In the Matter of:

MARK PRIOR, **ARB CASE NO. 04-044**

COMPLAINANT, **ALJ CASE NO. 2004-STA-1**

v. **DATE: April 29, 2005**

HUGHES TRANSPORT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mark Prior, pro se, Loyal, Wisconsin

For the Respondent:
Kenneth W. Gorski, Esq.*, Gorski & Wittman, S.C., Marshfield, Wisconsin*

FINAL DECISION AND ORDER

Mark Prior filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2005), alleging that his employer, Hughes Transport, Inc., violated § 31105 of the STAA when it terminated his employment because he refused to drive a truck. On January 13, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) dismissing Prior's complaint. The R. D. & O. is now before the Administrative Review Board (ARB) pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1) (2004).[1]

[1] Complainant Mark Prior filed a brief on February 27, 2004. Respondent Hughes Transport elected not to file a brief.

STANDARD OF REVIEW

Under the STAA, the ARB is bound by the factual findings of the ALJ if supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co*., ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). In reviewing the ALJ's conclusions of law, the ARB, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 2005). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc*., ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that there is a causal connection between the protected activity and the adverse action. *BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

Activity protected under STAA includes filing a complaint or beginning a proceeding "related to" a violation of a commercial motor vehicle safety regulation, standard, or order or testifying or intending to testify in such a proceeding. 49 U.S.C.A. § 31105(a)(1)(A). Protected activity also includes a refusal to operate a commercial motor 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." 49 U.S.C.A. § 31105(a)(1)(B).

Prior refused to drive the truck assigned to him because he considered it "barely road legal." Tr. 8. Prior gave the company mechanic a list of seven items he regarded as safety defects on the truck. CX 1. The ALJ concluded that Prior at least arguably had reasonable concerns that the truck "was in an unsafe condition and potentially unsafe to himself and or the public." R. D. & O. at 5. Thus, Prior's refusal to drive could have constituted protected activity under either prong of § 31105(a)(1)(B) – subparagraph (i), refusal to drive due to a violation of a safety law, or subparagraph (ii), refusal to drive due to a reasonable apprehension of serious injury.

The ALJ did not determine whether the defects Prior identified constituted violations of safety laws or supported a reasonable apprehension of serious injury, because Prior failed to establish that Hughes retaliated against him for refusing to drive the truck. R. D. & O. at 6. The ALJ found, and Prior conceded, that at the time Prior

decided his assigned truck was unsafe, Prior could have worked in the Hughes warehouse until the truck was repaired and then driven it, or he could have taken a different truck. *Id.*[2] Prior chose to leave and never asked to return to work. *Id.* 6-7. Thus, the ALJ found, Prior voluntarily left his job. *Id.* at 7. If, as Prior claims, Hughes Transport "terminated" him, it was for abandoning his job, not in retaliation for refusing to drive an unsafe truck. *Id.* We have reviewed the record and find that substantial evidence on the record as a whole supports the ALJ's findings. They are therefore conclusive. 29 C.F.R. § 1978.109(c)(3).

The ALJ concluded that Prior's failure to establish that Hughes fired him because he refused to drive required dismissal of the complaint as a matter of law. *See Pugh v. Con-Way Southern Express*, ARB No. 03-142, ALJ No. 03-STA-27 (ARB May 28, 2004) (failure to establish a causal connection between protected activity and adverse employment action necessitates dismissal of complaint). We concur.

CONCLUSION

We adopt the ALJ's decision, attach and incorporate the R. D. & O. and **DISMISS** Prior's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE G. BEYER
Administrative Appeals Judge

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[2] The ALJ particularly noted Prior's answer to the following question by the ALJ:

> Q Now my question first of all is why did you leave that day? Even though I understood you wrote the truck up and you felt justified in writing the truck up, why didn't you just hang around and do some warehouse work or trucking work or mechanic work or something?
>
> A That's a good question. I don't have the answer for that.

Tr. 36.