



December 17, 2013

Mr. Steve Crawford  
General Counsel  
New Prime, Inc.  
2740 N. Mayfair Avenue  
Springfield, MO 65803

Via UPS Tracking Number: 1ZX1051V0190287439

Re: New Prime, Inc./Ford/2-4173-09-119

Dear Mr. Crawford:

This is to advise you that we have completed our investigation of the above referenced complaint filed by Brian Ford (Complainant) against New Prime, Inc. (Respondent) on August 18, 2009, under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (STAA). In brief, Complainant alleges that on or about August 14, 2009, he discovered that Respondent had willfully and maliciously submitted false and negative information to USIS Commercial Services, Inc. (USIS)<sup>1</sup> which appeared on his DAC Report<sup>2</sup>. This action was allegedly in retaliation for the Complainant taking medical leave in late October 2008 to obtain treatment for his injured back, involving being placed out of work by his doctor for being prescribed medication prohibiting him from operating heavy equipment, followed by back surgery and convalescence<sup>3</sup>. Respondent's submissions to USIS included that the Complainant allegedly abandoning his assigned truck tractor and being at an unauthorized location without notice in early November 2008, during the time that Respondent acknowledged being aware that he was on medical leave. Respondent also submitted that Complainant was ineligible to be rehired, and although they rated him as having a satisfactory work record, it was qualified with the term "other". As a result of Respondent's retaliatory actions, Complainant was unable to obtain employment as a commercial truck driver for approximately nine months after he was cleared medically to return to work in July 2009.

Following an investigation of this matter by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, Region II, finds reasonable cause to believe that Respondent did violate 49 U.S.C. §31105, and issues the following findings:

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<sup>1</sup> US Investigations Services, Inc., (merged with HireRight, Inc. in August 2008) is a provider of pre-employment and drug testing screening services.

<sup>2</sup> Employment history information submitted by former employers in the trucking industry to HireRight & USIS Commercial Services, Inc., formerly known as DAC Services.

<sup>3</sup> Federal Motor Carrier Safety Regulation § 392.3: Ill or fatigued operator. No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

### Secretary's Findings

Complainant was given permission to take time off work in October 2008 to address a work related back injury. Following surgery and convalescence, he began applying for work with other trucking firms in May 2009, without success. On August 14, 2009, Complainant learned that Respondent had placed false and negative information on his DAC Report, which directly led to at least one of the trucking firms, Beacon Transport, not hiring him. On August 18, 2009, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105. As this complaint was filed within 180 days of learning of the alleged adverse actions, it is timely filed.

Respondent is a person within the meaning of 1 U.S.C. §1 and 49 U.S.C. §31105. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. §31101. Respondent, who maintains a principal place of business in Springfield, Missouri, is engaged in transporting goods in refrigerated, flatbed and tanker vehicles.

Complainant was an employee within the meaning of 49 U.S.C. §31105. In the course of his employment, Complainant directly affected commercial motor vehicle safety by driving Respondent's trucks over interstate highways in commerce transporting goods.

In June 2008, Complainant began working for Respondent as an over the road truck driver in their lease purchase program operating tractor trailer units with gross weight ratings of 10,001 pounds, and thus constituted as a commercial motor vehicle. Complainant was employed by a commercial motor carrier and traveled in company trucks over highways in commerce to transport merchandise. He is not represented by a union.

On October 17, 2008, Complainant injured his back while dropping a trailer at a Mt. Crawford, Virginia customer's site. For the next week the pain gradually increased in his back and eventually radiated down his leg, which impaired his ability to safely operate his vehicle. Between October 17, 2008 and October 25, 2008, Complainant informed Fleet Manager/Dispatcher, Jared Young of his back injury at which time he requested from Young to be routed to his Belton, South Carolina home to obtain medical attention. Young granted Complainant's request and permitted that he return to his home to address his back issue. On October 25, 2008, after he delivered his last scheduled load in Norcross, Georgia, Complainant traveled to his home in his assigned truck. Young alleges that after an October 25, 2008 contact with Complainant in which they discussed his return home to address his back injury, Complainant "just disappeared" and he was unable to reach him despite placing several telephone calls and leaving voice mail messages for him at his multiple telephone contact numbers on subsequent dates. On November 1, 2008, Complainant reported to the Abbeville Medical Center in Abbeville, South Carolina, and as a result of his "sciatica" diagnosis, he was prescribed Percocet and Oxycodone along with other medication, and cautioned about the medication causing drowsiness with a warning not to operate heavy machinery while taking

them. On November 2, 2008, Complainant sent a fax to Respondent which provided his medical information he obtained regarding his care he received the previous day, including his prescription information and that he was restricted from returning to work. Complainant alleged that he called Young on November 3, 2008 and informed him that he would therefore not be returning to work on his regularly scheduled shift the next day and he didn't know when he would be returning to work since his doctor recommended that he be examined by a neurologist first. On or about November 7, 2008, Complainant and Young made arrangements for Respondent's truck to be recovered. In a November 7, 2008 entry by Young in Respondent's internal "Driver Incident System", he wrote that Complainant's truck had been recovered for "medical reasons" as Complainant was unable to make any further deliveries as he is under a doctor's care and he was "prescribed pain killers", per the "faxed note" provided by Complainant. The entry also stated that Complainant "struggles with profitability in the lease program", he has problems with truck utilization, and that Complainant had been making improvements when his medical issue arose. Complainant alleged that in late November 2008, he sent Young an email informing him that he hoped to be medically able to return to work by early January 2009, to which Young expressed doubt that his position would be available for him in light of a slowdown in the movement of freight. Complainant did not pursue reinstatement with Respondent thereafter. Complainant underwent disc surgery on April 2, 2009, which was followed by a lengthy convalescence. In anticipation of being cleared medically to return to work in July 2009, Complainant began applying to several national interstate trucking companies for driving positions between May 2009 and July 2009, all without success.

On August 14, 2009, Complainant was informed by one such firm, Beacon Transport, that they would not hire him because his DAC Report contained information that Respondent had reported to USIS Commercial Services, Inc. (USIS) that in November 2008, he had allegedly abandoned his assigned truck tractor and was at an unauthorized location without notice and he was ineligible for rehire. Complainant also discovered that his DAC Report showed that Respondent indicated that his work record was satisfactory, but qualified it with the term "other".

Complainant filed a complaint with the Secretary of Labor on August 18, 2009, alleging Respondent retaliated against him for reporting his work related back injury, taking a medical leave to address his injury and being unavailable to make deliveries during that time. Complainant was not capable of safely operating the commercial motor vehicle and Complainant's voluntary removal from driving operations complied with Federal Motor Carrier Safety Regulation § 392.3. Respondent received notification of the complaint on August 31, 2009.

In its March 5, 2010 position statement, Respondent asserted that their dispatcher was unable to find Complainant for several days, so he assigned someone to retrieve his truck based on its last satellite location and recorded it as abandonment. Respondent asserted that Complainant was found two days later at which time he explained his situation and provided them with his medical documentation. Respondent asserts that in light of this, the dispatcher made Complainant eligible for rehire; however, inadvertently, the abandonment entry remained on Complainant's

work history until September 2009 when the error was brought to their attention by way of this complaint. Although Respondent removed abandonment from Complainant's DAC Report, contrary to their assertions, he was listed as not being eligible for rehire until June 2010, when it was changed in his DAC Report to "upon review". Respondent's assertion that Complainant could not be found is undermined by Fleet Manager/Dispatcher Jared Young's statement to OSHA on May 26, 2010 that Young knew Complainant had returned to his home to see a doctor for his back after Complainant made his last delivery in Norcross, Georgia on October 25, 2008. Young asserts, however, that Complainant failed to return any of his telephone calls for a week to ten days, and thought that Complainant had abandoned the truck. This is contrary to Complainant's assertions that he had remained in regular contact with Respondent during the entire time he returned home. Young asserted that there were no major issues with Complainant during his tenure with Respondent, except he "struggled with profitability", as Respondent wants to dispatch their vehicles to maximize revenue.

Barbara Mayhew, Personnel Director, in her statement to OSHA on June 24, 2010, advised that Young placed all of the entries in Respondent's Driver Incident System, which she in turn pasted and copied and sent to USIS to be placed on Complainant's DAC Report. Mayhew stated that she received a November 4, 2008 entry directly from Young in which he asked Mayhew to place abandonment on Complainant's record, which Mayhew copied and pasted and forwarded to USIS to be placed on his DAC Report. Mayhew asserted that besides the abandonment on Complainant's record, Respondent also listed that he had been in an "unauthorized location", as the truck had to be recovered. Mayhew confirmed that Respondent had these entries deleted from Complainant's DAC Report in September 2009. Mayhew asserted that although Complainant had a satisfactory work record during his employ, Complainant had "medical issues", and therefore, Respondent placed "other" on his DAC Report work record, an entry that remained on his DAC Report in June 2012, and is likely still present. Contrary to Respondent's assertions that after they recovered Complainant's truck in November 2008 they immediately changed Complainant's eligibility for rehire from "no" to "yes" on his DAC Report work record, Mayhew asserts that it was not changed until June 2010, at which time it was changed from no to "upon review", which has been Respondent's longstanding policy pursuant to their former employees in good standing. Thus, the negative entry was left on Complainant's DAC Report for twenty-one months after Respondent recovered his truck, and nine months after they removed the abandonment entry from his DAC Report.

Respondent has shown a blatant total disregard for Complainant's protected rights under the provisions of Section 405 of the Surface Transportation Assistance Act (STAA) beginning with Fleet Manager/Dispatcher Jared Young's November 4, 2008 "Driver Incident System" update in which he directed Personnel Director Barbara Mayhew to place "Abandonment" on Complainant's record, which ultimately appeared on his DAC Report, along with the entries "Unauthorized location without notice" and "Quit under load", as well as proclaiming that Complainant was ineligible for rehire and that his work record although rated as satisfactory, also included "other". Young was fully aware of the implications of having directed Mayhew to place Abandonment on Complainant's Drivers' Incident System file, which she in turn, sent to USIS Commercial Services, Inc. and was placed on his DAC report work history. Young's

actions show a callous indifference when you consider his admission that having such an entry placed on a driver's DAC report "is not to be taken lightly", as it is a "game changer" for anyone's career in the "driving industry". More egregious, is Respondent's reaction to Complainant's DAC Report entries that were brought to their attention during the course of the investigation of this whistle blower complaint and their failure to remove all the negative entries on the Report. Respondent failed to ensure that these entries had been totally removed, which could have occurred in September 2009 when they initially removed the Abandonment entry.

A preponderance of the evidence supports a finding that Complainant's reporting of his injury, Complainant's reporting to Respondent he was too ill to drive safely, and reporting to Respondent Complainant's use of prescribed medications rendering it unsafe for Complainant to safely operate a commercial motor vehicle, was a contributing factor in Respondent placing damaging notations in Complainant's records that blacklisted Complainant. Accordingly, OSHA finds that there is reasonable cause to believe that Respondent violated STAA. OSHA hereby orders the following to remedy the violation.

### ORDER

Respondent shall pay Complainant lost wages, including interest, in the amount of \$41,373.34 from July 1, 2009 when he was medically cleared to return to work, and it is believed when he would have returned to work but for Respondent's blacklisting, to April 1, 2010, the date that he began employment as a Northeast regional truck driver with New Century Transport, with interest to present.

Respondent shall pay Complainant compensatory damages in the amount of \$40,000 for his pain and suffering, emotional distress, loss of home and property which resulted from Respondent's retaliatory blacklisting.

Respondent shall also pay Complainant punitive damages in the amount of \$20,000 in this case in light of Respondent's reckless and callous disregard for Complainant's rights under the STAA.

Respondent shall expunge Complainant's employment records and his DAC Report records of any references to the exercise of his rights under STAA. This is to include, but is not limited to, references to his October 2008 back injury and removing himself from duty for same, and resulting medical treatment.

Respondent shall post immediately in a conspicuous place in or about Respondent's facility, including in all places where notices for employees are customarily posted, including Respondent's internal Website for employees or emails, if respondent customarily uses one or more of these electronic methods for communicating with employees, and maintain for a period of at least 60 days from the date of posting, the attached notice to employees, to be signed by a responsible official of Respondent and the date of actual posting to be shown thereon.

Respondent and Complainant have **30** days from receipt of these Findings to file objections and request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge Office of Administrative Law Judges  
U.S. Department of Labor  
800 K Street, NW, Suite 400 North  
Washington, D.C. 20001-8002

Tel. (202)693-7542 / Fax (202)693-7365

With copies to:

Mr. Brian Ford  
c/o Truckers Justice Center  
900 West 128<sup>th</sup> Street, Suite 104  
Burnsville, MN 55337

Mr. Steve Crawford  
General Counsel  
New Prime, Inc.  
2740 N. Mayfair Avenue  
Springfield, MO 65803

OSHA Regional Administrator  
201 Varick Street, Room 670  
New York, NY 10014

Department of Labor, Regional Solicitor  
201 Varick Street, Room 983  
New York, NY 10014

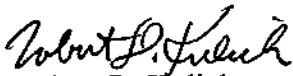
Department of Labor, Associate Solicitor  
Division of Fair Labor Standards  
200 Constitution Avenue, NW, N-2716  
Washington, D.C. 20210

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding under an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence *de novo* for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties.

Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under STAA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of the complaint.

Complainants under the Surface Transportation Assistance Act are handled in accordance with the rules and procedures found in Title 29, Code of Federal Regulations Part 1978, a copy of which may be obtained at <http://www.osha.gov/dep/oia/whistleblower/index.html>.

Sincerely,



Robert D. Kulick  
Regional Administrator

cc: Truckers Justice Center, Paul O. Taylor  
(Via UPS Tracking Number: 1ZX1051V0198562984)  
US DOL/OALJ-Chief Administrative Law Judge  
US DOL/SOL-FLS  
USDOL/SOL-Regional Solicitor, Region II  
FMCSA