U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 31 March 2005

CASE NO. 2004-STA-00056

In the Matter of:

GEORGE HERRICK, III,
Complainant,

vs.

SWIFT TRANSPORTATION COMPANY, INC.,
Respondent.

APPEARANCES:

George D. Herrick, III
in *Propria Persona*
14 Cottage Street
Medford, Oregon 97504
For the Complainant

Frank A. Moscato, Esq.
Harrang, Long, Gary, Rudnick P.C.
1001 SW Fifth Avenue
Portland, Oregon 97204
For the Respondent

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This claim arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA"), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004), and its implementing regulations, 29 C.F.R. Part 1978 (2004). George D. Herrick, III ("Complainant") filed a complaint alleging that Swift Transportation Company, Inc. ("Respondent" or "Employer") violated the STAA when his December 21, 2003 termination violated 49 U.S.C. § 31105(a)(1)(B)(i) (retaliation for refusing to operate a vehicle because the

operation violates a regulation of the Untied States related to commercial motor vehicle safety or health).[1]

The complaint was filed with the Secretary of Labor on June 17, 2004. The Occupational Safety and Health Administration ("OSHA") conducted an investigation on behalf of the Secretary of Labor, and on August 20, 2004, concluded that the complaint lacked merit. On August 31, 2004, Complainant requested a hearing before an administrative law judge, and the case was thereafter assigned to me. The parties waived the statutory and regulatory time limits on these proceedings as reflected in my order issued September 28, 2004. A formal hearing was held in Medford, Oregon on February 3, 2005. Both parties were present. Complainant appeared in *pro se*, and Respondent was represented by counsel. The following exhibits were admitted into evidence: Complainant's Exhibits ("CX") A, B, C,[2] D through K,[3] Transcript (Tr) 16, and Respondent's Exhibits ("RX") 101 through 118. Tr 17. The parties called witnesses, but did not offer oral or written argument other than their pre-hearing statements which were admitted as ALJX 1 (Complainant's) and ALJX 2 (Respondent's). In addition, the parties' post-hearing arguments in response to the admission of CX C, are made part of the record as ALJX 3 (Complainant's) and ALJX 4 (Respondent's).

SUMMARY OF DECISION

After reviewing and considering all of the evidence, I find Respondent did not violate the STAA when it terminated Complainant and that the reason for such termination was not because Complainant refused to engage in unsafe activity in violation of the Department of Transportation ("DOT") regulations, to wit driving his vehicle while fatigued or in violation of maximum driving time, or in nonconformity with speeding limits.

ISSUE FOR DETERMINATION

Was Complainant retaliated against for activity protected under the STAA when Respondent terminated him on December 21, 2003?

FINDINGS OF FACT

Stipulations

The parties stipulate, Tr 12-13, and I accept that:

Complainant was hired as a long haul commercial motor vehicle driver for Employer from August 5, 2003 until his discharge on December 21, 2003. Employer is a federally

---

[1] Complainant specifically cites to the following regulations governing commercial vehicle safety: 49 C.F.R. § 392.3 regarding "ill or fatigued operators;" 49 C.F.R. § 395.3 regarding "maximum driving time;" and, 49 C.F.R. § 392.6 regarding "schedules to conform with speed limits." Administrative Law Judge's Exhibit ("ALJX") 1, p.3.

[2] CX C was originally excluded, Tr 40, but is now admitted pursuant to my letter to the parties dated February 15, 2005, admitted as ALJX 5.

[3] CX L was withdrawn, Tr 165-166.

regulated motor carrier engaged in commercial motor vehicle operations and maintains a place of business in Troutdale, Oregon. Employer is among the nation's largest transportation service companies operating 18,000 tractors and 50,000 trailers within a network of 35 terminals. It provides primarily short to medium haul trucking services transporting a diverse range of cargo such as retail merchandise, paper products, non-perishable food, tires, building and hazardous materials. Employer's employees operate commercial motor vehicles with a gross weight in excess of 10,000 pounds in the regular course of business over interstate highways and connecting routes principally to transport cargo. Complainant operated a commercial motor vehicle on assignments coordinated by Employer's dispatching. Employer and Employer's drivers are federally regulated under U.S. Department of Transportation or DOT regulations.

Complainant's Testimony and Qual Comm Message Evidence

Complainant testified at trial, but a more cogent summary of his allegations is represented in his Pre-Trial Statement at ALJX-1, p.4. According to Complainant, on December 19, 2003, at approximately 8:30 a.m., he received several messages via QualComm soliciting drivers to help with Wal-Mart Surge loads. Complainant explains that Wal-Mart uses additional drivers at this time every year to help with increased workload before Christmas. Employer's dispatch stated "You will only be helping out for a couple of load [sic]." RX 117, p.1.[4] The assignment dates indicate "1219 1223." *Id.* Complainant accepted the assignment and began driving to Wal-Mart's Red Bluff, California location, arriving at 1:45 p.m. Tr 50. At that time, Complainant received an orientation and a load assignment. At 5:30 p.m., Complainant dropped his empty trailer and hooked up Wal-Mart's assigned trailer, made a pre-trip inspection, and went to lunch until 6:30 p.m. He then began driving south to Porterville, California. Tr 51. At 9:30 p.m., Complainant arrived in Ceres, California, and took a rest break in the sleeper berth until 6:30 a.m. on December 20, 2003. Tr 52. Then, Complainant made a pre-trip inspection and resumed the trip to Porterville, making the delivery to Wal-Mart at that location between 10:15 a.m. and 5:00 p.m. Tr 52. The trailer was unloaded. Some delay occurred because of the need for Wal-Mart personnel to sign papers. Complainant made a pre-trip inspection and began driving back to Red Bluff, California. Complainant arrived in Modesto, California at 8:30 p.m. and took a rest break in the sleeper berth until 4:30 a.m. on December 21, 2003. Tr 52. He made a pre-trip inspection and resumed driving, arriving at the Wal-Mart in Red Bluff at 9:30 a.m. Tr 52-53. Complainant dropped the Wal-Mart empty trailer and logged off duty. Complainant stated he felt tired at that point. The Wal-Mart dispatcher told Complainant that he was needed to take a load to Redwood City, California. According to Complainant, the distance to Redwood City from Red Bluff is 210 miles and would require three hours and sixteen minutes of driving. Complainant informed the Wal-Mart dispatcher that he had been "running hard" all month without any days off, was tired and needed time off. According to Complainant, the Wal-Mart dispatcher insisted he take the load, that Wal-Mart usually keeps Employer's drivers for five days. Complainant told the dispatcher that Employer had not told him that, and he had only about two hours driving time available on his logs. Complainant left the dispatcher to contact his manager. ALJX-1.

[4] Complainant's statement indicates that the dispatch stated "You will only be helping out for a couple *days*." RX 117 appears to be a QualComm message print-out.

At this point, Complainant used his satellite communications system ("QualComm") to contact his manager. The content of the December 21, 2003 Qual Comm messages between Complainant and Dayna Nelson, the driver manager on duty, are critical to this case. Complainant disputes the authenticity of the Qual Comm print-outs, found at CX B and RX 118 . Complainant claims that Respondent has tampered with and altered these messages and that they should not be relied on in determining the outcome of this case. He proffers in their place, CX I, which is his recollection of the substance of the Qual Comm messages. Complainant testified that he created this document from memory about a month and a half before the date of trial date on February 3, 2005.[5] Complainant called his brother, Jude Herrick as a witness. Mr. Jude Herrick testified that he looked at the Qual Comm screen messages on Complainant's Qual Comm screen (in his truck) when Complainant returned to his residence in Medford on December 21, 2003, and he agreed that his brother's recollection at CX is the more accurate version of the Qual Comm messages in question. Respondent contends that the Qual Comm messages put into evidence at CX and RX have not been tampered with and are more reliable than Complainant's recollection several months later.

Complainant specifically questions the authenticity of the Qual Comm messages based on (1) his memory of what they said; (2) his brother's testimony that his recollection is the same as Complainant's; (3) received times on some of the Qual Comm messages that are one second before sent times; and, (4) a message with two lines indented farther from the right than the other lines.

After examination of the evidence offered by both parties concerning the authenticity of the Qual Comm print-outs as set forth in CX B and RX 118, I conclude that they are authentic and I will rely on them in my analysis. This determination is based on the unrebutted testimony of Sondra Braumoeller, Complainant's driver manager, Dayna Nelson, driver manager, and Lloyd Tielking, security operations manager. Ms. Nelson and Ms. Braumoeller testified that they printed out the Qual Comm messages which constitute RX 118 on December 23, 2003, and they the they were not altered before or after print-out. Tr 95, 114, 120. Ms. Nelson testified that the exact time of print-out was 15:44:52.[6] Tr 114. Mr. Tielking explained how the Qual Comm system works.

Mr. Tielking is Manager of the Security Operations Center at Employer's Transportation Corporate Headquarters in Phoenix, Arizona, and has held this position for a little over eight years. Tr 132. He formerly served in the military at the National Security Agency. Mr. Tielking explained that the Qual Comm system transfers messages via satellite between a mobile point (the truck) and a home terminal (such as the one in Troutdale, Oregon where the driver manager is), the Qual Comm hub in San Diego, California and the Employer's computer in Phoenix, Arizona. The messages are sent by means of a keyboard and screen. In the course of the transmittal the longitude and latitude of the truck are ascertained by triangulation from three

---

[5] This would translate to almost a year after the events at issue which occurred on December 21, 2003. On cross, Complainant testified that Qual Comm messages were not reviewed by a forensic expert and Complainant did not write the messages down as they came up on the screen. Tr 66.

[6] This is the number that appears in the upper right hand corner of the first Qual Comm print-out, *see* RX 118, p.1.

satellites ("low earth orbiters or LEOs). The satellites send data back and forth to the Qual Comm hub computer in San Diego. Tr 135. From San Diego, the data is transmitted by dedicated line to the corporate computer in Phoenix. That information is then transmitted via the computer over telephone lines to the home terminal (i.e., Troutdale, Oregon) or to the truck.

These transmittals include the time and date as well as the longitude and latitude of the truck in the form of a "snapshot," i.e., at that moment in time. Tr 136. The time referred to is always Arizona time, or mountain standard time ("mst"). The time of transmission and receipt found on the Qual Comm message itself is the time the Qual Comm system recorded sending and/or receiving the message, not necessarily the time the message itself was sent or received. Tr 139. As to the question raised by Complainant regarding a received time which appears to occur before a sent time, Mr. Tielking testified that hesitation in the sent and received messages may occur because of traffic on the line or interference due to earth magnetics, solar flares, railroad tracks, railroad power lines, or railroad headings. In addition, two computer clocks are running – one at Qual Comm and one at Employer, and they are not always synchronized.

Mr. Tielking testified that on three or four occasions, he has seen other Qual Comm documents which show a received time before a sent time. He discussed this issue with Qual Comm and they explained it as a "time synch error where the two different systems did not synch." Tr 141. Mr. Tielking further testified that once a message has been sent, it cannot be altered, and that messages are retained in the system for six and a half days, after which they are deleted. Nobody has access to the messages once sent. Tr 145-146.

Of course, as Complainant pointed out while interrupting the witness, anyone could just create and send (or print) a new message. However, while that is an interesting speculation, there is no evidence to support that theory. Based on the unrebutted testimony of Ms. Braumoeller, Ms. Nelson and Mr. Tielking, I accept the authenticity of the Qual Comm messages as represented at CX B and RX 118.

Here are the December 21, 2003 Qual Comm communications between Complainant and Ms. Nelson, as represented in the printouts at CX B and RX 118. The first communication is directed to Sandi Braumoeller, Complainant's driver manager, who was absent that day:

Complainant: "SANDI, I ONLY AGREED 2 RUN WAL-MART FOR A COUPLE DAYS. I NEED SOME TIME OFF. CAN U GIVE ME A LD [load] 2 MEDFORD OR. THANX." CX B, p.1.

Nelson: "SANDI IS NOT IN TODAY WAL-MART GENERALLY KEEPS A DRIVER FOR 4 TO 5 DAYS GET WITH SANDI TOMORROW AND SEE WHAT SHE CAN DO. CX B, p. 2.

Complainant: "DAYNA, THE AGREEMENT WAS FOR A COUPLE DAYS, THEN RUN ME UP TO MEDFORD FOR TIME OFF." CX B, p. 3.

Nelson: "GEORGE I CANT GET YOU OFF WAL-MART IF YOU HAD AGREEMENT WITH SOMEONE IN WILLOWS ABOUT THAT I WOULD CALL THAT PERSON I DON'T HAVE THE AUTHORITY TO TAKE YOU OFF WAL-MART" CX B, p.4.

Complainant: "DAYNA, I HAVEN'T HAD ANY DAYS OFF FOR A MONTH. SO I NEED 2 GET HOME FOR MY DAYS OFF." CX B, p.5.

Complainant: "DAYNA, WHAT CAN SANDI DO THAT U CAN'T." CX B, p.6.

Nelson: "GEORGE I TOLD YOU YOU HAVE TO RUN THE MINIMUM OF 4 DAYS FOR WAL-MART IF YOU MADE A DEAL WITH SOMEONE IT WASN'T WITH ME SO YOU AND SANDI NEED TO WORK IT OUT WITH WHOEVER YOU STRUCK THE DEAL WITH." CX B, p.7.

Complainant: "DAYNA, I'M NOT TAKING ANY LDS [loads] UNTIL AFTER I GET SOME TIME OFF. THE ONLY LDS [loads] WILL BE TO MEDFORD, OR I CAN BOBTAIL." CX B, p.8.

Complainant: "DONT GET SMARTASS WITH ME DAYNA. I NEED TIME OFF. NOW!" CX B, p.9.

Nelson: "GEORG (sic) FROM YOU (sic) MOVEMENT LOOKS TO ME LIKE YOU HAVE BEEN GETTING BY THE HOUSE IF YOU BOBTAIL[7] HOME I WILL CHARG (sic) YOU A 1.25 A MILE EITHER YOU DO THE LOAD OR YOU PARK THE TRUCK AT WILLOWS[8] AND GO HOME PERMANENTLY YOUR CHOICE BUT I DO NEED A (sic) ANSWER TRUST ME I DO NOT PLAY GAMES." CX B, p.10.

Complainant: "I'LL BET U WHINE AND BITCH WHEN U DON'T GET UR 'WEEKLY DAYS OFF.' NOT 2 MENTION UR NIGHTLY HOME TIME." CX B, p.11.

Complainant: "I WIL (SIC) TURN IN THE KEYS AT WILLOWS. U WILL ALSO PAY FOR MY TRAVILING (sic) HOME AFTER I SUE U FOR WRONGFULL (sic) TERMINATION." CX B, p.12."

Nelson: "PLEASE TURN YOUR KEYS INTO BRODIE AT WILLOWS." CX B, p.13.

Complainant: "THEY WILL BE IN THE TRUCK." CX B, p.14.

---

[7] This term is used for driving a tractor without an attached trailer.

[8] Respondent's Distribution Center is located in Willows, California.

Nelson: "THANK YOU." CX B, p.15

Complainant: "OVER AND OUT!!!"

Ms. Nelson then noticed that the tracking system indicated Complainant was bobtailing north to Oregon, rather than driving to Willows. Tr 129.

Nelson: "GEORGE WHAT ARE YOU DOING WILLOWS IS SOUTH." CX B, p.17.

Complainant: "I WILL TURN THE TRUCK IN AT TROUTDALE. ALL THAT IS LEFT TO SAY IS INFORM YOUR CORP. ATTORNEYS YOU WILL BE HEARING FROM MINE!" CX B, p.18.

Nelson: "NO WE HAD AGREEMENT YOU WERE TO DROP THAT TRUCK IN WILLOWS I WILL CHARGE YOU FOR EACH MILE YOU BOBTAIL WILL TAKE IT OUT OF THE LAST CHECK SO TAKE IT TO WILLOWS AND TURN THE KEYS IN." CX B, p.19.

Complainant: "THE EMPLOYER CAMERAS COME IN HANDY. I JUST TOOK A SNAP SHOT OF YOUR STATEMENT AS EVIDENCE.[9] I WILL TURN THE TRUCK IN WHERE I GOT IT. AT TROUTDALE." CX B, p.20.

Complainant: "DAYNA, WILL EMPLOYER PAY TO DEVELOP THE FILM?" CX B, p.21.

It is undisputed that Complainant then bobtailed the truck to his home in Medford, Oregon:

Complainant: "DAYNA, AT MY HOUSE. WILL REMOVE MY BELONGINGS THEN RETURN THE TRUCK TO TROUTDALE." CX B, p.22.

It is undisputed that Complainant returned the truck the next day, December 22, 2003, to Troutdale, Oregon. Complainant was terminated as of December 21, 2003, when Ms. Nelson told him to turn in his keys. Stipulations of fact; Tr 28.

Management Testimony

Sondra Braumoeller

Ms. Braumoeller testified at the hearing. She was Complainant's driver manager, though absent on December 21, 2003, the day Complainant was terminated by Ms. Nelson who was covering for her. Ms. Braumoeller has been a driver manager with Employer for six years.

[9] In response to cross-examination regarding this Qual Comm message, Complainant testified that he did not take a photo of anything. Tr 64.

Before that she was a driver for Employer for six and a half years. Ms. Braumoeller works at the Troutdale terminal. Tr 69.

Ms. Braumoeller testified that it is the driver's responsibility to inform his driver manager regarding the in-service hours he has available. Although the computer tells the driver manager the number of hours available to the driver at 6:00 a.m. each day, the manager does not know the number of hours the driver has driven after 6:00 a.m. that day, unless the driver tells them. Tr 70. When hired, the driver learns about this responsibility at orientation. He also receives a driver's manual. Complainant participated in the orientation and signed a "Driver Orientation Training Sign Off" form on August 3, 2003. Tr 71-72; RX 102. In addition, Complainant was present when the drivers were oriented about the new DOT regulations on November 18, 2003. Tr 72. Ms. Braumoeller explained the change in the regulations: Under the old regulations, the driver could not drive more than 70 hours in eight days. In addition, the driver could not drive more than ten hours a day before taking an eighteen-hour sleeper berth break. The new regulations provide for a ten-hour break and the driver may not work more than fourteen hours from the time that he initially reports for duty, no more than eleven of those driving. Tr 72-73. The driver regains his hours at midnight every night, thus starting from zero for the hours permitted that day. Tr 75.

According the Ms. Braumoeller, if a driver reports that he is out of hours, the driver manager must "shut them down," and they are not permitted to take a dispatch until they have the hours available. Tr 76. The drivers keep logbooks, tracking their hours, *see* CX 20 and 21. The driver managers never see the logbooks because they are kept at corporate headquarters. Tr 77.

Ms. Braumoeller testified that a driver with limited hours may not drive a truck, whether loaded or unloaded, per the DOT regulations. Tr 79. Complainant had only two hours and forty-five minutes remaining per his logbook, when he left Red Bluff on December 21, 2003. CX E, p.21. If a driver reports to her that he has insufficient hours to deliver a load in the same day, and the load must be delivered that day, Ms. Braumoeller tells him they he may not take the load. Tr 80. In Complainant's case, Ms. Braumoeller did not become aware that he was out of service hours until she received notice of his filing for unemployment insurance. Tr 93. If Complainant had said, (as Complainant did to Ms. Nelson), "I need some time off," it would not indicate to her that he was out of service hours. Drivers may indicate they are out of hours by saying, for example: "I'm out of hours;" "My hours are too tight;" "I only have two and a half hours left;" or, "I'm up against my 70." Tr 93. After a review of the Qual Comm messages, Ms. Braumoeller saw nothing that would have alerted her that Complainant was out of hours. Tr 94.

Ms. Braumoeller explained Employer's relationship with Wal-Mart. Employer has "dedicated drivers" who only haul Wal-Mart goods, who are subcontracted to Wal-Mart. In addition, Employer uses drivers in what is called a Wal-Mart surge, when there are insufficient "dedicated drivers" to haul the number of loads required. Those drivers are subcontracted for the limited time required to haul the extra loads. The planner is in charge of placing drivers in the surge. Tr 82. Once a driver is placed in the surge, only Wal-Mart can release him. This is covered in the driver manual and at orientation. Tr 83-84. Ms. Braumoeller did discuss Complainant's Wal-Mart surge assignment with him, and assured him he would be home in time

for Christmas. Wal-Mart surges usually last a few days, and surge drivers who are working on the weekend are usually released on Monday morning. Tr 84. Wal-Mart provides the surge drivers with an orientation upon their arrival. Tr 85

Dayna Nelson

Ms. Nelson testified at the hearing. She is a driver manager for Employer. She has worked for Employer for nine years, eight years as a driver manager and one before that as a dispatch planner. Tr 111. Ms. Nelson supervised Complainant when he began his employment with Employer on August 5, 2003. After orientation, Ms. Nelson supervised Complainant on his training truck for six weeks. Then Complainant was permitted to operate a truck on his own. Tr 113.

Ms. Nelson was on duty on the date Complainant was terminated. She was on weekend duty, which the driver managers take in turn, covering for Ms. Braumoeller and other absent driver managers. All her communications with Complainant were via the Qual Comm system. Tr 113. She printed out the Qual Comm messages (at CX B and RX 118) on December 23, 2003. Tr 114.

Ms. Nelson tells drivers on the Wal-Mart surge to plan on working for four days, with a minimum of three days and possibly as little as two days if they are working on the weekend. Tr 116. Ms. Nelson testified that nothing Complainant told her on December 21, 2003 put her on notice that he was out of hours. A request for time off is not considered such a message, nor is a statement that the driver has not had any days off for a month. Tr 121-123. Nor did Complainant inform Ms. Nelson that he was fatigued or tired. Tr 131.

Per Ms. Nelson's testimony, Employer has a policy that drivers are not allowed to bobtail home unless authorized by one of Employer's planners or driver managers. Tr 128. Ms. Nelson was particularly concerned about Complainant driving Employer's truck from Red Bluff to Medford because he had already submitted his resignation and was therefore not covered by Employer's insurance. This was Employer's truck, not Complainant's. Tr 130.

Brodie Leage

Mr. Leage testified at the hearing. Mr. Leage has worked for Employer for four and a half years. Prior to being a driver manager, he drove a truck for Employer for just under two years. He is currently stationed in Grandview, Washington. Tr 148. Prior to that, he was stationed in Willows, California and was assigned to the Wal-Mart account. Tr 149. Employer was responsible for pay, human resources, fuel, and routing, and Wal-Mart assigned work to the drivers according to the hours reported to them by the driver. Tr 150.

Mr. Leage assigned Complainant to Wal-Mart in December 2003. In the Qual Comm message he sent to Complainant, he indicated that Complainant would be needed for "a couple of days." Tr 163.

On December 21, 2003, a Wal-Mart dispatcher contacted Mr. Leage and told him Complainant stated he was out of hours after he had already been booked on a load. Tr 152-153. They requested a replacement driver immediately if Complainant was unable to take the load. Mr. Leage told the dispatcher to tell Complainant that if he was out of hours he should "go get some rest." Tr 153. Mr. Leage had no further contact with Wal-Mart that day, nor with Complainant, although he did track his movement and discovered he was driving north. Tr 153-154. Mr. Leage started looking for a replacement driver.

Mr. Leage was examined in reference to CX E, Complainant's log. The log indicates that on December 21, 2003, Complainant was off-duty from 10:00 a.m. through midnight. As Complainant was driving a truck during that timeframe, he was in violation of DOT regulations regarding how one fills out a driver's log. Tr 158. In addition, since it would take Complainant at least three and a half hours of driving within the speed limit to reach Medford from Red Bluff, Complainant exceeded the two and three-quarters hours that he had left that day. Tr 159. Per the DOT regulations, "driving time" is any time you are driving a commercial vehicle, whether carrying a load or not. Tr 161. Therefore, Complainant's trip to Medford was grounds for termination. Tr 161. In addition, had Complainant been stopped at a weigh station, Employer's truck would have been shut down and Employer fined. Tr 159-160.

FINDINGS AND CONCLUSIONS

Complainant contends he was fired in violation of the STAA when he alerted management that he was out of hours to complete an assignment and that he was too tired to drive safely. Respondent counters that Complainant did not put management on notice that he was out of hours or too fatigued to drive safely; therefore, Complainant did not engage in activity protected by the STAA, and his complaint must fail. Based on the evidence before me and the law explained below, I find that Complainant did not engage in protected activity and is thus unable to show by the preponderant evidence that Respondent violated the STAA when it terminated him.

The STAA 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 activities. These protected activities include (1) making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," §31105(a)(1)(A); (2) "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," § 31105(a)(1)(B)(i); or (3) "refus[ing] to operate a vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition," § 31105(a)(1)(B)(ii). The case under submission raises two specific issues: whether Respondent violated the STAA when it terminated Complainant because he refused to operate a vehicle in violation of the DOT regulation specifying the maximum number hours commercial drivers are permitted to drive, and because he refused to operate the vehicle while fatigued in violation of the DOT regulation prohibiting operation of a commercial motor vehicle "when a driver's ability or alertness is so

impaired, or likely to be so impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial vehicle." 49 C.F.R. § 392.3.

To prevail on a complaint of unlawful discrimination under the STAA, the complainant must establish by a preponderance of the evidence that the respondent took adverse action against the complainant because he engaged in protected activity. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir, 1994); *Densieski v. La Corte Farm Equipment*, ARB No. 03-145, AU No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, AU No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, AU No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

As the Administrative Review Board ("ARB") explained in *Densieski*, slip op. at 4, STAA cases may be analyzed within the framework of burdens of production and proof developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws, such as the Age Discrimination in Employment Act. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dep't of Community. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Regan*, slip op. at 5-6; *Poll v. RJ. Vyhnalek Trucking*, ARB No. 99-110, AU No. 96-STA-35, slip op. at 5-6 (ARB June 28, 2002).

Under the burden-shifting framework, the complainant must first establish a prima facie case, thus raising an inference of unlawful discrimination. The complainant meets this burden by showing that the employer is subject to the STAA, that the complainant engaged in activity protected under the statute, that the employer was aware of such activity, that he suffered adverse employment action and that a nexus existed between the protected activity and adverse action. *Densieski*, slip op. at 4.

The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. At that stage, the burden is one of production, not persuasion. If the respondent carries this burden, the complainant then must prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. *Id.*; *Calhoun v. United Parcel Serv.*, ARB No. 00-026, AU No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The fact finder may consider the evidence establishing the complainant's *prima facie* case and inferences properly drawn from it in deciding that the respondent's explanation is pretextual. *Reeves*, 530 U.S. at 146; *Densieski*, slip op. at 4. The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Densieski*, slip op. at 4; *Gale v. Ocean Imaging and Ocean Res., Inc.*, ARB No. 98-143, AU No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002); *Poll*, slip op. at 5.

The Board has said that a case tried on the merits should be analyzed by focusing on the complainant's ultimate burden of proof rather than using the shifting burdens of going forward with the evidence. *See Densieski*, slip op. at 5; *Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01-021, ALJ No. 99-CAA-15 (ARB May 20, 2003).

While a *pro se* complainant may be held to a lesser standard than legal counsel in procedural matters, the burden of proving the elements necessary to sutain a claim of discrimination is no less. *See Flener v. H.K. Cupp, Inc.*, 90 STA-42 (Sec'y Oct. 10, 1991). Complainant here is unable to carry his burden to show by the preponderant evidence that Respondent engaged in unlawful reprisal. This is principally because Complainant is unable to carry his burden to show by the preponderant evidence that he engaged in protected activity. The employee has the burden under Section 405(b), absent unusual circumstances, to show that he communicated or attempted to communicate his safety concerns to the employer. *Boone v. TFE, Inc.*, 90-STA-7 (Sec'y July 17, 1991). Complainant argues that he put Employer on notice that he was out of hours and was too fatigued to drive, yet Employer insisted he continue to drive. Then Employer fired him when he would not cooperate. However, the interchange via Qual Comm, which I have determined to be the most reliable evidence of the actual conversation between Complainant and management, is at variance with Complainant's version. Based on the Qual Comm messages, which show the exact communications between Complainant and the driver manager on duty, Ms. Nelson, Complainant did not alert management that he was either too tired to drive safely, or that he was out of driving hours permitted under the DOT regulations. What he did say was that "I haven't had any days off for a month so I need to get home," and "I only agreed to run Wal-Mart for a couple [of] days." An employee's concerns can become too generalized and informal to be considered a complaint under the STAA. *See Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998); *White v. Maverick Transportation, Inc.*, 94-STA-11 (Sec'y) Feb. 21, 1996). Complainant's statements were too generalized and informal. Neither statement would reasonably alert the driver manager that she should make other plans for Complainant, such as giving him a shorter load to haul through the Wal-Mart dispatcher, or telling him to take a rest break until midnight so that he could then pick up additional hours. *See, e.g., Vogt v. Atlas Tours, Ltd.*. 94-STA-1 (ALJ Sept. 21 1994), *adopted*, (ARB June 24, 1996) (supervisor justified in terminating complainant when he did not know nor could reasonably have known that the complainant's refusal to take a dispatch was protected activity when he said he "felt that he was over the hours of DOT").

Assuming *arguendo* that Complainant's communications to Ms. Nelson were comprehensible as safety-related, his actions following show that he himself was not concerned about safety. Complainant states he was out of hours, or too fatigued to drive safely. If he took seriously the safety hazard inherent in those circumstances, he would not have proceeded to bobtail home, thus either driving while too fatigued to drive safely or exceeding the number of driving hours permitted by DOT regulations. Complainant's behavior demonstrates that he was not apprehensive about creating an unsafe condition. When underlying safety complaints are not genuine, they are not considered protected activity under the STAA. *Feltner v. Century Trucking, Ltd.*, ARB No. 03-118, USDOL/DOL Reporter, p.6 (Oct. 27, 2004).

Even assuming Complainant had proven that he engaged in protected activity, Respondent's legitimate, non-retaliatory reasons for firing Complainant are supported by the preponderant evidence: He did not alert management that he was in danger of running out of hours, as instructed in the orientation and driver's manual; he bobtailed home using a company truck, violating the DOT regulations, and putting the company at risk of DOT fines and sanctions; he used company fuel on personal business, and risked company liability in case of an accident, one not covered by company insurance; finally, his behavior endangered the business relationship between Employer and Wal-Mart since Complainant did not carry out his assignment and did not alert Brody Leage, the manager in charge of Wal-Mart assignments, so that he could assign another driver to timely replace Complainant.

It is understandable why Complainant was unhappy. After all, he understood that he would only have to work for a couple of days and was assured he would be home for Christmas. "Title VII [and by analogy, the STAA] does not take away an employer's right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules...Nor does the statute require the employer to have good cause for its decisions. The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or no reason at all, so long as its action is not a discriminatory reason." *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984) (citations omitted). In summary, Complainant is unable to carry his burden to show that he was terminated for activity protected under the STAA.

CONCLUSION

After reviewing and considering all of the evidence, I find Respondent did not violate the STAA when it terminated Complainant and that the reason for such termination was not because Complainant refused to engage in unsafe activity in violation of the Department of Transportation ("DOT") regulations, to wit driving his vehicle while fatigued or in violation of maximum driving time, or in nonconformity with speeding limits.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, and upon the entire record, I recommend the following Order:

Complainant shall take nothing.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).