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Issue Date: 29 July 2004

CASE NO.: 2003-STA-48

IN THE MATTER OF:

MARION CARNEY

Complainant

v.

PRICE TRANSPORT

Respondent

APPEARANCES:

MARION CARNEY, PRO SE

MERETTE L. OWEIS, ESQ.

For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment.

On or about February 14, 2004, Marion Carney (herein Complainant or Carney) filed a complaint against Price Transport (herein Respondent) with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), complaining of various unsafe acts under the STAA. (ALJX-1; Tr.

243).[1] An investigation was conducted by OSHA and on July 8, 2003, the Regional Administrator for OSHA issued the Secretary of Labor's Findings concluding that Complainant's complaint lacked merit and that credible evidence and testimony supported Respondent's contention that Complainant was terminated for legitimate business reasons. (ALJX-1).

On September 3, 2003, Complainant filed a request for formal hearing with the Chief Administrative Law Judge, Office of Administrative Law Judges. (ALJX-2). A Notice of Hearing and Pre-Hearing Order issued, scheduling a hearing in Dothan, Alabama, on November 24, 2003. (ALJX-3). However, due to pre-hearing developments, the matter was postponed several times until it was ultimately scheduled for a hearing in Gainesville, Florida, on April 28, 2004. (ALJX-21; ALJX-27).

The parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Complainant proffered CX-1 through CX-3, and CX-7 through CX-19, which were received into evidence. CX-4 through CX-6 were withdrawn. Respondent proffered RX-1 through RX-11, which were received. ALJX-1 through ALJX-27 were received.

Briefs were due in this office on June 21, 2004. (Tr. 577-580). On June 6, 2004, Complainant filed his post-hearing brief, while Respondent filed its post-hearing brief on June 21, 2004.[2] Based upon the evidence introduced and having considered

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[1] References to the record are as follows: Transcript: Tr.____; Complainant's Exhibits: CX-____; Respondent's Exhibits: RX-____; and Administrative Law Judge Exhibits: ALJX-____.

[2] On June 21, 2004, Complainant submitted a facsimile request for the undersigned to "disallow" Respondent's post-hearing brief because he was not personally served with a copy of the post-hearing brief by June 21, 2004. On April 29, 2004, Respondent was ordered to submit a copy of its post-hearing brief to Complainant. Assuming **arguendo** Complainant's request could be considered a motion to exclude Respondent's post-hearing brief for failure to comply with an order, I find his motion is without merit because Respondent submitted its post-hearing brief on June 21, 2004, the date on which the undersigned ordered the parties to submit their post-hearing briefs to this office. (See Tr. 577-580). Further, a review of Respondent's June 21, 2004 post-hearing brief reveals a certificate of service indicating Complainant was mailed a copy of the post-hearing brief on June 18, 2004. Moreover, on July

the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (Tr. 21-26; ALJX-1, pp. 1-2), and I find:

1. Respondent is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105.

2. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101.

3. Respondent, which maintains a place of business in Winter Haven, Florida, is engaged in interstate delivery of goods via tractor-trailer throughout the continental United States.

4. Respondent hired Complainant as a driver of a commercial motor vehicle, to wit, a truck with a gross vehicle weight of 10,001 pounds or more.

5. Complainant was employed by a commercial motor carrier and drove Respondent's trucks over highways in commerce to haul materials and goods.

6. In the course of employment, Complainant directly affected commercial motor vehicle safety.

7. Complainant was terminated on February 10, 2003.

8. Complainant timely filed his complaint alleging Respondent violated 49 U.S.C. § 31105.[3]

14, 2004, Respondent submitted a Notice of Filing and supporting affidavit indicating it mailed a copy of its post-hearing brief on June 18, 2004 and again on July 9, 2004. Accordingly, Complainant's requested relief is denied.

[3] At the hearing, there was some disagreement between the parties as to the exact date on which Complainant filed his complaint, although it was noted that, according to DOL's referral letter, the complaint was filed "on or around February 19, 2003." Complainant indicated that he filed his complaint on February 14, 2003, while Employer was unsure of the date on which the complaint was filed. Notably, a DOL "Report of Filing

9. Pursuant to recent changes in regulations which became effective on January 4, 2004, drivers may drive 11 hours rather than 10 hours, but must take ten hours off-duty, while they may not be on-duty in a 24-hour period for more than 14 hours.[4] (Tr. 99-101).

II. ISSUES

The issues for resolution based upon the pleadings are:

1. Whether Complainant engaged in protected activity within the meaning of the STAA?

2. Whether Respondent terminated Complainant in retaliation for his protected activities in violation of the STAA?

III. Contentions of the Parties

Complainant contends he was discharged by Respondent for complaining about excessive hours of service.[5] Respondent argues

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of Complaint under 11(c)/STAA" indicates Complainant filed his complaint on February 14, 2003. Nevertheless, the parties agreed the complaint was timely filed. (Tr. 24, 280-281; ALJX-1, p. 4).

[4] It is noted that the recent changes to the hours of service rule may no longer be effective in consideration of Public Citizen v. Federal Motor Carrier Safety Admin., 2004 WL 1585847, --- F.3d ---, (D.C. Cir. July 16, 2004) (the Court vacated the rule, finding it "arbitrary and capricious" in that the Federal Motor Carrier Safety Administration neglected to consider the statutorily-mandated factor of the rule's impact on driver health).

[5] In his post-hearing brief, Complainant also alleges Respondent required him to drive while sick, in contravention of 49 C.F.R § 392.3, which provides that a motor carrier shall not require or permit drivers to operate commercial motor vehicles while their ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make driving unsafe. Complainant did not present this issue or otherwise develop this theory at the hearing, nor did he raise the argument in his August 2003 objections to the

Complainant was terminated for modifying his truck in contravention of company policy.

IV. SUMMARY OF THE EVIDENCE

The Testimony

Mr. Doyce E. Price

Mr. Price, Respondent's operations manager, vice-president and chief executive officer, was called by Claimant to testify. He primarily works as Respondent's operations manager, which requires him to purchase, trade and maintain Respondent's equipment. He is also responsible for insuring Respondent's loads are booked and dispatched according to the availability of its 16 trucks. Paperwork, including the receipt and review of drivers' logbooks, is handled by his wife, Lawanda Price, and Mrs. Hope McGuire. (Tr. 65-69).

Mr. Price testified that he is familiar with federal motor carrier safety regulations. When Complainant worked for his company, Mr. Price explained that a driver could be on-duty no

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Secretary's findings or in his November 2003 formal complaint. (ALJX-2; ALJX-5).

However, his April 2003 OSHA complaint indicates he was sick and had been nauseous on February 7, 2003, when he wanted to visit a hospital, but Respondent demanded he drive or be fired. (RX-10, p. 2). His driving logs indicate he did not discontinue driving due to any illness or was otherwise sick from February 6 through 10, 2003. (RX-4, pp. 60-62). Insofar as this theory was not developed at the hearing and the record includes no supporting evidence, his argument is not considered herein.

Additionally, Complainant also noted in his post-hearing brief that criminal sanctions are available because Respondent violated "R.I.C.O.," which ostensibly refers to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, et seq. Insofar as the undersigned is without authority to grant relief requested under that statute, Complainant's argument is not considered herein.

more than 15 hours in a 24-hour period.[6] Of those fifteen hours, a trucker could drive no more than ten hours without an 8-hour rest period. Drivers could not exceed 70 hours of on-duty service in an 8-day period. Respondent authorized drivers to go off-duty for one 15-minute coffee break and one 30-minute lunch break every five hours. (Tr. 29-30, 32-33, 50-54).

According to Mr. Price, miles driven per day depends on states in which drivers drive, terrain, speed limits and construction zones. Dispatches, which drivers are not forced to accept, are made on a first—in/first-out basis, and hours of service are considered. When Complainant worked for his company, Mr. Price was generally aware of the loads assigned to drivers. He indicated Respondent's safety record was good, noting only one fatality occurred approximately one year prior to the hearing in this matter, but that accident was not the driver's fault. He also noted that one driver was put out of service due to log book violations. (Tr. 57-67).

Mr. Price estimated that 40% of Respondent's deliveries are time sensitive. With such dispatches, drivers are told specific dates and times for deliveries. A driver for Respondent is paid 25% of his or her truck's gross revenue. (Tr. 68-75).

Mr. Price discussed Respondent's two-year history of using a paperless fuel ticketing system with "Flying J," which sells fuel to Respondent and promptly provides Respondent with facsimile transmittals documenting transaction details. He noted the system is used by much larger trucking companies to reduce man-hours associated with paper-based transactions. Further, state and federal agencies have not objected to the use of such reporting systems. (Tr. 75-76).

Noting that Respondent could not physically control its drivers on the road, Mr. Price described Respondent's use of a "check-call" procedure in which drivers must contact Respondent daily between 8 a.m. and noon to identify their progress, allowing Respondent to ascertain how quickly or slowly its drivers are proceeding. He recalled that some drivers were removed from trucks due to hours of service violations. (Tr. 76-78).

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[6] Mr. Price noted Complainant worked for his company, which was formerly "Case Knife Express," prior to recent amendments to the federal motor carrier safety regulations. (Tr. 32).

Respondent recalled Mr. Price, who has been a driver since 1971, in its case—in—chief. He noted that there has only been one change in hours of service regulations which went into effect in January 2004. Under the old rules, which applied when Complainant was employed by Respondent, a driver could legally drive more than 10 hours in a 24-hour period if the driver went off-duty for eight hours during the 24-hour period. He denied telling any drivers they had to drive 900 miles in a day. However, assuming he made such a statement, he noted that a driver could travel more than 900 miles if they had 45 hours of available driving time remaining on their log book. Respondent's "company speed limit" is 68 miles per hour, which allows 952 miles of potential traveling in 14 hours (14 hours x 68 mph = 952 miles). Respondent mostly hauls fruit, produce and frozen juice from Florida, while it transports chicken and textiles from Douglas, Georgia to Los Angeles, California. (Tr. 452-458).

Mr. Price recalled Complainant's problems during a trip carrying tomatoes from Palmetto, Florida to Blaine, Washington. On Thursday, December 26, 2002,[7] Complainant picked up his load, which was due in Blaine on Tuesday, December 31, 2002. On Friday, December 27, 2002, Complainant called Respondent, indicating he went home to Dothan, Alabama.[8] However, he did not call-in at all on Saturday, December 28, 2002. (Tr. 458-465).

On Sunday, December 29, 2002, Complainant called Respondent at 5:00 p.m. or 6:00 p.m. from a truck stop approximately 25 miles north of Dothan to report a malfunctioning alternator which required repair. Noting that Complainant had not contacted Respondent in more than 48 hours, Mr. Price asked him why he did not call-in sooner if the truck was malfunctioning; however, Complainant provided no explanation. Mr. Price did not fire Complainant for this event. He told Complainant, "If you're late with that load of tomatoes, after you've been lost

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[7] On December 26, 2002, the date on which he departed Palmetto, Florida, Complainant testified he also provided a letter via facsimile complaining of hours of service violations. Mr. Price did not recall ever receiving the document. (Tr. 566-567; CX-11).

[8] According to Mr. Price, Respondent allows its drivers to stop by their homes during trips if they had time to do so. Mr. Price recalled that Complainant had time to stop by his home on the way to Blaine. (Tr. 462).

for 48 hours, and it costs any money, it's going to be taken out of your payday." (Tr. 465-468).

On Sunday night or Monday morning after the alternator was repaired, Mr. Price recalled that Complainant began traveling to his destination. He called-in from Jackson, Mississippi, which is five or six hours from Dothan, on Monday, December 30, 2002. He failed to reach his destination timely by arriving on Thursday, January 2, 2003, which would ordinarily have caused a problem; however, the holiday on the previous day "saved" Complainant and Respondent because the receiver was not open to receive the goods. Mr. Price stated that he never fired a driver for being late on only one occasion. He added that it is approximately 3,100 miles from Palmetto, Florida, to Blaine, Washington, noting Complainant took a "full week to get there." (Tr. 467-469).

Mr. Price stated Complainant complained "some" about not having enough time to legally continue driving, mostly on return trips with Atlantic Brokerage. He also stated that Complainant reported driving illegally at some point. However, Mr. Price explained that he cannot control what a driver does on the road to waste driving time. He explained that drivers could voluntarily go off-duty while waiting two hours or more to pick up loads. He also noted that Complainant drove illegally on his trip to Blaine, Washington, after wasting 48 hours when he should have been driving. He did not check drivers' logs on a daily basis. He did not believe Carney's complaints of hours of service violations "most of the time" because "you never knew whether he was doing his job or doing something else with his time." Nevertheless, he kept Complainant on with the company. (Tr. 469-472, 477).

Mr. Price acknowledged Complainant's logs showed him to be in Amarillo, Texas, rather than Jackson, Mississippi, when he called-in on Monday, December 30, 2002, but denied telling Complainant to incorrectly report his logs.[9] He stated Complainant could have completed the trip from Dothan to Blaine legally without falsifying his logs had he begun driving when his alternator was repaired. From the time his alternator was repaired in Dothan until he reached Blaine, which was approximately a 2,500-mile trip, Complainant had approximately

[9] Mr. Price denied ever telling Complainant to drive illegally. (Tr. 519).

84 hours, which was "all kind of time to get there legally."[10] (Tr. 472-477; RX-4, p. 42).

Mr. Price noted that Complainant drove only one truck the entire time he was employed by Respondent. The truck, number 137, was worth approximately $101,000.00 to $102,000.00. Mr. Price purchased an extended warranty on the truck which covered the truck's mechanical repairs to the engine and transmission beyond the original warranty. He purchased extended warranties because of high hourly service rates, which generally exceeded the purchase price of the warranty. His mechanic, Ryan, could not perform work on the engine because it was under warranty; however, Ryan was responsible for routine maintenance. Without routine maintenance, the warranty could be voided. Likewise, tampering with the engine and turbo hose could void the warranty. (Tr. 477-481).

Mr. Price explained that the turbo charger produces power, but builds up pressure as it works. He noted that a turbo charger will "blow itself up," which may cost as much as $10,000.00 to $15,000.00 if a driver "on a long hill or mountain" is "pulling hard" and does not reduce the accelerator, which is why a turbo hose is installed to release excess pressure. He noted that Complainant complained after "every trip" that his truck had insufficient power. Three "rocker arms" were replaced, but Complainant continued complaining about pulling power. (Tr. 481-484).

On February 10, 2003, Mr. Price recalled Ryan telling him that the turbo hose on Complainant's truck was tied-off. Mr. Price personally observed the modified hose. He showed Complainant the modified hose, and Complainant admitted another driver told him how to tie off the turbo hose. He immediately fired Complainant for tying off the turbo hose and provided him a termination letter. Complainant did not immediately leave. He remained around Mr. Price's office and pleaded for his job several times until Mr. Price directed Complainant to leave. (Tr. 484-488, 491).

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[10] Under the hours of service rules applicable when Complainant worked for Respondent, Mr. Price estimated a trip from Los Angeles, California to Palmetto, Florida would take three full days. He also estimated that a round-trip between Palmetto and Los Angeles would be "real close" to 70 hours. He added that it would be "real easy" to go from Douglas, Georgia, to Los Angeles, California and back to Alabama within 70 hours. (Tr. 493-494).

Mr. Price stated that he tells all drivers not to tamper with the truck engines. He also indicated that he had seen turbo hoses modified before. Prior to Complainant's employment with Respondent, Mr. Price terminated one other driver for the same offense on the same day that he observed the modified hose. In that instance, the driver made no complaints about driving illegally while he was employed with Respondent. Id.

Mr. Price recalled Complainant telling him that he went to DOT, but could not remember the date on which Complainant told him he contacted DOT. He guessed Complainant's report that he went to DOT might have occurred the day before, the day of, or the day after he terminated Complainant. He could not recall Complainant reporting a DOT complaint during January 2003. (Tr. 488-490).

Mr. Price denied telling Complainant to "get his shit out of the truck" when Complainant called in from the road complaining about driving excessive hours; however, he probably made that statement when he fired Complainant on February 10, 2003. (Tr. 484-485).

Mr. Price stated that DOT has not contacted him since he fired Complainant, whose contact with DOT had nothing to do with his termination because he "complained about everything . . . mostly about his truck wouldn't pull." He could not recall Complainant driving 900 miles in one day, but was "sure" he drove some 800-mile days, which may be legally driven with enough remaining driving hours under the 70-hour rule. When Complainant reported insufficient remaining driving hours to Mr. Price, he did not indicate whether the 10-hour or 70-hour rule was concerned. (Tr. 491-492).

Mr. Price indicated he received many documents from Complainant via facsimile before, during and after Complainant's employment with Respondent. He denied receiving a facsimile or letter from Complainant thanking him for a Christmas bonus. He could not remember if he got a letter from Complainant complaining about hours of service violations during Complainant's employment. (Tr. 494-495).

Mr. Price noted that Complainant would have driven illegally "quite a bit of the time" if he could drive no more than 10 hours per day while he worked for Respondent. However, he explained that, under the hours of service rules applicable at the time of Complainant's employment, a driver could exceed

ten hours of driving daily as long as drivers obtained a requisite 8-hour period of rest, indicating 650-mile days, which included 10 hours of driving at 65 miles per hour, were legal. (Tr. 495-497).

On cross-examination, Mr. Price stated he did not know if Complainant had been reprimanded or fined for not calling-in on his way to Blaine, Washington, but he should have been. Mr. Price opined it is "basically impossible" for a dealership to verify a turbo hose is tied down without prior physical observation of the hose or blown turbo. (Tr. 498-505).

Mr. Price indicated Respondent's driving policy involved a formula requiring drivers to make three trips monthly to California. Drivers exceeding three trips monthly would be running illegally. Complainant made ten trips to California and one trip to Blaine, Washington within four months. Mr. Price agreed with Complainant that running in mountainous terrain "the farther west you go" could affect travel time, which would be different on flat terrain. Mr. Price agreed with Complainant that weather might affect travel time, but could not recall the weather conditions during Complainant's trip to Blaine, Washington. (Tr. 509-512).

Mr. Price stated he once fired a driver for log book violations when that driver drove all the way to California, but failed to keep log book entries which were discovered while the driver was stopped and checked in Banning, California. Mr. Price does not perform log book audits because he does not have sufficient time. As a safeguard, Ms. McGuire audited logs when Complainant worked for Respondent, but she is no longer performing that service for Respondent, who has since hired a new employee for that task. Driving longer distances may be more profitable for Respondent "if it's permitted to drive that many more miles or loads." Mr. Price never told Complainant to drive illegally, nor has he encouraged any drivers to run illegally. (Tr. 512-519).

Mr. Price noted Ryan was unavailable, but indicated that Complainant could have attempted to locate him or call him as a witness if he needed to. He reiterated that he personally observed the turbo hose, which was the information on which he relied to terminate Complainant. (Tr. 519-520).

On re-direct examination, Mr. Price stated Ryan was located in Indiana. He affirmed his earlier testimony that Complainant could have completed his trip from Dothan, Alabama, to Blaine,

Washington, if Complainant would have started driving after his alternator was repaired. (Tr. 520-522).

On re-cross examination, Mr. Price indicated an applicant for employment would probably be denied employment by Respondent if the applicant stated he or she was unwilling to drive more than ten hours in a 24-hour period. For some of Respondent's loads, Mr. Price indicated 680-mile days would not be reasonable. (Tr. 522-524).

Ms. Hope McGuire

Hope McGuire, Respondent's clerk, keeps drivers' folders and motor vehicle reports (MVRs). She enters information contained in drivers' log books into Respondent's computer using computer software called "Trucker's Helper," which immediately generates discrepancy letters detailing problems with log books or hours of service violations if discrepancies occur during data entry. When she receives such reports she generally places them into a folder "hoping to get back with the driver;" however, she often fails to contact drivers because she does not see them more than one or two times per month. (Tr. 79-82).

Prior to Respondent's computerized system, Ms. McGuire would log data by hand and provide discrepancy reports to the Prices, who would handle the matters. After the implementation of the computerized system, which was in use during Complainant's tenure with Respondent, Ms. McGuire did not notify the Prices about the computer's discrepancy letters because the computer provided reports for her to use to contact drivers. She stated that, if it was a "really bad" violation, such as driving 800 miles in a 10-hour period, she would attempt to personally contact the drivers to "try not to do it again." (Tr. 82-90).

Ms. McGuire testified she does not know anything about log falsifications. The only way she knows whether a driver is stopped by DOT is if the driver involved in the traffic stop tells her. According to Ms. McGuire, the Prices are in charge of safety; however, she is unaware of safety enforcement procedures. Other than entering logs into Respondent's computer, Ms. McGuire claims she does not know that much about the company. (Tr. 90-97).

Ms. McGuire stated she occasionally asked drivers to "redo" their logs to correct the logs, but then stated she never asked a driver to change his logs. She would merely ask drivers to

"re-add" or "re—count" their hours. "Correcting" is not falsifying according to Ms. McGuire. She would ask drivers to change reported distances, but would "leave that discretion up to [drivers]." (Tr. 97-109).

On cross-examination, Ms. McGuire testified that she never told a driver to falsify or conform logs to comply with the law when, in fact, they were not in compliance. She never experienced an occasion in which a driver's log exceeding the hours of service rules was modified to reflect an increase in off-duty hours. She conceded she was supposed to inform the Prices of discrepancy letters, but nevertheless failed to notify them because she anticipated talking directly to drivers. (Tr. 111-122).

On further examination, Ms. McGuire affirmed her earlier testimony that she asked drivers to recalculate hours if they were incorrect, but never asked drivers to modify their logs to comply with the law. She was unaware of any drivers who modified their logs to a point where the information on the logs was false and she knew about it. She explained that changes made to logs reflected miscalculations in total hours driven rather than the number and status of hours driven. (Tr. 122-136).

Mr. Willie J. Fantroy

Willie Fantroy testified he has been driving commercial trucks for 11 years. He has had no accidents in the last six or seven years. He is not familiar with the Federal Motor Carrier Safety Regulations, but has not been removed from service for logbook violations since he has been working for Respondent for the last 1.5 years. Likewise, he has received no disciplinary action from Respondent for logbook violations. He admitted that he falsified logs for his "own personal use," but he has not been suspended or received any warnings, noting, "if I get pulled over, my logbook always pass [sic]." (Tr. 140-147).

Mr. Fantroy acknowledged that his logs and bills of lading do not match up. He stated the governor on his truck is set for 80 miles per hour rather than 68 miles per hour. He also stated he was contacted one or two times by Ms. McGuire regarding his logs.[11] On those occasions, he signed a letter acknowledging a

[11] Ms. McGuire, on further re-cross examination, could not recall providing Mr. Fantroy a warning or a notice due to logbook violations, but might have possibly informed him of log

log violation, but was not allowed to recalculate his log. According to Mr. Fantroy, Mr. Price did not talk to him about the log violations and probably had no knowledge they ever occurred. Mr. Fantroy acknowledged that falsifying logs is illegal, but estimated that he falsifies his logs 5% of the time. He admitted driving distances in specified times which he acknowledged were not legal. (Tr. 148-182; CX-7; CX-8).

On cross-examination, Mr. Fantroy explained some of his logs do not correlate with bills of lading because he often signs paperwork for loads which are not ready for transportation until a day or two later. Consequently, he rests in his berth off-duty until he receives the load for departure. (TR. 182-187; CX-8).

Mr. Fantroy, who has some mechanical background from working diesel mechanic shops and performing mechanical work for other companies, explained the purpose of a truck's "turbo hose," which is a hose that relieves pressure "inside the turbo to keep it from blowing up." If tied off or cut, it does not work properly, resulting in "more turbo boost," which improves acceleration from a complete stop and which improves pulling power in mountainous areas; however, modifying the hose does not produce more speed. (Tr. 187-191).

Mr. Fantroy, noting that impeding the performance of a turbo hose might result in the destruction of a turbo or an entire engine, stated he has never cut any of the hoses on trucks he has driven. He explained that modifying the hoses is easy for a mechanic to discover and voids trucks' warranties. He has observed trucks with modified hoses. Drivers usually use plastic ties, but also use vice grips to clamp the hoses because such clamps are easy to remove. He estimated the cost to repair a defective turbo is approximately $1,200.00 to $1,400.00, while the cost to repair an entire engine may be as high as $15,000.00. (Tr. 191-194).

According to Mr. Fantroy, Mr. Price admonished drivers not to tamper with Respondent's trucks. Modifying a turbo hose is

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violations. She again explained that discrepancy letters were occasionally generated upon data entry, and the letters were placed into drivers' files. Periodically, she recalled obtaining a signature from a driver, but could not identify which drivers signed the letters. After six months, if Ms. McGuire could not contact drivers regarding discrepancy letters, the letters were destroyed. (Tr. 206-216).

considered tampering with equipment. Some minor repairs, including small oil leaks or air leaks, might be addressed by drivers, who carry tools in their trucks; however, major repairs must be performed by proper mechanics. (Tr. 192-194).

Mr. Fantroy stated Mr. Price never asked him to drive illegally. Mr. Fantory recalled Complainant complained to him that Respondent wanted him to drive illegally, but Complainant had too much work to do. Complainant told Mr. Fantroy that he was tired of "driving hard." Mr. Fantory estimated 15-20% of his dispatches were time sensitive, which required a specific delivery time. (Tr. 194-201).

On further cross-examination, Mr. Fantroy explained that his earnings are produced based solely on the gross receipts of his truck rather than on an hourly basis. Accordingly, he fails to disclose his proper location approximately 25% of the time he contacts Respondent because he has personal pursuits in different areas. For instance, he might arrive and unload in California, while telling Respondent he is unloaded in Arizona, which allows him extra time to enjoy California. (Tr. 201-205).

Complainant

Complainant was born on December 9, 1961. He testified that he has a degree in Botany and is an Army veteran. He has been driving trucks since 1988. (Tr. 217-218).

In October 2002, Complainant began driving for Respondent, which paid him 25% of his load's gross revenue. He occasionally reported equipment failures to Mr. Price, who promptly resolved the issues. (Tr. 218-223).

When Complainant first began with Respondent, either Mrs. Price or Ms. McGuire asked him if he knew how to "work his logs." He recalled Ms. McGuire directing him on one occasion to falsify his logs when it was discovered his logs reflected hours of service violations. (Tr. 253-264).

In November 2002, Complainant recalled Mr. Price teaching him to falsify logs after Complainant discussed hours of service rules with a law enforcement officer in Arizona. He was instructed to discard prior logs upon departing a location and report his status on a new log as "off-duty the last 7 days," which allowed a driver a "whole fresh 70 [hours] to work with." Id.

According to Complainant, most of Respondent's dispatches were time sensitive, requiring drivers to arrive on a specified date regardless of whether or not drivers had the requisite hours to drive. There was no excuse for a late arrival involving such dispatches unless a driver's equipment failed. Despite Mr. Price's testimony that Respondent did not force drivers to accept dispatches, Complainant indicated drivers did not realistically have a right to decline Respondent's dispatches. (Tr. 225-226, 234-236).

In December 2002, Complainant first complained to Mr. Price about the safety of driving long hours and exceeding the hours of service requirement. At the time, Complainant was in transit from Florida to Blaine, Washington. His truck broke down near Dothan, Alabama, and he was forced to stop to repair the equipment.[12] He complained to Mr. Price that he would be required to drive approximately 900 miles per day to reach his destination on time from Dothan, which was approximately a 3,000-mile trip. Mr. Price responded that all drivers were required to drive 900 miles per day, and he did not "give a damn" about Complainant's complaint. He added that he would fire Complainant if he did not reach Blaine on time. Complainant drove to Blaine, where he arrived on January 2, 2003.[13] (Tr. 223-234; CX-10; RX-4, p. 42).

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[12] Complainant indicated Mr. Price did not believe his truck was malfunctioning until Mr. Price verified the defective equipment. Complainant produced a December 30, 2002 invoice from "Dothan Mobile Trk. Mnt. & Repair," indicating Respondent's truck was jump-started and brought to a shop, where an alternator was repaired. The invoice was received for the sole purpose of showing that Complainant's truck was physically in Dothan, Alabama on December 30, 2002. Complainant acknowledged his December 30, 2002 log indicating he was in Amarillo, Texas, while he was actually in Dothan, Alabama. He explained the log was falsely completed and that Mr. Price must have been aware his log was incorrect because Mr. Price paid for his repairs in Dothan, Alabama on December 30, 2002. He added that he provided his log to Respondent, which never disciplined him for his log discrepancy. (Tr. 223-229, 305-306; CX-12; RX-4, p. 42).

[13] Complainant produced a December 26, 2002 letter he prepared notifying Mr. Price that Respondent's trips were illegal and that he refused to continue driving illegally. He stated that he sent the letter to Mr. Price via facsimile on December 26, 2002, the date on which he departed Palmetto, Florida, for Blaine, Washington. Mrs. Price denied receiving any letters

In January 2003, after he completed the Blaine, Washington trip, Complainant called the DOT safety line to report excessive miles driven and illegal or "hot" loads. On or around January 20, 2003, Respondent dispatched Complainant with another "illegal load," but Complainant refused because he was still upset about the Blaine, Washington trip. Rather, he reported to Mr. Price that he contacted DOT.[14] Mr. Price directed him to get his "shit" out of the truck and "get out of here." However, he told Complainant to return the following day, when he acted "as if nothing ever happened." (Tr. 270-278).

Other than the incident involving Blaine, Washington, Complainant also complained to Respondent about loads "mostly coming from . . . California." He explained that return loads via Atlantic Brokerage, a west-coast freight carrier which often worked with Respondent on return trips, required drivers to "run harder because you're hauling produce, [which] pays more money coming from California than it does going to California." When he became tired after waiting on-duty for extended periods of time to receive loads on the return trips, he complained to Mr. Price, who argued Complainant should have slept while awaiting the cargo. Mr. Price told Complainant to return the truck to Respondent's facility, remove his "shit" from the truck, or be terminated. On another occasion Mr. Price also responded that he was tired of Carney's "shit," and that, "if you ain't [sic] going to fu—ing run, you bring the truck in and get your shit out of the truck." (Tr. 245-250).

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from Complainant prior to his February 2003 termination. She indicated she had not seen Complainant's December 26, 2002 letter prior to the hearing. Likewise, Mr. Price did not recall receiving the letter. (Tr. 236-245, 566-567; CX-11).

[14] At some point during his conversation with Mr. Price on or about January 20, 2003, Complainant overheard Mr. Price tell Mrs. Price "this son-of-a-bitch called DOT." Complainant indicated he was "sure" DOT investigated his January 2003 complaint; however, he later stated that he actually informed the Florida State DOT, which does not "do too much." After a period of no response by the state DOT, he called to inquire about the status of his claim. He was told that the matter would be handled by the federal DOT. Elsewhere, he indicated that he was directed to DOT by OSHA. He later had "no idea" whether DOT ever contacted Mr. Price prior to his termination. (Tr. 271, 274-276, 291-293, 295).

On February 10, 2003, Complainant stated he was terminated after a period of "constant" problems with Mr. Price, who was upset with Complainant for complaining about excessive hours of service. While he was in Respondent's office, Complainant recalled "D.E. Ryan," a racist mechanic who "had something against me," went outside with Mr. Price for a brief discussion. Mr. Price returned, accusing Complainant of clamping off the turbo hose in Respondent's truck. Mr. Price told him to get your "shit out of my truck and get off the property." (Tr. 236-245).

Complainant testified he was not provided a discharge letter at the time of his termination. He later received a February 10, 2003 letter of termination informing him that he was being discharged for clamping a turbo hose, which could cause damage. He offered to pay for any necessary repairs.[15] (Tr. 265-267, 278-280; RX-5; RX-6).

Noting that he is not a mechanic, Complainant denied clamping-off the turbo hose of Respondent's truck. He did not

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[15] Complainant testified that he was not provided the written notice of termination until his April 28, 2004 deposition; however, he had no objection to the letter, which affirmed Mr. Price's stated reasons for the decision to terminate. (Tr. 278-280). However, in his deposition, Complainant stated that, on the day he was terminated, he cleaned out his truck and went to return his key to "the gate," when "Mr. Price came out there with a letter stating that I did damage to his turbo, or I did damage to the turbo or something. I took it and I left." He reviewed Respondent's February 10, 2003 termination letter and could neither confirm nor deny the letter was what he received upon termination, "because it's been a while." He added that Mr. Price later sent a notice of termination to him in the mail. (RX-11, pp. 109-111).

In an undated letter, Complainant stated, "I talked to Peterbilt, and they confirmed that what I did would not have caused damage, but nevertheless, I was wrong." In another undated letter, Complainant stated, "I have come to the conclusion that I was discharged illegally and wrongfully – But since you was [sic] so content on releasing me, even after I told you I would pay for any damage that might have been caused by me – but we both know there was [sic] no damages." (RX-6, pp. 1, 6).

know whether there ever was a clamp on the truck's turbo hose. He testified that he quickly left Respondent's office per Mr. Price's instructions without observing any clamp on any hose because he anticipated there "would have been a confrontation and I'm [sic] in the wrong, it's his property." He indicated a "turbo or something" on the truck previously required repair. (Tr. 268-269).

Complainant explained that a truck is "out of [his] hands" and that he has "nothing more to do with it" after he delivers it to a mechanic. He recalled that the last people who worked on Respondent's truck were D.E. Ryan and an unidentified mechanic at a truck dealership. He concluded Mr. Price merely relied upon Mr. Ryan's tampering report to terminate him because he previously reported complaints. (Tr. 268-270).

After his termination, Complainant drew $5,400.00 in unemployment compensation, but he must pay all or some of it back due to a subsequent determination by the unemployment office that his termination was his fault.[16] In May 2003 or June 2003, he earned $1,851.00 working briefly with Santa Fe Express (Santa Fe/Flat Creek). From July to December 2003, he earned $21,726.98 while driving for Wood Trucking Company (Wood).[17] From January 4 or 5, 2004 through March 25, 2004, he earned $7,251.00 driving for G&S Transportation (G&S). For approximately two weeks prior to the hearing, he worked for Santa Fe Express out of Clinton, Alabama (Santa Fe/Clinton), earning approximately $1,017.00. (Tr. 280-289, 339).

On cross-examination, Complainant acknowledged his October 9, 2002 signatures on employment forms indicating: (1) Respondent's drivers must timely call Respondent during transportation; (2) drivers are forbidden to falsify logs; (3) Respondent maintains a system of graduated discipline for log

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[16] Complainant later denied receiving $5,400.00 in unemployment income. Rather, he estimated receiving $3,000.00 in unemployment benefits. He admitted receiving unemployment benefits for approximately two weeks while employed by Santa Fe. (Tr. 331-333).

[17] Complainant later estimated that he earned only $15,000.00 while working with Wood, notwithstanding his W-2 indicating that he earned more than $21,000.00 with Wood. He did not dispute his prior earnings estimates regarding Santa Fe/Flat Creek, Santa Fe/Clinton and G&S. (Tr. 332-337).

violations; and (4) Respondent's drivers are responsible for any damage to its trucks caused by its drivers; and (5) safety is Respondent's "most important consideration." He also acknowledged the entirety of his driving logs submitted to Respondent during his tenure with Respondent. (Tr. 320-322; RX-1; RX-2; RX-3).

After he was terminated by Respondent, Complainant stated it took a "couple of months or something" to find employment with Santa Fe/Flat Creek.[18] He left that job because the company was sold to a new owner requiring team driving, which generally paid less and which Complainant deemed to be less safe than solo driving. Additionally, the company employed "bad paymasters," who would issue checks on insufficient funds.[19] After a "month or two," he began working with Woods, which he left because "their trucks stayed in the shop." He quickly found employment with G&S; however, he suspected he was terminated by that employer because Respondent's attorney contacted the employer to cause his termination after his March, 2004 deposition.[20] He acknowledged G&S's stated reason for his termination was the truck's lack of profitability during a period of rising fuel costs, which Complainant noted "is possible." (Tr. 322-328).

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[18] Complainant later testified he was out of work for "probably about five or six months," but elsewhere stated he was out of work for four or five months after he was terminated by Respondent. He later stated it took him 4.5 months to find employment after Respondent terminated him. (Tr. 331-334).

[19] Complainant acknowledged his March 2004 deposition testimony did not mention any Santa Fe/Flat Creek pay-masters as part of the reason he decided to leave the company. A review of Complainant's deposition testimony indicates he left Santa Fe/Flat Creek because the company decided to require team drivers. He noted that his hearing testimony was "expounding on the actual reasons" he left Santa Fe/Flat Creek. (Tr. 329-331; RX-11, pp. 20-22).

[20] Complainant's deposition occurred on March 15, 2004, while his termination from G&S occurred on or about March 17 through 20, 2004. (Tr. 341). Supporting evidence for Complainant's allegation that he was terminated by G&S as a result of communication by Respondent or its attorney and G&S is not of record. Moreover, Complainant conceded in his deposition testimony that he "can't prove . . . Mr. Price talked to anybody." His hearing testimony thus constitutes mere speculation or supposition. (Tr. 328; CX-13; RX-11, p. 143).

Complainant testified that Mr. Price hired him. He formerly worked at Buccaneer Trucking (Buccaneer), where he filed a complaint over log book violations with DOT, which required Buccaneer to use team driving, which Complainant chose not to perform. He sought employment with Respondent after he heard from an unknown person that Mr. Price was a "hothead," but that Mr. Price would not "go messing . . . around on your pay." Complainant noted that weekly earnings during peak trucking seasons with Respondent approached $2,500.00; however, he worked during the off-season, from October 2002 through February 2003, when weekly rates were approximately $1,400.00 through $1,600.00. (Tr. 341-345).

Complainant had no knowledge that Mr. Price ever checked his driving logs. Pursuant to Respondent's check-call procedure, Complainant would speak with Mr. Price when he called the office daily. Respondent's drivers were required to carry cellular telephones. Unlike Mr. Fantroy, Complainant testified he always told Mr. Price the truth regarding his whereabouts when calling the office. Upon arriving at Respondent's facility, Complainant submitted his logs to Ms. McGuire. He recalled one occasion in which his logs were wrong and he did not get paid. (Tr. 345-347).

Complainant identified various logs which he alleged were modified by Respondent after he submitted them during the course of employment. He conceded that modifications on October 26, 2002, November 3, 2002, November 11, 2002, December 11, 2002, and January 17, 2003, reveal accurate changes in the driving time he originally miscalculated. He also noted that his November 3, 2002 log was corrected to reveal illegal driving in excess of ten hours. (Tr. 347-355; RX-4, pp. 9, 14, 18, 33, 50).

Complainant recalled one occasion in October 2002 when Ms. McGuire told him to "re—do" his logs because he reported too many miles, or else he would not be paid; however, he noted that "it might have happened a couple of times." He explained that he generally submitted falsified logs to Respondent since October 2002 or November 2002 when he realized that the log books had to "look legal" to get paid. (Tr. 355-360).

Complainant conceded he was paid on October 17, 2002, October 23, 2002, and November 1, 2002, when he reported driving excessive hours; however, according to Complainant, the log entries related to DOT exceptions allowing for drivers to exceed

10 hours in adverse conditions or when unforeseen events occur on the highways. He noted that his October 30, 2002 log, on which he reported driving 10.25 hours, included supporting remarks indicating his extended driving time was due to an accident.[21] He agreed that he did not always turn in logs reporting that he was driving legally. He acknowledged that his signature on a log verifies the log is true and correct. (Tr. 360-364; RX-4, pp. 5, 8, 11, 13).

Complainant testified that he complained about brakes, lights, motor and transmission problems, which were all corrected by Respondent. He stated his truck was not pulling properly, which could be a power problem or a problem with the truck's whole operation.[22] Although remarks about equipment problems are typically written on the back of logs, Complainant prepared lists of problems on separate sheets of paper and left them at Respondent's facility. (Tr. 365-368).

Complainant again recalled falsifying his logs for the Blaine, Washington trip, noting that he believed that he would be fired if he did not make the trip. His log for the Blaine, Washington trip indicates he departed Dothan, Alabama on December 28, 2002, and arrived at his destination 5.5 days later on January 2, 2003.[23] (Tr. 368-370; RX-4, p. 40).

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[21] Notably, Complainant's October 17, 2002, October 23, 2002, October 29, 2002, and November 1, 2002 logs do not include remarks indicating the nature of his delay or otherwise indicate his hours were DOT exceptions. (RX-4, pp. 5, 8, 11, 13). Complainant stated he was able to lawfully drive more than ten hours on the above dates because he took breaks of at least eight hours during the day on those trips. (Tr. 407-411).

[22] In his deposition Complainant indicated he "found out" that a clamped turbo hose "would be there to give a truck more power." (RX-11, p. 104). He later denied knowing the purpose of a clamped turbo hose, but admitted Mr. Price would be justified in terminating him for clamping the hose if he was able to prove Complainant clamped the hose. (RX-11, p. 107).

[23] In his deposition, Complainant admitted he did not enter any remarks describing any mechanical malfunctions in his logs when his alternator allegedly became defective in Dothan, Alabama. (RX-11, pp. 45-47).

Complainant affirmed his earlier testimony that he filed a complaint with DOT over the internet in January 2003 and that he told Mr. Price about the complaint later that month, when Mr. Price became angry, but allowed Complainant to return to work the following day. He acknowledged his April 2003 OSHA complaint in which he indicated he also told Mr. Price about contacting DOT on February 9, 2003, the day before he was fired.[24] (Tr. 370-373; RX-10, p. 3).

Complainant also acknowledged that he was informed by Mr. Price that he was terminated for having a clamped-off turbo hose.[25] He explained that Mr. Price initially told him he had "messed with" or altered the truck; however, Mr. Price did not mention the turbo hose, nor did he allow Complainant any opportunity to deny altering the truck.[26] Complainant reviewed his deposition testimony indicating Mr. Price "said that the clamp could damage his truck, and since I was driving his truck, I tried to damage his truck, and he fired me." He explained that he had the discussion with Mr. Price after he departed Respondent's facility and later phoned Mr. Price to discuss the

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[24] According to OSHA's July 8, 2003 investigation letter, Complainant filed a complaint on February 19, 2003, after he was terminated. (ALJX-1, p. 1). When asked why he did not testify earlier that he discussed contacting DOT with Mr. Price the day before he was terminated, Complainant stated that he forgot about his February 9, 2003 discussion until he reviewed his complaint at the hearing. (Tr. 372). In his deposition, Complainant stated he last complained to Mr. Price in January 2003. (RX-11, p. 112).

[25] In his deposition, Complainant was asked whether Mr. Price mentioned "anything about this complaint that you filed with the DOR," and he replied, "No. All Mr. Price did was say, 'you're fired' and get off his property." (RX-11; 123-124).

[26] In his deposition, Complainant recalled a different version of events. He specifically noted that Mr. Price left his office with the mechanic and returned, asking Complainant about "a clamp around tubing, and he asked me about that. And he asked me did I alter his equipment. And I explained to him that, no I didn't alter the equipment. But I did explain to him the problem he had with his equipment." (RX-11, pp. 103). Earlier in his deposition, Complainant indicated Respondent's truck lacked pulling power. (RX-11, pp. 33-35). He stated that his memory was better at the hearing than it was at his earlier deposition. (Tr. 377).

matter. He was later told the clamp could damage the truck. (Tr. 373-379).

Prior to his termination, Complainant stated that he had no idea that clamping a turbo hose would give his truck more power or cause damage. After his termination, he learned about the turbo hose "by speaking to Peterbilt and other people." Complainant stated he did not clamp off the hose. He acknowledged his deposition testimony indicating Mr. Price was justified in terminating him assuming he tied off the turbo hose. (Tr. 379-381, 407; RX-11, p. 107).

Complainant acknowledged his undated, handwritten letters to Mr. Price indicating "what I did would not have caused damage, but nevertheless, I was wrong. We all make mistakes and I am real sorry for what I have done . . ." and that he would pay for damage "caused by me." Complainant stated he prepared his letters simply in an effort to return to his former job. Although he admitted any damage he was referring to in his letters involved clamping the turbo hose, he denied actually clamping off the turbo hose. Rather, he was merely relying on the "liability letter [which] states automatically that you are responsible regardless." He added that he wrote the letters under the assumption that he clamped the hose simply "to avoid any argument" in his effort to return to work with Respondent. (Tr. 381-389; RX-6, pp. 1, 6).

Complainant does not know who modified the turbo hose, but noted that Mr. Ryan was the only other person who had access to the truck and who once performed work under the hood of the truck. He also indicated that a Peterbilt mechanic was the last person who worked on the truck.[27] (Tr. 389-391).

After his termination, Complainant contacted Mr. Price "on a constant basis and I was faxing him all the time . . . almost everyday begging for my job back." He was not told by Mr. Price that he would be rehired. Nevertheless, approximately two weeks after his termination, he was of the impression that Mr. Price would rehire him because Mr. Price expressed some interest in his unemployment status.[28] On the following day, Complainant

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[27] In his deposition, Complainant reported that he did not know who modified his turbo hose. He nevertheless accepted responsibility for the truck. (RX-11, p. 114).

[28] In his deposition, Complainant indicated he had "a few conversations" with Mr. Price after his termination because he

called Mr. Price to follow-up on his rehire, but OSHA apparently contacted Mr. Price during the interim period to discuss Complainant's complaint. Consequently, Mr. Price told Complainant he had "a lot of nerve trying to contact him and I got OSHA on him, I reported him to OSHA." Complainant "lied to him" and denied filing a complaint, but Mr. Price knew Complainant filed a complaint because "OSHA gave him the specifics of everything I said on that. And that was the end -- after that, that was the end of our conversation . . . for awhile."[29] At some point, Complainant told Mr. Price he was willing to "drop the charge," and Mr. Price requested a letter from Complainant stating the charges were dropped. Complainant noted that he never submitted the requested letter stating any charges were dropped. (Tr. 397-407).

Complainant stated he was confused over hours of service rules and that various people interpret the rules differently. He generally prepared his logs under the assumption that he could drive up to 15 hours after an 8-hour break during a 24-hour period. (Tr. 407-419).

Mrs. Lawanda Price

Mrs. Price, Respondent's co-owner, testified that Respondent brokers freight. In 2002, her job included safety, financing, drug testing, payroll and banking. She acknowledged Complainant's net payroll records, noting Complainant was paid based on 25% of his load. Mrs. Price participated in Complainant's hiring process by administering his application and drug testing. She denied informing drivers in advance that

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desired to return to his job with Respondent. He explained that he normally corresponded in writing with Mr. Price via facsimile regarding his rehire, but occasionally contacted Mr. Price telephonically to request his return to work. He then added that he and Mr. Price had "no conversation at all, period" and that, when he contacted Mr. Price by telephone, Mr. Price would not talk to him. Nevertheless, Complainant later stated that he actually talked to Mr. Price on the telephone to discuss why Mr. Price reported to an unemployment agency that Complainant was terminated for modifying a turbo hose. (RX-11, pp. 129-134, 138-140).

[29] At the hearing, Complainant noted that he did not testify earlier about this occasion involving Mr. Price's purported willingness to rehire him because "I'm just remembering now." (Tr. 397-398).

drug screens, which randomly occur, were scheduled. (Tr. 525-527; RX-7).

According to Mrs. Price, Ms. McGuire took medical leave in October 2003 and does not do the same job she performed before her leave. During Complainant's period of employment with Respondent, Ms. McGuire's responsibilities included entering logbooks into a computer, which would generate notices of violations that were to be provided to drivers. Ms. McGuire never reported the notices to Mrs. Price. In October 2003, Mrs. Price discovered that Mrs. McGuire was not reporting the notices to drivers, who "guesstimate" their mileage. Mrs. Price stated she randomly examined logs for inaccuracies and then give them to Ms. McGuire for computer data entry. (Tr. 527-532; RX—7).

Mrs. Price did not have much contact with Complainant. She did not fine Complainant $25.00 for his delayed trip to Blaine, Washington, but she should have. She explained that she decided not to penalize Complainant because it was "Christmas time." She recalled receiving no faxes from Complainant regarding complaints, noting that Respondent's facsimile machine sits "right in front of her" in Respondent's office. She recalled the first facsimile she received from Complainant occurred after his termination in February 2003, when Complainant reported that he would "report us to OSHA, DOT, et cetera." (Tr. 532-535).

Mrs. Price was present when Complainant was fired, but she did not see the turbo hose. She recalled that Complainant had just returned from a trip.[30] Complainant and Mr. Price entered the office, where Mrs. Price was working. Mr. Price told Complainant what damages could be caused by the turbo hose being clamped off. After Complainant and Mr. Price discussed the turbo hose, Mrs. Price prepared Complainant's termination letter, which was given to him with his settlement check at the same time. Complainant remained around Respondent's facility and returned to the office several times to talk to Mr. Price. Mrs. Price never spoke with Complainant about the turbo hose,

[30] Complainant's February 10, 2003 driving log indicates he returned to Winter Haven, Florida, from Orlando, Florida. (RX-4, p. 62). Although Mrs. Price did not observe Complainant's truck or any mechanics working on the truck upon Complainant's return because she was in the office at the time, she indicated that, from her experience with the company, the mechanics' general practice includes raising an incoming truck's hood, walking around the truck, waiting for the hot engine to cool and report any irregularities. (Tr. 537-538).

but she received letters from Complainant insinuating he tied off the hose. (Tr. 532-541; RX-6).

Mrs. Price acknowledged a letter from a vendor, "Flying J," indicating fuel purchases would be processed electronically without paper receipts, which affords more time for drivers to drive and also results in a minor rebate on each purchase. The rebates range from $750.00 to $950.00 quarterly. According to Mrs. Price, Respondent does not use Flying J to avoid DOT violations. Flying J approached Respondent and sent regular mailings requesting Respondent to use its services at approximately 102 locations between Florida and California. Respondent directs its drivers to use Flying J because its facilities are "very responsive to truckers" and are "trucker friendly." She noted that Respondent may contact Flying J if drivers are missing and Flying J will direct its employees to look for the missing trucks. (Tr. 541-545).

Mrs. Price described bills of lading as analogous to receipts which drivers are provided by clients while hauling freight. Drivers should request them from clients, but do not always keep copies to return to Respondent. Some clients only provide receipts rather than actual bills of lading. Respondent asks its clients and drivers for copies of bills of lading, but does not always get them. (Tr. 545-548).

Mrs. Price recalled that a new employee, "Judy," replaced Mrs. McGuire when she had a heart attack. In an effort to clean up office paperwork, Judy actually confused all of the paperwork which impeded Mrs. Price's ability to locate all of its bills of lading. Bills of lading requested by Complainant were difficult to find. Recently, after multiple searches by Mrs. Price, Judy and Ms. McGuire, who returned part-time, the bills of lading were found in an unmarked box in a loft. She added that she was "so stressed out over finding the bill of ladings" that she forgot to look for requested fuel receipts in drivers' envelopes, where she found the entirety of fuel receipts submitted by Mr. Fantroy and Complainant. She indicated fuel receipts are not destroyed. (Tr. 548-551).

Mrs. Price recalled that one other driver, "Jackie McGuire," who is unrelated to Ms. McGuire, was fired for clamping off a turbo hose in 2001, prior to Respondent's employment of Mr. Fantroy and Complainant. Jackie McGuire never complained about hours of service violations. (Tr. 551-552).

Mrs. Price stated Complainant never reported to her that he filed or wanted to file a DOT complaint. Since Complainant's departure, DOT has not contacted Mrs. Price or Respondent. (Tr. 552-556).

On cross-examination, Mrs. Price stated she had never issued Complainant any reprimand letters regarding logbook violations, although she has fired employees in the past for such violations. She stated a driver can drive 13 hours within a 24-hour period if the driver takes a rest. Mrs. Price was presented with Complainant's December 26, 2002 hand-written letter complaining of hours of service violations. She denied ever receiving the letter or a facsimile copy of it from Complainant. (Tr. 556-567).

V. DISCUSSION

I find Complainant failed to establish his adverse employment action was the result of discriminatory treatment in retaliation for protected activities in violation of the Act.

1. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 92- ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v.NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Complainant's burden of persuasion rests principally upon his testimony. His **prima facie** case is generally corroborated by the testimony of other witnesses, including Mr. and Mrs. Price, who indicated they were aware of Complainant's numerous complaints regarding malfunctioning equipment and hours of service problems. However, I found Complainant generally less impressive as a witness in terms of confidence, forthrightness and overall bearing on the witness stand. I found Complainant's credibility suffers because his testimony was at times vacillating, unsupported in the record and presented in an inconsistent manner.

Until he reviewed his OSHA complaint at the hearing Complainant did not recall reporting a DOT complaint to Mr. Price on February 9, 2003; however, he recalled his other complaints from November 2002 through January 2003. Insofar as this matter involves Complainant's alleged unlawful termination in response to his safety complaints, it is difficult to accept Complainant's failure to recall his complaint on February 9, 2003, the day before he was terminated. Further, Complainant later explained that he denied reporting any complaints to Mr. Price when they purportedly discussed his re-employment. Accordingly, the circumstances under which Complainant may or may not have reported complaints on February 9, 2003 are not clearly established in the record. Notably, Mr. Price could not deny that Complainant reported safety complaints on February 9, 2003, but he also testified that the safety complaint might have occurred after Complainant's termination.

Further, Complainant indicated that he was "sure" DOT investigated his January 2003 complaint, but later indicated he

had no idea whether DOT contacted Respondent. The consistent testimony of Mr. and Mrs. Price that DOT has not contacted Respondent regarding Complainant's complaints undermines his testimony that he filed complaints which were investigated prior to his termination.

Complainant's hearing testimony surrounding the events of February 10, 2003 was inconsistent and conspicuously departed from his deposition testimony, which undermines the reliability of his overall testimony. At the hearing, he initially recalled Mr. Price accusing him of clamping off the turbo hose; however, he later stated that Mr. Price only told him that he "messed with" the truck without any mention of the turbo hose and that Mr. Price did not give him the opportunity to deny modifying the equipment. He also denied receiving any written letter of termination until his April 28, 2004 deposition.

However, his deposition testimony indicates Mr. Price explicitly confronted him about the clamped turbo hose, an action he denied on the date he was terminated. His deposition testimony also indicates he received written letters of termination discussing the turbo hose before he departed Respondent's facility and later in the mail. His hearing testimony that he received no written letters of termination prior to his deposition is contradicted by Mrs. Price, who specifically testified that she prepared Complainant's termination letter after his confrontation with Mr. Price over the turbo hose and that she presented the letter to Complainant with his settlement check. His hearing testimony is also arguably inconsistent with his argument in his post-hearing brief that Mrs. Price prepared his termination letter earlier during the day on which he was terminated.

Complainant's testimony that he immediately left Respondent's facility upon his termination because there would have been a confrontation is contradicted by the consistent testimony of Mr. and Mrs. Price, who recalled that he remained around the office and returned to the office after his termination. Accordingly, I find Complainant's testimony that he quickly left the office without discussing or otherwise finding out he was being terminated because of the clamped hose is not persuasive.

Complainant's deposition testimony reveals his understanding that clamping a turbo hose could result in more pulling power, yet he elsewhere denied understanding the effects of a clamped turbo hose. His explanation that he discovered the

effects of clamped turbo hoses after his termination is contrary to Mr. Price's testimony generally indicating Complainant understood the effect of clamped turbo hoses when he was fired. Accordingly, I find Complainant's testimony is unpersuasive in establishing he did not know what a clamped turbo hose could do when he was terminated.

I find Complainant's multiple post-termination letters accepting responsibility for any damages related to what he "did" to his truck buttress Respondent's contention that Complainant altered his equipment. Based on Complainant's testimony that he was referring to the clamped hose in his post-termination correspondence acknowledging what he "did," I agree with Respondent that Complainant's representations in his letters apparently relate to the modified turbo hose. Complainant argues he admitted responsibility in his letters because he did not know what he did when he was terminated and merely relied on a liability letter while desiring to avoid a confrontation; however, as noted above, the record supports a conclusion that Complainant was provided a letter of termination indicating the grounds on which he was being terminated and that he remained around Respondent's facility and returned to the office for a period of time before leaving, which is arguably contrary to his assertion that he desired to avoid confrontation. I find Complainant's explanation, that he denied responsibility for modifying his equipment while at the same time accepting responsibility for any damages he caused, strains credulity beyond reason.

I found Complainant's hearing testimony about conversations with Mr. Price possibly rehiring him after February 10, 2003, lacked factual uniformity with his deposition testimony, was selectively recalled and otherwise not persuasive. In his deposition, Complainant indicated he never had any conversations with Mr. Price after his termination, yet he stated elsewhere that he had conversations with Mr. Price regarding Mr. Price's communications with an unemployment agency. Because Complainant may have filed a complaint with OSHA on February 19, 2003, there is arguably an inference that OSHA contacted Respondent at some point after February 19, 2003; however, there is inadequate evidence of record supporting or otherwise corroborating Complainant's testimony that OSHA actually contacted Mr. Price on any specific date, when Mr. Price allegedly decided not to rehire Complainant as a result of OSHA's contact.

From the testimony of Complainant, Mr. Price and Mrs. Price, it is generally established that Complainant communicated

regularly with Respondent via facsimile before, during and after his employment with Respondent. A review of Complainant's post-termination facsimile's reveals no communication by Mr. Price indicating Complainant would be rehired or otherwise indicating Mr. Price was contacted by OSHA or DOT. Rather, the post-hearing facsimile correspondence includes several requests to return to work that apparently went unanswered. The correspondence concludes with Complainant's statement that he "begged" to return to work, but Mr. Price "did not care," which generally implies Mr. Price was not willing to rehire Complainant. Accordingly, I find Complainant's hearing testimony that Mr. Price was apparently willing to rehire him until OSHA's contact regarding Complainant's complaints is not persuasive or credible.

Complainant stated drivers were not allowed to receive pay if they submitted driving logs with excessive hours; yet he conceded being paid on numerous occasions when he reported excessive hours. Although he explained that some exceptions might allow drivers to exceed certain time limits due to weather or traffic problems, his logs on the dates he was paid despite reporting excessive hours generally do not reveal any such extenuating circumstances. Further, there is no argument or allegation that Complainant was not paid on the occasions when Respondent's computer generated discrepancy reports indicating he was driving excessive hours.

Moreover, I find Complainant's complaints that Respondent encouraged its drivers to run illegally are weakened by his admission that he was confused about hours of service limits, which are interpreted differently by individuals.[31] Accordingly,

[31] Pursuant to former regulation 49 C.F.R. § 395.3 (2002), no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive "[m]ore than 10 hours following 8 consecutive hours off duty" or "[f]or any period after having been on duty 15 hours following 8 consecutive hours off duty." Theoretically, it is noted that, assuming a driver has sufficient hours under the 70-hour rule to drive, he or she may drive in excess of 10 hours per day so long as the driver obtains the requisite 8 hours of rest. Assuming a driver begins driving at midnight, he or she may drive 10 hours and seek 8 hours of rest until 6:00 p.m., when he or she may return to driving for conceivably another 10 hours, which would result in a total theoretical driving time of 16 hours in a 24-hour period. Of course, the above illustration ignores meals, inspections and other on-duty services which might be required

I find Complainant's testimony that Respondent refused to pay its drivers unless they fabricated logs is not persuasive.

Complainant submitted various mechanical reports indicating the status of Respondent's truck on certain dates. Notably, the dates of the reports, to the extent they can be discerned, do not include any mechanical report during February 2003. The reports were apparently generated from February 26, 2002, through April 26, 2002, and on October 3, 2000. Otherwise, there is no year indicated on any remaining reports, which occurred from "10-12" through "12-15." Accordingly, I find Complainant's reliance on the mechanical reports is not helpful for a resolution of the instant matter.

I find Complainant's testimony that Respondent or its agents contacted his post-termination employers to adversely affect his employment because of his alleged protected activity is not factually supported, as Complainant generally conceded in his deposition, and further amounts to mere speculation.

Lastly, Complainant's allegation that Respondent forced him to drive illegally from Dothan, Alabama, to Blaine, Washington, overlooks 48 hours from Complainant's voluntary trip home in Dothan on Friday, December 27, 2002, until his eventual report of equipment failure on Sunday, December 29, 2002. While Complainant presented a receipt for mechanical repairs indicating he was in Dothan when he finally called Respondent, his logbooks do not establish difficulties during the 48-hour period or that Complainant was otherwise precluded from repairing the alternator earlier. Meanwhile, there is no dispute that Complainant was dispatched with his load on Thursday, December 26, 2002, one week before he eventually arrived at his destination. Likewise, it is undisputed that Complainant had time to stop by his home on the way to his destination. Accordingly, I find Complainant's argument that Respondent forced him to drive illegally is not persuasive.

On the other hand, Respondent's witnesses were more impressive in my view. They demonstrated greater confidence and forthrightness on the witness stand. Each of Respondent's witnesses corroborated the testimony of the other witnesses. I found their testimony to be straight-forward, detailed, and

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and which would necessarily reduce actual driving time. Nevertheless, it is arguable that a driver could, on occasion, exceed 10 hours of driving in a 24-hour period under the former hours of service regulations.

presented in a sincere and consistent manner. Their testimony buttressed the strength of Respondent's defense and its legitimate, nondiscriminatory business reasons for its actions. At times, their testimony, including Ms. McGuire's candid admissions that she received discrepancy letters indicating Complainant exceeded hours of service rules and Mr. Price's admissions that Complainant often complained, was against Respondent's interest, which I find supports the credibility of the witnesses.

Complainant argues Respondent's witnesses should be discredited because they willfully withheld records he sought through discovery. While the failure to produce documents resulted in a ruling that an adverse inference would be drawn against Respondent, it is noted, as it was in my March 24, 2004 Order Denying Respondent's Motions to Vacate and Extend Deadline and Invoking Adverse Inference (ALJX-24, pp. 2-3), that the adverse inference invoked against Respondent assists Complainant only in establishing, in part, the basis of his safety complaints. Because the basis of his safety complaints is essentially undisputed insofar as Ms. McGuire clearly admitted Respondent's computer software regularly produced discrepancy reports, I find Respondent's failure to timely produce fuel receipts, logbooks data and bills of lading does not diminish the reliability of Respondent's witnesses' testimony.

On issues germane to a resolution of the instant matter, even Complainant's witnesses buttressed the testimony of Respondent's witnesses. For instance, Mr. Fantroy noted that clamping a turbo hose might result in severe equipment damage and is forbidden by Respondent. He also noted that clamped hoses are useful in adding pulling power in mountainous areas, which arguably include the areas where Complainant experienced most of his problems. Accordingly, I place more probative value on the testimony of witnesses called by Respondent in the resolution of the instant claim.

2. The Statutory Protection

The employee protection provisions of the STAA provide, in pertinent part:

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

> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because –
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; **or**
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a).

Thus, under the employee protection provisions of the STAA, it is unlawful for an employer to impose an adverse action on an employee because the employee has complained or raised concerns about possible violations of DOT regulations. 49 U.S.C. § 31105(a)(1)(A). See, e.g., Reemsnyder v. Mayflower Transit, Inc., Case No. 93-STA-4, @ 6-7 (Sec'y Dec. and Ord. On Recon. May 19, 1994). Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to drive because operating a vehicle violates DOT regulations **or** because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C. § 31105(a)(1)(B).

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and

limits the necessity of enforcement through formal proceedings." (Emphasis added). Davis v. H. R. Hill, Inc., Case No. 86-STA-18 @ 2 (Sec'y Mar. 19, 1987).

3. The Burden of Proof

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because he engaged in protected activity. A complainant initially may show that a protected activity likely motivated the adverse action. Shannon v. Consolidated Freightways, Case No. 96-STA-15, @ 5-6 (ARB Apr. 15, 1998). A complainant meets this burden by proving: (1) that he engaged in protected activity; (2) that the respondent was aware of the activity; (3) that he suffered adverse employment action; and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. Clean Harbors Environmental Services, Inc. v. Herman, 146 F.3d 12, 21 (1st Cir. 1998); Kahn v. United States Sec'y of Labor, 64 F.3d 261, 277 (7th Cir. 1995).

A respondent may rebut this **prima facie** showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action, but rather his or her protected activity was the reason for the action. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-508 (1993).[24]

However, since this case was fully tried on its merits, it is not necessary for the undersigned to determine whether Complainant presented a **prima facie** case and whether the

[24] Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a **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, 509 U.S. at 510-511. See Carroll v. United States Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a **prima facie** case becomes irrelevant once the respondent has produced evidence of a legitimate, nondiscriminatory reason for the adverse action).

Respondent rebutted that showing. See Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1063 (5th Cir. 1991); Ciotti v. Sysco Foods Co. of Philadelphia, Case No. 97-STA-30 @ 4 (ARB July 8, 1998).

Once Respondent has produced evidence in an attempt to show that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason,[25] it no longer serves any analytical purpose to answer the question whether Complainant presented a **prima facie** case. Instead, the relevant inquiry is whether the Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If he did not, it matters not at all whether he presented a **prima facie** case. If he did, whether he presented a **prima facie** case is not relevant. Somerson v. Yellow Freight System, Inc., Case No. 98-STA-9 @ 8 (ARB Feb. 18, 1999).

I find that, as a matter of fact and law, Respondent has articulated a legitimate, nondiscriminatory reason for its adverse action against Complainant. Respondent contends Complainant violated its policy against tampering with its equipment by clamping-off a turbo hose, which might result in damages and void its warranty on the equipment. Respondent offered the testimony of Mr. and Mrs. Price, who indicated clamping turbo hoses violates company policy and results in immediate termination. Their consistent and uncontradicted testimony indicates another employee was immediately terminated for clamping a turbo hose. Further, their testimony is supported by Mr. Fantroy's testimony that Respondent maintains a policy against tampering with trucks. Likewise, the consistent testimony of Mr. Fantroy and Mr. Price establishes clamping turbo hoses might result in severe damage to equipment, which generally supports Mr. Price's testimony that such tampering may

[25] The respondent must clearly set forth, through the introduction of admissible evidence, **the reasons for the adverse employment action**. The explanation provided must be legally sufficient to justify a judgment for the respondent. Upon articulating some legitimate, nondiscriminatory reason for the adverse employment action or "explaining what it has done," Respondent satisfies its burden, which, as noted above, is only a burden of production, not persuasion. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 256-257; 101 S.Ct. 1089, 1093, 1095-1096 (1981). Respondent does not carry the burden of persuading the court that it had convincing, objective reasons for the adverse employment action. Id.

void a truck's warranty. Thus, I find and conclude that Respondent met its burden of production to articulate a legitimate, nondiscriminatory basis for its adverse employment action.

Once Respondent has articulated a legitimate nondiscriminatory reason for its adverse employment action, the burden shifts to Complainant to demonstrate that Respondent's proffered motivation was not its true reason but is pretextual and that its actions were actually based upon discriminatory motive. Leveille v. New York Air National Guard, Case Nos. 94-TSC-3 and 94-TSC-4 @ 7-8 (Sec'y Dec. 11, 1995); Carroll v. Bechtel Power Corp., Case No. 91-ERA-46 @ 6 (Sec'y Feb. 15, 1995).

Complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. Zinn v. University of Missouri, Case No. 93-ERA-34 @4 (Sec'y Jan. 18, 1996); Yellow Freight Systems, Inc. v. Reich, 27 F.3d 133, 1139 (6th Cir. 1994). As noted above, Complainant retains the ultimate burden of proving that the adverse action was in retaliation for the protected activity in which he allegedly engaged, and thus was in violation of the STAA.

4. Protected Activity

Complainant alleges that he was terminated solely because he filed numerous complaints about hours of service violations with employer and with DOT.[32]

It is well settled that the Act protects safety-related complaints that are purely internal to the employer. Ake v. Ulrich Chemical Co., Inc., Case No. 93-STA-41 @ 5 (Sec'y March

[32] Assuming **arguendo** Complainant contends he was terminated for refusing to drive illegally, he has failed to establish that he engaged in protected activity by refusing to drive his truck in violation of potential safety violations during his tenure with Respondent because his logbook entries and testimony establish that he voluntarily continued driving in violation of potential safety regulations. See Zurenda v. J & K Plumbing & Heating, Inc., 97-STA-16 (ARB June 12, 1998) (an employee cannot be considered to have refused to operate a vehicle under the Act when the employee voluntarily elected to drive in violation of potential safety violations).

21, 1994); Clean Harbors Environmental Services, Inc. v Herman, 146 F.3d at 19. In matters involving analogous employee protection provisions of other statutes, the Eleventh Circuit has found that internal complaints as well as external complaints constitute protected activity. Pipkins v. City of Temple Terrace, Fla., 267 F.3d 1197 (11th Cir. 2001) ("Statutorily protected expression," for purposes of Title VII retaliation claim, includes internal complaints to superiors as well as complaints lodged with the Equal Employment Opportunity Commission (EEOC)); Bechtel Const. Co. v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995) (internal complaints are protected activity under the Energy Reorganization Act).

Section 405(a)(1)(A) of the Act is referred to as the "complaint clause," which prohibits, inter alia, the discharge of an employee or discipline or discrimination against an employee regarding pay, terms, or privileges of employment because the employee has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or order. Protection under the complaint clause is not dependent on actually proving a violation of a commercial motor vehicle safety regulation; the complaint need only relate to such a violation. Schulman v. Clean Harbors Environmental Services, Inc., Case No. 98-STA-24 @ 6 (ARB Oct. 18, 1999); Barr v. ACW Truck lines, Inc., 91-STA-42 (Sec'y Apr. 22, 1992)(a complaint related to a safety violation is protected under the Act even if the complaint is ultimately determined to be meritless).

The record establishes that Complainant's alleged activity included both "internal" complaints and "external" complaints. His testimony and evidence indicates he complained about defective or malfunctioning equipment as well as hours of service violations to Respondent's management on numerous occasions during his tenure. Mr. Price's admission that Complainant complained about not having enough time to legally continue driving is consistent with Complainant's evidence and persuasive in establishing Complainant submitted internal complaints.

Likewise, Complainant alleged that he provided Respondent with written complaints about driving illegally, which is generally supported by Mr. Price's admission that Complainant reported driving illegally at some point. The consistent positions of Complainant and Mr. Price are supported by Respondent's discrepancy reports which Ms. McGuire candidly

admitted receiving on numerous occasions when Complainant's data exceeded hours of service regulations.

Similarly, Complainant's testimony and evidence indicates he submitted complaints about hours of service violations to State and Federal regulatory agencies, which is generally consistent with Mr. Price's recollection that Complainant reported filing complaints with DOT possibly on the date that he terminated complainant or the day before he terminated Complainant.

Accordingly, I find the record supports a conclusion that Complainant engaged in protected activity under the Act by submitting internal and external complaints.

5. Respondent's Adverse Action

Adverse action closely following protected activity "is itself evidence of an illicit motive." Donovan v. Stafford Const. Co., 732 F.2d 954, 960 (D.C. Cir. 1984). The timing and abruptness of a discharge are persuasive evidence of an employer's motivation. NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983), citing NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 465 (2d Cir. 1973). See NLRB v. RainWare, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984).

Although he forgot about it until the hearing, Complainant alleged that he reported filing a complaint with DOT on February 9, 2003, the day before he was terminated, in addition to reporting another DOT complaint a few weeks earlier during January 2003. As noted above, the circumstances surrounding Complainant's February 9, 2003 complaint are not clear; however, the parties generally agree Complainant reported safety complaints on numerous occasions during his employment with Respondent. Respondent's candid admission that multiple discrepancy reports were generated by its computer program buttresses the reliability of Complainant's safety complaints. Thus, the record generally supports a finding that the timing of Complainant's safety complaints was proximate to his discharge. Accordingly, the pivotal issue is whether Respondent's decision to terminate was motivated even in part by Complainant's protected activity. I find Respondent's action was not so motivated for the reasons below.

6. The Alleged Legitimate, Nondiscriminatory Reason for Termination

The Act does not prohibit an employer from discharging a whistleblower where the discharge is not motivated by retaliatory animus. See, e.g., Newkirk v. Cypress Trucking Lines, Inc., Case No. 88- STA-17 @ 9 (Sec'y, Feb. 13, 1989)(although a complainant engaged in protected activity, he was terminated by the respondent's managers who collectively determined to discharge the complainant for his failure to secure bills of lading); cf. Lockert v. United States Dept. of Labor, 867 F.2d 513, 519 (9th Cir. 1989)(an employee who engages in protected activity may be discharged by an employer if the employer has reasonable grounds to believe the employee engaged in misconduct and the decision was not motivated by protected conduct); Jackson v. Ketchikan Pulp Co., Case No. 93-WPC-7 (Sec'y Mar. 4, 1996) (when a respondent's beliefs that the complainants engaged in sabotage, which was not a protected activity, played a major role in its decision to terminate them, it needed to prove only that the managers who decided to fire the complainants had a reasonable and good faith belief the complainants engaged in the unprotected activity).

To prevail under the Act, the employee must establish that the employer discharged him because of the protected whistleblowing activity. Newkirk, slip op. @ 8-9. It is Respondent's subjective perception of the circumstances which is the critical focus of the inquiry. Allen v. Revco D.S., Inc., 91-STA-9 @ 5-6 (Sec'y Sept. 24, 1991) (a complaint was dismissed when the respondent presented evidence of a legitimate business reason to discharge complainant -- falsification of logs and records -- and the evidence permitted an inference that the employer believed that the schedule could be run legally and believed that complainant illegally and unnecessarily falsified his logs).

I find that Respondent tolerated many false logs, log book violations and complaints from Complainant about a myriad of topics, including mechanical problems and hours of service violations. He was never disciplined for any of his complaints. According to Complainant, Mr. Price specifically directed him to return to work after he reported DOT complaints in January 2003. For the reasons discussed above, I find Complainant's hearing testimony that Mr. Price was considering rehiring him until OSHA contacted Mr. Price regarding Complainant's complaint is neither factually supported nor persuasive. Further, I find Complainant's factually unsupported speculation that Respondent

interfered with his post-termination employment because he engaged in protected activity is not persuasive. Accordingly, I generally find Respondent exhibited no discriminatory animus toward Complainant in response to his protected activity under the Act during or after his employment with Respondent.

Meanwhile, it is undisputed that Complainant generally complained about the lack of pulling power in his truck during return trips from the west coast, where Complainant and Mr. Price agreed the terrain is mountainous. In consideration of Mr. Fantroy's testimony that clamping turbo hoses increases pulling power in mountainous regions while encouraging the likelihood of equipment failure, I find it reasonable for Respondent to conclude Complainant clamped the turbo hose to achieve greater pulling power, notwithstanding Complainant's denial, which might cause damage or otherwise void its warranty.

Further, the uncontroverted and consistent testimony of Mr. and Mrs. Price establish another employee, who engaged in no protected activity under the Act, received the same disciplinary action for the same offense Complainant allegedly committed. Consequently, I find no evidence of disparate treatment among Respondent's employees who may have engaged in protected activity under the Act.

In the absence of any additional evidence, I find Complainant has failed to demonstrate that discrimination was more likely the motivating factor for his termination. Complainant argues Respondent's contention that he was terminated for tampering with equipment must fail because Respondent failed to call its mechanic as a witness. I find his argument overlooks his burden of proving that the adverse action was in retaliation for the protected activity in which he allegedly engaged, and thus was in violation of the STAA. His argument also overlooks his multiple letters of admission acknowledging responsibility for his truck and his admission elsewhere that Respondent would be "justified" in terminating him. Otherwise, I find that Complainant has failed to show that Respondent's proffered explanation for his termination is not worthy of credence.

In light of the foregoing, I find Complainant failed to carry his burden of establishing that Respondent discharged him because of filing internal and external safety complaints. I find Respondent's decision to terminate was not motivated by any discriminatory animus. Rather, the evidence indicates Respondent reasonably believed that Complainant tampered with

its equipment which could void a mechanical warranty or otherwise cause severe damage. In the absence of a showing of discrimination and animus, Respondent is not prohibited from discharging Complainant for his misconduct.

7. Relief

In the present matter, Complainant was unsuccessful and is not entitled to affirmative action under the Act, which provides for action to abate the violation, reinstatement, attorney fees and costs, and compensatory damages. 49 U.S.C. § 31105(b)(3)(A). Consequently, the relief he requests is hereby **DENIED.**

VI. CONCLUSION

I find and conclude that, on the facts presented, Complainant failed to establish his complaints of discrimination under the Act have any merit. I find and conclude that, despite the temporal proximity between Complainant's protected activity and his termination, the preponderance of the record evidence establishes Respondent terminated Complainant for reasons unrelated to any activities protected under the Act.

VII. RECOMMENDED ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Complainant's claim is hereby **DISMISSED.**

ORDERED this 29th day of July, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210.

29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).