**U.S. Department of Labor**

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**Issue Date: 30 November 2004**

CASE NO.: 2004-STA-00042

In the Matter of

NICHOLAS F. DAIGLE
Complainant

v.

UNITED PARCEL SERVICE
Respondent

Appearances: Complainant, Pro Se

Jason C. Schwartz, Esquire
Joshua Ian Rosenstein, Esquire
For Respondent

Before: Janice K. Bullard
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("the Act" hereinafter), and implementing regulations set forth at 29 C.F.R. part 1978. § 405 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 such operation would be in violation of those rules. The pertinent provisions of the Act prohibit the discharge or discipline of, or any other discriminatory act against, covered employees. This recommended decision and order is also governed by those provisions, and the provisions of 29 C.F.R. Part 18.

Procedural Background

Nicholas F. Daigle ("Complainant" hereinafter) was employed by United Parcel Service ("Respondent" or "UPS" hereinafter) from October, 1989 until he was terminated on September 29, 2003. On January 26, 2004, Complainant filed a complaint with the United States Department of Labor's Office of Occupational Safety and Health Administration ("OSHA" hereinafter) alleging that he had been discriminated against by Respondent for engaging in whistleblowing activities. OSHA investigated Complainant's allegations, and on March 23, 2004, issued the Secretary's Findings and Preliminary Order, recommending that the complaint be dismissed. OSHA concluded that Complainant did not establish that he had been terminated for engaging in protected activity.

On April 23, 2004, Complainant filed an objection to OSHA's findings with the Office of Administrative Law Judges ("OALJ") and requested a hearing. The case was assigned to me, and a hearing was scheduled in the matter for Thursday, May 13, 2004. Respondent requested a continuance, which was granted after a pre-hearing conference was held with the parties by telephone on May 6, 2004.

On May 20, 2004, Respondent filed a motion to dismiss the complaint, or in the alternative, for Summary Decision. Respondent alleged that dismissal was appropriate because Complainant failed to serve his objection and request for hearing upon Respondent. Respondent suggested precedence in my dismissal of a complaint on those grounds in the matter of Steffenhagen v. Securitas Sverige, 2004-ERA-00003 (ARB December 16, 2003). Complainant did not dispute that he failed to serve Respondent with a copy of his objection and request for hearing. The record evidence supports this conclusion as well. Nevertheless, I denied Respondent's motion to dismiss on these procedural grounds because I find the cases distinguishable.

In the first place, dismissal of the Steffenhagen case was warranted because that complaint was brought under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), codified at 42 U.S.C. section 5851. The regulations pertaining to adjudications of whistleblowing complaints under the ERA provide specifically that OSHA's Notice of Determination after investigation shall become the final order of the Secretary unless Complainant's appeal is filed in a timely fashion and served on the opposing party by "facsimile (fax), telegram, hand delivery, or next-day delivery service..." 29 C.F.R. §§ 24.4(d)(2)(3). In contrast, the regulations that control the instant adjudication provide that OSHA's findings and preliminary orders become effective thirty days after they are received by a complainant, or at such date set by OSHA, "unless an objection to the findings or preliminary order has been timely filed…" 29 C.F.R. § 1978.105(b)(1). The regulations further provide "[i]f no timely objection is filed with respect to either the findings or the preliminary order, [they] shall become final and not subject to judicial review." 29 C.F.R. § 1978.105(b)(2). Thus, in cases under the STAA, the agency did not impose the jurisdictional requirement of serving the appeal upon the opposing party.

The instant circumstances differ from the Steffenhagen case in another significant way. Mr. Steffenhagen, who was represented by counsel, had not provided OSHA with sufficient information for the agency to serve the seventeen respondents identified by the complainant with notice of an investigation. OSHA dismissed the complaint on those grounds. The complainant did not cure this defect when he filed his objection with OALJ. Therefore, the respondents in that case had no knowledge of Mr. Steffenhagen's allegations. In the instant case, Respondent was involved in OSHA's investigation of Mr. Daigle's complaint. Mr. Daigle's failure to serve UPS with a notice of his appeal and request for hearing did not prejudice Respondent, particularly when my Notice of Hearing was issued five days after Complainant's appeal was docketed with OALJ.

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. § 18.40, *see also* Federal Rule of Civil

Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670 (10th Cir. 1998). I denied Respondent's motion for summary judgment because I concluded that the record contained sufficient evidence regarding material disputed facts.

A formal hearing was held before me in Saratoga Springs, New York on June 8 and June 9, 2004, at which time the parties were provided the opportunity to present evidence and argument. The testimony of an additional witness was taken telephonically on July 8, 2004 in the presence of all parties. After the hearing, the parties were allowed additional time to present evidence regarding Complainant's claim for damages. By Order issued September 30, 3004, I overruled Complainant's objections to Respondent's request for financial information, and bifurcated the proceeding so that I might issue a Decision and Order on the issue of liability, with the possibility of securing additional evidence on the issue of remedies if necessary.

The parties filed written closing arguments. The findings of fact and conclusions of law set forth in this Recommended Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties may not be specifically referenced throughout, but each has been carefully reviewed and thoughtfully considered.[1]

## ISSUE

Whether Respondent UPS took adverse action against Complainant Nicholas F. Daigle in retaliation for his alleged protected activities in violation of the STAA.

## CONTENTIONS OF THE PARTIES

*Complainant*

Complainant contends that he was terminated by UPS for complaining about overweight package delivery trucks. He had driven a tractor trailer for Respondent for eight years, and then in late spring 2003, changed jobs so that he could work days. He experienced several incidents when driving his package delivery route that convinced him his truck exceeded acceptable registered weight, which he believed was 9,000 pounds. He confirmed his suspicions on several occasions by having his truck weighed at a quarry, with results of 10,800 pounds, 11,080 pounds and 11,860 pounds. On at least one such occasion, Complainant advised his supervisors and asked for help offloading some of the weight. He also objected to starting deliveries with a heavy truck. He contacted the Department of Transportation (DOT) to determine if he was correct to complain about his overweight truck. On one occasion, his first supervisor off loaded some of the weight, but every other time that he complained he was ordered to continue driving the truck as loaded. Management was aware that he had contacted DOT. On the day of his last

[1] In this Recommended Decision and Order, "ALJX" refers to exhibits admitted into the record and offered by the Administrative Law Judge, "CX" refers to the Complainant's exhibits, and "EX" refers to Respondent's exhibits. "Tr." refers to the hearing transcript.

complaint to his immediate supervisor about the weight of his truck, September 24, 2003, Complainant returned to the package Center at the end of his shift and was told that the Center's manager was on the phone and wanted to speak with him. The manager told him that that he was to be suspended for misdelivering a package and for making entry errors on delivery records. On September 25, 2003, he was given official notice of his one day suspension, effective September 26, 2003. On Monday, September 29, 2003, he was advised by the Center's manager that he was to be discharged for working past shift hours and padding his work sheets. Complainant contends that he would not have been discharged but for his complaints about overweight trucks to UPS management and to DOT.

*Respondent*

Respondent denies that Complainant's discharge was related in anyway to his complaints regarding the weight of his delivery truck, but in fact was for his falsification of delivery records. Respondent alleged that complaints about Complainant's delivery performance prompted an audit of his delivery records that disclosed claims for non-existent deliveries and fabricated delivery times and addresses. Respondent also cited Complainant's consistent failure to meet his daily delivery obligations in the time allotted by UPS (10 ½ hours), and customer complaints that he had misdelivered or failed to pick up packages. Respondent further denies that Complainant engaged in protected activity, or that UPS took adverse action against him because of his participation in protected activity.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Summary of the Evidence

*Testimonial Evidence*

The following summary of the testimony of the witnesses who appeared at the hearing emphasizes those facts that I consider most consistent, probative and relevant to my findings. However, in reaching my findings of fact and conclusions of law, I have carefully considered all of the testimony of all of the witness, taking into account all relevant and probative evidence. I have evaluated the testimonial evidence by assessing its inherent consistency and consistency with other evidence of record. I have also made assessments of the credibility of the witnesses, considering the source of information, its reasonableness, its consistency with other evidence, and the demeanor and behavior of the witnesses.

Nicholas F. Daigle

Mr. Daigle started his career with UPS in the fall of 1989 as a casual driver out of their Glens Falls Facility. Tr. at 48. The job required him to be on call and accept whatever driving job the company assigned to him, and he held the job for approximately five years, at which time he was considered eligible to bid for a full time position. Id. When a position opened as a tractor-trailer driver, he bid on it and was selected. The job required him to travel between UPS facilities in Glens Falls and Albany at night, and he worked in that job for more than eight years. Tr. at 49. Complainant eventually experienced difficulty sleeping and looked to move off the

night shift. After protracted discussions with management, which are described in detail in Complainant's statement before OSHA, he was able to bid for a day position as a route delivery driver, which he assumed in early May, 2003. Tr. at 51-52.

Complainant described receiving some informal training on the procedures involved in tracking package deliveries using the company's computer clipboard ("DIAD"). Tr. at 53-54. Complainant's immediate supervisor, George Kernochan, provided this training. Id. Mr. Daigle speculated that work coverage shortfalls caused by vacationing drivers prevented him from being scheduled for two weeks of formal training that he expected to get. Tr. at 56. Complainant's starting time was 8:30 a.m. and it often took him 11 to 12 hours to "complete the run". Tr. at 58. His starting and finishing times were logged on the DIAD. Id. His route covered an established geographic area, although it sometimes varied. Tr. at 59. Each morning he received a printout that showed whether the driver delivered a "scratch performance", which Complainant described as completing the route in the timeframe anticipated by management. Tr. at 64. He consistently failed to scratch, and could remember only one time when he did scratch his route. Id.

Sometime in August, 2003, the management at the Center changed, and Dave Strainer became Complainant's immediate supervisor. Tr. at 60. Also about that same time, the Center Manager, Keith Moore, was replaced by David Scaglione. Id. Complainant did not recall anyone in management telling him that he was strictly obliged to complete his route in 10 ½ hours. Complainant recalled both of his immediate supervisors telling him that he was expected to not exceed an hour over the standard "scratch time". Tr. at 73. However, he recalled that in late September, Dave Scaglione told him that he was expected to finish the route in no more than 10 ½ hours and directed him to call the Center by 3:00 p.m. if he thought he could not finish his route within 10 ½ hours. Tr. at 66-67. Complainant admitted that though he often exceeded the anticipated work shift, he did not often try to call in. Tr. at 68. Sometimes his attempts to call in were thwarted by lack of cell phone coverage. Tr. at 68-69.

Complainant continued to experience trouble meeting the deadline, and he asked his supervisor to ride his route with him so that Mr. Strainer could see how difficult it was to cover in 10 ½ hours. Tr. at 70. He expected Mr. Strainer to accompany him on September 23, 2003. Id. On that morning, Complainant perceived that his truck was heavily loaded, because it was sitting low to the ground, and was very full. Tr. at 92, 93, 94. He told Mr. Strainer that he was glad that he would experience firsthand how the truck handled poorly when it was heavy, but Mr. Strainer told Complainant that he could not go with him. Tr. at 92. He had the truck weighed at the quarry, and it weighed 11,860 pounds. CX 1, Tr. at 94. He tried to report the overweight truck to the Center, but was unable to reach anyone. Tr. at 97. He altered his route to unload as much weight as quickly as possible, and then continued his "run". Tr. at 98. Complainant believed that he did not complete his route until after 8:30 p.m. The next day, Complainant confronted Mr. Strainer about the overweight truck, and was in turn confronted about exceeding the dispatch time. Tr. at 99. He tried to show Mr. Strainer the weight slip he had from the quarry, but Mr. Strainer terminated the conversation by walking away from him. Id. Complainant did not bring up the weight issue with anyone else at that time, and left to deliver his route. Id. When he returned to the Center at about 8:30 p.m., he was told to call Mr. Scaglione, who made it clear to Complainant that he was expected to finish the route in 10 ½ hours or call by 3:00 p.m. if he could not. Tr. at 71, 101. Mr. Scaglione also told Complainant

that he had concerns that Complainant was duplicating stops and duplicating package records, and instructed him to report to his office with a union representative on the following day. Tr. at 101-102.

On the morning of September 25, 2003, Complainant reported to Mr. Scaglione's office with union representative Carson Kenyon. Tr. at 102. Mr. Scaglione expressed his concerns over Complainant's ability to perform his duties in a proper and timely manner, and specifically advised Mr. Daigle that his practice of pre-recording deliveries led to inaccuracies. Tr. at 103. Complainant explained that his practice was to set out his delivery route in the morning and "pre-record" on his DIAD deliveries in accordance with how he expected to deliver the route; however, there were times he realized that the planned route was not as efficient as he expected. Tr. at 104. In those circumstances, he would deliver parcels in a manner that was inconsistent with the information recorded on the DIAD. Tr. at 105. He did not know of any way to reset the DIAD to record the actual sequence of delivery. Id. At the meeting with Mr. Scaglione, Complainant learned that Respondent also had concerns about his misdelivery of a package, and he was advised that he would be suspended for one day for that offense, and would receive warning letters about not following procedures. Tr. at 106. The suspension was to take effect on September 26, 2003. Id. Mr. Scaglione also advised Complainant that he was expected to complete his route in 10 ½ hours, and to advise Center management by 3:00 p.m. if he could not. Tr. at 107-108. He did not advise Mr. Scaglione about his concerns regarding the weight of his truck. Tr. at 109. He left to deliver his route, and in fact, did exceed the 10 ½ hour deadline. Although he said that he tried to call, he failed to advise management. Id. Complainant also, however, said that he thought he would complete the deadline, and admitted that he was preoccupied that day because his wife had a medical emergency. Id. at 100.

On the day that Complainant was suspended, Friday, September 26, 2003, he undertook to determine if he had actually misdelivered the package that was at issue in his suspension. Tr. at 110-111. He concluded that he had not, and he went to the Center to confront Mr. Scaglione with the information he found. Id. Mr. Scaglione advised him that he was upset that he had exceeded his delivery time the evening before, and advised him to report to his office on his next scheduled work day, Monday, September 29, 2003. Tr. at 111. When he arrived at the office on Monday, he was advised that Respondent believed he had falsified delivery records, and that he would be discharged for dishonesty. Tr. at 112. Complainant disputed Respondent's interpretation of his DIAD entries, contending that he pre-recorded information because he had been advised to do so by a supervisor and made double entries in error. Tr. at 137. He denied having falsified customer signatures, as charged. Tr. at 155. Complainant addressed each charged discrepancy at length in his testimony. Tr. at 120 - 176.

Complainant was convinced that Respondent made efforts to build a case against him to support the decision to discharge him as pretext for discharging him for his weight related complaints. Tr. at 140. Complainant contended that a number of warning letters were created and referred to meetings with a union representative that did not take place, and were not delivered to him on the indicated dates. Tr. at 140, 167-168, 171, 215-216. Complainant received some letters from a union representative in January, 2004, before a grievance panel hearing involving his discharge (Tr. at 213) and at least one other letter through the mail (Tr. at 215). Complainant construed these letters to be fabricated to bolster Respondent's case. Tr. at

145. Complainant also pointed out that some of the letters in evidence were unsigned and not on UPS letterhead. Tr. at 146, 154. Complainant admitted that he had misdelivered one package, but that no contemporaneous discipline was taken against him. Tr. at 153. He admitted misdelivering a package in the summer, but his recollection regarding whether he received a warning letter was inconsistent. Tr. at 211, 219. He admitted that he had hit a customer's wall with his truck, but denied being disciplined at the time for that infraction. Tr. at 154-155. He also admitted getting stuck in a customer's driveway, but denied hitting the customer's mailbox as she complained to Respondent. Tr. at 158-160. He admitted being disciplined for failing to pick up a package from a customer, and said that he had been advised by Mr. Scaglione during their meeting on September 29, 2003, that he would receive a warning letter regarding this incident. Tr. at 162-163. Complainant completely denied falsifying customer signatures. Tr. at 221-222. Complainant had asked his supervisor, Mr. Strainer for help with his route, including help with expanding his knowledge about using the DIAD because he did not fully understand all of its functions and capabilities. Tr. at 251

Complainant had advised supervisors on occasions other than September 24, 2003 that he believed his truck was overweight and unsafe. Tr. at 73-74. In June, 2003, he felt his truck was swaying and went to a stone quarry to have it weighed. Id. He recalled being told that the truck weighed more than 9,000 pounds, which is the weight that the Complainant believed the truck was registered for. Tr. at 76. Complainant called his supervisor, who brought another truck to the site and offloaded some of the weight. Tr. at 77. Complainant continued with the rest of his route, and noticed that the truck responded more normally. Tr. at 78. On several other occasions, Complainant believed that his truck was overweight, and he had it weighed on five occasions. Tr. at 80. The truck was within registered weight on two of those occasions. Mr. Daigle expressed his concerns with Mr. Kernochan, who responded by agreeing to figure out how to better balance the loads. Id. On one of the occasions when the truck was overweight, Complainant spoke with the Center manager, Mr. Moore, who directed him to return to the Center with the truck. When he arrived, Mr. Moore advised that the truck was capable of carrying 11,000 pounds. Mr. Daigle also spoke with a union business agent, who advised him to continue his route as loaded, since the company agreed to bear responsibility for any weight-related issues. Tr. at 81. Mr. Moore instructed him to "get on with your day or else face disciplinary action, period". Tr. at 82.

Mr. Daigle was not satisfied with Respondent's explanation for the weight requirements of his truck, and he told Mr. Moore that he intended to investigate the matter with the Department of Transportation. Tr. at 82. After contacting several governmental entities, Complainant "came to the conclusion that, in fact, the company could allow you—you could be allowed to drive the vehicle over the registered weight, but once you exceeded the GVW weight, that was when you were actually putting yourself in more jeopardy of being outside of the guidelines of the law. So the fact that the vehicle…was registered for under its vehicle manufacturer's weight did not necessarily dictate that as a driver you had the opportunity to refuse to drive the vehicle". Tr. at 82-83. Complainant testified that after learning this: "I felt that as long as I didn't exceed the GVW of the vehicle that I must be within the allotted criteria of the law and I really must be okay to drive the vehicle without having any negative reactions or adverse reaction to my license or if I could be sued if there was an accident." Tr. at 83.

Complainant admitted that he was concerned about the legal ramifications of driving an overweight truck, but also expressed his concern that he or someone else could be hurt because the extra weight would reduce the vehicle's handling. Tr. at 84-85. He discerned that the vehicle swayed more and became "very unmanageable to control" when it weighed more than 10,000 pounds. Tr. at 86. He asked Respondent's mechanic to check the vehicle but nothing untoward was discovered. Tr. at 85, 86. In August, 2003, Complainant "spun off the side of the road" after braking, and reported the incident to Joe Bartol at the Center. Tr. at 87. Complainant's request for a wrecker to be dispatched to the site was denied. Mr. Bartol agreed to meet him at a point not too far away, and before Complainant had driven a mile, a wheel came off the truck. Tr. at 88. A wrecker was dispatched to haul the truck back to the Center, and a supervisor met Complainant at the accident site to offload his load into another truck, after which Complainant finished his route. Tr. at 88-89.

Complainant admitted that he did not directly discuss weight issues with Mr. Scaglione. He asserted that he raised the issue to union official Frank Kearney before a meeting held in October, 2003, between himself, Mr. Kearney, Mr. Scaglione and Mr. Kuhl. Tr. at 231. Complainant was advised by Mr. Kearney not to bring the subject up, and the issue was not discussed during the meeting. Tr. at 232. Complainant did not recall confronting anyone in UPS management with his safety concerns after discussing them with Mr. Strainer. Id. He did not bring the matter up at his grievance arbitration upon the advice of his union representative. Tr. at 233, 241.

Mr. Daigle provided some testimony regarding his income and its sources following his discharge from UPS. Tr. 580-623.

David A. Scaglione

Mr. Scaglione has worked for UPS for sixteen (16) years in a variety of positions. At the time of the hearing, he was employed as Division Manager in Syracuse, New York. Tr. at 373. In August, 2003, he was business manager at the Glens Falls facility where he was responsible for overseeing 110 employees, of whom approximately 50 were drivers. Tr. at 374. Two shifts were in operation at that Center, with day workers loading, picking up and delivering parcels, and evening workers sorting out parcels that were picked up. Tr. at 375. Two delivery supervisors, Joe Bartol and Dave Strainer reported to him, and his immediate supervisor was Division Manager Bill Kuhl. Id., Tr. at 389. Mr. Scaglione held that position until May, 2004, and Complainant was a delivery driver out of the Center during his tenure as manager. Id.

Although he had known Complainant from his time as a tractor trailer driver, Mr. Daigle did not come to Mr. Scaglione's attention until early September, when he was made aware of Complainant's misdeliveries, property damage, and over-standard shifts. Tr. at 376 – 377. Mr. Scaglione believed that Complainant's errors were abnormally high in comparison with other drivers. Tr. at 378, 452. He described receiving complaints from several sources about Mr. Daigle's performance, including misdeliveries that he discussed with the Complainant, and which were the topic of warning letters later issued to him. Tr. at 382-387. Mr. Scaglione was not responsible for finalizing or delivering disciplinary letters. They were prepared by UPS' main office in Syracuse and delivered by a union steward. Tr. at 388. Although Mr. Kuhl's

name appears on discipline letters, Mr. Scaglione was responsible for making decisions regarding disciplining employees under his supervision. Tr. at 389-390.

In addition to his concerns regarding Complainant's misdeliveries and other customer-related incidents, Mr. Scaglione was concerned with Mr. Daigle's failure to complete his route in 10 ½ hours. Drivers were expected to return to the Center with parcels that they picked up, so that they could be dispatched for delivery to their destination centers. Tr. at 391. Mr. Scaglione was certain that drivers were aware of the 10 ½ day policy, and was aware that the driver supervisors discussed the policy at PCMs (pre-work communications meetings) that were generally held in the morning. Tr. at 392. Mr. Scaglione spent the early part of his day with the drivers who were working "on the belt" where the packages were loaded onto the trucks, and had observed his supervisors conducting PCMs. Id. He found it difficult to believe that Mr. Daigle was unaware of the 10 ½ hour a day policy, and its significance to the Center's operation. Id. He personally spoke with Mr. Daigle by telephone on September 24, 2003, and emphasized the need to complete his route in 10 ½ hours, or call and advise that he could not. Tr. at 394. He kept notes summarizing the conversation on index cards. Id. Mr. Scaglione recalled that Complainant blamed his failure on his workload, and claimed that he had tried to call in but could not reach anyone. Tr. at 395. Mr. Scaglione was skeptical of Complainant's assertion, because in his experience someone is always available to answer customer calls. Tr. at 396.

With respect to Complainant's accusation that his workload was too heavy, Mr. Scaglione undertook a review of his delivery route by looking at reports that documented the number of packages and stops drivers had. Tr. at 397. Mr. Scaglione was aware that Complainant had attributed his trouble with misdeliveries to his method of pre-recording deliveries, and he took an industrial engineering supervisor to observe Complainant delivering his route. Tr. at 401. He observed that Complainant did not have his DIAD with him when he made a delivery, which is against procedures. Tr. at 402-403. He then undertook a more thorough review of Complainant's delivery records, and determined that he had falsified entries. Tr. at 406. Mr. Scaglione identified instances where Complainant had recorded multiple stops at the same location, and had recorded delivering the same packages twice or to different customers. Tr. at 407-411. He also noted instances where it appeared that someone other than a customer had actually signed for receipt of packages. Tr. at 411-412. In addition, his inspection disclosed that stops were duplicated and entries were made for non-existent stops. Tr. at 413-418. Mr. Scaglione explained that the entries he noted were deliberate, and could not have been caused by error or pre-recording, though he did see some examples of problems caused by pre-recording. Id.

Because of his findings, Mr. Scaglione decided to discharge Mr. Daigle for breaching Respondent's code of conduct with respect to honesty. Tr. at 419. He also relied upon his past transgressions of misdelivering packages, and failure to complete his route timely. Tr. at 419-421. He concluded that Mr. Daigle had made duplicate entries and created false stops and packages to make it appear that his route took more time than it should have. Tr. at 423. Increasing the number of stops he made "would narrow the difference or the gap between what UPS said that his work assignment should take to complete, compared to the actual time from punch in to punch out…" Tr. at 423-424.

Mr. Scaglione denied being told by Complainant or anyone in Respondent's management that Complainant had concerns over the weight of his truck. Tr. at 393. In his conversations with Complainant, Mr. Scaglione perceived his complaints that the truck was too heavy meant that he had too many packages, and too many stops. Tr. at 400. He recalled conversations where Complainant had told him that he had "too much work, too many stops, too many packages, and [] could not complete [his] work assignment…" Tr. at 431. He recalled instances where Complainant said to him that he was "too heavy today". Tr. at 438. Mr. Scaglione did not speak with his predecessor about Complainant; nor did he speak with Complainant's prior supervisor. Tr. at 421, 433. Upon repeated questioning, Mr. Scaglione admitted hearing Complainant "say in passing" that the weight of his vehicle was too heavy. Tr. at 440.

In his position as Center manager, Mr. Scaglione was responsible for compliance with regulations regarding the operation of vehicles and transportation of goods and packages, as well as labor standards and other laws and regulations that affect the workplace. Tr. at 441-442. Mr. Scaglione had no independent knowledge of how much weight the delivery trucks could bear in compliance with regulations, but he had access to charts that showed the information. Id. Packages were not weighed before trucks were loaded, and trucks were not weighed to determine whether they met the weight limits established by various governmental units. Id.

Chris Poffenbaugh

Mr. Poffenbaugh is District Labor Relations Manager for UPS' Empire State District, and is responsible for administering Respondent's labor relations policies. Tr. at 479. Mr. Poffenbaugh described Respondent's progressive discipline policy, which is a negotiated contractual requirement. Tr. at 480-481. He explained that certain employee misconduct warranted immediate discharge, including dishonesty. Tr. at 481. Respondent considered falsification of company delivery records to be an example of dishonesty. Tr. at 482. Mr. Poffenbaugh was aware of Complainant's discharge and his subsequent grievance and the decision of a grievance panel upholding the discharge. Tr. at 483. Mr. Poffenbaugh described other instances involving the discharge of employees who had falsified delivery records. Tr. at 486-492. Complainant did not raise the issue of the weight of his truck at the grievance hearing, and Mr. Poffenbaugh first learned of the issue when Respondent was contacted by OSHA regarding Complainant's complaint. Tr. at 499.

David Strainer

Mr. Strainer has worked for UPS for twenty-five years in a variety of positions, and at the time pertinent to this adjudication, held the position of road supervisor at Respondent's Glens Falls Center. Tr. at 501. He was responsible for assigning work to and supervising approximately 24 drivers. Tr. at 502. Complainant was under his supervision during the month of September, 2003. Id. Mr. Strainer held daily PCMs at 8:30 a.m., and he recalled at least two occasions where he told his drivers that they were required to finish their delivery day within 10 ½ hours. Tr. at 512-513. Mr. Strainer also recalled discussing the issue with Complainant after he had exceeded the 10 ½ hour limit, and recalled instructing him to call the Center if he could not complete his route in the allotted time. Tr. at 514. The drivers who took the route after Complainant was discharged routinely completed it within the scheduled time. Tr. at 515. Mr.

Strainer observed that Complainant had other difficulties with the job, including a greater number of misdelivered packages than other drivers had, and customer complaints. Tr. at 514, 519. Mr. Strainer agreed to accompany Complainant on his route, but was unable to accomplish that task before Complainant was terminated. Tr. at 519. He did not recall Mr. Daigle asking for training on using the DIAD. Tr. at 529.

Mr. Strainer did not speak with his predecessor or the former Center manager about Complainant. Tr. at 509. Mr. Strainer denied having any discussion with Complainant about the weight of his truck. Tr. at 509. He denied being shown any documents relating to the weight of Complainant's truck. Id. Mr. Strainer admitted that he had been involved in a heated discussion with Complainant on one occasion that he terminated by walking away mid-conversation. Tr. at 517. He denied being shown any paper, or hearing Complainant raise the issue of an overweight truck. Id. He recalled the conversation involved Mr. Daigle's failure to complete his route in 10 ½ hours, and Complainant attributed his failure to being over dispatched. Tr. at 516. However, Mr. Strainer had heard other drivers discussing the fact that Mr. Daigle had raised an issue of the weight of his truck and had the truck weighed in the summer before he assumed his position as supervisor. Id. He considered the issue resolved and saw no reason to investigate the weight of Mr. Daigle's truck., nor did he see any purpose in relating the overhead conversation to Mr. Scaglione. Tr. at 511. He did not speak with Mr. Scaglione about complaints from Mr. Daigle regarding the weight of his truck. Tr. at 510. Mr. Strainer asserted that he would resolve complaints about overweight delivery vehicles by ascertaining that the vehicle was overweight, and then by off loading some of the load. Tr. at 520. Mr. Strainer was not involved in the decision to terminate Mr. Daigle. Id.

Mr. Strainer visited an address at 3 Roberts Drive and determined that there was only one building at that location. Tr. at 503. He photographed the site, which showed only one residence with a visible number 3 marked on a mailbox post. Tr. at 503-508.

Carson Kenyon

Mr. Kenyon is a union steward and driver at Respondent's Glens Falls Center. Tr. at 568. Mr. Kenyon also participates as co-chairman of a health and safety committee at the company. Tr. at 569. He had heard people discussing Complainant's concerns about overweight vehicles, but he did not directly speak with Complainant about those concerns. Id. Mr. Kenyon had participated in discipline meetings with Complainant and UPS management. Tr. at 574. He described the meetings as being informal in nature, and usually occurring on the work floor, though at times they were held in a manager's office. Tr. at 575, 578.

Mr. Kenyon was familiar with the circumstances underlying Complainant's discharge, and recalled that Mr. Daigle admitted that he had falsified his delivery records. Tr. at 571. He recalled being consulted by Complainant about his grievance but did not specifically recall delivering warning letters to Complainant. He explained that management had ten days after a discipline meeting to formalize discipline letters. Tr. at 577.

*Affidavit Testimony*

David Scaglione gave a written statement submitted in support of Respondent's motion to dismiss or in the alternative for summary decision. His assertions therein were reiterated in his oral testimony.

George Kernochan gave a written statement signed on May 19, 2004, in which he noted that he had been Complainant's direct supervisor from the spring of 2003 until August 2003. Mr. Kernochan did not speak about Complainant's comments about vehicle weight with any members of management who succeeded him at the Glens Falls Center. Mr. Kernochan denied taking adverse employment action against Complainant for comments made about vehicle weight.

Jefferson S. Strider is the managing director in the Forensic and Litigation Consulting Practice of FTI Consulting and was offered as an expert in accounting procedures. His signed statement of September 2, 2004 describes the documentation he would need from Complainant to make an assessment of Complainant's actual income derived from his business ventures following his discharge from UPS.

*Documentary and Other Evidence*

Filings and Pleadings of the parties shall be referred to by description herein. Complainant submitted exhibits that were marked CX 1 through CX 5. Because CX 2 through CX-4 were duplicated in Respondent's exhibits, I excluded them. CX 1 was described as a weight slip from a quarry and CX 5 consists of letters from UPS to Mr. Daigle. Following the hearing, Complainant provided to me and to Respondent various financial documents related to his claim for damages. These fall into several categories, that I have identified and admitted to the record as follows:

CX 6 Documents related to tax returns and IRS forms

CX 7 Complainant's bank statements

CX 8 Documents relating to Complainant's business expenses

CX 9 Invoices, contracts, and other documents relating to Complainant's self-employment

CX 10 Documents relating to Complainant's medical bills and medical insurance

CX 11 Documents relating to Complainant's retirement and pension

Respondent submitted exhibits identified as EX-1 through EX-165. EX 14 was withdrawn, and Exhibit 23 was omitted intentionally. Some of the documents had been submitted earlier with Respondent's motion for summary decision and/or dismissal of the complaint. I incorporate all duplicated exhibits into the exhibits offered at the hearing.

Respondent's Exhibits are described generally as follows:

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| EX 1 through 4 | UPS procedures regarding package driver delivery and pickup methods |
| EX 5 | Labor-Management agreement in effect for period relevant to claim |
| EX 6 | Complainant's signed "Honesty in Employment" Form |
| EX 7 through 13 | Customer complaints |
| EX 15 | Warning letter of 9/17/03 regarding misdelivery |
| EX 16 | Suspension letter of 9/29/03 regarding incorrect delivery records |
| EX 17 | Suspension letter of 9/29/03 regarding misdelivery |
| EX 18 | Suspension letter of 9/30/03 regarding failure to call in over-hours |
| EX 19 | Discharge letter of 9/29/03 |
| EX 20 | Warning letter of 9/29/03 regarding failure to follow instructions |
| EX 21 | Letter of 9/29/03 regarding failure to work as directed |
| EX 22 | Warning letter of 9/30/03 regarding failure to complete a pick up |
| EX 24 through 86 | Delivery records |
| EX 87 through 103 | Driver Route analysis |
| EX 104 through 111 | Handwritten notes by Mr. Scaglione |
| EX 112 | Termination form |
| EX 113 | Grievance Form |
| EX 114 through 116 | Grievance Panel minutes |
| EX 117 through 124 | Arbitration decision |
| EX 125 through 131 | Discharge letters of other employees |
| EX 132 through 141 | Complainant's Statement |
| EX 142 through 144 | Equipment weights and sizes |

EX 145 through 150 OSHA's report

EX 151 through 153 OSHA's recommended findings

EX 154 January 5, 2004 Discharge letter

Pursuant to my order at the hearing, Respondent also forwarded copies of evidence that was introduced at the hearing on rebuttal and at the supplemental hearing. This evidence is admitted and described as follows:

EX 155 Warning letter of June 12, 2003

EX 156 Arbitration form

EX 157 through 159 Property records for 3 Roberts Drive

EX 160 through 164 Photographs of 3 Roberts Drive

EX 165 through 167 Three grievance forms

B. Statement of the Law

The STAA, 49 U.S.C.A. § 31105(a)(1), provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The protected activity includes making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order." § 31105(a)(1)(A). Internal complaints to management are protected under the STAA. *Reed v. National Minerals Corp.*, Case No. 91-STA-34, Sec., Dec. and Order, slip op. at 4, July 24, 1992. A "commercial motor vehicle" includes "any self-propelled…vehicle used on the highways in commerce principally to transport passengers or cargo" with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. app. § 2301(1).

The STAA further provides protection for employees who have "a reasonable apprehension of serious injury to [themselves] or the public due to [an] unsafe condition." § 31105(a)(1)(B)(ii). Whether an employee's apprehension of serious injury is reasonable is subject to an inquiry of whether a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. Id. To prevail under the STAA, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young's Commercial Transfer, Inc.,* ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sac's v. Minnesota Corn Processors, Inc.,* ABR No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003). By establishing a prima facie case, a complainant 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).

Once the inference is established, the respondent has the opportunity to present evidence of a nondiscriminatory justification for the adverse employment action. *Carroll v. J.B. Hunt Transportation*, 91- STA-17 (Sec'y June 23, 1992). The respondent need only articulate a legitimate reason for its action. *St. Mary's Honor Center v. Hicks*, 509 I.S. 502 (1993). If such evidence is presented, then the complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination. *Moon v. Transport Drivers, Inc.*, 836 F. 2d 226 (6th Cir. 1987); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, supra. at 2752-56. In addition to discounting the employer's explanation, "the fact finder must believe the [complainant's] explanation of intentional discrimination." Id.

When an employer offers a nondiscriminatory justification for the adverse employment action, then it is necessary to decide whether that reason is pretextual. Instead of focusing on whether a prima facie case has been made out in this circumstance, the proper inquiry is whether the complainant has shown that the reason for the adverse action was his protected safety complaints." *Pike v. Public Storage Companies Inc*., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." *Mitchell v. Link Trucking, Inc.,* ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

*Analysis*

In the course of his employment with Respondent, Complainant operated a delivery vehicle with a gross vehicle weight that was not definitively shown to meet the standards of the STAA, but which at times was shown to have weighed in excess of 10,000 pounds. See, CX-1. Respondent did not at any time assert that its vehicles did come within the statutory requirements, and indeed, the evidence from Respondent regarding the weight of the vehicle in question was astonishingly uninformed. I find that the evidence substantially establishes that Complainant drove a vehicle subject to the STAA.

Although a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the complainant must still carry the burden of proving the necessary elements of discrimination. *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec'y Oct. 10, 1991). In instances where a full hearing has been held, there is usually no need to determine whether the employee presented a *prima facie* case and whether the employer rebutted that showing. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 709, 713-14 (1983); *Pike v. Public Storage Companies, Inc.*, 98-STA-35 (ARB July 8, 1998). An examination of whether Complainant established the elements of a prima facie case is not useful where Respondent establishes a legitimate, nondiscriminatory reason for the adverse action taken

against a Complainant. *White v. Maverick Transportation, Inc*., 94-STA-11 (ARB February 21, 1996).

It is uncontroverted that Complainant was terminated from his employment with Respondent on September 29, 2003. In addition, two work days before his discharge, Complainant was suspended for one day. Both of these actions constitute adverse employment actions within the meaning of the statute. Although Respondent contends that it was unaware of Complainant's concerns about the weight of his delivery truck, I find that management was aware that Complainant's concerns were significant enough to prompt him to weigh his truck on several occasions. Complainant's immediate supervisor and the Respondent's Glens Falls Center manager both admitted having heard other employees discussing Complainant's weighing his truck. Therefore, I discredit their testimony suggesting that Complainant had not engaged in protected activity. I find it plausible that Complainant attempted to share his concerns about the weight of his vehicle with Mr. Strainer on September 24, 2003. His version of his conversation with his supervisor is compatible with Mr. Strainer's admission that his focus during the conversation was on Complainant's performance deficiencies. Moreover, Mr. Strainer admitted that he considered the conversation heated, and terminated it mid-stream by walking away from the Complainant. He had no recollection that Complainant tried to show him a weight slip, but did not vehemently deny that he had.

I find Mr. Strainer's and Mr. Scaglione's willingness to ignore Complainant's concerns consistent with the portrait of Respondent that the evidence paints: a company with, at best, casual indifference to, and perhaps deliberate disregard for, compliance with recommended weight loads for its over-ground delivery vehicles. Other than for transport by air, parcels are not weighed, and no process to weigh delivery trucks is in place. Although the evidence shows that Respondent had addressed Complainant's concerns and offloaded some weight on at least one occasion, the overall impression is that Respondent paid little attention to whether or not delivery vehicles met weight standards. Indeed, the Center manager could not say what the recommended weight standards were for the vehicles that he daily dispatched from Glens Falls. Respondent's evidence did not rebut Complainant's demonstration that his truck had been overweight on several occasions. Respondent took no pains to even address the safety issue implicit in overweight vehicles. I further find that Complainant's concern that an overweight truck posed a safety problem is reasonable.[2] Complainant was a professional driver of various vehicles for many years, and I accord his opinion some deference because of his expertise.

However, despite the reasonableness of Complainant's concerns, and Respondent's apparent disinterest about how much delivery trucks weigh, I find that Respondent has shown by clear and convincing evidence that the adverse actions against Complainant were motivated by legitimate nondiscriminatory reasons. I further find that Respondent's rationale for Complainant's suspension and subsequent discharge were not pretextual. I reject his assertions that he was unaware of the 10 ½ hour day standard, and find Mr. Strainer's testimony that he raised it at meetings on two occasions credible. Mr. Daigle admitted that he often was preoccupied during meetings, and although it is possible he did not hear Mr. Strainer's admonition about the time limit, I find it more probable that he did not give it the importance that

[2] I note that Complainant's truck malfunctioned and lost a wheel one day, but there is no evidence to relate that incident to the weight of the truck on the day of the accident.

management did. I reach this conclusion because his explanations for failing to follow repeated instructions to call the Center if he could not meet the 10 ½ hour standard are implausible.

Moreover, although I find that Respondent was aware of Complainant's concerns about the weight of his vehicle, I am troubled by Complainant's inconsistent behavior with respect to this issue. On September 23, 2003, when he confirmed at the quarry that his truck was overweight, he did not persist in contacting his supervisor to tell him, nor did he refuse to drive. When his attempt to show the weight documentation to Mr. Strainer was rebuffed, he failed to make further attempts, or advise anyone else in management. He had the opportunity to tell Mr. Scaglione directly that very evening, but failed to do so. He neglected to talk about the issue during any of the meetings he had with Mr. Scaglione regarding his proposed suspension and discharge. Complainant's credibility is further impugned by his testimony that he did not feel he should bring his concerns about weight to the safety committee because he made complaints to management. Tr. at 288. This is completely inconsistent with his admission that he never directly complained about the weight of his truck to Mr. Scaglione, and only attempted to show Mr. Strainer the weight slip on September 24, 2003.

Although Mr. Daigle testified that he was advised by his union representative not to discuss the weight issue at his grievance hearing, his failure to do so compromises the degree to which he truly believed that Respondent's adverse actions were related to his protected activity. This conclusion is bolstered by Mr. Kenyon's credible testimony that Mr. Daigle admitted that his record discrepancies were not due purely to his unfamiliarity with the DIAD. In addition, Mr. Strainer credibly testified that Mr. Daigle did not request specific training on using the DIAD; indeed, had he been so trained, he would have been unable to blame his discrepancies on his ignorance. Without this defense, Mr. Daigle would have no explanation at all for the discrepancies in his recordkeeping. I find Complainant was not entirely credible in his explanation for discrepancies on his delivery documentation.

I put no weight on Respondent's cumulative issuance of warning letters to establish progressive discipline in accordance with a labor-management agreement. I also find little credence in Complainant's contention that he did not have meetings with management regarding his work performance deficiencies. I am persuaded that they occurred, because the testimony from several witnesses was consistent in describing the casual nature of such meetings.

Although I discredit the testimony of Mr. Scaglione regarding his knowledge of Complainant's protected activity, I find his explanations for Complainant's delivery documentation discrepancies fully credible. The evidence clearly demonstrates that Complainant duplicated deliveries, fabricated addresses and signatures, and failed to accurately record information that Respondent relied upon for customer service. I further find that the discharge of Complainant for dishonesty is consistent with discipline actions taken against other employees for similar dishonest conduct. In addition, Complainant's suspension for performance deficiencies was warranted.

## CONCLUSION

Respondent's suspension of the Complainant for one day on September 26, 2003 was solely for his performance deficiencies. Respondent's discharge of the Complainant on September 29, 2003 was for Complainant's dishonest manipulation and fabrication of his delivery records and performance deficiencies. Neither the suspension nor termination was causally related to any protected activity under the STAA, and Respondent's adverse actions against Complainant do not constitute violations of § 405 of the STAA.

## RECOMMENDED ORDER

It is hereby recommended that the complaint filed herein by NICHOLAS F. DAIGLE be dismissed.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

**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).