U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 April 2005

CASE NO. 2004-STA-00044

In the Matter of:

ROY CHAPMAN,
Complainant,

vs.

J.B. HUNT TRANSPORTATION COMPANY,
Respondent.

Appearances:

Roy Chapman
Las Vegas, Nevada
pro se

Byron L. Ames, Esq.
Las Vegas, Nevada
Attorney for the Respondent

BEFORE: ALEXANDER KARST
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises from a complaint filed by Roy Chapman under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (the Act), and the implementing regulations at 29 C.F.R. Part 1978, which protect employees from discharge, discipline, or discrimination for engaging in a protected activity pertaining to commercial motor vehicle safety. The case is before me on objections filed by Mr. Chapman to the findings and preliminary order of the Occupational Safety and Health Administration (OSHA) to the effect that Mr. Chapman's termination on December 4, 2003 was "based on legitimate business reasons rather than any alleged activities protected by the Act." 49 U.S.C. 31105(b)(2)(A); 29 C.F.R. § 1978.105.[1]

[1] The following abbreviations are used throughout this decision: TR = hearing transcript of June 29, 2004; RX = Respondent's exhibits.

Mr. Chapman, 51, testified that he has had a commercial driver's license since he was seventeen, and he has worked full time as a truck driver since 1992. TR 10. Before then, he was a carpenter, hauled cattle for rodeos, and was a rodeo clown. TR 10. He has worked for several trucking companies since 1992. TR 12-13. He testified that in 1991 he successfully applied to work for J.B. Hunt but decided not to take the job when he learned that he would have to attend trucking school because "I don't need somebody to teach me how to drive a truck." TR 13. However, Mr. Chapman went to work for Hunt in 2003 after a recruiter convinced him to work there. He attended a three-day orientation in Dallas, Texas beginning on April 1, 2003 that consisted of paperwork, a road test, a Smith System test,[2] and instructions on company policy. TR 89-90.

After his orientation, Mr. Chapman was based out of Houston, Texas. TR 10. His job duties consisted of hauling freight in the forty-eight continental states. TR 18. He was usually dispatched from Houston to the Northeast, where he made various 200 to 300 mile trips before making his way back to Houston. TR 19-20. These runs usually lasted about four weeks, and he would have four days off at their conclusion. TR 22. During these runs, Mr. Chapman slept in the truck's sleeper berth. TR 21. He drove the same truck from the time he left Houston until he returned and was assigned to a new truck for his next run. TR 20.

During his first two weeks, his immediate supervisor was a "fleet manager trainee" whose name Mr. Chapman could not remember, and thereafter his immediate supervisor was Phil Shank. TR 17. Mr. Shank was based in Lowell, Arkansas, and Mr. Chapman's communications with him were primarily over the telephone or through an on-board computer (OBC).[3] TR 18. Mr. Shank's supervisor was Ms. Deb Beecher, who was the team leader for the Gulf Coast region, also based in Lowell, Arkansas. TR 179. She managed twelve fleet managers, mediated disagreements between drivers and fleet managers, reviewed log audits, and performed multiple complaint reviews. TR 181.

Mr. Chapman testified that he became disenchanted with Hunt just two or three months after starting when he was informed that he would be suspended for three days because he had too many "service failures."[4] TR 42. According to Mr. Chapman, one late delivery happened because he had diarrhea. TR 70. He claimed that the service failure that prompted the notice of suspension happened because he was intimidated into driving a narrow and winding route during foggy conditions because it was shorter than an alternate route along an interstate. TR 70-71. He protested to Mr. Shank that he should not be suspended, and Mr. Shank transferred the call to Ms. Beecher. Mr. Chapman testified that Ms. Beecher agreed that the service failure relating to his illness was excused, but she refused to remove the second service failure because Mr. Chapman did not promptly notify his fleet manager that the delivery would be late because of inclement weather. TR 70. Ms. Beecher remembered that Mr. Shank had transferred the call to her and that she agreed with Mr. Chapman that he should not have received a service failure

[2] Mr. Chapman explained that the Smith System is a driver's training program that teaches drivers to keep seven seconds' distance behind other vehicles and pay attention to fifteen seconds' distance on the road ahead. TR 91. Further, drivers are taught to pay attention to their mirrors and what is happening in their surroundings. TR 91.

[3] The OBC is also referred to as "Qualcomm" in the record.

[4] Hunt uses the term "service failure" to describe late deliveries. TR 69.

when he was ill. TR 219. During these telephone conversations, Mr. Chapman alleges that he told both Mr. Shank and Ms. Beecher that he was going to file a grievance with OSHA. TR 66-67, 72. Mr. Chapman also testified that "I told Miss Beecher that she was in violation of federal law not giving me as safe of a work place as humanely possible."[sic] TR 72. Further, he claims that he threatened to have his father write a column in the Beaumont, Texas newspaper. TR 73. According to Mr. Chapman, when he returned to his truck after his conversation with Ms. Beecher, a message was waiting on his OBC withdrawing the suspension. TR 74.

Mr. Shank no longer works for Hunt and was not called to testify. Ms. Beecher denied that Mr. Chapman told her that he was going to call OSHA. She said that any time an employee mentions that they will call OSHA or pursue legal action she immediately notifies the human resources department which records the call. There is no such record. TR 190-91.

Mr. Chapman testified that he did not complain to OSHA in May because Hunt changed his due home date to May 28, 2003 "and I thought they were going to work with me." TR 75. But he testified that he called OSHA in mid-June after Hunt told him that he had an excessive "idle percentage," which is the amount of time that the truck is idling. TR 76-77. Mr. Chapman avers that he complained to Charlie Clack, an OSHA investigator in Houston, over the phone about not being paid for all the miles that he had driven, that people with no experience driving a truck were telling him how to do his job, and that he was delivering "hot loads" (deliveries that must be made by a certain time). TR 44-46. Mr. Chapman testified that Mr. Clack told him to document what was happening and promised to call him back. TR 47. He did not speak to Mr. Clack until August 2003. TR 50. Mr. Chapman testified that he did not reduce his complaint to writing because Mr. Clack told him that a telephone call would be sufficient. TR 92-93. Mr. Chapman made the call from his cellular phone, and he claims that his telephone bill has a record of every call made on that phone. TR 93. He did not produce his telephone bill at the hearing or introduce it as an exhibit, but he did read Mr. Clack's telephone number into evidence. TR 94. Mr. Chapman claims that he told Mr. Shank "whenever he called OSHA." TR 78.

Mr. Chapman's next encounter with Ms. Beecher was on December 4, 2003, when she conducted a "multiple complaint review." TR 188-90. Ms. Beecher explained that a multiple complaint review is performed when Hunt receives four complaints about a driver within one year from either the general public or an investigator whom Hunt hires to observe whether its drivers are following safety procedures. TR 183-84. After the fourth complaint, the fleet manager, the safety manager, and the team leader have a conference with the driver to discuss each incident, and the driver gets additional training after the conference. TR 184. According to Ms. Beecher, the purpose of these meetings is to get the driver's side of the story and to determine whether the driver is receptive to suggestions about safe driving practices. TR 197. She explained that these sessions very rarely result in termination, and she estimated that only three reviews have resulted in terminations during her three years as team leader. TR 198.

Ms. Beecher testified that Mr. Chapman's fourth complaint was submitted by a motorist who had to slam on her brakes when Mr. Chapman swerved to avoid a sloughed off outer tire he called a "gator." TR 191-92. She recalled that the motorist complained that Mr. Chapman straddled both lanes of traffic so that other cars could not pass. TR 192. According to Ms. Beecher, the review session "went downhill very quickly" because Mr. Chapman insisted "that

there was nothing else that could have been done…. He got rather loud, was yelling at us, and that's not professional." TR 200. She testified that he refused to take "any instruction or any ideas whatsoever from someone that had never driven a truck." TR 189. She testified that during the review, she concluded that Mr. Chapman was not receptive to Hunt's safety policies, and she decided to fire him solely because of his obstinate attitude. TR 201. Mr. Chapman claims that he was terminated on December 4, 2003 because he failed to adhere to Hunt's policy of running over objects on the road instead of swerving to avoid them. TR 80-81. He disagrees with this policy because – in his experience – a driver should swerve to avoid such objects. TR 81. He testified that Ms. Beecher informed him that he had violated Hunt's policy and asked him how he would react to a similar situation in the future. TR 82. Mr. Chapman says he told her that he would "do the same thing in the future, the same damn thing." TR 82.

It is undisputed that Mr. Chapman filed a complaint against Hunt with OSHA's regional administrator in Dallas, Texas on December 18, 2003. Mr. Chapman expressed concerns about the safe operation of commercial vehicles and the manner in which Hunt implemented company driving policies. On April 14, 2004, OSHA denied Mr. Chapman's complaint, finding that Hunt had articulated legitimate business reasons for his termination.

The Act prohibits a covered employer from retaliating against an employee who engages in any of the following protected activities: (1) safety-related complaints (either internal or external), (2) refusals to operate a vehicle when the operation of the vehicle would in fact violate Federal safety standards, and (3) refusals to operate a vehicle if (a) an employee has a "reasonable apprehension of serious injury to himself or the public" because of the unsafe condition of the vehicle and (b) the employee has unsuccessfully attempted to have his employer correct the unsafe condition. 49 U.S.C. § 31105(a)(1). In order to establish a *prima facie* case under the Act's whistleblower protection provisions, the complainant must show by a preponderance of the evidence that he engaged in protected activity, that he was subjected to adverse action, and that the employer was aware of the protected activity when it took the adverse action. *Auman v. Inter Coastal Trucking*, 91-STA-32 (Sec'y July 24, 1992), slip op. at 2. In addition, the complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Dec. 15, 1992), slip op. at 2. However, once a case is fully tried on the merits, it is not necessary to determine whether the complainant has presented a *prima facie* case and whether the employer has rebutted that showing. *Ciotti v. Sysco Foods of Philadelphia*, 97-STA-30 (ARB July 8, 1998), slip op. at p. 5 (citations omitted). Because Hunt has produced evidence that it terminated Mr. Chapman for a legitimate, nondiscriminatory reason, the analysis of the facts will be limited to the issue of whether Mr. Chapman has proven by a preponderance of the evidence that his termination violated the Act. *See USPS Board of Governors v. Aikens*, 460 U.S. 711, 713-16 (1983) and *Ciotti*, *supra*, slip op. at p. 5.

There is no dispute that Mr. Chapman was subjected to adverse action because he was fired at the conclusion of the multiple complaint review. Therefore, he must demonstrate that he was fired in retaliation for engaging in protected activity. Mr. Chapman argues that he was terminated on December 4, 2003 because in mid-May he had told Ms. Beecher that he was going to complain to OSHA if he was suspended for three days. Construing Mr. Chapman's complaint liberally, he presents three potential protected activities: (1) he complained to OSHA about Hunt

not paying him for all hours worked, "hot loads," and being told how to drive by non-truckers during the summer of 2003; (2) he made internal complaints about safety-related issues to Ms. Beecher and Mr. Shank; and (3) he complained about Hunt's safety procedures to Ms. Beecher during the multiple complaint review because she advocated driving in an unsafe manner. Hunt argues that Mr. Chapman was terminated because he was insubordinate and unprofessional during his multiple complaint review and denies – through Ms. Beecher – that he threatened to complain to OSHA on May 15, 2003.

According to Mr. Chapman, when he returned to his truck after his conversation with Ms. Beecher on May 15, 2003, "the flasher was beeping on the OBC stating, 'Your off duty – your due date home has been changed back to May 28th. No longer under suspension.'" TR 215. He argues that this proves that Ms. Beecher rescinded the suspension and "changed her company policy whenever she found out that I was going to file a grievance with OSHA because she knew she was in violation." TR 74. Ms. Beecher stated that she withdrew the suspension because Mr. Chapman had an excuse as it related to one of his service failures, but she denied that it was withdrawn because he had threatened to contact to OSHA. TR 219. Moreover, she testified that she was unaware that there was even an issue regarding Mr. Chapman's due home date. TR 220. Instead, she testified that Mr. Shank would have been responsible for changing the due home date and denied any involvement in the message that changed Mr. Chapman's due home date. TR 219-20. The transcript from his OBC from May 15, 2003 reveals that *after* Mr. Chapman's conversation with Ms. Beecher, he sent the following message to Mr. Shank at 3:20 p.m.: "I have talked to Deb B. in safety about srvc. flr., my home time change, reason for s/f rain fog rt. rd. const. fatigue etc. I have no hard feelings towards you, I know you are just doing your job." RX 11, at 139. About nine minutes later, Mr. Shank apparently sent Mr. Chapman a message that his due home date had been changed to May 28, 2003. RX 11, at 139. Notably, neither Mr. Chapman nor Mr. Shank referred to OSHA in this exchange. On balance, I find that Mr. Chapman did not threaten to contact OSHA on May 15, 2003.

Mr. Chapman claims that he was intimidated into driving an unsafe route during inclement weather as the result of a message Mr. Shank sent to his OBC. TR 70. I construe Mr. Chapman's statement to argue that the service failure on May 15, 2003 was illegally issued because Mr. Chapman would have had to break the law to deliver the load on time. On May 14, 2003, Mr. Shank sent the following message to Mr. Chapman:

> Yikes, we're #91 out of 98 OTR fleet managers on variance … that means we're driving more miles then we need to, useing up more [hours] on your 10/15/70 then you need to, if we're not being paid the miles let's not drive them![sic]
> Variance tips: Always request the optistop routing, use it as a tool to plan your trip, FYI – we don't pay pump price & studies show tripplan fueling recommendations average 4 cents saving per gallon!!! Everyone should have a map, pick the most direct truck route keeping in mind transit time/[appointments] and routes that are safe legal, during and between loads drive as little extra miles as possible – this same you driving hrs. [sic] RX 11 at 136.

Mr. Chapman responded, "I agree 100%. I'll follow your instructions[] and not drive any more miles then [sic] paid for." RX 11 at 136. However, he also added that whoever posted the miles

paid for the trip should "learn how to read a map and how to calculate miles and take all facts into consideration such as [construction] detours, cities, safest routes, etc." RX 11, at 136. About six hours later, Mr. Chapman objected to the planned route for one of his deliveries because it was "a death trap for a route" that was "more crooked then [sic] a Philadelphia lawyer and T.V. preacher put together." RX 11, at 137. Mr. Shank then advised Mr. Chapman to update his estimated time of arrival and to send a message explaining the reason for the delay as soon as possible. RX 11 at 137. Mr. Chapman reiterated that he would make the delivery on time and added, "I'm starting to think that it was safer to drive old junk and [be] left alone to do my job then [sic] it is to drive good equipment and have someone that has never driven a truck telling me how and cheating me blind on every load too[.] I can see why drivers are having wrecks and being killed at J.B. Hunt. I'm trying not to let it happen to me, so leave me alone and let me do my job!" RX 11, at 137. This message is similar to others that Mr. Chapman submitted through his OBC. He frequently stated that he could not deliver a load on schedule because of safety concerns. *See* RX 11 at 269-70, 275, 277, 284, 287, 321, 325-26, 329, 333-34, 348-49, 369, 371-72, 388, 398-99 and 400. He also frequently invoked safety concerns when a message from Hunt caused him to be upset. Notably, the dispatcher (usually Mr. Shank) did not threaten Mr. Chapman with discipline when he submitted these messages.

On balance, I find that Mr. Chapman's argumentative attitude towards Mr. Shank and the six hours between Mr. Shank's message and the reported problem with the route undermines his claim that he was intimidated. Further, he was not required to continue driving when he was fatigued, and he did not refuse to drive the route as a result of his safety concerns. Instead, he maintained that he would deliver on time. I also find that the service failure was not the result of Hunt retaliating against him for complaining about the route. At 6:44 a.m. on May 15, 2003, Mr. Chapman received a message asking if he was at the customer delivering the load. RX 11, at 138. He immediately responded that he would not make the delivery on time because of safety concerns relating to rainy and foggy weather, construction, the route, stress, and fatigue. RX 11, at 138. Mr. Shank acknowledged that these were valid reasons, but admonished Mr. Chapman that he should have sent a service alert the night before so that the trailer could have been switched to another driver to allow an on-time delivery. RX 11, at 138. Thus, I find that the service failure was not issued to punish Mr. Chapman, but because he did not follow a company procedure designed to coordinate timely deliveries.

Mr. Chapman claims that he told Mr. Shank of each of his complaints to OSHA. However, Mr. Chapman's OBC communications are devoid of any reference to OSHA, the National Traffic Safety Board, or the Department of Transportation. See RX 11, 139-404. On balance, I find that this casts some doubt on his testimony that he informed Mr. Shank whenever he called OSHA. Further, Mr. Chapman averred that he complained to OSHA in June 2003 about Hunt "nitpicking" him about his idle percentage, not being paid for all the miles that he had driven, being told how to do his job by people who had not driven a truck, and delivering hot loads. TR 44-46, 76-77. Even if true, I find that these grievances are not related to commercial motor safety regulations, rules, or orders. Moreover, David Whiteside, who has been the Senior Director of Compliance at Hunt for three years, testified that he only knew about the complaint Mr. Chapman made to OSHA in December 2003 after he was fired, and he was unaware of any complaints that Mr. Chapman had filed before his termination. TR 124, 147. Thus, I find it plausible that OSHA did not conduct an investigation and that Ms. Beecher was unaware of any

complaints that Mr. Chapman may have made before his termination in December 2003. Accordingly, I find that even if Mr. Chapman complained to OSHA before December 2003, he cannot establish a causal link between this complaint and Ms. Beecher's decision to discharge him. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec'y June 23, 1992). Indeed, even if Mr. Shank knew about these complaints, he did not make the decision to fire Mr. Chapman, and Mr. Chapman has presented no persuasive evidence that Ms. Beecher knew about his alleged communications with OSHA before the multiple complaint review. Ms. Beecher's credible testimony that she did not, and the circumstantial evidence lead me to conclude that she did not know of Mr. Chapman's ostensible communication with OSHA before she fired him.

However, the Act not only protects safety-related complaints made to OSHA, but also complaints made within a company. *Calmat v. U.S. Dept. of Labor*, 364 F.3d 1117, 1121 (9th Cir. 2004)(citing *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 19-21(1st Cir. 1998)). An employee's communications to the employer should give the employer sufficient notice "that a complaint is being filed and thus that the activity is protected." *Clean Harbors*, 364 F.3d at 22. An internal complaint qualifies as protected activity "no matter where that supervisor falls in the chain of command." *Harrison v. Roadway Express, Inc.*, 99-STA-37 (ARB Dec. 31, 2002), slip op. at p. 6 (quoting *Zurenda v. J & R Plumbing & Heating Co.*, 97-STA-16 (ARB June 12, 1998), slip op. at p. 5).

Neither party addressed the question whether Mr. Chapman's conversation with Ms. Beecher on May 15, 2003 about his diarrhea and the excused service failure, his OBC communications with Mr. Shank, or his statements during the multiple complaint review on December 4, 2003 qualify as internal complaints under the Act. Although a complaint need not cite a specific regulation, the complaint must nevertheless "'relate' to a violation of a commercial motor vehicle safety standard." *Nix v. Nehi-RC Bottling Co., Inc.*, 84-STA-1 (Sec'y July 13, 1984), slip op. at p. 4. Thus, there must be a sufficient nexus between the complainant's statements and a safety violation to render the statement a "complaint" cognizable under the Act. *Moravec v. HC &M Transportation, Inc.*, 90-STA-44 (Sec'y July 11, 1991), slip op. at pp. 4-5. That is, the statement must be reasonably covered by the Department of Transportation's Federal Motor Carrier Safety Regulations contained at 49 C.F.R. § 390 *et seq.* *Perrine v. Poole Truck Line, Inc.*, 85-STA-13 (Sec'y Mar. 11, 1986).

Mr. Chapman's OBC messages contain many comments regarding the impact of safe driving on his delivery time and criticisms of Hunt as an employer. *See* RX 11 at 269-70, 275, 277, 284, 287, 321, 325-26, 329, 333-34, 348-49, 369, 371-72, 388, 398-99 and 400. For the most part, theses messages stated that Mr. Chapman would deliver a load later than scheduled because he wanted to be "safe." On other occasions, Mr. Chapman declared that he was too upset to drive, and he needed to take a break to calm down. These complaints are too broad to qualify as internal complaints. Merely including the word "safety" in a criticism of an employer does not qualify as an internal complaint. However, on November 8, 2003, Mr. Chapman informed his dispatcher that he was not safe to drive because he was upset and he added, "I need my rest now, I am turning down OBC now and going to sleep, you are not going to cause me to get killed or kill someone else."[sic] RX 11 at 369. Although this statement undoubtedly invokes 49 C.F.R § 392.3 (prohibiting a driver from operating a vehicle when his ability is impaired due to fatigue), the dispatcher did not order Mr. Chapman to continue driving, and

responded to Mr. Chapman's allegation of ordering him to do something dangerous by telling Mr. Chapman that he was not being ordered to continue driving. RX 11 at 369. Moreover, there is no direct or circumstantial evidence that Ms. Beecher was aware of this exchange when she decided to fire him. Likewise, during the multiple complaint review on December 4, 2003, Mr. Chapman objected to Ms. Beecher's suggestions merely because she does not have as much truck driving experience as he does. However, there is no regulation that mandates that a covered employer's safety or supervisory personnel must have truck driving experience. Accordingly, Mr. Chapman did not engage in protected activity on December 4, 2003 when he objected to Ms. Beecher's suggestions on the basis of her inexperience driving a truck.

In contrast, Mr. Chapman's conversation with Ms. Beecher on May 15, 2003 would qualify as protected activity even if he did not threaten to pursue the matter with OSHA. Ms. Beecher and Mr. Chapman both agreed that he objected to the proposed suspension on the grounds that he should not have received service failures when he was too ill to drive, when inclement weather prevented him from making a timely delivery, or both. Mr. Chapman's objection to his suspension was related to two commercial motor vehicle safety regulations: 49 C.F.R § 392.3 (a motor carrier shall not require a driver to operate a commercial motor vehicle when his ability is impaired due to illness) and 49 C.F.R. § 392.14 (extreme caution shall be exercised when hazardous conditions such as rain and fog adversely affect visibility or traction). Accordingly, his conversation with Ms. Beecher on May 15, 2003 qualifies as a complaint under the Act. If Mr. Chapman can prove that Ms. Beecher fired him as a result of his conversation with her on May 15, 2003, then Hunt has violated the Act.

Hunt avers that Ms. Beecher terminated Mr. Chapman solely because of his behavior during the multiple complaint review on December 4, 2003. Mr. Chapman argues that some of the complaints that triggered his multiple complaint review could be fabricated by Hunt, fabricated by the motorists making the complaints, or incorrectly attributed to him because of an error. TR 221-23. I take this to be an argument that the multiple complaint review was a mere pretext to allow Hunt to terminate Mr. Chapman. An employer's failure to follow its own disciplinary procedure can be considered a pretext when the employer cites compliance with the procedure as a legitimate business reason for disciplining an employee. *Settle v. BWD Trucking Co., Inc.*, 92-STA-16 (Sec'y May 18, 1994).

Hunt avers that Mr. Chapman's multiple complaint review was consistent with Hunt's policy because it was scheduled after his fourth complaint. Ms. Beecher explained that each of Hunt's different trailers is assigned a number, which is used when a member of the public calls the hotline with a complaint. TR 222. A report is then generated that documents the time of the complaint, the location, and the driver to whom the trailer has been assigned. TR 223. The fleet manager then compares the location in the complaint to the location reported from the driver's OBC to determine if the complaint is accurate. TR 224. Ms. Beecher also explained that the driver is notified of a complaint within twenty-four hours and has the chance to explain what happened. TR 225. Further, she stated that the most common response drivers give is that they were not in the area at the time. TR 226. Mr. Chapman acknowledges that the fourth incident happened as reported. TR 242. However, he denies that he was involved in the other incidents because he was not in the area when the events happened. TR 242.

The first complaint against Mr. Chapman was made on May 18, 2003 at 12:38 p.m. by a caller in Little Rock, Arkansas who claimed that Mr. Chapman was driving fifty miles per hour in the left lane of I-30 and would not get over to the right lane. RX 9 at 19. On May 18, 2003, Mr. Chapman's OBC listed his location as being near Conway, Arkansas (which is northwest of Little Rock) about one hour after the incident. RX 11 at 143. The next complaint was lodged on June 15, 2003 from a caller who alleged that Mr. Chapman cut him or her off on I-70 in Ohio, causing the motorist to swerve onto the shoulder to avoid an accident. RX 9 at 20. The OBC listed him as being in the vicinity of Camden, Ohio (which is just off I-70) about forty minutes after the alleged incident. RX 11 at 170. The third complaint came from a truck driver on November 13, 2003 who claimed that Mr. Chapman had cut him off on a highway in Atlanta, Georgia. RX 9 at 27. Again, the OBC reported that he was in suburban Atlanta on the morning of November 13, 2003. RX 11 at 379. The final complaint came on November 27, 2003 from a caller in Benton, Arkansas who claimed that Mr. Chapman cut him off and then straddled both lanes of traffic to prevent him from passing the truck. RX 9 at 28. The information from Mr. Chapman's OBC shows that he was in the area at the time these complaints were lodged and casts doubt on his claim that he was the victim of dishonest or mistaken motorists. Even if the motorists' complaints were self-serving, Mr. Chapman has produced no direct or circumstantial evidence that Hunt fabricated these incidents in order to initiate a multiple complaint review. In addition, he received messages from his dispatcher asking him to call him within twenty-four hours of the incidents. *See* RX 11 at 144, 170-71, and 379. On November 27, 2003 – after the fourth complaint – he was instructed to call the safety department, RX 11 at 402, and he was reminded to do so on November 28 and December 1. *Id*. at 403. Thus, I find that Ms. Beecher's testimony regarding Hunt's procedure was credible and consistent with the evidence in the OBC communications. Accordingly, Mr. Chapman has failed to demonstrate that the review was initiated as a pretext to fire him.

Mr. Chapman claims that he was improperly terminated because he refused to adhere to Hunt's policy of running over objects instead of swerving to avoid them. TR 81-82. Mr. Chapman and Ms. Beecher both testified that Mr. Chapman's reason for swerving to avoid the gator was to either avoid flipping his truck or avoid having the truck's fuel line severed. TR 81-82, 240-41. Likewise, Ms. Beecher remembered that Mr. Chapman claimed that a severed fuel line would cause the truck to come to a stop and could have caused accidents behind him. TR 241. She said that she told Mr. Chapman, "That it would not be your fault that someone behind you would have an accident." TR 241. Further, Mr. Chapman was quite candid in acknowledging that he swerved into the left lane and caused the other motorist to slam their brakes to avoid hitting his truck and he is of the opinion that he did nothing wrong because the other motorist was going too fast. TR 242. Ms. Beecher explained that Hunt's safety procedure is more nuanced than Mr. Chapman suggests, and she denied that Hunt requires its drivers to run over objects in the road instead of avoiding them. TR 203. She acknowledged that a driver should hit an object when a lane change cannot be performed safely or the driver cannot safely stop the truck. TR 204. However, she explained that the Smith System – which is Hunt's safety procedure – would have drivers looking far enough down the road so that they would be able to slow down if an object were in the road. TR 204. She also explained that a driver should change lanes to avoid hitting the object if this can be done in a safe manner. TR 204. She reasoned that swerving into a lane when other traffic is present is not safe because the general public will try to avert the truck when it abruptly changes lanes and an accident may result. TR 204.

Ms. Beecher testified that she fired Mr. Chapman solely because of his attitude and conduct during the multiple complaint review. TR 201. She testified that Mr. Chapman refused to listen to any suggestions made to him during the review, and he became hostile towards her. TR 200-01. Ms. Beecher's account of Mr. Chapman's attitude during the review is consistent with his attitude during the hearing. Moreover, his statements on the record are consistent with the statements and attitude that Ms. Beecher attributed to him during the multiple complaint review. He evidently believes that his driving skills cannot be improved because he is already experienced. Indeed, Mr. Chapman argued that his termination was unlawful simply because "I have a license. She does not. I have experience. She does not. So therefore, what I chose to do was the right thing, and when there was no accident, and there was no incident, and when the load was delivered on time, she was wrong to fire me." TR 82. I find that Mr. Chapman was not fired because he had made safety-related complaints to Hunt or OSHA. Rather, I find that he was fired because he demonstrated an attitude of resistance to any instructions about improving his safe driving skills or habits. I find that a business employing operators of high risk equipment such as trucks, airplanes, or ships can and should require its drivers or pilots to receive continuing safety education. Such businesses are within their rights in refusing to employ people who cannot accept reasonable efforts to improve their skills, or change their habits or practices. Mr. Chapman's testimony here amply demonstrated an incorrigible know-it-all attitude of nearly total resistance to any safety instructions on the grounds that his own experience as a licensed truck driver should trump the safety policies of Hunt – which are presumably based on the collective long-term experience of the trucking industry. Accordingly, his complaint is hereby DISMISSED.

A

ALEXANDER KARST
Administrative Law Judge

AK:jb

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).