rails. Before pulling the trailer, apply trailer brakes and gently rock trailer backwards and forwards to ensure sliding suspension is secure.

(RX 21).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Congress included section 405(b) in the STAA to ensure that employees in the commercial motor transportation industry who make safety complaints, participate in proceedings, or refuse to commit unsafe acts, do not suffer employment consequences because of those actions. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060 (5th Cir. 1991) (citing 128 Cong. Rec. 29192, 32510 (1982)). The Act protects all employees of commercial motor carriers from discharge, discipline, or discrimination for the following activities: filing a complaint about commercial motor vehicle safety, testifying in a proceeding on safety, refusing to operate a

vehicle when operation would violate a federal safety rule, and refusing to operate a vehicle when the employee reasonably believes it would result in serious injury to himself or others. 49 U.S.C. §31105(a).

I find the evidence shows that respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101 and falls under the Surface Transportation Assistance Act. I further find that Complainant is a commercial motor vehicle driver within the meaning of 49 U.S.C. § 31101.

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* showing 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, a 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. at 507-5083; *see also Bechtel Constr. Co.*, 50 F.3d at 934 (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.

However, since this case was fully tried on its merits, it is not necessary to determine whether Complainant presented a *prima facie* case and whether Respondent rebutted the showing. *U.S.P.S. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 (1983); *Roadway Express*, 929 F.2d at 1063. Once a respondent has produced evidence in an attempt to show that the complainant was subjected to adverse action for a legitimate reason, it no longer serves any

analytical purpose to answer the question whether the complainant presented a *prima facie* case. *Ciotti v. Sysco Foods of Philadelphia*, 97-STA-30 at 5 (ARB July 8, 2003). Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. *Id.*

Complainant alleges his refusal to pull a trailer that he believed to be unsafe and in violation of federal safety regulations was a contributing factor in his suspension and termination. The parties do not dispute that Complainant was suspended and then terminated, both of which are adverse employment actions. However, the Employer contends Complainant did not engage in protected activity. Employer argues that Complainant did not refuse to drive the trailer, he refused to inspect it. Employer also contends Complainant refused to drive the trailer not because he thought it was unsafe but because he wanted to go home because it was late in the day. Finally, Employer argues that if Complainant refused to drive because he believed the trailer to be unsafe, that belief was not reasonable.

A. Refusal to Drive

Complainant alleges two problems existed with the tandem axle pins that gave him concerns as to the safety of the trailer and resulted in his refusal to pull it. The first was that at least one of the pins was not protruding as far as the others. The second was that one or more pins moved when pushed on despite the lever being in the locked position. Complainant argues that the condition of the pins constituted an actual violation of a federal safety rule and also caused his reasonable apprehension that serious injury could result due to the vehicle's unsafe condition if he pulled the trailer.

Although some testimony from Southeastern management suggested that Complainant's preference was to get off work between 5 and 5:30, I find the evidence is insufficient to show such a desire was his sole motivation in refusing to pull the trailer on October 14. Complainant expressed concerns about the safety of the tandem axle pins that morning and reiterated them when he was told to go pick up the trailer. He continued to express those concerns to Mr. Dodd and Mr. Wininger after 5:30 p.m. Thus, the remaining question is the reasonableness of his apprehension and belief that the trailer was not safe to pull.

There is conflicting testimony as to when Complainant first noticed the condition of the pins. Mr. Largen testified that Complainant pointed out that one pin protruded through the rail less than the other three on the morning of October 14 in Southeastern's terminal. He testified Complainant asked him to look at the trailer he had been assigned before he left the terminal. Complainant pointed out lights on the trailer that weren't working and also the discrepancy in the pins. (TR 156-157). However, Complainant offered a different account. He testified that he did not notice the pins until he was at Wood's Fleet & Truck Center. (TR 53, 55). The only other evidence to address when Complainant first noticed the pins is the summary of the incident composed by Ms. Clayton after she spoke with the parties involved. Her description indicates Complainant asked Mr. Largen to look at the pins that morning at the terminal. (CX 6, RX 5). Although Complainant relies in his argument on Mr. Largen's estimation that one of the pins protruded 1/16th of an inch, he offered no explanation on the conflict in testimony regarding whether he pointed the length of the pins out to Mr. Largen that morning or not. After

consideration of both men's testimony, I find Mr. Largen's version of events to be more credible. He would have had no reason to look closely enough at the tandem pins to gauge their length if Complainant had not pointed them out to him. Mr. Largen's version is also supported by Ms. Clayton's summary, which was completed shortly after the incident.

1. Actual Violation

The Act states that "a person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment" because the employee refuses 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." 49 U.S.C. § 31105(a)(1)(B)(i). The protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle. *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB Case No 10-001, ALJ Case No. 2008-STA-61 (ARB Sept. 30, 2011). The reasonableness of the refusal must be subjectively and objectively determined. *Id.* Complainant contends that had he pulled the trailer he would have been in violation of 49 C.F.R. §§ 393.207, 396.3(a)(1), and 396.13.

Section 393.207 governs suspension systems including the requirement that "adjustable axle assemblies shall not have locking pins missing or disengaged." Complainant argues that a violation of § 393.207 would also result in a violation of § 396.3(a)(1) requiring that:

Parts and accessories shall be in safe and proper operating condition at all times These include those specified in part 393 of this subchapter and any additional parts and accessories which may affect safety of operation, including but not limited to, frame and frame assemblies, suspension systems, axles and attaching parts, wheels and rims, and steering systems.

Complainant contends that at least one of the pins on the trailer he was asked to pull was not engaged. He argues both that at least one pin did not protrude far enough to be considered engaged and that at least one pin could be moved while in the locked position. With regard to the first, the parties disagree as to the severity of the condition and whether it would constitute the pin being considered disengaged. With regard to the second, the parties dispute whether the condition existed at all.

Protrusion of Pin

All of the testimony from witnesses who looked at the pins supports a finding that one of the tandem axle pins on the trailer did not protrude through the frame rail as far as the other three. However, the witnesses differ in their estimations of how far the pin at issue protruded. Complainant testified of the two front pins one was "flush" and the other was "barely protruding." (TR 82). Mr. Largen, who testified he saw the pin at Southeastern's terminal that morning, said it protruded about 1/16th of an inch. (TR 169). Mr. Campbell, the mechanic who worked on the trailer at Wood's, testified it was through about one inch. (TR 340). Finally, Mr.

Hudgins, the driver who picked the trailer up that evening, stated it was through about a quarter of an inch. (TR 315).

Complainant relies primarily on the testimony of two expert witnesses to support his contention that the pin was not protruding far enough to be considered engaged. As neither Mr. Shultz nor Mr. Millard actually examined the pin and both testified they could not tell the amount of protrusion from the photographs introduced into evidence, neither was able to offer an opinion as to the specific pin at issue. (TR 244, 268). However, both opined that a tandem axle pin that protruded 1/16th of an inch would not be considered engaged. (TR 240, 264). They differed on how far they believed a pin should protrude, however. Mr. Shultz estimated that such pins protrude an average of two inches. (TR 239-40). Mr. Millard stated that pins typically go through the frame rail approximately one inch. (TR 269). Neither offered a specific opinion on whether the quarter of an inch protrusion that Mr. Hudgins estimated or the one inch protrusion that Mr. Campbell estimated would be considered engaged.

In contrast, Mr. Pitts, field engineer for Southeastern, testified that pins only need to protrude through the slide holes to be engaged, and 1/16th of an inch would be an acceptable amount. (TR 280, 296). He also explained that on some trailer types, including the one at issue in this case, the front pins don't extend as far as the rear pins. (TR 293). He indicated that such a discrepancy was one an experienced driver should have seen multiple times. (TR 308). Mr. Campbell and Mr. Hudgins also testified that in their experience it is not uncommon for pins to extend different lengths. (TR 312, 341).

Movement of Pins

Complainant was the only witness to testify that he saw the pins move freely when pushed although the lever was in the locked position. In fact, despite Claimant's assertions that he showed Mr. Wininger how the pins moved and that he saw Mr. Campbell push on the pins, both men refuted either event took place. The conflicting accounts cannot be reconciled.

Complainant was clear when recounting his version of the events. He stated that he saw Mr. Campbell push on the front pins with his fingers while the lever was still in the locked position. (TR 58). The pins "reached back between the frames, there was no pressure." (TR 59). Mr. Campbell was equally clear, stating that the springs had "plenty of pressure" and that he had not used his fingers to move the pins back through the frame. He also testified he didn't see any other mechanic do so.² (TR 343-44).

Complainant also claimed he demonstrated the pins moving to Mr. Wininger when Mr. Wininger came to pick him up from Wood's on October 14. He said he also heard the mechanics at Wood's tell Mr. Wininger something was missing from the locking mechanism. (TR 62-63). In contrast, Mr. Wininger testified Complainant did not demonstrate the pins moving when he came to pick him up from Wood's nor did he have any conversation at all with the mechanics at that time, including one related to the pins. (TR 209-10, 213, 220). Mr. Wininger also testified

² Nor did he see Complainant do so, although he volunteered the somewhat vague, "Somebody told me he did it, but I never saw it." (TR 344). Complainant did not identify who that "somebody" might have been in presenting his case and no witness testified they saw it happen.

Complainant never said anything to him about the pins moving; the only problem he mentioned with the pins was that one was not protruding far enough. (TR 214).

I find Complainant's version of the events is simply not credible. Mr. Winger and Mr. Campbell both testified they did not move the pins nor see them move freely while the lever was in the locked position, despite Complainant's insistence in his testimony that they did. Nor did any other mechanic or other witness testify that he saw the pins moving as Complainant has claimed. The lack of corroboration from any other witness, including any mechanic at Wood's, which is not a party to this case, raises serious questions as to the veracity of Complainant's story. Coupled with the denials by Mr. Winger and Mr. Campbell, whose testimony I find to be otherwise credible, I have doubts as to Complainant's credibility.

Further, Mr. Hudgins reported no such condition with the pins and found the trailer to be safe when he picked it up from Wood's that evening. (TR 314). The mechanics at Wood's also ultimately deemed the trailer safe and found that no repairs were needed to the pins. Had the pins moved as Complainant contends, it is unclear what would have motivated Wood's to declare the trailer safe when the company's business is in fact tractor and trailer repair.

After examining the totality of the evidence, I find there is no credible evidence that the pins moved freely while the lever was in the locked position.

Conclusion

I find that pulling the trailer would not have resulted in an actual violation of a safety rule because the pins were engaged, as required by 49 C.F.R. § 393.207. I find the evidence supports finding that only one concern existed with the tandem axle pins—that one pin did not protrude as far as the others—and that condition existed despite all of the pins being properly engaged.

Mr. Campbell, a mechanic for 18 years, who performs Department of Transportation inspections on trailers, testified that the tandem pins were safe. Although he admitted he does more tractor work than trailer work, with Mr. Campbell's experience he is certainly qualified to identify problems with a tandem assembly, yet Mr. Campbell deemed the system on the trailer to be safe, even after specific consideration of the protrusion of the tandem pins. Further, Mr. Campbell was not the only mechanic at Wood's to look at the trailer as the three mechanics at the shop work as a team. (TR 322). After inspecting the springs, lever, and rods of the tandem system, they determined no repairs were needed. (TR 340-41). Also, Mr. Isaacson said from what he saw the tandem pins were locked in place. (TR 326).

Although Mr. Shultz nor Mr. Millard both have extensive experience with tractors and trailers, including tandem axle pins, neither man inspected the pins at issue in this case nor even knew the manufacturer of the system in question. Both men could only opine generally that they did not believe a pin that protruded 1/16th of an inch should be considered engaged. I find Mr. Campbell to be equally qualified and give greater weight to his opinion as he was able to examine the trailer himself. Further, I find it likely that the pin at issue protruded greater than 1/16th of an inch as Mr. Campbell, who had an extended opportunity to examine the pin at the shop, and Mr. Hudgins, who was told specifically to check the tandem pin system when picking

up the trailer, both gave greater estimates of the protrusion of the pin. There was no testimony from either Mr. Shultz or Mr. Millard as to how much beyond 1/16th of an inch a pin would have to protrude for their opinion to change.³

Ultimately, 49 C.F.R. § 393.207 puts no minimum measurement on the amount of protrusion necessary, but simply says that a pin must be engaged. The manufacturer's documentation states only that the main body of the pin should protrude through the holes in the rails. (RX 21). The mechanics at Wood's who examined the trailer, including Mr. Campbell, determined the pins were engaged. For additional assurance they contacted Mr. Pitts at Southeastern who had experience with the specific trailer in question. The conclusion remained that the pins were engaged. I find the testimony of Mr. Shultz and Mr. Millard is not persuasive in light of the testimony from particularly Mr. Campbell, who was able to render an opinion after examining this specific pin. Mr. Shultz and Mr. Millard only were able to opine on a hypothetical 1/16th of an inch protruding pin. In this case given the differing estimates, I find the pin likely protruded greater than that amount. Considering the totality of the evidence, I find there was no actual violation of 49 C.F.R. §§ 393.207 or 396.3(a)(1).

I also find that Complainant did not have a reasonable belief that there was an actual violation based on the facts he had at the time he refused to go pick up the trailer. The reasonableness of a refusal must be subjectively and objectively determined. *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB Case No 10-001, ALJ Case No. 2008-STA-61 (ARB Sept. 30, 2011). An objective reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant. *Id.*

Complainant's belief was not objectively reasonable. I find Mr. Campbell's testimony credible that he had told Complainant that the trailer was safe to pull. Also, it is undisputed that both Mr. Dodd and Mr. Winger told Complainant that Wood's had determined the trailer was safe and did not need any repairs. Mr. Dodd testified he called Wood's himself and was told no repairs were needed, which he relayed to Complainant. (TR 180). Mr. Dodd also told Complainant he had been told that Mr. Pitts had been contacted and said the trailer was safe. (TR 181). Mr. Winger also testified he told Complainant that he had spoken with Wood's and Mr. Pitts and both had determined the trailer was safe to pull. (TR 212). Thus, Complainant had been reassured by three people, including the mechanic who examined the trailer that it was safe and no repairs were needed. However, Complainant continued to persist that he would not pick up the trailer because it was unsafe.

Mr. Winger told Claimant that when he went to pick up the trailer, which he had not seen since that morning, he should re-inspect it to see if he continued to feel that it was unsafe. (TR 218). Complainant refused. Complainant argues that since he was told no repairs were made he had no reason to inspect the trailer again since presumably it was in the same condition as it had been in that morning. Complainant could not know that, however, since he refused to look. Further, he had new information that evening that he didn't have that morning that experienced mechanics had deemed the trailer safe.

³ At the one inch estimated by Mr. Campbell, Mr. Millard apparently would consider the pin engaged as he testified that was the typical protrusion for a tandem axle pin.

Notably, Mr. Hudgins, who ultimately picked up the trailer, felt the trailer was safe after doing a pre-trip inspection, paying particular attention to the tandem axle pins. (TR 314). Mr. Hudgins, Mr. Pitts, and Mr. Campbell all testified that in their experience it was not uncommon for pins to extend different lengths. (TR 308, 312, 341). Mr. Pitts noted that he would have expected an experienced driver to have seen pin length differences before. (TR 308). Yet despite Mr. Hudgins, Mr. Pitts, and Mr. Campbell's testimony suggesting that someone with Complainant's driving experience should have seen pins protruding different lengths before, Complainant testified he had never seen pins look like the ones on the trailer in question.

Based on the foregoing, I find that Complainant did not have a reasonable belief that there was an actual violation based on the facts he had at the time he refused to go pick up the trailer.

Complainant also contends that had he pulled the trailer he would have violated 49 C.F.R. § 396.13(a) stating that before driving a motor vehicle, the driver shall "be satisfied that the motor vehicle is in safe operating condition." Courts, however, have limited this argument by stressing that the driver's level of satisfaction is not unfettered. It has consistently been held that to come within the protection of this prong of the refusal to drive provision, the complainant must show by a preponderance of the evidence that an actual violation of a regulation would have occurred. *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76 (2nd Cir. 1994); *Cook v. Kidimula Int'l, Inc.*, 95-STA-44 at 2 (Sec'y Mar. 12, 1996); *Robinson v. Duff Truck Line, Inc.*, 86-STA-3 (Sec'y Mar. 6, 1987), *aff'd*, *Duff Truck Line, Inc. v. Brock*, 848 F.2d 189 (6th Cir. 1988) (per curiam) (unpub.). I have found that there was no violation of a regulation in this case. Therefore, Complainant's refusal to drive is not protected because pulling the trailer would have violated 49 C.F.R. § 396.13(a).

2. Reasonable Apprehension

The Act states that "a person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment" because the employee refuses to operate a vehicle because of "a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C. § 31105(1)(B)(ii). An employee's apprehension of serious injury is reasonable "only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health." 49 U.S.C. § 31105(a)(2). To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. *Id.*

The parties do not dispute that Complainant made Respondent aware of his concerns regarding the tandem axle pins and sought to have Respondent correct what he believed to be their unsafe condition. Thus, the remaining question is whether Complainant's apprehension was reasonable at the time he refused to pick up the trailer. While he does not need to show an actual safety defect, he must show by a preponderance of the evidence that his apprehension of serious injury to himself or others was objectively reasonable. *Barnett v. Lattimore Materials, Inc.*, ARB No. 07-053, ALJ No. 06-STA-38 (ARB Sept. 22, 2008).

I find Complainant's apprehension was not objectively reasonable. Although I recognize Complainant's lengthy experience as a truck driver, which presumably would give him some insight into the proper functioning of tandem axle pins, he was the only one who maintained that the pins were unsafe. Mr. Campbell, an experienced mechanic, examined the system and found it to be operating properly. After a verbal description of the issue, Mr. Pitts, another experienced mechanic, also agreed the trailer was safe to pull. Finally, the driver who ultimately picked the trailer up from the shop, Mr. Hudgins, examined the pins and determined the trailer was safe to pull.

Further, Mr. Wininger and Mr. Pitts testified that no repairs had been done on the tandem axle pins since October 14 and no other driver had noted concerns about the pins since that time. (TR 220-21, 287).⁴ In *Dutile v. Tighe Trucking, Inc.*, 93-STA-31 (Sec'y Nov. 29, 1993), the Secretary indicated that it is proper to look to evidence that repair work was performed later in judging the reasonableness of Complainant's refusal to drive.

Complainant cannot insist upon a standard of care for his vehicle that is higher than the legal standard. See e.g., *Wiggins v. Roadway Express, Inc.*, 84-STA-7 (Sec'y Aug. 9, 1985) (concluding the complainant's refusal to drive was unreasonable because the tires in question complied with both the federal and more stringent state standards). I have found that the pins were engaged in compliance with federal safety rules. Mechanics and another truck driver all agreed the pins on the trailer were fine and it was safe to pull. Complainant cannot insist the pins protrude further than is necessary for the system to be considered safe.

Whistleblower provisions of other statutes suggest that a complainant's refusal to drive may lose protected status if the respondent investigated the hazard, determined the vehicle was safe, and informed the employee of that determination. As explained in *Pensyl v. Catalytic, Inc.* under the Energy Reorganization Act, while "a worker has a right to refuse work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful . . . [the R]efusal to work loses its protection after the perceived hazard has been investigated by responsible management officials . . . and, if found safe, adequately explained to the employee." *Pensyl*, 83-ERA-2 (Sec'y Jan. 13, 1984), slip op. at 6-7. Without explicit adoption of the reasoning, the Administrative Review Board has upheld an administrative law judge recommended decision applying the standard articulated in *Pensyl* in STAA cases. *Harris v. C & N Trucking*, ARB No. 04-175, ALJ No. 2004-STA-37 (ARB Jan. 31, 2007).

When Complainant raised concerns about the trailer the morning of October 14, Respondent had him take it to Wood's, the shop the Roanoke terminal contracted with to do repair work on its tractors and trailers. The mechanics at Wood's examined the tandem axle system, spoke with Southeastern's field engineer, and ultimately determined the trailer was safe to operate. Both Mr. Dodd and Mr. Wininger spoke with Wood's to confirm that no repairs were needed on the trailer and both conveyed to Complainant that the trailer had been deemed safe. There is little more that could be expected out of the Respondent beyond promptly having the

⁴ In addition, the trailer had undergone routine maintenance just two days earlier on October 12, at which time mechanics straightened the lever on the tandem axle system, but noted no problems with the pins. (TR 286).

issue inspected by experienced mechanics and only putting the trailer back in service when the repair shop determined there was no problem with it.

I find Complainant has not produced adequate evidence to demonstrate that a reasonable person, under the circumstances confronting Complainant at the time he refused to pull the trailer, would conclude that there was a danger of serious injury to himself or others due to the condition of the trailer.

B. Complaint

The STAA also protects a driver who “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.” 49 U.S.C. § 31105(a)(1)(A). The complaint must be based on a “reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation.” *Calhoun v. Dept. of Labor*, 576 F.3d 201, 212 (4th Cir. 2009) (internal citations omitted). As previously discussed, I have found Complainant’s belief was not reasonable, therefore even if I were to find he made a valid complaint, I conclude he is also not eligible for protection under this clause of the STAA.

C. Conclusion

I find that the preponderance of evidence establishes that Complainant’s refusal to drive was not protected activity under the STAA.

ORDER

For the foregoing reasons, I hereby ORDER that Complainant’s claim be DENIED.

A

Daniel A. Sarno, Jr.
District Chief Administrative Law Judge

DAS,JR/amc
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).