**U.S. Department of Labor**

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**Issue Date: 30 January 2008**

Case No.: 2006-STA-00035

In the Matter of:

DONALD J. FORMELLA,
Complainant

v.

SCHNIDT CARTAGE, INC.,
Respondent

APPEARANCES:

Timothy Huizenga, Esq.,
Rebecca Silver, Esq.,
For Complainant

Bruce F. Mills, Esq.,
For Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

This case involves the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA"), 49 U.S.C. § 31101, *et. seq*., and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978. Donald J. Formella ("Complainant"), filed a complaint with the Occupational Safety and Health Administration, United States Department of Labor, on February 23, 2006, alleging that his employer, Schnidt Cartage, Inc., ("Respondent") violated the Act when it discharged him because of his protected activities.

On May 18, 2006, the Secretary issued a report finding that Complainant was fired because of his aggressive conduct and not his protected activity. On June 14, Complainant filed an objection requesting that his case be transferred to the state attorney general's office. The secretary construed this as an objection and request for a hearing pursuant to 29 C.F.R. § 1978.105, and the matter was transferred to the undersigned. A formal hearing was held on November 16, 2006 in Chicago, Illinois, at which time I offered both parties the opportunity to

offer testimonial and documentary evidence. The record was held open for the filing of post-hearing briefs, which both parties have filed.

The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered.

## Findings of Fact and Conclusions of Law

I. Summary of the Evidence

*A. Testimony of Complainant, Donald J. Formella (TR at 20-58)*[1]

Complainant testified as follows: He has been a truck driver for the last 41 years, having driven over 1.5 million miles in the Chicago area. He worked for Respondent since October 3, 2005. On the day in question, February 23, 2006, Complainant arrived at work and punched in at 7:13 AM. (*see* CX 3). A meeting was then held, where Ms. Markus made comments discouraging the employees from unionizing. Complainant was assigned a tractor for his route, which was different than what he normally drove. Upon seeing the tractor, Complainant observed that the tire treads were mismatched and the high-beams and a reflector were out.

Complainant believed it was unsafe and illegal to drive a truck with mismatched tire treads. Specifically, he thought mismatched tire treads could cause water or snow to be dispersed in different directions causing loss of control; he also believed that in extreme heat, the patterns could cause the tires to cool unevenly, causing a blowout. Complainant testified that his concern was based on federal regulations pertinent to truck safety, magazines he has read, and his experience as a truck driver generally.

Respondent testified that after he discovered the problems with the tires and the lights, he went into the office to tell the dispatcher. Ms. Markus then called him into her office. At that time, Ms. Markus allegedly told Complainant that if he was unhappy, he could quit. Complainant refused to quit and Ms. Markus fired him.

At some point, Mr. Landowski also entered the office. According to Complainant, he conveyed his safety concerns to Mr. Landowski, mentioning the tire treads as well as problems with a reflector and the high-beams. Complainant testified that he never stood up or raised his voice during the conversation with Ms. Markus or Mr. Landowski.

After his termination, Complainant briefly worked for several other companies, but did not obtain long-term employment. In addition to the loss of income, he testified that he was "disturbed" over his firing.

I find Complainant's testimony generally credible; however, I find portions of his testimony to be incomplete and evasive. Complainant disputed or evaded several facts that were

[1] TR refers to the November 16, 2006 hearing transcript. CX, RX, and ALJX refer to the exhibits of Complainant, Respondent, and the Administrative Law Judge, respectively.

established by the overwhelming weight of contrary evidence. For example, Complainant testified that he reported all of the safety issues at a single time, while the other witnesses established that Complainant made several trips back and forth between his truck and the office. Similarly, Complainant denied that he knew Mr. Osten or Mr. Miehle or that he had a confrontation with either. Complainant also denied that he blocked anyone with his truck or that anyone moved his truck. He also denied that Mr. Landowski called Penske to seek their input on the issue of the tire treads. Finally, Complainant denied that he ever asked Ms. Markus if he was fired. With regard to these discrepancies, I find the accounts of the Respondents' witnesses to be more consistent, logical, and credible.

*B. Testimony of Linda Markus (TR at 63-144)*

Linda Markus, Vice-President of Schnidt Cartage, Inc., testified as follows: Ms. Markus has worked in trucking and for Respondent for over twenty years. Respondent, Schnidt Cartage, Inc., is a "local cartage company," which moves freight within a fifty-mile radius of Chicago. Respondent employs twenty-six drivers. Drivers are not assigned to specific trucks. Approximately half of Respondent's trucks are owned by Respondent, while half are leased from Penske. The truck leases generally last five years, but Penske is entitled to terminate the leases early and sell the truck to a third-party. In such cases, Penske provides another truck to Respondent.

Trucks used by Respondent are not new, and there are minor mechanical issues with one or more trucks every day. Each morning, the drivers inspect their trucks, but do not complete a written safety report. A written report is completed at the end of the day. When safety issues are identified, drivers are supposed to first go to Paul Landowski; however, the command structure is informal, and problems are often brought to the attention of the dispatcher or Ms. Markus. When a problem is identified, Respondent's mechanic fixes it, if possible, or a different truck is used. If one of the leased trucks needs a major repair, it is sent to Penske or an outside mechanic for repairs. Schnidt's mechanic also makes "minor" repairs to the Penske trucks.

Ms. Markus testified that each morning, truckers arrive in shifts between 6:00 AM and 9:00 AM. On February 23, Complainant was scheduled to arrive at 7:30 AM. Ms. Markus arrived at 6:30 AM and was in the dispatch room when Complainant arrived. She first saw him when he clocked in, at which time she handed him his clipboard and phone. Ms. Markus then held a meeting with the truckers. At the meeting, Ms. Markus engaged in anti-union campaigning, the legality of which is not at issue here.

Ms. Markus testified that following the meeting, she had three separate contacts with Complainant. First, he came into the office "questioning" his truck assignment, and asking where his truck was. Truckers are not assigned specific trucks but often a driver is assigned the same truck for several months at a time. Complainant had been using truck number 47 for several months and referred to it as "his" truck. On February 23, Complainant was assigned a different truck, because the one that he had been using had been returned to Penske. Ms. Markus or the dispatcher explained to Complainant that he would be driving a different truck.

Five or ten minutes later, Complainant returned, this time entering the dispatch office,[2] complaining that there were no permits in the truck. Ms. Markus gave Complainant the appropriate permits.

Complainant entered a third time fifteen minutes later in a "boisterous" manner, complaining about the tire treads and lights being out on the truck. When he entered the office, Ms. Markus was standing at the window speaking to another driver, Charles Miehle. Kurt, the dispatcher, was also involved in the conversation. After Complainant entered the third time, Ms. Markus had Complainant enter her office and they left the dispatch room. She also asked Paul Landowski to join them in her office to witness the conversation.

In Ms. Markus' office, Complainant became increasingly "louder" and more "vehement," and began complaining about unrelated matters, such as Mr. Landowksi's management ability, in addition to the mismatched treads. During the conversation, Paul Landowski went to his office across the hall to call Penske. He also called the mechanic on the two-way radio and asked him to fix the lights.

Ms. Markus testified that she felt "a bit threatened" by Complainant's demeanor, and that Complainant "kept pushing" her, by repeatedly asking "am I fired?" Summarizing the conversation, Ms. Markus testified that Complainant was fired because of his "volatile condition … his anger, [and] his unstableness." She testified that Complainant was so loud that other workers came running into the area to see what was happening. Ms. Markus told Complainant that if he was unhappy maybe he should go work somewhere else. Eventually, Ms. Markus told Complainant that he was fired. She testified that he may have said "fine" but was unsure.

The conversation in Ms. Markus' office lasted 20-30 minutes. Ms. Markus testified that she told Complainant that he was fired at 8:00 AM or 8:30 AM; although previously she signed an interrogatory answer stating that the termination occurred at approximately 8:00 AM. (*See* CX 14). As Complainant was leaving, Ms. Markus called the police because she felt threatened. The police dispatcher told her that Complainant had also just called. Shortly thereafter, Ms. Markus asked Schnidt's human resources person, Cheryl Woolever, to draft a letter of termination to Complainant. (*See* CX 7). The letter did not state a reason for Complainant's termination, but only that "[w]e regret that this action is necessary…."

Prior to this incident, Complainant had worked for Respondent for approximately 4½ months. Ms. Markus testified that she had previously had no negative contact with Complainant. Her relationship was "cordial," but she had not "graduated" to a point where she talked with him about his family yet. Ms. Markus testified that Complainant had not done anything noteworthy in a negative sense and was a good driver. Ms. Markus alone made the decision to fire Complainant. She testified that she had dealt with angry truck drivers before, and that she may have fired one other driver in her twenty years at Schnidt. She testified that she had no intention of firing Complainant, "had he not kept pushing and getting more and more volatile and

[2] Ms. Markus testified that the office at Schnidt Cartage consists of a large open area and several small offices. One of the offices is the dispatch office, which can be approached through a window from the trucker's lounge or entered through a door. Mr. Osten later testified that drivers are supposed to approach the dispatch room at the window, rather than enter through the door.

agitated." On cross-examination, Ms. Markus acknowledged that Complainant never stood up during the encounter but was sitting on the edge of his seat, leaning toward her or Paul Landowski. He made no threatening remarks, but was "very loud," and "boisterous."

On cross-examination, Ms. Markus also acknowledged that she contested Complainant's application for unemployment benefits on March 6 by writing that he had been fired for "threaten[ing] several employees with bodily harm." (*See* CX 15). At the hearing, Ms. Markus testified that the "several employees" was a reference to altercations with Charles Miehle and Richard Osten. However, she admitted that she did not learn of the altercations with Mr. Osten until after she fired Complainant. She also admitted that "maybe" she was trying to convince investigators that she fired him for this reason, but repeated that she fired Complainant because of his volatile condition.

Mr. Osten and Mr. Miehle later gave typed statement to Ms. Markus. Ms. Markus stated that one of the two men sent her an unsolicited account of the events, and that she then asked the other for his account. She did not remember which statement was solicited and which was unsolicited.

I find Ms. Markus' testimony to be credible with few exceptions. Overall, I find her account of the events leading up to Complainant's termination to be more credible than Complainant's account. I acknowledge that Ms. Markus admitted that she did not learn about Complainant's altercation with Mr. Osten until after she fired Complainant, which was a potentially damaging admission. She testified that Mr. Miehle started to tell her about his altercation with Complainant immediately prior to her firing Complainant, but Mr. Miehle testified that it did not occur until afterward. This discrepancy is understandable, as Mr. Miehle testified that he was attempting to tell Ms. Markus what happened, but was unable to because Ms. Markus was occupied dealing with Complainant. I credit Mr. Miehle's testimony that he did not inform Ms. Markus of his altercation with Complainant until after she terminated Complainant. However, it is possible that Mr. Miehle started to tell Ms. Markus about his altercation with Complainant before Complainant interrupted. Notwithstanding these minor discrepancies, I find Ms. Markus' overall account of the events of February 23, 2006 to be more credible than Complainant's account.

*C. Testimony of Paul Landowski (TR at 145-175)*

Paul Landowski has worked for Schnidt for thirteen years. He is Schnidt's safety director and is also responsible for purchasing and leasing Schnidt's trucks and buildings.

Mr. Landowski's testimony as to Respondent's protocol for reporting safety violations was similar to Ms. Markus'. When a driver notices a problem in the morning, he normally reports it to the dispatcher or directly to Mr. Landowski. If the problem is minor, the mechanic addresses the problem on site. If the problem cannot be fixed, another truck is used. If the problem occurs with one of the leased trucks, Respondent contacts Penske, who repairs or replaces the truck. Mr. Landowski testified that problems are always addressed, and that a driver has never refused to drive a vehicle before.

On February 23, Mr. Landowski was called into Ms. Markus' office by Ms. Markus. Complainant was already in her office and was "very upset" and "almost hostile." Complainant stated that it was illegal and unsafe to operate a truck with mismatched treads. Mr. Landowski did not think the mismatched treads posed a safety threat, but called Penske to obtain another opinion. Mr. Landowski left Ms. Markus' office to call Penske. He also radioed Schnidt's mechanic to ask him to fix the tail light.

Mr. Landowski's office is right across the hall from Ms. Markus' and he could continue to see into Ms. Markus' office while he was on the phone. After the call, Mr. Landowski walked back to Ms. Markus' office and told Complainant about his phone call to Penske. Complainant continued to protest and stated that Mr. Landowski and Penske were wrong about the tire tread issue. Complainant stated that he "can't be driving a vehicle like that." Mr. Landowski testified that he believed Complainant was legitimately concerned about safety when he complained about the tire treads.

During the conversation, Complainant also expressed displeasure with being assigned a different truck. Evidently, he had attached a citizen's band radio antenna to the truck that he had been using, and was upset that the truck, along with his personal radio antenna, had been returned to Penske.

Mr. Landowski testified that Complainant was "fired up" and "very red in the face" and that he felt threatened by Complainant. At some point, Ms. Markus told Complainant that if he did not feel comfortable with Schnidt, then maybe he should leave. Complainant said he didn't have to leave. At some point in the conversation, Ms. Markus fired Complainant.

*D. Testimony of Richard Osten (TR at 176-208)*

Richard Osten, a truck driver for Respondent, testified as follows: He has been a truck driver since 1993 and has worked for Respondent for approximately three years. Mr. Osten had a brief encounter with Complainant on the morning in question. On his way into work, Mr. Osten saw Complainant getting out of a truck and heading into the office.

Complainant had parked the truck such that it was blocking another driver, and Mr. Osten moved the truck out of the way. Mr. Osten testified that after Complainant came back out of the office, he got "up in [Mr. Osten's] face and [was] very loud about it" and said, in Mr. Osten's words, "don't ever get in my fucking truck or I'll kill you." Mr. Osten testified that Complainant's voice was "dead serious." This was evidently right before Complainant's third trip into the office to complain about the tire treads.

Mr. Osten had just gotten to work and was not sure if this occurred before or after he clocked in. After his encounter with Mr. Osten, Complainant went into the office and started yelling at Ms. Markus. Mr. Osten also tried to talk to Ms. Markus, but "[Complainant] was too much yelling at Linda [Markus] at that point." Mr. Osten testified that Complainant was "yelling and screaming about the tires." Mr. Osten "couldn't get a word in edgewise." Ms. Markus and Complainant went into Ms. Markus' office and Mr. Osten told two other individuals what had happened with Complainant. Sherry Woolever, the human resources manager, told Mr. Osten

that she would convey Mr. Osten's account of his altercation with Complainant to Ms. Markus after she was finished speaking with Complainant. Sherry also told Mr. Osten to write up a statement of what had happened. Complainant denied that this altercation occurred or that he even knows Mr. Osten; however, I find Mr. Osten's testimony more credible.

*E. Testimony of Charles Miehle (TR at 209-257)*

Charles Miehle has been a truck driver for approximately thirty years and has worked for Schnidt for approximately one year. On the morning in question, Mr. Miehle also had a brief encounter with Complainant. He thought he may have seen Complainant before, but had never spoken with him prior to that day and did not know his name. While passing each other, Complainant said "it's your fault" to Mr. Miehle. A conversation ensued and Complainant started asking Mr. Miehle about forming a union. Mr. Miehle told Complainant that he was "not interested." According to Mr. Miehle, Complainant said something like, "if I put a contract[3] under your nose, you're going to sign it."

Mr. Miehle felt threatened and upset by the conversation and intended to ask for permission to take the day off. The dispatcher, Kurt, came outside and asked what had happened. Kurt suggested Mr. Miehle go into the office to cool off, which he did. Five minutes later, Complainant entered the office, and, in Mr. Miehle's words, Complainant was "making a lot of noise and ruffling a lot of feathers." Mr. Miehle testified that he did not start talking to Ms. Markus about the altercation until after she finished with Complainant. Later that morning or possibly the next morning, he told Ms. Markus what had happened and that he did not want to work at Schnidt if there was going to be a union. Ms. Markus asked Mr. Miehle to write down what had happened. He emailed her within the next two weeks. Mr. Miehle stated that he does not write well and he thinks his letter may have been rewritten, but he signed the final copy. Complainant denied that this altercation occurred or that he even knows Mr. Miehle; however, I find Mr. Miehle's testimony more credible.

Complainant argues that Mr. Miehle's timesheet, showing that he clocked in at 7:54 AM, proves that he could not have had an altercation with Complainant on February 23, because Respondent answered an interrogatory by stating that Complainant was terminated at approximately 8:00 AM. However, Complainant was most likely terminated at 8:30 AM or later. Complainant testified that he clocked out after being fired, and he did not clock out until 8:52. (*See* CX 3). Additionally, Mr. Miehle testified to observing Complainant arguing with Ms. Markus shortly after his confrontation with Mr. Miehle, and I credit this testimony.

F. Documentary Evidence

The formal case file, including the proceedings before the Occupational Safety and Health Administration, are part of the record as Administrative Law Judge's Exhibits (ALJX 1-18). Complainant's exhibits (CX 1-15) and Respondent's exhibits (RX 55-70, 75-76) have also been admitted into the record.

[3] "Contract" apparently referred to a union authorization card.

Complainant's exhibits include manifests from February 22 and February 23, (CX 1-2); Complainant's time sheet showing that he clocked in at 7:13 AM and clocked out at 8:52 AM on February 23, (CX 3-4); photos of the truck tires, (CX 5-6); Complainant's letter of termination, (CX 7); timesheet showing that Charles Miehle clocked in at 5:58 AM on February 23, (CX 8); timesheet showing that Richard Osten clocked in at 8:25 AM on February 23, (CX 9); interrogatories to Respondent, (CX 10, CX 14); examples of vehicle inspection reports, (CX 11); Complainant's pay stubs, (CX 12-13); and a notice filed by Respondent, protesting Complainant's claim for unemployment benefits, (CX 15).

Respondent's exhibits include vehicle inspection reports, (RX 55-70) and printouts of safety regulations. (RX 75-76). Written statements of Charles Miehle and Richard Osten, were also admitted, at Complainant's request, for impeachment. (RX 71-74).

*II. Applicable Law*

The provisions of the STAA relevant to this appeal are set out at 49 U.S.C. § 31105(a):

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because–
> …
> (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.

"Congress enacted the STAA to combat the increasing number of deaths, injuries and property damage resulting from commercial trucking accidents." *Roadway Express, Inc. v. United States Dept. of Labor*, 495 F.3d 477, 480 (7th Cir. 2007) *(citing Brock v. Roadway Express, Inc.*, 481 U.S. 252, 282 (1987) (internal quotations omitted). The STAA "was intended to create a climate in which employees would feel free to voice their health and safety concerns without fear of employer retaliation." *Clean Harbors Env't. Serv., Inc. v. Herman*, 146 F.3d 12, 19 (1st Cir. 1998); *see also Brinks, Inc. v. Herman*, 148 F.3d 175, 179 (2d Cir. 1998) ("Congress sought to assure that employees are not forced to drive unsafe vehicles or commit unsafe acts and to provide protection for those employees who are discharged or discriminated against for exercising their rights and responsibilities") (internal quotations omitted).

## *III. Analysis*

### A. Protected Activity

Initially, Respondent contends that Complainant has not engaged in protected activity because Complainant never refused to operate the vehicle and because his belief concerning the tire treads was not objectively reasonable. The Act protects three types of activities: filing a complaint;[4] refusing to operate a vehicle because of an actual violation;[5] or refusing to operate a vehicle because of a reasonable apprehension that the vehicle is unsafe.

Paul Landowski testified that "[Complainant] told me that I was wrong and Penske was wrong [about the tire treads]. That is illegal and I can't be driving a vehicle like that." I find that this constitutes a "refusal" to operate the vehicle. Furthermore, I find that Complainant had a reasonable apprehension that the tires possessed a serious danger to himself or the public. Complainant articulated a credible and logical explanation for his safety concerns; specifically, he feared that mismatched tire treads could cause water to be dispersed inconsistently, causing a loss of control. Regardless of whether this concern was technologically or scientifically sound, I find it was at least "objectively reasonable."[6] Therefore, I find that Complainant has engaged in protected activity.

### B. Adverse Action

The Act prohibits an employer from "discharge[ing] … disciplin[ing,] or discriminat[ing] against an employee regarding pay, terms, or privileges of employment" because of the employee's protected activity. 49 U.S.C. § 31105(a)(1). It is undisputed that Complainant was discharged on February 23, 2006. Therefore, I find that Respondent took an adverse employment action against Complainant. The remaining issue is whether Respondent fired Complainant "because [of]" his protected activity.

### C. Reason for Complainant's Termination

Once an employer has come forward with a nondiscriminatory explanation for its action, "the *McDonnell Douglas* framework–with its presumptions and burdens–is no longer relevant." *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1993). Instead, "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant

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[4] The Board and several courts have held that purely internal complaints, even oral complaints, made to supervisors, may fall under the "filing a complaint" prong of the STAA. *Clean Harbors Env't Serv., Inc. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998) (*citing Stiles v. J.B. Hunt, Transp. Inc.*, No. 92-STA-34 (Sec'y Sep. 24, 1993)). Because I have found that Complainant's conduct falls with the "reasonable apprehension prong," it is not necessary to determine whether Complainant's informal oral communication constitutes the "filing of a complaint."

[5] Additionally, the parties devote considerable time to the issue of whether operating a vehicle with mismatched tire treads is in fact illegal, citing various transportation regulations. As I have found that Complainant clearly engaged in protected activity under the "reasonable apprehension prong," it is not necessary to address this highly technical issue.

[6] Admittedly, the lack of expert testimony on this issue, from either side, hampers my analysis. However, I find that Complainant has advanced a facially reasonable argument, and Respondent presented no expert testimony to refute his claim.

intentionally discriminated against him.'" *Id.* at 511; *See also Luckie v. United Parcel Serv., Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007); *Carroll v. Bechtel Power Corp.*, No. 1991-ERA-46 (Sec'y Feb. 15, 1995).

Complainant has established that he engaged in protected activity and was subjected to an adverse employment action. Respondent has offered several non-discriminatory justifications for his termination. Therefore, I must proceed to the ultimate issue of whether Complainant was discharged "because [of]" his protected activity.

Based on my review of the record and credibility determinations, I conclude that Complainant was not terminated because of his protected activity. Rather he was terminated because of his provocative, intemperate, volatile, and antagonistic conduct. Ms. Markus and Mr. Landowski testified consistently that Complainant was upset and acted inappropriately toward both after discovering that he was being assigned a different truck than the one to which he was accustomed. Complainant also managed to provoke and antagonize two of his coworkers in his short time at work on the morning in question. While the evidence shows that Ms. Markus was not aware of these incidents at the time she fired him, they are still probative on the events of the day.

Mr. Osten and Mr. Miehle both encountered Complainant in the middle of one of his trips back and forth between the office and his truck. In both cases, Complainant was hostile and threatening, evidently because he was upset about his truck being switched. While these events could not serve as the basis for Complainant's termination, they corroborate Ms. Markus' and Mr. Landowski's testimony concerning Complainant's temperament and demeanor that morning.

I am cognizant of the fact that had Claimant not engaged in protected activity, he might not have been terminated, because the confrontation leading up to his termination stemmed from Complainant's refusal to drive on the mismatched tires. However, this appears to have been only partially responsible for the altercation, because there was testimony that Complainant was irate before even discovering the mismatched tire treads.

Additionally, I observe that Complainant's safety concerns, however legitimate, did not give him license to yell at supervisors, challenge their capability, and threaten and provoke his coworkers. In addressing an STAA claim, where an employee was fired not for his safety concerns, but the manner in which he addressed them, the Second Circuit held:

> [i]nsubordination and conduct that disrupts the workplace are legitimate reasons for firing an employee, and an employer may discharge an employee for inappropriate forms of complaint even if the complaint itself has substance.
> …
> An employee's entitlement to submit a complaint about a vehicle's safety would not mean that the employee was similarly entitled to attach the complaint to a rock and throw it through his supervisor's window. The employee's protected right to complain would not prevent [the employer] from disciplining the employee for communicating his complaint by rock-throwing.

*Harrison v. Admin. Review Bd., U.S. Dep't. of Labor*, 390 F.3d 752, 759 (2d Cir. 2004) (internal quotations omitted); *see also Kenneway v. Matlack, Inc.*, 88-STA-20 (Sec'y June 15, 1998) (although the right to engage in statutorily protected activity permits some leeway for impulsive behavior, this is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts).

In the present case, I find that Complainant's behavior: storming into the dispatch office, yelling, antagonizing, and provoking his supervisors, by questioning their capabilities, and repeatedly asking if he was fired, effectively amounted to throwing a rock through his supervisors' window. While Complainant may have acted in response to legitimate safety concerns, his behavior far exceeded any leeway to which he was entitled.

One additional fact must be addressed. In contravening Claimant's unemployment claim, Ms. Markus originally cited Claimant's threatening behavior toward coworkers as the reason for his discharge. However, Ms. Markus acknowledged that she did not know of the altercation with Mr. Osten until after she fired Complainant, and she likely did not learn of Complainant's altercation with Mr. Miehle until afterward as well. At the hearing, Ms. Markus testified that Complainant was fired not for these events but because of his conduct toward her. Complainant strenuously argues that this shift in explanation establishes that Complainant was in fact discharged because of his protected activity. However all three incidents occurred very closely in time and while Complainant was upset over his truck being switched. Although Ms. Markus likely did not learn about the incidents with Mr. Osten and Mr. Miehle until after terminating Complainant, it is reasonable that she could perceive the entire sequence of events that morning as a single incident or fail to correctly remember the sequence of when she became aware of each event that occurred that morning.[7]

Furthermore, even if I disbelieve Ms. Markus' original explanation, this would not compel a finding of discrimination. *See Hicks*, 509 U.S. at 511. Disbelieving the employer's non-discriminatory justification for the employment action only "permits" a finding of discrimination, it does not require it. *Id; see also Patrickson v. Entergy Nuclear Operations, Inc*., ARB Nos. 05-069, 05-070 (August 31, 2007) (applying *Hicks* to whistleblower case). In this case, I find Respondent's reasons to be partially credible. Specifically, I find Claimant's behavior toward Ms. Markus and Mr. Landowski to be a credible reason for his discharge, while I find Claimant's conduct toward Mr. Osten and Mr. Miehle to not be a credible reason for Complainant's discharge, because Ms. Markus did not have knowledge of these acts when she made the decision to terminate Complainant. Despite the fact that Ms. Markus subsequently sought to justify the termination with facts not known to her at the time of the termination, either as a result of innocently confusing the sequence of events on the morning in question, or out of an attempt to embellish or even misrepresent her basis for terminating Complainant, I still find that Respondent terminated Complainant for his behavior and not in retaliation for his protected activity.

[7] Complainant's brief identifies numerous other perceived inconsistencies in the testimonies of Ms. Markus, Mr. Landowski, Mr. Osten, and Mr. Miehle. Except where specifically discussed, I find none of these perceived inconsistencies to be significant or material. In fact, I find the testimony of these four witnesses to be largely consistent and coherent.

**Recommended Order**

For the above stated reasons, IT IS HEREBY RECOMMENDED that the complaint of Donald J. Formella under the Surface Transportation Assistance Act be DENIED.

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JOSEPH E. KANE
Administrative Law Judge

NOTICE: This 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, 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.