U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 28 October 2005

Case No. 2004-STA-18

In the Matter of

WILLIAM J. BETTNER

Complainant

v.

CRETE CARRIER CORPORATION

Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case arises under the Surface Transportation Assistance Act of 1982 ("STAA" or the "Act"), as amended by 49 U.S.C Section 31105 and the Regulations found at 29 C.F.R. Part 1978. Section 31105 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

The proceedings before the Office of Administrative Law Judges ("OALJ") were initiated on December 6, 2003, when William J. Bettner (hereinafter "Complainant" or "Bettner"), filed a complaint with the Secretary of Labor, Occupational Safety and Health Administration ("OSHA") on December 6, 2003, alleging that Crete Carrier Corporation (hereinafter "Crete" or "Respondent") discriminated against him in violation of the Act. Following an investigation, the Secretary of Labor served its Findings and Order on February 23, 2004, denying relief. On March 3, 2004, Complainant appealed that finding to this office.

However, because Bettner filed Chapter 7 bankruptcy on June 30, 2004, I stayed this matter until Bettner's attorney retention was authorized by the trustee in bankruptcy, which occurred on September 7, 2004. Thereafter, the formal hearing was set for July 19, 2005 in Chicago, Illinois.[1] However, on June 24, 2005, Respondent filed a Motion for Summary Decision requesting that this matter be dismissed.

Crete's Motion is styled "Respondent's Motion for Summary Decision" (hereinafter "Respondent's Motion"). It was received by our office on June 27, 2005 and includes nine attachments captioned Exhibits ("EX") A through I. The description of these Exhibits is as follows: "EX A" is a copy of Bettner's deposition taken on November 22, 2004[2]; "EX B" is a copy of the Findings and Order from OSHA dated February 23, 2004; "EX C" is a copy of Bettner's objections to the Secretary's Findings and Order dated March 3, 2004; "EX D" is a copy of the September 10, 2004 Order directing parties to address the automatic stay provision at 11 U.S.C. § 362(a)(1); "EX E" is a copy of the Declaration of Jack Peetz dated June 13, 2005; "EX F" is a copy of the Declaration of Ray Coulter dated June 13, 2005; "EX G" is a copy of the Declaration of Jon Thompson dated June 14, 2005; "EX H" is a copy of the Declaration of Threna Greenfield dated June 14, 2005; and "EX I" is a copy of the Declaration of Chris Lingbloom dated June 11, 2005.

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[1] On June 30, 2005, I granted the parties' Joint Motion of Continuance and rescheduled the hearing to November 29, 2005.

[2] "Exhibit A" includes 12 subparts labeled: 1-4, 9-11, 14, 17, and 22-24. A description of these subparts is as follows: "EX A-1" is a copy of Complainant's Objections and Answers to Respondent's First Set of Interrogatories; "EX A-2" contains two copies of Bettner's Driver's Log from October 1, 2003 to October 12, 2003; "EX A-3" is a copy of Bettner's Complaint he filed with OSHA on December 6, 2003; "EX A-4" is a copy of Bettner's Driver Qualification Application dated September 3, 2003; "EX A-9" is a copy of the October 10, 2003 Qualcomm messages between Bettner and Crete's dispatcher; "EX A-10" is a copy of the October 13, 2003 Qualcomm messages between Bettner and Crete's dispatcher; "EX A-11" is a copy of the October 24, 2003 letter Bettner wrote to Duane Acylie; "EX A-14" is a copy of Bettner's Employment Application – Crete Carrier Cop. dated November 5, 2003; "EX A-17" is a copy of the November 26, 2003 letter written by Jack Peetz to Bettner; "EX A-22" is a copy of the October 9, 2003 Qualcomm messages between Bettner and Crete's dispatcher; "EX A-23" is a copy of the October 8, 2003 Qualcomm messages between Bettner and Crete's dispatcher; and "EX A-24" is a copy of the October 11, 2003 Qualcomm messages between Bettner and Crete's dispatcher.

On July 16, 2005, Complainant filed a response to the Respondent's Motion (hereinafter "Reply Brief"). Complainant also filed the "Declaration of William J. Bettner in Opposition to Respondent's Motion for Summary Decision and in Support of Complainant's Motion for Partial Summary Decision" (hereinafter "Bettner's Declaration").[3]

On August 11, 2005, Crete filed "Respondent's Reply in Support of its Motion for Summary Decision and Response to Complainant's Cross-Motion for Partial Summary Decision" (hereinafter "Respondent's Reply Brief").[4] Crete, on the same date, also filed "Respondent's Motion to Strike William Bet[t]tner's Declaration Filed in Response to Respondent's Motion for Summary Decision and in Support of Complainant's Cross-Motion for Partial Summary Decision" (hereinafter "Motion to Strike").[5]

Respondent's Motion to Strike

In its Motion to Strike, Respondent argues that Complainant "cannot raise facts in a subsequent affidavit which the party failed to mention when these facts were related to issues touched upon in the previous deposition." Respondent requests that I exclude the entire Declaration or, at the very least, strike the portions that raise issues known to Bettner at the time of his deposition.

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[3] For Decision purposes, Bettner's Declaration has been marked as Claimant's Exhibit ("CX") 1.

[4] Respondent's Reply Brief contains four attachments. These Exhibits have been identified as Exhibits 1, 1A, 1B, and 2. A description of these Exhibits is as follows: "EX 1" is a copy of the Second Declaration of Jack Peetz; "EX 1A" is a copy of the Company Driver Pay Summary for the Pillsbury Temperature Control Dedicated Fleet; "EX 1B" is a copy of the Company Driver Pay Summary for the National/Single Fleet; and "EX 2" is a copy of the full text version of the case *Stone & Webster Engineering Corp. v. Herman.*

[5] The Motion to strike contains four attachments. These Exhibits have been identified as Exhibits 1, 2, 2A, and 2B. However, since the Reply Brief also contains Exhibits 1 and 2, the Exhibits attached to this Motion will be identified as "EXM 1, 2, 2A, and 2B." A description of these Exhibits is as follows: "EXM 1" is a copy of the full text version of the case: *Czubaj v. Ball State University.* "EXM 2" is a copy of the Second Declaration of Jack Peetz; "EXM 2A" is a copy of the Company Driver Pay Summary for the Pillsbury Temperature Control Dedicated Fleet; and "EXM 2B" is a copy of the Company Driver Pay Summary for the National/Single Fleet.

In the Declaration, Complainant noted that he stopped in Oak Grove, Kentucky because "it is difficult to find safe parking areas at truck stop[s] or rest areas later at night." However, he failed to state this point in his deposition. Additionally, Complainant failed to mention that he was delayed in Geneva, Illinois because the trailer he was scheduled to take to Kankakee, Illinois was still being unloaded. Respondent asserts that these statements are Complainant's attempts to "patch-up" his deposition testimony and should be stricken from his Declaration since they conflict with his previous testimony. Bettner's statements may or may not conflict with his previous testimony given during his deposition. However, Respondent offered no evidence that these subsequent statements raised in the Declaration conflicted with specific statements made during his deposition. *See Russell v. Acme-Evans Co.*, 51 F.3d 64, 67-8 (7th Cir. 1995). Therefore, Respondent's request to strike these statements from the record is Denied.

Respondent also requests that Bettner's discussions relating to the differences between the National and Dedicated Fleets be stricken from Bettner's Declaration. Respondent asserts that Bettner's statements are not based on personal knowledge, conflict with his deposition testimony, and are not supported by the record.

In his Declaration, Bettner indicated that the National Fleet was different from the Dedicated Fleet, in the following ways: would be required to stay away from home for longer periods of time, which would increase the cost for meals, laundry, and taking showers; the majority of the loads are live loads, which may require the driver to assist in loading and unloading the shipments from the trailers; and would be required to haul hazardous material.

A review of the Driver Pay Summaries indicates that the drivers on the National Fleet are expected to be on the road for two to three weeks before getting to go home (EXM 2B), while drivers on the Dedicated Fleet are usually out on road between 11 to 14 days at a time (EXM 2A). Thus, drivers on the National Fleet are required to be away from their homes for longer periods of time. The evidence shows that Bettner drove for the National Fleet for several weeks prior to driving for the Dedicated Fleet. (EX A, CX 1). Thus, having driven for both Fleets, I find that Bettner would have some personal knowledge of the differences of the road costs between the two Fleets. Therefore, I find that Bettner's statement is supported by the record and based on his personal knowledge. Respondent's

request to strike this statement from Bettner's Declaration is Denied.

Respondent argues that "Bettner's Declaration paragraph 108 directly contradicts his sworn deposition testimony that the Dedicated Fleet is not always 'drop and hook.'" However, I disagree and find these statements to be consistent. Bettner testified at his deposition that the Dedicated Fleet "was supposed to be drop and hook but it always wasn't drop and hook." (EX A at 161). In Bettner's Declaration, he noted that the "dedicated account involves almost all drop and hook loads . . .." In both cases, Bettner acknowledged that the Dedicated Fleet does not always involve drop and hook loads. Thus, I find the two statements to be consistent and, therefore, Respondent's request to strike this statement from Bettner's Declaration is Denied.

Respondent also argues that Bettner's assertion that he may be required to haul hazardous materials and load and unload the shipments while driving on the National Fleet are not supported by the record. I also disagree with that statement.

In Jack Peetz's Second Declaration[6], he indicated that the "National Fleet drivers generally do not haul hazardous materials." (EXM 1). Thus, according to Peetz, there is a possibility that the National Fleet drivers may be required to haul hazards material.

Additionally, I find Bettner's Declaration statement that the National Fleet would require him to physically load and unload to be supported by the record. Specifically, Peetz indicated that the "National Fleet drivers are not required to load and unload anymore than drivers on the Dedicated Fleet." (EXM-2). I interpret Peetz's statement to mean that drivers on both Fleets are required to assist with the loading and unloading of the shipments. Therefore, I find that Bettner's statement that he would be required to haul hazardous material and assist with the loading and unloading of the shipments to be supported by the record.

[6] Jack Peetz ("Peetz"), who is the Executive Vice President and Chief Operating Officer for Crete, is responsible for Crete's Dedicated and National Fleets. (EXM-2). He has worked for Crete since 1990 and over the years, he has gained personal knowledge of the drivers' pay plans for both fleets. (*Id.*).

Overall, I find Bettner's Declaration to be supported by the record and based on his personal knowledge. Therefore, following due consideration of the Respondent's request, IT IS ORDERED that Crete's Motion to Strike any portion of Bettner's Declaration is hereby DENIED.

Undisputed Material Facts

Based on my review of the record generally, Crete's Motion and attachments, and the Complainant's response to the Motion, I find the following material facts to be undisputed and I view these facts in a light most favorable to the Complainant.

Crete is an over the road trucking company that operates in Illinois and throughout the United States. (EX E, F, G, H, I). Its operations consist of long haul, regional and dedicated, dry van, and temperature control transportation services. (*Id.*). During the time of Complainant's employment, Respondent operated a dedicated account for General Mills (hereinafter "Dedicated Fleet"). The Dedicated Fleet "required Crete to designate a certain number tractors, trailers and drivers exclusively for Pillsbury's use. (*Id.*).

Under the Dedicated Fleet, General Mills would provide Crete's dispatchers with multiple pick-up and delivery windows. (*Id.*). Thereafter, the dispatchers would compile the windows into planned dispatches that could be performed within the Department of Transportation ("DOT") hours of service regulations. (*Id.*). Drivers assigned to the Dedicated Fleet "are responsible for planning their trips so as to ensure not only timely pick-ups and deliveries but also compliance with the hours of service regulations." (EX E, F, G, I). A Service Failure Delivery Comment is placed on those orders where the driver failed to pick-up or deliver within the designated window. (EX E, G, I).

Crete also operates a non-dedicated fleet, which is referred to as the National Fleet. (EX E, F, G, H). The delivery and pick-up times are not as critical on this fleet as compared to the Dedicated Fleet. (*Id.*).

In August of 2003, Jon Thompson ("Thompson") called Bettner to see if he was interested in applying for a position as a truck driver on the Dedicated Fleet. (EX A at 16-17, G). During the time of Complainant's employment, Thompson was employed as a Fleet Manager with Crete at the Terminal in Ottawa, Illinois. (EX G). Shortly after Complainant completed

an employment application (EX A-4), Crete hired Bettner on or about September 5, 2003. (EX G). As a truck driver, Complainant operated commercial motor vehicles with a gross vehicle weight of 10,001 pounds or more on the highways and interstates. (CX 1). Although Complainant was hired primarily to drive for the Dedicated Fleet, he spent the first couple weeks of his employment driving for the National Fleet. (CX 1).

On October 3, 2003, Chris Lingbloom ("Lingbloom"), a dispatcher for the Dedicated Fleet, provided Complainant with a dispatch consisting of three separate pick-ups and deliveries. (*Id.*). Complainant's dispatch consisted of the following:

	Pick-up Location/Window	**Delivery Location/Window**
(1)	Geneva, Illinois 10/03/03 5:00p.m. – 11:59p.m.	Atlanta, Georgia 10/06/03 12:01a.m. - 12:00p.m.
(2)	Lavergne, Tennessee 10/06/03 8:30a.m. – 5:00p.m.	Geneva, Illinois 10/07/03 12:01p.m. – 11:00p.m.
(3)	Kankakee, Illinois 10/07/2003 3:00p.m.	Joplin, Missouri 10/08/03 11:00p.m.

(CX 1; EX A).

(1) Geneva to Atlanta

Bettner picked up his first load in Geneva on time and drove to his home in Rochelle, Illinois where he went off-duty from 4:45p.m on October 3, 2003 until 1:00a.m. on October 5, 2003. (*Id.*). Once on duty, he drove for four hours and rested in his sleeper berth for eight hours. (*Id.*). Upon exiting his sleeper berth, Complainant went off-duty for another one and one-fourth hours. (*Id.*). He then drove two hours and 15 minutes, stopped and fueled the truck for 45 minutes, and went off-duty for one and one-half hours. (*Id.*). At 7:00p.m, Complainant drove to Hillsboro, Tennessee where he went off-duty at 11:30p.m. for the night. (*Id.*).

On October 6, 2003, Complainant went on-duty at 7:00a.m., performed a vehicle inspection, drove for 30 minutes, and went off-duty for 45 minutes to have breakfast. (*Id.*). After breakfast, he resumed driving and arrived in Atlanta at

11:00a.m. (*Id.*). Although Complainant arrived before the delivery window closed, the load received a Service Failure Comment because the trailer was not unloaded until 12:45p.m., which was after the delivery window had closed. (*Id.*).

(2) Lavergne to Geneva

Complainant departed Atlanta at 1:00p.m. in route to Lavergne, Tennessee. (*Id.*). Complainant stopped and fueled his truck for 15 minutes, drove for one hour, and took a two hour break. (*Id.*). Complainant resumed driving at 4:45p.m. (*Id.*). He arrived at Lavergne at 7:45p.m., which is two hours and 45 minutes after his scheduled pick-up time. (*Id.*).

After picking up the load, Complainant drove across the street and went off-duty for 30 minutes. (*Id.*). He then drove one hour and 15 minutes to Oak Grove, Kentucky where he entered his sleeper berth for 10 hours. (*Id.*). After exiting his sleeper berth on October 7, 2003 at 8:00a.m., he remained off-duty for another 90 minutes. (*Id.*). Complainant went on-duty at 9:45a.m. and drove until 2:00p.m. before stopping and taking a one hour break. (*Id.*). After fueling his truck for 15 minutes, he drove two hours to Gillman, Illinois where he took a break from 5:30p.m. to 6:30p.m. (*Id.*).

During his trip to Gillman, Complainant sent Crete a Qualcomm message requesting that his pick-up time in Kankakee, Illinois be rescheduled. (CX 1). The Kankakee pick-up time was changed to October 8, 2003 at 7:00a.m. (CX 1; EX A). After his break, Complainant completed his trip to Geneva where he arrived at 8:45p.m., which was within his delivery window. (*Id.*). However, the trailer that he needed to take to Kankakee was not unloaded so he went off-duty. (CX 1). One hour later, Complainant hooked the trailer, drove for one hour, and decided to stop in Morris, Illinois where he stayed in his sleeper berth for 8.15 hours. (CX 1; EX A).

On October 8, 2003 at approximately 1:52a.m., Complainant sent the following message to Crete: "WILL NOT BE ABLE TO BE @ SHIPPER @ 07:00, OUT OF HOURS." (EX A-23; CX 1). At 7:30a.m., Complainant exited his sleeper berth to inspect his truck for 15 minutes and resumed driving at 7:45a.m. (CX 1). He arrived at Kankakee at 9:00a.m. and went off-duty for two hours until his trailer was unloaded. (*Id.*).

(3) Kankakee to Joplin

Complainant left Kankakee at 11:15a.m., drove for 30 minutes, and took a one hour break. (CX 1). He then drove until 2:45p.m. and went off-duty for three hours and 45 minutes. (CX 1; EX A). During his break, he sent dispatch the following Qualcomm message: "WILL NOT BE ABLE TO GET TO RECEIVER BY END OF DAY, WILL BE OUT OF HOURS FOR ONE THING, WILL BE THERE FIRST THING IN MORNING, DROP AND HOOK, RIGHT." (EX A-23; CX 1). The Joplin delivery window was changed to October 9, 2003 at 9:00a.m. (EX A-22; CX 1).

Complainant resumed driving at 6:30p.m. and drove for 1.5 hours before he stopped and fueled his vehicle for 30 minutes. (CX 1; EX A). Once on the road, he drove for three hours before stopping and going into his sleeper berth at 11:30p.m. for the night. (*Id.*).

On October 9, 2003 at approximately 7:10a.m., Complainant sent Crete's dispatcher the following Qualcomm message: "I WOULD SAY IT IS ABOUT 3 2 4 HOURS FROM WHERE I AM AT MY 8 HOUR BREAK IS NOT UP FOR ANOTHER ½ HOUR." (EX A-22; CX 1). Complainant remained off-duty until 8:45a.m., inspected his vehicle for 15 minutes, and resumed driving. (CX 1; EX A). Complainant drove for one hour before stopping in Lebanon, Missouri where he went-off duty for one hour. (*Id.*). At approximately 11:00a.m., Complainant went back on duty and finished his trip to Joplin. (*Id.*). He arrived in Joplin at 1:00p.m., dropped his trailer, and immediately went into the sleeper berth for 1.5 hours. (CX 1). Thereafter, Complainant hooked-up to another trailer with a load for Kalamazoo, Michigan, fueled his truck, and departed for Michigan at 4:00p.m. (CX 1).

On October 10, 2003, Crete, via Qualcomm, notified Bettner that he was being transferred to the National Fleet. (EX A-6; CX 1). On October 11, 2003, Complainant called Crete's Ottawa Terminal and spoke to Threna Greenfield ("Greenfield"). (EX A, H). Greenfield, who was the Assistant to the Fleet Manager, explained to Bettner that he was being transferred because he failed to routinely pick-up and deliver his loads on time. (EX H). She then advised Complainant that he should speak to Thompson on October 13, 2003 once he returned from an out of town trip. (*Id.*). Complainant delivered the load to Kalamazoo and drove to Battle Creek, Michigan to pick-up another load that was scheduled to be delivered in Minnesota on October 14, 2003. (EX A; CX 1).

On October 12, 2003, Complainant returned to the Ottawa Terminal to have his truck serviced. (*Id.*). Once there, he was informed that his truck would not be ready until the next day, so he drove his personal vehicle home. (CX 1). On the morning of October 13, 2003, Greenfield advised Bettner on the telephone that the load he was scheduled to deliver to Minnesota had been reassigned to another driver. (EX A, H; CX 1). However, Complainant had the paperwork relating to the load, so he drove to the Ottawa Terminal and gave it to another employee since neither Greenfield nor Thompson could be located. (CX 1).

Complainant, believing that he was fired, removed all of his personal belongings from the truck and sent the following Qualcomm message to Crete: "I WANT IT UNDERSTOOD THAT I DID NOT QUIT. I BELIEVE I WAS FIRED BY CHRIS LINGBLOOM WHEN HE SWITCHED ME FROM GENERAL MILLS DEDICATED TO NATIONAL FLEET WITH OUT MY KNOWLEDGE OR OK." (EX A-10; CX 1). Bettner acknowledges that neither Greenfield nor anyone else at Crete ever told him that he was fired. (EX A).

On October 14, 2003, Thompson returned to the Ottawa Terminal. (EX G). "After not hearing from Bettner and discovering that he had removed his personal items from his assigned company truck, [Thompson] assumed that Bettner abandoned his position with Crete." (*Id.*).

At the end of October, Thompson offered Complainant a position as a truck driver on the National Fleet. (*Id.*). Complainant was interested driving for Crete again because he believed that the position paid 39 cents per mile. (CX 1, EX A). Once he was recertified to drive for Crete, Thompson called Bettner and left a message for him to report to the Ottawa Terminal on November 10, 2003. (EX A, G). Since Complainant failed to appear, Thompson placed another call to Bettner to try to get him to commence his reemployment. (EX A, E, G). However, Bettner refused to return to Crete because the pay had dropped from 39 cents to 36 cents per mile. (EX A, CX 1). Thereafter, on November 26, 2003, Peetz sent Bettner a letter informing him that the offer for reemployment had been rescinded. (EX E-1).

On December 6, 2003, Bettner filed a Complaint against Crete under the STAA alleging that Crete discriminated against him when they terminated his employment on the Dedicated Fleet and moved him to the National Fleet after he complained about operating his vehicle over hours. (EX A-3). Specifically, Complainant states that:

> The discrimination took place on a run from Kankakee, Illinois to Joplin, Missouri. I was expected to go from Kankakee to Joplin with driving time available of 8¾ hours. It is 566 miles from the shipper at Kankakee to the receiver at Joplin. . . A 566 mile run should take at least 10 hours driving time. . . To go 566 miles in 8¾ hours I would have had to travel at a speed of 65 MPH, on average.

(*Id.*).

Upon investigating Bettner's Complaint, the Area Director for the Department of Labor ("DOL") issued its Findings on February 23, 2004. EX B). He determined that Complainant proved that he engaged in protective activity when he complained to his dispatcher he would be driving his vehicle over hours. In addition, as Bettner reported the protected activity to a Crete dispatcher, the Area Director concluded that Respondent had knowledge of the alleged activity. However, Bettner's Complaint was dismissed because he failed to show that he suffered an adverse employment action.

On March 3, 2004, Bettner filed Complainant's Objections to Secretary Findings and Order. Pursuant to Claimant's request for a formal hearing, the case was transferred to the OALJ. Thereafter, Respondent filed this Motion for Summary Decision.

DISCUSSION AND APPLICABLE LAW

Standard for Summary Decision

The standard for granting summary decision in whistleblower cases is analogous to the rules governing summary judgment under the Federal Rules of Civil Procedure. *See Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-52, slip. op. at 1 (ARB Dec. 13, 2002); Fed. Rule of Civ. P. 56(e). Summary decision is appropriate for either party where the record shows that "there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d);

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A material fact is one that might affect the outcome of the suit, and a genuine dispute is one where a reasonable jury could find for the nonmovant based on the evidence. *Anderson v. Liberty Lobby, Inc.*, U.S. 242, 247 (1986). The opposing party may not rest upon the mere allegations or denials of such pleading but must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. § 18.40(c). All evidence and factual inferences are viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). *See also Williams v. Lockheed Martin Corp.*, ARB NOS. 99-54 & 99-064, OALJ Nos. 1998-ERA-40, 42 (Sept. 29, 2000).

Scope of Coverage and Burdens of Proof Under the STAA

Applicable Law:

Since Complainant's employment was within the state of Illinois, this case is controlled by the law of the Seventh Federal Circuit.

In the Seventh Circuit, if a complainant "does not have direct evidence of retaliation to defeat a motion for summary judgment, he can proceed under the indirect, burden-shifting method of proof. *Stutler v. Illinois Dep't of Corrections*, 263 F.3d 698, 702 (7th Cir. 2001)(external citations omitted).

> Under that method, the plaintiff must first establish a prima facie case. After doing so, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. If the employer carries this burden, the plaintiff must produce evidence that would, if believed by a trier of fact, show that the true reason for the employment action was discriminatory--in this case, done in retaliation for [Bettner]'s engaging in protected conduct. "Although intermediate evidentiary burdens shift back and forth under this framework, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'"

Id., (internal and external citations omitted).

To establish a *prima facie* case of discriminatory treatment under the STAA, Bettner must prove: (1) that he engaged in an activity protected under the STAA; (2) that the employer was aware of the protected activity; (3) that he was the subject of an adverse employment action; and (4) that a causal link exists between his protected activity and the adverse action of his employer. *See Stutler,* 263 F.3d at 702; *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 278 (7th Cir. 1995); *Safley v. Stanndard, Inc.,* ARB No. 05-113, ALJ No. 2003-STA-54, slip op at 4-5 (ARB Sept. 30, 2005). At a minimum, Bettner must present evidence sufficient to raise an inference of causation. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec'y June 23, 1992). 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).

Protected Activity

In order to prevail under the STAA, Bettner must first establish that he engaged in protected activity. The employee protection provisions of the STAA are set forth at 49 U.S.C. § 31105. The relevant part of this Section provides that:

> (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.

49 U.S.C. § 31105(a).

In his Complaint, Bettner argues that he engaged in protected activity when he complained to Crete's dispatch that he was out of hours during his trip from Kankakee to Joplin. (EX A-3). Complainant explains that it was impossible to drive straight to Joplin without taking an eight hour break as required by the DOT. Respondent asserts that Complainant has failed to establish that he engaged in any protected activity under the Act.

(1) Whether Bettner engaged in Protected Activity under Section 31105(a)(1)(A)

As stated above, Bettner must establish that he has engaged in protected activity under either Section 31105(a)(1)(A) or (a)(1)(B). Section 31105(1)(A) protects employees that have suffered an adverse employee action after filing a complaint, begun a proceeding, or testified or will testify in a proceeding relating to a violation of a commercial motor vehicle safety regulation or standard. Based on the undisputed facts in the record, Complainant was not protected under this provision.

Here, the record establishes that Complainant filed his Complainant on December 6, 2003. However, Crete informed Bettner of his transfer to the National Fleet on October 10, 2003. In addition, the record contains no evidence that Complainant testified or that Crete knew that Bettner was going to testify in a proceeding relating to commercial motor vehicle safety prior to the transfer. Therefore, I find that Complainant has not alleged any material facts to establish protection under Section 31105(a)(1)(A).

(2) Whether Bettner engaged in Protected Activity Under Section 31105(a)(1)(B)

Section 31105(a)(1)(B) is commonly referred to as the "refusal to drive" clause. "The STAA's 'refusal to drive' clause provides two categories of circumstances in which an employee's refusal to drive will be protected thereunder, referred to as the 'actual violation' and 'reasonable apprehension of serious injury' categories, found at 49 U.S.C. §31105(a)(1)(B)(i) and (B)(ii), respectively." *Schulman v. Clean Harbors Environmental Services, Inc.*, ARB No. 99-015, ALJ No. 1998-STA-24, slip. op. at 7 (ARB Oct. 18, 1999).

(a) *Bettner's claim under (B)(i): "actual violation"*

A STAA complaint under 49 U.S.C. § 31105(a)(1)(B)(i) requires that a complainant show an *actual* violation of a commercial motor vehicle safety regulation; it is not sufficient that the driver has a reasonable good faith belief about a violation. *Id.*; *Cook v. Kidimula International, Inc.*, 95-STA-44 (Sec'y Mar. 12, 1996).

Complainant asserts that "an actual violation of 49 C.F.R. § 395.3 (and/or violations of speed limits) would have occurred if Bettner [would have driven from] Kankakee to Joplin without taking an eight-hour break." (Reply Brief). Respondent argues that prior to Crete's decision to transfer Bettner, he failed to communicate to anyone at Crete that his planned dispatch would require him to violate the DOT's service hours.

Section 395.3 provides that:

> (a) Except as provided in Secs. 395.1(b)(1), 395.1(f), and 395.1(h), no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive: (1) More than 10 hours following 8 consecutive hours off duty; or (2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.
>
> (b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after--(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. § 395.3.

The record establishes that Bettner left Kankakee with his load at approximately 11:15a.m. on October 8, 2003. He was scheduled to deliver the load in Joplin that night at 11:00p.m. Respondent does not dispute Complainant's assertion that the run from Kankakee to Joplin is approximately 566 miles, which would require at least 10 hours of driving time. However, a few hours into his drive to Joplin, Bettner informed Crete, via Qualcomm, that he will not be able to make the scheduled delivery time because he "WILL BE OUT OF HOURS FOR ONE THING." Complainant

argues that since he had already driven for one hour and 15 minutes, he could have only driven for another eight and three-fourths hours before he would have violated the 10 hour ruled under Section 395.3(a)(1).

A refusal to drive when the contemplated run would cause the driver to violate the hours of service regulation, § 395.3, is a protected activity under the Act. *See Settle v. BWD Trucking Co., Inc.,* 92-STA-16 (Sec'y May 18, 1994) (*citing Trans Fleet Enterprises v. Boone,* 987 F.2d 1000, 1004 (4th Cir. 1992); *Hamilton v. Sharp Air Freight Service, Inc.,* 91-STA-49 (Sec'y July 24, 1992), slip op. at 1-2; *Greathouse v. Greyhound Lines, Inc.,* 92-STA-18 (Sec'y Aug. 31, 1992). However, "the STAA does not protect an employee who, through no fault of the employer, has made himself unavailable for work." *Ass't Sec'y & Porter v. Greyhound Bus Lines*, 96-STA-23, slip op. at 3 (ARB June 12, 1998).

Here, I find as a result of Bettner's poor planning skills, Complainant was late picking-up and delivering his loads on time. Specifically, the record establishes that after Complainant picked-up the first load in Geneva on October 3, 2003, he went home to spend time with his wife. (CX 1). He was off-duty for 32 hours from October 3 to October 5, 2003. (*Id.*). However, once he was back on-duty, he only drove for two hours before he stopped to take an eight hour break.

As a result of Complainant's poor planning skills, he arrived near the end of his delivery window in Atlanta. Bettner's late arrival resulted in the load receiving a Service Failure Comment because the trailer was not able to be unloaded until after the delivery window had closed. Complainant admitted that if he did not drive home to spend the weekend with his wife, he would have arrived in Atlanta on the evening of October 4, 2003. (CX 1 at 4). Because Complainant spent so much time at home in Rochelle prior to leaving for Atlanta, it resulted in him being late to his subsequent pick-ups and deliveries.

As a driver on the Dedicated Fleet, Bettner was responsible for planning his own trips to not only ensure timely pick-ups and deliveries but also compliance with the hours of service regulations. I find that Bettner has failed to do just that. As a result of Complainant's own failure to properly plan his trip to ensure that all of the loads would be picked-up and delivered on-time, he did not engage in protected activity when he informed dispatch he could not make the Joplin delivery until

October 9 because he was out of hours. *See Ass't Sec'y & Porter, supra.*

The record also establishes that Bettner's late arrival to Joplin was also attributable to numerous breaks he took during the trip. Specifically, on October 8, Bettner departed from Kankakee at 11:15a.m. Complainant realized that he would not be able to drive straight to Joplin, so he requested that the Joplin delivery window be changed to the morning of October 9. Crete's dispatch accommodated Bettner's request by changing the delivery time to October 9, 2003 at 9:00a.m. This additional time would have allowed Complainant ample time to deliver the load on-time without running out of hours. However, due to the numerous breaks Bettner took during his trip from Kankakee to Joplin, he arrived at Joplin four hours late.

The record shows that after Bettner left Kankakee, he drove for 30 minutes and took a one hour break. Once back on the road, Bettner drove for two hours before stopping and going off-duty for three hours and 45 minutes. He resumed driving, drove for one hour and 30 minutes, and went off-duty to fuel his vehicle for 30 minutes. After driving approximately eight hours, he retired to his sleeping berth at 11:30p.m. Although Bettner's eight-hour break ended at 7:30a.m, he stayed in his sleeper berth for another one hour and 15 minutes. Furthermore, after he resumed driving, he stopped and went off-duty for one hour, prior to arriving in Joplin.

The record establishes that Bettner did need to take an eight-hour break prior to arriving in Joplin to avoid violating the ten-hour rule. However, even if the ten-hour break was necessary, it was not necessary for him to have taken an additional seven hours in breaks, since he failed to report being fatigued or having vehicle problems on October 8 or 9. (EX A-22, 23). Thus, if Bettner would have decreased his breaks by four hours, he could have made the 9:00a.m. delivery time without violating the DOT's hours of service requirements. Therefore, I conclude that Bettner did not engage in protected activity when he took numerous breaks resulting in untimely pick-ups and deliveries from October 3 through October 9, 2003. *See Blackann v. Roadway Express, Inc.*, ALJ no. 00-STA-38, ARB No. 02-115 (ARB June 30, 2004).

In sum, Bettner was not protected by the STAA when he ran out of hours delivering the load to Joplin because of his poor planning skills and the numerous breaks he took. Therefore, "[b]ased upon undisputed facts, [Bettner] failed to demonstrate

that he engaged in protected activity, an essential element of his claim, and therefore [Crete is] entitled to prevail as a matter of law." *Blakann,* ARB No. 02-115, slip op. at 5.

(b) *Bettner's claim under (B)(ii): "reasonable apprehension of serious injury"*

In order for Bettner's refusal to drive to qualify as protected activity under subsection § 31105(a)(1)(B)(ii), Complainant "must establish that he refused to drive the assigned [trailer] because of a reasonable apprehension of serious injury to himself or to the public because of the vehicle's unsafe condition." *Schulman*, ARB No. 99-015, slip op. at 8. Respondent argues that Complainant has failed to establish that he notified Crete that he had apprehension of serious injury to himself or the public because of the vehicle's unsafe condition.

The Act defines "reasonable apprehension":

> (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(a)(2).

Bettner has failed to show that his refusal to drive was protected under subsection (B)(ii). The record does not mention any unsafe vehicular condition from the time the vehicle was picked up on October 3, 2003 until it was serviced on October 12, 2003. Bettner also makes no mention of any claim that he stopped to sleep because he was too sleepy to drive or that driving would have been unsafe. *See Bettner v. Daymark, Inc.*, ARB No. 01-0888, ALJ No. 00-STA-041, slip. op. 18 (ARB Oct. 31, 2003). In fact, Bettner conceded, at his deposition, that he never complained to Crete's dispatch that he was fatigued or tired while on the road. (Tr. 217). Since Complainant has failed to establish he sought correction of an unsafe condition from the Respondent, he is not protected under § 31105(a)(1)(B)(ii).

Additionally, even if Complainant had proven his refusal to drive was protected under this subsection because of fatigue, the record shows that Respondent corrected the unsafe condition by extending his delivery time to October 9, 2003 at 9:00a.m. Therefore, I find that Complainant has not alleged any material facts to establish that he refused to drive because of a reasonable apprehension of serious injury to himself or to the public.

In sum, Complainant has failed to establish that he engaged in protected activity under Section 31105. Additionally, even assuming Complainant did engage in protected activity, Crete would still prevail as a matter of law due to Bettner's failure to demonstrate he suffered an adverse employment action.

Adverse Employment Action

Any employment action by an employer that is unfavorable to the employee's compensation, terms, conditions or privileges of employment constitutes an adverse action. *Long v. Roadway Express, Inc.*, 88-STA-31 (Sec'y Mar. 9, 1990). "At minimum, the employee must be able to show a quantitative or qualitative change in the terms or conditions of employment." *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524, 532 (7th Cir. 2003).

In his Complaint, Bettner argues that he suffered an adverse employment action when Crete informed him that he was being "taken off of the General Mills account . . . [and] assigned a load from the National Account, dry freight." (EX A-3). Complainant initially asserts that he considered the transfer as if Chris Lingbloom had fired him. (CX 1). However, in its Motion for Partial Summary Decision, Bettner abandons the contention that he was terminated and argues that the transfer was the adverse action. I will address the termination and transfer as separate issues below.

(1) Termination

Based on the undisputed facts in the record, I find that Crete never terminated Bettner's employment. The record establishes that Bettner only believed that he was fired because he was transferred from the Dedicated Fleet to the National Fleet. (CX 1; EX A-1). Bettner failed to present any evidence to show that any Crete employee ever told him that his employment with Crete was terminated. Although Complainant asserts that Peetz stated that he could be fired for any reason,

Bettner admits that Peetz never told him that he was terminated. (EX A-1).

The evidence supports a finding that Bettner abandoned his employment with Crete. In his Declaration, Thompson noted that he assumed Bettner had abandoned his position after not hearing from the Complainant for several days and discovering that he removed all his personal items from his assigned truck. (EX G). Additionally, shortly after Complainant left Crete, he noted on a subsequent application for future employment that he had resigned. (EX A-1). Although Thompson made multiple attempts to try to get Bettner to return to Crete after his resignation, Bettner refused to return to work. (*Id.*).

I find the above facts analogous to those in *Waters v. Exel North American Road Transport,* ARB No. 02-083, ALJ No. 02-STA-3 (ARB Aug. 26, 2003). In *Waters,* the Complainant walked away from a meeting and failed to return to work. *Id.*, slip op. at 2. The Board upheld the Administrative Law Judge's determination that "Waters abandoned his contract and Exel did not discharge him, [and] Waters did not meet his burden of proving by a preponderance of the evidence that Exel subjected him to adverse action in retaliation for protected activity." *Id.*, slip op. at 3.

As in *Waters*, I find that Bettner abandoned his employment with Crete when he removed all of his personal items from his assigned truck and walked away from his employment. Therefore, I find that Complainant has failed to establish by a preponderance of the evidence that he was terminated for engaging in protected activity.

(2) Transfer

Complainant argues that he suffered an adverse employment action as a result of being transferred from the Dedicated Fleet to the National Fleet. Respondent contends that Bettner did not suffer an adverse employment action since the transfer did not result in a material change to his job duties, pay, or benefits.

Here, Complainant argues that the transfer resulted in a significant difference in working conditions between the Dedicated Fleet and the National Fleet. Specifically, Bettner asserts that driving for the National Fleet will require him to be on the road for longer periods of time resulting in increased costs for meals, washing clothes, and even paying to take showers. The record establishes that drivers for the Dedicated

Fleet are required to be on the road for 11 to 14 days at a time, while drivers on the National Fleet stayed on the road for two to three weeks before returning home. (EX 1-A, B). However, the record establishes that Crete's Terminal facilities have showers and laundry facilities on site that are free to Crete's drivers. (EX 1). "Additionally, Crete has an arrangement with Pilot Travel Centers whereby Crete drivers assigned to both the National Fleet and the Dedicated Fleet may obtain vouchers which can be redeemed for free showers." *Id.* To be actionable, the adverse action must materially alter the terms and conditions of Complainant's employment. *Stutler*, 263 F.3d at 703 (citing *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996)). Although Complainant may have to spend additional time on the road while driving for the National Fleet, I find that the potential increase in Complainant's expenses will not result in a material alteration of the terms and conditions of Complainant's employment.

Complainant also argues that he would make less money on the National Fleet because the majority of the loads are live loads. However, I disagree. Peetz noted in his Declaration that National Fleet drivers are not required to make as many stops as drivers on the Dedicated Fleet and, therefore, make more money since they are paid by the mile. (EX 1). The record also establishes that Complainant would have received identical employment benefits and pay per paid mile. (EX 1-A, B). Specifically, the Company Driver Pay Summaries that Complainant signed on November 5, 2003 for the National Fleet and on November 3, 2003 for the Dedicated Fleet both indicate that Complainant would get paid $.36 cents per mile. (*Id.*). Although Complainant argues that he was offered $.39 cents per mile to drive for the National Fleet after he resigned, Complainant provided no evidence to support this allegation. The Seventh Circuit "[has] repeatedly held that a lateral transfer without a loss in benefits does not constitute an adverse employment action." *Stutler*, 263 F.3d at 702 (citing *Place v. Abbott Lab., Inc.*, 215 F.3d 803, 810 (7th Cir. 2000); *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 645 (7th Cir. 2000); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996)). I find that Complainant has failed to prove that his benefits and pay materially changed as a result of the transfer to the National Fleet. As such, Complainant did not suffer an adverse employment action.

Finally, Complainant contends that unlike on the Dedicated Fleet, he will be required to assist in loading and unloading the shipments and may have to "haul hazardous materials which

[he] does not like to do." As stated above, Peetz noted that that Complainant would be required to load and unload shipments on both Fleets. (EX 1). Additionally, Bettner only asserts that he does not like to haul hazardous materials. However, he failed to provide any evidence on how this additional duty changed the responsibilities or benefits of his employment. "The fact that [Bettner] did not like the new position is irrelevant when there is no evidence that the transfer decreased h[is] responsibilities or benefits in any way." *Stutler*, 263 F.3d at 703. Therefore, Complainant has failed to establish that he suffered an adverse employment action as a result of having to haul hazardous materials and load and unload shipments from the trailer.

To support its position that Bettner's transfer resulted in an adverse employment action, Counsel for the Complainant cites: *Stone & Webster Engineering v. Herman*, 1997 U.S. App. Lexis 16225 (11th Cir. 1997). Counsel states that "the court defined an adverse action as 'simply something unpleasant, detrimental, and even unfortunate.'" (Reply Brief at 6). However, I agree with the Respondent that *Stone & Webster* is not controlling since Bettner's claim arose in the Seventh Circuit. As such, I must analyze this case using Seventh Circuit precedent or persuasive authority consistent with Seventh Circuit case law. *See Northwestern Nat'l Ins. Co. v. Maggio,* 976 F.2d 320, 323 (7th Cir. 1992); *Todd v. Societe Bic S.A.,* 21 F.3d 1402, 1411 (7th Cir. 1994); *Calhoun v. United Parcel Service*, 1999-STA-7 (ALJ Jan. 6, 2000).

Counsel for Complainant also asserts that "the Secretary has held that for purposes of whistleblower cases administered by the Secretary, the decisions of Court's determining what constitutes an "adverse employment action" under Title VII do not control the Secretary's determination under the whistleblower statutes." (Reply Brief at 7). As an example, counsel cites to *Diaz-Robainas v. Flordia Power & Light Company*, 1992-ERA-10 (Sec'y April 15, 1996). However, I agree with the Respondent that this case does not support Counsel's argument. I interpret the case to stand for the proposition that an adverse employment action need not result in an "ultimate employment decision" or be limited to economic harm, but practically any discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment can be actionable. *Diaz-Robainas,* 1992-ERA-10, slip. op. at 1-2.

Additionally, the Seventh Circuit has stated that they look to Title VII case law for guidance when analyzing whistleblower claims under the *McDonnell Douglas* method of proving discrimination. *Frobose v. American Sav. and Loan Ass'n of Danville*, 152 F.3d 602, 616-17 (7th Cir. 1998). *See also Kahn*, 64 F.3d at 277. Therefore, I find that Complainant's arguments have no merit.

In sum, Complainant has failed to establish that he suffered an adverse employment action. As the transfer did not materially change the Complainant's primary duties, responsibilities, compensation, and benefits, I find that the transfer was not severe enough to constitute an adverse employment action. *Haywood*, 323 F.3d at 532; *Stutler*, 263 F.3d at 704. Therefore, based upon undisputed facts, I find that Bettner has failed to demonstrate an essential element of his claim and, therefore, Crete is entitled to summary decision as a matter of law. *See Stutler*, 263 F.3d at 705; *Blackman*, ARB No. 02-115, slip. op. at 5.

Because Bettner did not suffer an adverse employment action as a result of his transfer to the National Fleet, I need not determine whether there was a casual connection between the alleged adverse action and protected activity. *See Stutler,* 263 F.3d at 705.

Legitimate, Non-discriminatory Reason for Adverse Action

In a STAA whistleblower case, if a complainant presents evidence raising a reasonable inference of retaliatory discrimination, the employer has the burden of articulating a non-discriminatory reason for its action. *Nolan v. AC Express,* 92-STA-37 (Sec'y Jan. 17, 1995). Even assuming that the Complainant had established a *prima* facie case under the STAA, Crete has carried its burden of articulating a legitimate, nondiscriminatory reason for transferring Bettner.

Respondent asserts that Complainant was transferred because he was consistently late with picking-up and delivering his pre-planned loads. The record establishes that out of the three pick-ups and three deliveries originated from the pre-planned dispatch, Bettner was late delivering to Atlanta and Joplin and failed to arrive on time to pick-up his loads in Lavergne and Kankakee. Bettner does not dispute that four service failures were issued due to his failure to deliver or pick-up shipments in a timely manner. Crete asserts that since Bettner received four service failures in less than four days, he was transferred

to the National Fleet where he would not have the same rigorous on-time service requirements.

"A complainant is not automatically immune to adverse action subsequent to engaging in protected activity." *Clement v. Milwaukee Transport Services, Inc.*, ARB No. 02-025, ALJ No. 2001-STA-6, slip. op. at 5 (ARB Aug. 29, 2003). An employer does not violate the STAA by taking an "employment action against a driver who is unable to meet the physical demands of the job on a sustained basis." *Blackman,* ARB No. 02-115, slip. op at 4.

Respondent contends that Bettner was transferred because of his poor planning skills, which resulted in his receiving four service failures in four days. I find Crete's assertion to be supported by the record. Therefore, I find that Respondent has met its burden of production by articulating a legitimate, non-discriminatory reason for transferring Bettner to the National Fleet.

Pretext

If the Respondent articulates a legitimate nondiscriminatory reason for the adverse employment action, Complainant must then show that the articulated reason is a pretext and that the employer discriminated against him because of his protected activity. *Shannon v. Consol. Freightways*, ARB No. 98-051, ALJ No 1996-STA-15 (ARB April 15, 1998).

Complainant has failed to articulate a pretext argument in its Reply Brief. Complainant's burden on summary decision is to set forth specific facts showing that there is a genuine issue of fact for the hearing. *See* § 18.40(c). Not only did the Complainant fail to produce any evidence to suggest that Crete's reason for the transfer was pretexual, he does not even address the issue. Since Complainant failed to submit an appropriate factual statement in opposition to Crete's Motion for Summary Judgment, I will assume that the facts as claimed and supported by admissible evidence by Crete are admitted to exist without controversy. *See Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994).

The Seventh Circuit has stated that "a party's failure to address or develop a claim in its opening brief constitutes a waiver of that claim, for '[i]t is not the obligation of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel ...'"

West Hubbard Restaurant Corp. v. U.S., 203 F.3d 990, 997 (7th Cir. 2000) (quoting *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 668 (7th Cir. 1998), (citing *Sere v. Bd. of Trustees of the Univ. of Ill.*, 852 F.2d 285, 287 (7th Cir. 1988))). As Complainant failed to address the pretext issue in his Reply brief, I find that he has waived that portion of his claim.

In sum, Bettner has failed to carry his burden of demonstrating that Crete's proffered reason for transferring him was pretextual and that the real reason was for engaging in protected activity under the STAA. *See Bahl v. Royal Indem. Co.*, 115 F.3d 1294, 1297 (7th Cir. 1997). Therefore, I conclude that, on this record, there is no genuine issue of triable fact as to whether the reason for Bettner's transfer was legitimate and non-discriminatory. *Id.*

CONCLUSION

Bettner's burden on summary decision with respect to Crete was to create a triable issue of fact concerning whether he engaged in protected activity and suffered an adverse employment action. *See Allison v. Delta,* ARB No. 03-150, ALJ No. 2003-AIR-00014, slip. op. at 5 (ARB Sept. 30, 2004). He has failed to do so. Since essential elements of his claim have not been shown, summary decision is appropriate and Crete's Motion for Summary Decision must be granted. Additionally, I find that the Respondent is entitled to summary decision, since Bettner has failed to rebut Crete's proffered reason for transferring him.

Based on this record, Complainant failed to demonstrate that he engaged in protected activity and suffered an adverse employment action. Since Complainant cannot establish a *prima facie* case of discrimination under the STAA, Bettner's Complaint must be dismissed. *See Stutler,* 263 F.3d at 705; *Bahl,* 115 F.3d at 1297; *Bushway*, ARB No. 01-018, slip. op. at 3. Therefore, I find that there exists no genuine issue of any material fact and that Crete is entitled to judgment as a matter of law.

RECOMMENDED ORDER

IT IS ORDERED that the Motion for Summary Decision filed by the Respondent, Crete Carrier Corporation, is hereby GRANTED and Complainant's Motion for Partial Summary Decision is DENIED. Furthermore, IT IS ORDERED that William J. Bettner's Complaint filed against Crete Carrier Corporation is hereby dismissed.

In view of the above, **IT IS ALSO ORDERED** that the formal hearing rescheduled for November 29, 2005 in Chicago, Illinois is hereby cancelled.

A

Rudolf L. Jansen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).