U.S. Department of Labor

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Issue Date: 28 October 2004

Case Nos. 2004-STA-00002
2004-STA-00003

In the Matter of

ARTIS ANDERSON,

Complainant,

v.

JARO TRANSPORTATION SERVICES,

Respondent,

And

McGOWAN EXCAVATING, INC.,

Respondent.

APPEARANCES:

Artis Anderson,
Pro Se for the Complainant;

Matthew J. Blair, Esq.
Blair & Latell
Niles, Ohio
For the Respondent, Jaro Transportation Services

John P. Chappell, Esq.
London, Kentucky
For the Respondent, McGowan Excavating Inc.

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

These cases, which have been consolidated for the purpose of judicial economy, arise under the Surface Transportation Assistance Act of the 1982 [hereinafter referred to as the Act or STAA], 49 U.S.C. § 2305, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

The Complainant, Artis Anderson, filed complaints with the Occupational Safety and Health Administration, United States Department of Labor, on or about January 6, 2003 and February 18, 2003, alleging that the Respondents, McGowan Excavating, Inc. [hereinafter "McGowan Excavating"] who was a subcontractor to Respondent, Jaro Transportation Services [hereinafter "Jaro"], discriminated against him in violation of 49 U.S.C. § 31105. (ALJX 1, 2).[1] The Secretary of Labor, acting through a duly authorized agent, investigated the complaints and on September 17, 2003 and September 29, 2003, determined that Mr. Anderson failed to establish that adverse action was taken against him in retaliation for his alleged protected activities. (Id.). Furthermore, the Secretary of Labor found that although the Respondents are covered under the Act, that there was no reasonable cause to believe that either violated 49 U.S.C. § 31105. (Id.).

The Complainant filed objections to the Secretary's findings by way of notice of appeals both dated October 21, 2003. (ALJX 3, 4). The two cases were consolidated on December 23, 2003. (ALJX 8). A formal hearing was held before the undersigned on April 27, 2004, in London, Kentucky. (TR 1). All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder.

[1] In this Recommended Decision and Order, "ALJX" refers to exhibits 1 through 24 admitted into the record and offered by the Administrative Law Judge, "CX" refers to the Complainant's exhibits 1 through 3, "RX" refers to Respondent, Jaro Transportation's, exhibit 1, and "TR" refers to the pages in the hearing transcript.

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

ISSUE

The issue in this case is:

> Whether Jaro or McGowan Excavating took adverse action against Artis Anderson in retaliation for his alleged protected activities in violation of the STAA?

Based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

In August of 2001, Mr. Anderson began work as an independent contractor for McGowan Excavating driving a flatbed tractor trailer. (TR 27, 29-30). McGowan Excavating contracted with Jaro. (TR 127). However, there was no contract between Mr. Anderson and Jaro, but the Complainant did comply with Jaro's driving policy. Jaro subcontracted driving routes to various companies and individuals, and used Daniels' Dispatch as the dispatching service to notify the subcontractors of routes. (TR 127). Mr. Anderson was obligated to call into the dispatcher every two hours during the day to determine if he was needed for an available route, and the dispatcher would call him when routes were open. (TR 31). The Complainant always drove the same route which consisted of picking aluminum ingots at Alcan Recycling in Berea, Kentucky and delivering them to Logan Aluminum in Russellville, Kentucky. (TR 29). Mr. Anderson was paid a flat rate of $80.00 per load by McGowan Excavating. (TR 36-37).

Mr. Anderson alleged that Brenda Daniels, owner and operator of Daniels' Dispatch, informed him that Jaro instituted a six-hour rule which required the drivers to get from Berea to Russellville in six hours or a $50.00 fine would be imposed. (TR

39, 42). Mr. Anderson began having problems meeting the six-hour deadline in July of 2002. (TR 41). When the Complainant received a dispatch for a route in the late evening, he would go to Berea pick up the load then drive to Nancy, Kentucky where he would park the truck overnight and then drive the route in the morning. (TR 40, 79). Mr. Anderson contends that he spoke to Mrs. Selena McGowan, owner of McGowan Excavating, in July of 2002 about safety concerns regarding the six-hour rule including driving fatigue at night. (TR 41, 42). Mrs. McGowan and Mr. Anderson both agreed to meetings over the next few months concerning the six-hour rule. (TR 43, 128). Mrs. McGowan alleges the Complainant was given a warning over late deliveries in July or August of 2002. (TR 128).

Mr. Anderson filed his Department of Transportation complaint on November 18, 2002 against Jaro and McGowan Excavating. (ALJX 1, 2). The President of Jaro, Jim Steffey, called Mr. Anderson on the day before Thanksgiving 2002 to determine if he filed the complaint and ascertain its substance. (TR 47, 48). Mrs. McGowan again warned the Complainant about late deliveries at the end of November or beginning of December 2002, and subsequently on December 17, 2002, Mrs. McGowan terminated Mr. Anderson. (TR 128). She states that she fired the Complainant because he was consistently late delivering loads and he took the truck off the specified route. (TR 132). She testified that she had no knowledge of Mr. Anderson's complaint with the Department of Transportation until after she terminated him. (TR 129). Mr. Anderson then sought employment elsewhere and used Jaro as a reference. (EX 1). Jaro responded to questions about the Complainant's employment history stating he had been discharged. (EX 1). Mr. Anderson wrote a letter to Jaro concerning this matter. (EX 1). He then filed his complaints with the Department of Labor under the Surface Transportation Act in January of 2003. (TR 85).

Testimonial Evidence and Credibility Findings:

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence analyzing and assessing its cumulative impact on the record. See e.g., Frady v. Tennessee Valley Auth., 92-ERA-19 at 4 (Sec'y Oct. 23, 1995)(citing Dobrowolsky v. Califano, 606 F.2d 403, 409-10 (3rd Cir. 1979)); Indiana Metal Prod. v. Nat'l Labor Relations Bd., 442 F.2d 46, 52 (7th Cir. 1971).

Credibility is that quality in a witness which renders his or her evidence worthy of belief. For evidence to be worthy of credit:

> [it] 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 it.

Indiana Metal Prod., 442 F.2d at 51. 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. See Altemose Constr. Co. v. Nat'l Labor Relations Bd., 514 F.2d 8, 15 n.5 (3rd Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses from which impressions were garnered as to their demeanor. 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 the demeanor of witnesses.

The transcript of the hearing in this case is comprised of the testimony of two witnesses: Artis Anderson and Selena McGowan.

1. Artis Anderson

Mr. Anderson contends that he was fired from his employment unlawfully by McGowan Excavating. He was hired by McGowan Excavating in August of 2001 to drive their tractor trailer on a route from Berea, Kentucky to Russellville, Kentucky hauling ingots. He complied with Respondent, Jaro's, policy and was dispatched by Daniels' Dispatch, an agent of Jaro. He testified that initially there were no serious problems with his employment, only minor log violations. In July 2002, Mr. Anderson had a conversation with one of his bosses, Selena McGowan, and informed her he had heard that Jaro was imposing a six-hour rule that required him to complete his run from Berea to Russellville in at least six hours or he would be fined $50.00. Mr. Anderson alleges he told Mrs. McGowan that this could be a potential safety concern. According to Mr.

Anderson's testimony, Mrs. McGowan told him she would talk to Jaro and/or Daniels' Dispatch and find out more information regarding this matter. The Complainant stated he was concerned about the six-hour rule because he was on call during the day then would have to pick up a load late at night or in the early morning and drive. He feared that fatigue or "being up 24 hours without sleep" could lead to an accident. He stated, though, that he had no medical reasons that would prevent him from driving at night.

Mr. Anderson testified that there were several conversations between Mrs. McGowan and himself over the next few months. In November 2002, Mr. Anderson filed his Department of Transportation complaints against both Respondents. He received a call from Jaro President, Jim Steffey, in late November over the complaint. Mr. Anderson testified this was a pleasant conversation.

The Complainant stated that, in his opinion, he did not receive a warning from Mrs. McGowan until early December 2002 when he went to pick up his check. At that time, the Complainant said Mrs. McGowan was very angry and stated she had been "hearing a bunch of stuff" and "wanted to get it straight." She also warned him not to park the loaded truck over night in Nancy, Kentucky anymore. Furthermore, Mr. Anderson testified that Mrs. McGowan said she had received complaints from Brenda Daniels and Jaro concerning the six-hour rule. Mr. Anderson told her then that he had filed a Department of Transportation complaint with respect to the six-hour rule and the safety issues.

Mr. Anderson testified that approximately a week after the December conversation Mrs. McGowan called him and asked him to meet her at the parked truck. He showed up as requested, and she instructed him to give her the keys to the truck and the company credit card. It was at this point that Mr. Anderson states he was fired.

I question Mr. Anderson's credibility. Mr. Anderson is able to recall facts and conversations that are supportive of his position. However, he seems to have trouble remembering facts or details that could possibly be to his detriment. He concedes that he and Mrs. McGowan had several conversations after he spoke to her about safety issues in July of 2002, but he cannot recall the substance of those conversations. Also, he had to rely on outside sources to recall the reason Mrs. McGowan gave for his termination as well as the percentage of times he

parked the truck overnight in Nancy, Kentucky. Additionally, Mr. Anderson submitted log reports into evidence, but he did not submit the complete set of logs in his possession. He stated that he just picked random logs; however, he admitted the logs not in evidence would indicate late deliveries.

I also have doubts regarding Mr. Anderson's credibility in that he appears to be a perpetual complainant leaning towards litigation. He testified to representing himself as a *pro se* claimant in "quite a few" cases, and to find an exact number, he would have to "review an awful lot of records." His history of self-representation spans thirty years.

Based on these reasons, I grant less probative weight to Complainant's allegations of fact as contradicted by the subsequent more credible, probative testimony.

2. Selena McGowan

Mrs. McGowan is the owner of McGowan Excavating. She testified that she hired Mr. Anderson as an independent contractor in August of 2001 and did not experience problems with his employment until late August 2002 or early September 2002. Mrs. McGowan stated she terminated the Complainant because he did not deliver loads on time and he parked the loaded truck off route. She also said that Mr. Anderson was not answering dispatch calls when she knew he was at home and supposed to be available.

She testified to giving Mr. Anderson his first oral warning in late August or early September 2002 when she informed him that "he needed to get his loads delivered on time in order for everyone else's schedule to run on time." Mrs. McGowan also alleged seeing, as well as being informed that, Mr. Anderson's loaded truck was sitting in a lot off of the Nancy, Kentucky exit overnight. Mrs. McGowan gave the Complainant his second oral warning in late November or early December of 2002 after repeated complaints which included Mr. Anderson going off route with a loaded truck. This also concerned Jaro because they provided insurance on the load when it was in the truck.

Mrs. McGowan terminated the Complainant on December 17, 2002 solely for the above-stated reasons. Mrs. McGowan testified that neither Jaro nor Daniels' Dispatch had any influence on her terminating Mr. Anderson. She stated that she had no knowledge of the Complainant's Department of Transportation complaint until January 2003 after Mr. Anderson was terminated.

I find the testimony of Mrs. McGowan to be credible. She offered full and honest answers under examination.

Applicable Law:

The STAA provides:

> (a)(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 any complaint or begun a proceeding relating 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 himself or the public due to the unsafe condition of such equipment.
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 31105.

1. *PRIMA FACIE* CASE

To establish a *prima facie* case of discriminatory treatment under the STAA, Mr. Anderson must prove: (1) that he was engaged in an activity protected under the STAA; and (2) that he

was the subject of adverse employment action; and (3) that a causal link exists between his protected activity and the adverse action of his employer. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). The establishment of the *prima facie* case creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). At a minimum, Mr. Anderson must present evidence sufficient to raise an inference of causation. Carroll v. J.B. Hunt Transportation, 91-STA-17 (Sec'y June 23, 1992).

A. Protected Activity

1. § 31105(a)(1)(A)

Mr. Anderson has alleged that he was fired as a result of his complaint to the Department of Transportation. Under subsection (a)(1)(A) of Section 31105, protected activity may be the result of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal activities, such as internal complaints to management. Reed v. National Minerals Corp., 91-STA-34 (Sec'y Decision, July 24, 1992).

Complaints do not have to refer to particular safety standards in order to be protected. See Davis v. H.R. Hill, Inc., 86-STA-18 (Sec'y Mar. 1987) *slip op.* at 5-6; Nix v. Nehi-R.C. Bottling Complainant, 84-STA-1 (Sec'y July 31, 1984). Further, the alleged safety violations need not be proven in order for the complainants to be considered protected activity. Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-57 (6th Cir. 1992).

Here, Mr. Anderson made complaints pursuant to § 31105(a)(1)(A) because he had complained to the Department of Transportation that the six-hour rule was unsafe. Specifically, Mr. Anderson alleged that he could not meet the required six-hour time requirement on his route due to his fatigue from being on call during the day. Mr. Anderson made the complaint in question on November 18, 2002, and it was related to hours of service as set out by the U.S. Department of Transportation regulations at 49 C.F.R. § 395 (2004).

The Respondents have not disputed that Mr. Anderson made this complaint. However, both McGowan Excavating and Jaro challenged the accuracy of Mr. Anderson's complaint. In support, the Respondents have effectively demonstrated that Mr.

Anderson's complaints were unfounded. Mr. Anderson testified that he felt that it was unsafe to drive the truck under the six-hour rule late a night due to fatigue and potential danger to other drivers. However, he made no attempt to request routes in the day or to call ahead to the pick-up site to determine if they would be able to quickly load his truck so he could leave at an earlier time. He testified that he has no medical reasons that would prevent him from performing the drive in the allotted time. Furthermore, he had previously been able to meet the six-hour requirement. In contrast to Mr. Anderson's testimony, Mrs. McGowan testified that she employed another driver, Jason Baker, who drove the same route who did not experience time problems. In addition, a six-hour rule would allow the 184 mile route to be driven in a safe and legal manner. However, the Act does not call for a determination of the complainant's motivation in filing a claim. It is the respondent's motive in discharging the complaint that is under scrutiny. Moravec v. HC & M Transportation, Inc., 90-STA-44 (Sec'y July 11, 1991). Therefore, although the evidence shows that there is no factual basis to support any of Mr. Anderson's complaints, he engaged in protected activity by making complaints pursuant to § 31105(a)(1)(A).

2. Section 31105 (a)(1)(B)

Section 31105(a)(1)(B) is designed to protect employees who refuse to operate a vehicle because such operation violates law or because the employee has a reasonable apprehension of serious injury to the employee or the public because of the unsafe condition. Mr. Anderson stated that he did not want to drive the route late at night or in the early morning under the six-hour rule because of illness or fatigue as well as potential danger to other drivers on the road.

The issue ultimately lies with whether or not Mr. Anderson reasonably believed that it was unsafe to meet the six-hour driving requirement. An employee's belief must be grounded in conditions constituting reasonably perceived violations of the underlying Act. Johnson v. Old Dominion Security, 86-CAA-3 to 5 (Sec'y May 29, 1991). Under Section 31105(a)(2), "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health." Furthermore, the Section reads, "[t]o qualify for protection, the employee must have sought from the employer, and

been unable to obtain, correction of the unsafe condition." (Id.)

Mr. Anderson's complaint is a safety concern; however, I do not find that his apprehension of serious injury is reasonable. I doubt his desire not to drive late at night or early in the morning was due to fatigue or illness. He never conveyed any such symptoms to Mrs. McGowan, the dispatcher, or anyone at Alcan Recycling where he picked up his load, and he testified at the hearing he had no medical reason that prevented him from driving. Furthermore, Mr. Anderson, according to his own testimony, was required to call into the dispatcher from 10:00am to 5:00pm every two hours to see if he was needed for a route. The remaining hours of the day were his for rest and relaxation; therefore, he should not have been fatigued when he was called in to drive a route. A reasonable person in this case would not view the six-hour rule as establishing a real danger. This is demonstrated by Mrs. McGowan's other driver as well as numerous Jaro contractors who were able to drive the route in the allotted time.

For these reasons and my observation of Mr. Anderson at the hearing, I do not find that Mr. Anderson's belief that he was unable to meet the six-hour driving requirement was reasonable. However, I acknowledge he engaged in protected activity by making complaints pursuant to § 31105(a)(1)(A).

B. Adverse Action

Mr. Anderson contends that he was subjected to adverse action by both McGowan Excavating and Jaro. Mr. Anderson conveyed his concerns about the six-hour rule leading to safety issues to Mrs. McGowan in July 2002. He testified that they had several subsequent conversations in the following months. He received a phone call from Jaro's president in late November 2002 in which they discussed the complaint he filed. In early December 2002, he told Mrs. McGowan that he had filed a Department of Transportation claim. He states that his employment with McGowan Excavating was terminated approximately a week later. He then sought work elsewhere and used Jaro as a reference. At their request, Jaro reported to potential employers that he had been discharged. Mr. Anderson wrote a letter to Jaro threatening suit, and shortly thereafter, he filed a claim under the Surface Transportation Act.

Mr. Anderson's testimony is disputed by Mrs. McGowan. Mrs. McGowan testified that she gave the Complainant two oral

warnings, one in late August or early September of 2002 and the other in late November or early December of 2002. Both warnings advised Mr. Anderson that his deliveries were late and he needed to meet the six-hour rule. The later warning also informed him not to park the loaded tractor trailer off route. Mrs. McGowan stated these were the reasons for her decision to terminate Mr. Anderson. Additionally, she testified that she did not find out that he had filed a complaint with the Department of Transportation until after he was fired at his unemployment proceeding. Mrs. McGowan denied terminating Mr. Anderson because he filed any complaint.

Mr. Anderson has also alleged that he was blacklisted from similar employment by Jaro. Specifically he claims that he applied with Heartland Express and Bowling Green Freight, and he was denied employment because Jaro told both companies he had been discharged.

1. Termination

A complainant must establish that the respondent took adverse action against him or her. Any employment action by an employer which is unfavorable to the employee's compensation, or terms, conditions, or privileges of employment, can constitute adverse action. Long v. Roadway Express, Inc., 88-STA-31 (Sec'y Mar. 9, 1990). In this case, Mrs. McGowan issued Mr. Anderson formal warnings and ultimately terminated his employment. It is therefore clear that Mr. Anderson was subject to adverse employment action.

2. Blacklisting

Mr. Anderson alleges that he was blacklisted by Jaro. He claims that he was denied work by potential employers because Jaro informed them that Mr. Anderson had been "discharged."

In order to establish a claim of blacklisting, there must be evidence that the respondent had intentionally interfered with any employment opportunity that the complainant may have had available. Frady v. Tennessee Valley Authority, 92-ERA 19 and 34 (Sec'y Oct. 23, 1995).

The only evidence presented by Mr. Anderson is his own testimony. As noted, I find Mr. Anderson's testimony lacking in credibility. The Complainant stated that when he applied at Heartland Express and Bowling Green Freight he was denied employment because Jaro told both potential employers he was

discharged. Mr. Anderson offers no additional evidence for this allegation. Moreover, Mr. Anderson's testimony indicated that he offered Jaro's name as a reference to both companies. As the evidence fails to support Mr. Anderson's allegation of blacklisting, I find that the Respondent did not participate in this form of adverse action.

C. Causal Link

In the last element for a *prima facie* case of discriminatory treatment, the complainant must prove that a causal link exists between his protected activity and the adverse action of his employer. Yellow Freight Systems, Inc. v. Reich, No. 93-3488 (6th Cir. 1994). Direct evidence is not required for a showing of causation. Clay v. Castle Coal & Oil Co., Inc., 90-STA-37 (Sec'y Nov. 12, 1991). Under the Act, the ultimate burden of proof usually remains on the complainant throughout the proceeding. Byrd v. Consolidated Motor Freight, ARB Case No. 98-064, ALJ Case No. 97-STA-9, Final Dec. and Ord., May 5, 1998, slip op. at 4 n.2.

Close proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action. Kovas v. Morin Transport, Inc., 92-STA-41 (Sec'y Oct. 1, 1993) (citing Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987)). A six day interval between a protected activity and an adverse action has been found to meet the criterion to show causation. Newkirk v. Cypress Trucking Lines, 88-STA-17 (Sec'y Feb. 13, 1989); see also Chapman v. T.O. Haas Tire Co., 94-STA-2 (Sec'y Aug. 3, 1994). However, evidence of wholly unprotected conduct immediately preceding an adverse employment action may mitigate an inference of causation. Etchason v. Carry Companies of Illinois, Inc., 92-STA-12 (Sec'y Mar. 20, 1995) (citing Monteer v. Milky Way Transp. Co., Inc., 90-STA-9 (Sec'y July 31, 1990), slip op. at 4). Even when employees engage in protected activity, employers may legitimately discipline them for insubordination and disruptive behavior. Logan v. United Parcel Service, 96-STA-2 (ARB Dec. 19, 1996).

Mr. Anderson engaged in protected activity when he filed complaints against McGowan Excavating and Jaro with the Department of Transportation concerning the six-hour driving requirement on November 18, 2002. Mr. Anderson had originally addressed the possibility of safety concerns with Mrs. McGowan in July of 2002. He claims there were several conversations that followed regarding the matter, and he stated that he told Mrs.

McGowan early December 2002 that he had filed his complaint. Mr. Anderson offers no evidence other than his testimony to support the allegation that Mrs. McGowan discharged him due to the complaint he filed. Mrs. McGowan terminated the Complainant on December 17, 2002. She testified that she did not learn about the complaint he filed with the Department of Transportation until January 2003 when his unemployment proceedings began. She stated that her reasons for termination were related to other issues. The Complainant has failed to establish the causal link between his protected activity and the adverse action taken by his employer. Mr. Anderson, relying solely on his own testimony, has not proven that Mrs. McGowan had knowledge of his protected activity when she terminated him; therefore, he has not established the causal link.

Furthermore, Mr. Anderson does not qualify for the proximity inference either. As stated in Kovas, close proximity between a protected activity and an adverse result can raise the inference that the employment action in question was illegitimate under the Act. Mr. Anderson filed his complaint on November 18, 2002, and he was terminated a month later on December 17, 2002. This falls well outside of the six day window of suspicion articulated in Newkirk.

In addition, Mrs. McGowan had legitimate, non-discriminatory reasons for Mr. Anderson's termination. Mrs. McGowan testified that she discharged the Complainant because his loads were late and he took the truck off route. She also stated that she had problems with Mr. Anderson answering dispatch calls during the time he was supposed to be on call. Mrs. McGowan received complaints about late loads from Jaro and Brenda Daniels of Daniels' Dispatch. She testified that she orally warned Mr. Anderson about this matter in late August or early September of 2002. This first warning occurred at least two months prior to Mr. Anderson's complaint. The problems continued, and Mrs. McGowan gave Mr. Anderson his second oral warning in late November or early December 2002, a few weeks after he filed his complaint with the Department of Transportation. If Mr. Anderson's termination was related to his complaint, this would have been the perfect opportunity for Mrs. McGowan to terminate the Complainant, however she did not do so. Mrs. McGowan testified that Mr. Anderson's violation of the six-hour rule created a back up and scheduling problems for other drivers. Moreover, the truck Mr. Anderson drove required a special weight permit that only allowed it on certain roads. Mrs. McGowan testified that she was informed by others and personally saw that the loaded truck was off route parked at a

lot in Nancy, Kentucky. She was concerned because the weight of the loaded truck could breakdown the trailer, and also Jaro's insurance covered the loaded truck. Mrs. McGowan stated that she told Mr. Anderson about these problems in his second warning. Approximately a week later in a meeting called by Mrs. McGowan, she terminated Mr. Anderson. After two prior warnings, Mrs. McGowan had legitimate, nondiscriminatory reasons to discharge Mr. Anderson.

In evaluating the facts that Mrs. McGowan had no knowledge of Mr. Anderson's complaint at his time of termination, the lack of proximity in the time of filing the complaint and termination, and Mrs. McGowan's legitimate, nondiscriminatory reasons for discharge, the Complainant has not shown a casual link. As such, I find that Mr. Anderson did not meet his burden of proof in establishing a *prima facie* case of discriminatory treatment under STAA.

Conclusion:

In summation, I have found no evidence to indicate that any alleged adverse action taken by the Respondents was in any way motivated by the Complainant's engagement in alleged protected activity. Since the Complainant has failed to establish that the actions against him were motivated by any prohibited reason, his claims must be dismissed.

RECOMMENDED ORDER

IT IS RECOMMENDED that the complaints of Artis Anderson for relief under the Act be DENIED.

A

DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. See 61 Fed. Reg. 19978 and 19982 (1996).