



**Issue Date: 08 March 2011**

CASE NO. 2010-STA-00032

***In the Matter of:***

RONALD R. JOHNSON,  
Complainant,

v.

BLUE LAKES CHARTERS & TOURS,  
Respondent.

Appearances: Ronald R. Johnson  
Complainant, pro se

Steven Snyder, Esq.  
For Employer/Carrier

Before: Paul C. Johnson, Jr.  
Administrative Law Judge

**DECISION AND ORDER DENYING COMPLAINT**

This proceeding arises from a claim under the employee protection provisions of the Surface Transportation Assistance Act (“STAA” or “the Act”), 49 U.S.C. § 31105 et seq., and the implementing regulations found at 29 C.F.R. Part 1978. Complainant, Ronald Johnson, alleges he was discharged after filing complaints with Respondent, Blue Lakes Charters & Tours, and the Department of Transportation related to violations of commercial vehicle safety regulations. Comp. Br. at 3-12.<sup>1</sup> Respondent alleges Complainant was discharged due to “inept” performance of his duties and “insubordination.” Resp. Br. at 1.<sup>2</sup> After a complete review of the record, I find that Respondent did not violate the Act.

**Background and Procedural History**

Complainant alleges he was terminated on August 17, 2009, the same day Respondent received Complainant’s letters complaining of violations of vehicle safety regulations. *See* Tr. at

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<sup>1</sup> “Comp. Br.” refers to Complainant’s Pre-Hearing Brief, dated October 27, 2010, and is followed by the page number(s).

<sup>2</sup> “Resp. Br.” refers to Respondent’s Pre-Hearing Brief, dated May 7, 2010, and is followed by the page number(s).

33.<sup>3</sup> On August 21, 2009, Complainant filed a complaint under the employee protection provisions of Section 405 of the STAA. The Regional Administrator for the Occupational Safety and Health Administration (“OSHA”), Region V, investigated the matter. On February 17, 2010, OSHA concluded the investigation and found that Respondent made the decision to terminate Complainant several days before receiving Complainant’s letters. Secretary’s Findings at 2.<sup>4</sup> The complaint was dismissed. On March 17, 2010 Complainant submitted a letter objecting to the Secretary’s Findings and requesting a hearing before an Administrative Law Judge. The matter is now before the United States Department of Labor, Office of Administrative Law Judges. A hearing was held on November 2, 2010. Closing arguments were made at the end of the hearing in lieu of post-hearing briefs.

### **Summary of Testimony**

Five witnesses testified at the hearing: Complainant on his own behalf, and James Neering, Lloyd Zimmerman, David Cupp, and Chris Griffin for Respondent. Tr. at 13-291. Complainant’s Exhibits (“CX”) 1 through 100 were received into evidence, as were Respondent’s Exhibits (“RX”) A through U. The hearing concluded with the parties’ closing arguments. Tr. at 291-96.

#### **Testimony of Ronald Johnson**

Complainant worked at Blue Lakes from March 2001 until his termination on either August 17, 2009 or August 18, 2009.<sup>5</sup> Tr. at 13. He worked as a charter bus driver for Blue Lakes, driving passengers of all ages on trips throughout the U.S. and Canada. Tr. at 13.

The events in question “all started” with a Cedar Point Express trip. Tr. at 14. Blue Lakes offers direct service to and from Cedar Point, an amusement park. Tr. at 14-15. Customers call Blue Lakes or a local travel broker to make arrangements. Tr. at 15. Customers are given a receipt, either from Blue Lakes or the local travel broker, saying: “Motor coach leaves Cedar Point at 8:00pm sharp. If you are late you will be left behind.” Tr. at 17; CX 9. Blue Lakes drivers are instructed to leave promptly at 8:00 o’clock p.m., Tr. at 17, and to tell passengers to be on the bus by 8:00 o’clock p.m. sharp or they will be left behind, Tr. at 18. *See* CX 8, 10-B. Complainant customarily informed passengers as they boarded that the bus will leave at 8:00 o’clock p.m. Tr. at 17. Complainant also customarily asked passengers, once they arrived to the amusement park, something to the effect, “what time are we leaving?” and passengers would respond in unison “8:00 o’clock p.m. sharp.” Tr. at 20. Advertisements for the Cedar Point Express trip state that the bus leaves Cedar Point at 8:00 o’clock p.m. sharp and “If you are late you will be left behind.” Tr. at 19; CX 10-A.

On July 30, 2009<sup>6</sup>, Complainant drove a Cedar Point Express trip. Tr. at 17. Complainant left at 8:00 o’clock p.m. Tr. at 21. Complainant did a headcount. *Id.* Complainant

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<sup>3</sup> “Tr.” refers to the transcript of the November 2, 2010 hearing before Hon. Paul C. Johnson, Jr. and is followed by the page number(s).

<sup>4</sup> “Secretary’s Findings” refers to the February 17, 2010 letter from the Department of Labor to Complainant issuing the Secretary’s Findings. It is followed by the page number(s).

<sup>5</sup> Later testimony shows that Complainant received his termination letter on August 18, 2009. Tr. at 29; CX 58-B.

explained, “[t]here’s never been any requirement to do a headcount, but I do one anyway because I don’t want to leave anyone there.” *Id.* Complainant further explained, “[t]he problem is . . . people are moving around . . . [s]o you do your best.” *Id.* Two minors, approximately 16 and 17 years of age, were left behind. *Tr.* at 22. Complainant thought he had everyone and “didn’t think anyone would be late after they had been told so many times.” *Tr.* at 21. Complainant explained that he would have waited if he had known passengers were missing. *Tr.* at 21-22. The passengers left behind received a ride back from another Blue Lakes bus. *Tr.* at 23. The passengers met Complainant at the Blue Lakes garage to retrieve items they left on the bus. *Id.* The passengers said it was their fault and apologized to Complainant. *Id.*

On August 3, 2009, Lloyd Zimmerman, the safety compliance officer, motioned Complainant into his office. *Tr.* at 24. Mr. Zimmerman had recently been promoted to safety compliance officer, and Complainant stated that he shook hands with Mr. Zimmerman and congratulated him on his promotion. *Id.* Mr. Zimmerman asked Complainant about the Cedar Point Express trip and told Complainant he should do a headcount. *Id.* Complainant stated that Mr. Zimmerman “continued to berate me on this.” *Id.* Complainant walked out of Mr. Zimmerman’s office after “several minutes of him just hounding on the same topic” and said something to the effect, “the next time, I’ll have you come over and count my people.” *Tr.* at 25.

Later that day, Complainant drove to Midland, Michigan to pick up a group of women, members of the Daughters of Zion, and drop them off in Detroit, Michigan. *Tr.* at 38. Upon arriving, Complainant received instructions from a member of the group. *Id.* Another woman, the leader of the group, became upset during the trip. *Tr.* at 39-40. Complainant stated that he believed she was upset “because plans had already been made, and she was the leader of the group, and somebody else made the plans.” *Tr.* at 40. Once the bus arrived in Detroit, Complainant began unloading luggage. *Tr.* at 41. A member of the group told Complainant he was throwing the luggage and members began to unload their own luggage. *Id.* Complainant stated that he did not throw the luggage. *Id.* Daughters of Zion later filed a complaint alleging, among other things, that Complainant threw the luggage. *Tr.* at 41-44; CX 6-D. Complainant stated he had no knowledge of the complaint by Daughters of Zion until discovery in this matter. *Tr.* at 38.

On August 4, 2009, Complainant reported for work and was given a reprimand by Mr. Zimmerman for failure to do the required headcount during the Cedar Point Express trip and for displaying “total disrespect to our customers and [Mr. Zimmerman].” *Tr.* at 25; CX 6-B. Later, in rebuttal testimony, Complainant added that he borrowed Mr. Zimmerman’s glasses in order to read the reprimand and that he handed the glasses back to Mr. Zimmerman. *Tr.* at 272. Complainant explained that there has never been a required headcount and that he didn’t know “where the total disrespect to our customers come[s] in.” *Tr.* at 25. Complainant explained that his comment to Mr. Zimmerman (“next time I’ll have you come over and count my people”) was a sarcastic comment and said, “I guess that was the disrespectful.” *Tr.* at 25-26. Along with the reprimand, Complainant was given one week off. *Tr.* at 26. This was Complainant’s first reprimand. *Id.* This was also Complainant’s first disciplinary action. *Tr.* at 28.

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<sup>6</sup> Complainant initially stated the date of the event in question as July 2, 2009. *Tr.* at 17. Complainant later corrected the date to July 30, 2009. *Tr.* at 20.

Complainant went to David Cupp's office, the owner of the company, to discuss the reprimand. Tr. at 26. Mr. Cupp called Mr. Zimmerman into his office to join the discussion. Id. Mr. Cupp asked Complainant to shake hands with Mr. Zimmerman, but Complainant did not, explaining, "I shook hands with Lloyd yesterday when I came in and congratulated him for his promotion . . . there's no reason for me to shake Lloyd's hand now after he gave me a reprimand." Tr. at 27. Complainant stated that he never yelled during this discussion and that he walked out, not stormed out. Id. As Complainant walked out, he heard Mr. Cupp say, "maybe you'll have a few more days off than just the week." Id. Complainant did not say anything as he left the office. Id. In later rebuttal testimony, Complainant added that he did not say "you'll be sorry" as he left the office. Tr. at 273.

On August 5, 2009 or August 6, 2009, Complainant filed for unemployment benefits to cover the time off. Tr. at 49. Complainant explained that he "thought, well, I'd better apply for unemployment now, just in case he is going to extend [the time off] for a couple of weeks." Tr. at 49. On cross-examination, counsel for Respondent produced evidence showing Complainant did not file for unemployment benefits until August 20, 2009, coverage beginning August 16, 2009. Tr. at 66. Complainant stated that he filed for unemployment benefits before this day and that the coverage beginning August 16 "might be a follow-up" to his original claim. Tr. at 66-67.

On August 15, 2009<sup>7</sup>, Complainant mailed a letter to Blue Lakes, the U.S. Department of Transportation, and the Michigan Department of Transportation. Tr. at 29; *see* RX E. According to Post Office records<sup>8</sup>, it was received by Blue Lakes on August 17, 2009 at 11:04 a.m. Tr. at 32-33; CX 57-58A. In later rebuttal testimony, Complainant added that he sent a copy of the letter, via email, to the Department of Transportation and to Blue Lakes on August 14, 2009. Tr. at 284; RX U. On cross-examination, Complainant added that he previously made several complaints to Blue Lakes concerning the safety of its buses, both written, Tr. at 56-57; CX 23-24, and orally, Tr. at 61. Complainant explained that Blue Lakes has a system whereby drivers fill out a form after each trip. Tr. at 56. On the form, drivers write down any complaints regarding the operation of the bus. Id. Complainant stated this was a common occurrence "[n]ot just with me, but from all of the drivers." Tr. at 61; CX 25-57. Complainant stated that he did not know if Blue Lakes fixed its buses after complaints were made because "normally I would have a different bus on each trip." Tr. at 59-60. Complainant also mentioned another safety concern, drivers falling asleep. Tr. at 62-63. In later rebuttal testimony, Complainant added that he had discussed safety issues directly with Mr. Cupp, and that Mr. Cupp responded with something to the effect, "well, what do you expect from a 25 year old bus?" Tr. at 277.

Complainant did not speak with anyone from company management until August 17, 2009 when he called the dispatcher, James Neering, to see if there was any work. Tr. at 28, 72. Mr. Neering said he would talk to Mr. Cupp and get back to Complainant. Tr. at 29. On August 18, 2009, Complainant went to the Post Office and received a letter from Blue Lakes terminating

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<sup>7</sup> The letter is dated August 10, 2009, but Complainant explained he did not mail the letter until August 15, 2009. Tr. at 29. On cross examination, Complainant explained that there was "no effort on my part to make the dates incorrect." Tr. at 69.

<sup>8</sup> Complainant explained that the Post Office website allows persons to determine the date and time a letter was picked up or delivered. Tr. at 32.

him. *Id.* In later rebuttal testimony, Complainant added that the termination letter contained no attached information regarding COBRA or HIPPA. Tr. at 283, *see also* CX 58-C.

According to Post Office records, Blue Lakes delivered its termination letter to the Post Office on August 17, 2009 at 3:44 p.m. Tr. at 32; CX 58-B. Complainant stated, “[s]o, basically, four or five hours [after they received Complainant’s letter to the Department of Transportation], they terminated me.” Tr. at 33. Complainant stated that he did not think the Cedar Point Express trip incident or the Daughters of Zion incident would have prompted a reprimand or termination. Tr. at 45.

Another version of the termination letter was produced during discovery, dated August 7, 2009. Tr. at 31, 33; CX 4-B. Complainant stated he never received this letter. *Id.* Complainant explained that he believed “they never typed out that letter on August 7 . . . [t]hat was something that they either manufactured later on, because they set up, on August 17, we’d better cover ourselves . . . we’d better type out a letter because we need to show that we were actually going to fire him on August 7, even though we didn’t do it until August 17.” Tr. at 34.

On cross-examination, counsel for Respondent pointed to a letter dated August 13, 2009, from Complainant to Respondent, returning his company keys and credit card. Tr. at 67; CX 6-A. This letter was in response to Complainant’s termination. Tr. at 67-68. Complainant explained that he “hit the one instead of the two,” and that the letter should have been dated August 23, 2009. Tr. at 67. Complainant also added that he has a receipt from the Post Office, dated August 25, 2009, demonstrating that Blue Lakes received this letter on that day. Tr. at 68; CX 6-A.

In later rebuttal testimony, Complainant added that Blue Lakes’ employees drank on the job, including Mr. Cupp, and Mr. Neering. Tr. at 274-75.

#### Testimony of James Neering

Mr. Neering has worked at Blue Lakes since 1990, first as a driver, then as a night dispatcher, and now as a full-time dispatcher. Tr. at 76.

On the night of the Cedar Point incident, Mr. Neering received a call from a garage mechanic informing him that young people had been left behind at Cedar Point. Tr. at 77. Mr. Neering instructed the garage mechanic to coordinate with one of the other bus drivers who had driven to Cedar Point that day to bring the young people home. Tr. at 77-78. The following Monday, Mr. Neering reported the incident to Blue Lakes management. Tr. at 78. Mr. Neering explained that it is not unusual for people to be left behind, but that minors are usually watched more carefully. *Id.* On cross-examination, Mr. Neering said, “these Cedar Point Expresses are a little different because we’re the chaperone.” Tr. at 107. Mr. Neering indicated that Cedar Point Express drivers typically give passengers an additional 15 minutes to show up, and that there used to be a printed form instructing drivers to call the dispatcher if passengers did not arrive within 15 additional minutes. Tr. at 107-109. This printed form is now being used again. Tr. at 109. Further on cross-examination, Mr. Neering stated that he did not know of another instance where Complainant left anyone behind at Cedar Point. Tr. at 80.

Mr. Neering did not recall any safety complaints made by Complainant. Tr. at 78-79. On cross-examination, Mr. Neering said he recalled only “non-safety-sensitive” complaints made by Complainant. Tr. at 81. Mr. Neering also stated that Complainant’s accusation that he would punish drivers for making safety complaints was unfounded. Tr. at 84-88.

On cross-examination, Mr. Neering stated that he was initially surprised how quickly Complainant was fired until he heard the full story. Tr. at 90. Mr. Neering emphasized Complainant’s termination had nothing to do with the letters to the Department of Transportation. Id. Mr. Neering said he was instructed not to dispatch Complainant ever again before Complainant wrote the letters.<sup>9</sup> Id. Later in his testimony, upon a request for clarification, Mr. Neering explained that he was first told not to dispatch Complainant again until disciplinary measures had been taken, but, one day later, he was told not to dispatch Complainant ever again. Tr. at 106.

Further on cross-examination, Mr. Neering denied that drivers are asked to drive more than ten hours per day or 600 miles per day<sup>10</sup>, which is prohibited by law, except in unusual circumstances. Tr. at 92-93. Mr. Neering also denied being aware of circumstances where drivers break the rule requiring 8 hours off between shifts. Tr. at 93-96. Mr. Neering admitted that he has received two or three reports of drivers falling asleep, and that he does not dispatch these drivers in the evenings anymore. Tr. at 99.

#### Testimony of Lloyd Zimmerman

Mr. Zimmerman has worked as safety director at Blue Lakes for about 18 months. Tr. at 111. Previously, Mr. Zimmerman worked as a driver for Blue Lakes. Id.

On the Monday following the Cedar Point Express incident, Mr. Zimmerman went to speak with Complainant. Id. Complainant was confrontational and told Mr. Zimmerman that he was the wrong person for the safety director position. Tr. at 112. Mr. Zimmerman explained that he asked Complainant why he did not follow the headcount policy, but that Complainant “just kind of blew [the Cedar Point incident] off.” Tr. at 112-13. Mr. Zimmerman stated that he did not believe the issue had been resolved following this conversation. Tr. at 113.

Following their conversation, Mr. Zimmerman went to speak to Chris Griffin and David Cupp, the general manager and owner of Blue Lakes, respectively. Tr. at 113-14. Mr. Zimmerman was instructed to give Complainant a week off. Tr. at 114. Mr. Zimmerman prepared a written reprimand and gave it to Complainant on August 4, 2009. Tr. at 114-15; RX C. The reprimand included instructions to Complainant to always follow the headcount policy and to wait at least 10 minutes for late passengers. Tr. at 115; RX C. Complainant responded saying Mr. Zimmerman “would be sorry” for this. Tr. at 116. As a result of this conversation, Mr. Zimmerman was concerned about possible insubordination. Id.

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<sup>9</sup> Later, on a point of clarification, Mr. Neering stated that the date he was told not to dispatch Complainant ever again was either the Wednesday or the Thursday following the Cedar Point Express incident. Tr. at 105-106.

<sup>10</sup> Later testimony by Lloyd Zimmerman states that the law may be 650 miles per hour. Tr. at 158.

Complainant then went up to Mr. Cupp's office to discuss the reprimand. Tr. at 117. Mr. Zimmerman was then called into Mr. Cupp's office over the PA system. Id. Mr. Cupp told Complainant to let it go and shake Mr. Zimmerman's hand; Complainant refused. Tr. at 118. Mr. Zimmerman said that Complainant used a foul word and stormed out of the office continuing to use foul words. Tr. at 118-19. On cross-examination, Mr. Zimmerman could not recall what words were used, Tr. at 145, and could not definitively remember if Complainant used profanity, Tr. at 146. Complainant refused to return to Mr. Cupp's office. Tr. at 119. Upon his refusal to return, Mr. Cupp said, "fire him," but then said to wait so he could think it over. Tr. at 120. Thirty minutes to an hour following the meeting in Mr. Cupp's office, the Daughters of Zion called Blue Lakes with a complaint about Complainant. Tr. at 121; see RX B. Mr. Cupp then decided to fire Complainant. Tr. at 122. Mr. Zimmerman delivered this news to Christopher Griffin, Blue Lakes' general manager. Id.

Mr. Zimmerman said Complainant did not discuss any safety issues with him. Tr. at 122-23. Mr. Zimmerman also said that Blue Lakes' safety ratings following inspections have always been satisfactory. Tr. at 123; RX R. On cross-examination, Mr. Zimmerman stated that he's heard of problems with drivers falling asleep, but that he had no "official knowledge in [his] capacity as the safety manager." Tr. at 162. Mr. Zimmerman also stated that he was not aware if any drivers had been placed on restriction or reprimanded for falling asleep. Tr. at 163.

On cross-examination, Mr. Zimmerman further explained the headcount policy, admitting that there was no written policy, but that it was a standard practice. Tr. at 128. Mr. Zimmerman also admitted that minors and adults alike purchase the same ticket, so a driver may not know if a minor is on the bus. Tr. at 127. Regarding the Cedar Point Express incident, Mr. Zimmerman stated, "[f]rom what I know of these minors, it was apparent that they were minors." Id.

Further on cross-examination, Mr. Zimmerman said he vaguely remembered Complainant shaking his hand to congratulate him on his promotion. Tr. at 131. Mr. Zimmerman then recalled asking Complainant what had happened at Cedar Point because "I'm the kind of guy that wants to hear it." Tr. at 132. Mr. Zimmerman explained that he likes to hear the drivers' points of view because he is a "driver first and foremost." Id. Mr. Zimmerman said that Complainant did not have an explanation for the Cedar Point Express incident. Tr. at 133. Mr. Zimmerman also said that he asked Complainant why he did not turn back once a mechanic called him and told him passengers had been left behind. Tr. at 137-38. Mr. Zimmerman did not specifically recall Complainant saying that he would have waited had he known passengers were left behind. Tr. at 135. Mr. Zimmerman also did not specifically recall Complainant saying that the late passengers apologized to him. Tr. at 136. Mr. Zimmerman did recall Complainant saying something to the effect, "next time I'll call you and have you count the passengers." Tr. at 141.

Further on cross-examination, Mr. Zimmerman discussed giving Complainant the reprimand. Tr. at 142-44. Mr. Zimmerman said he did not recall Complainant asking for his glasses to read the reprimand. Tr. at 142-43. Mr. Zimmerman stated that Complainant's threat upon receiving the reprimand, that "you'll be sorry for this," concerned him, and that he thought it was a physical threat. Tr. at 144.

Further on cross-examination, Mr. Zimmerman stated that he did not recall if other drivers had left any persons behind at Cedar Point before. Tr. at 147. Mr. Zimmerman said that it was not unusual for a driver to receive a complaint from time to time. Tr. at 148. Mr. Zimmerman also said he did not know if drivers have been terminated for making a mistake before. Tr. at 147.

### Testimony of David Cupp

Mr. Cupp is President of Blue Lakes Charters & Tours. Tr. at 173. He has been President since the company was founded in 1989. Id. Complainant worked at Blue Lakes for the past 7 or 8 years. Tr. at 174.

The Cedar Point Express incident was brought to Mr. Cupp's attention by Mr. Zimmerman. Tr. at 175. Mr. Zimmerman asked Mr. Cupp what type of reprimand should be issued to Complainant. Id. Mr. Cupp was aware that Mr. Zimmerman had confronted Complainant about the Cedar Point Express and that they had a "heated conversation." Tr. at 176. Mr. Cupp and Mr. Zimmerman decided that a written reprimand and a week off were appropriate. Id. Mr. Cupp considered this the end of the matter. Id.

Mr. Cupp said that the matter returned when Complainant got into a confrontation with Mr. Zimmerman about the written reprimand and week off. Id. Complainant came into Mr. Cupp's office, upset over the matter. Tr. at 176. Mr. Cupp asked Mr. Zimmerman to join them so they could discuss the matter. Tr. at 176-77. Mr. Cupp stated, "I made an offer to Mr. Johnson to come into the office and the three of us sit down and hash this out and try and resolve the issue. I asked him if he would do that, that we would take the written reprimand out of his employee file." Tr. at 177. Mr. Cupp then asked Complainant to shake hands with Mr. Zimmerman. Id. Complainant walked out, and Mr. Cupp said, "if you don't come back in here right now, you'll be getting more time off than you've already been given." Id. On cross-examination, Mr. Cupp explained that this statement did not mean he was terminating Complainant. Tr. at 197-98. Further on cross-examination, Mr. Cupp stated that he did not recall Complainant using profanity during this discussion. Tr. at 194. Following the meeting, Mr. Cupp said that he felt the issue had grown beyond leaving two minors at Cedar Point. Tr. at 177.

Shortly after the meeting in Mr. Cupp's office, Mr. Cupp received a complaint from the Daughters of Zion. Tr. at 178; *see* RX B. The complaint alleged that Complainant was rude, wore a headset playing loud music, threw luggage, and told the group he "couldn't believe that they were Christian people." Id. The complaint also alleged Complainant argued with passengers over whether to stop for food and that Complainant told the group to call Blue Lakes "if you don't like it." Id. Mr. Cupp stated that the Daughters of Zion said they would never use Blue Lakes again if Complainant was the driver. Tr. at 179. Mr. Cupp then decided to terminate Complainant. Id.

Complainant called Mr. Cupp the next day or the day after to ask when he was going to be able to come back to work. Id. Mr. Cupp then informed Complainant that he was terminated, and that he would get it in writing. Tr. at 179-80. Complainant responded, "you'll be sorry."



Tr. at 180. The same day, Mr. Cupp instructed Chris Griffin to prepare a termination letter. Id. Mr. Griffin did not send the termination letter the same day, but rather several days later because Mr. Griffin was waiting on information regarding Complainant's health insurance. Tr. at 181.

Mr. Cupp stated that he has talked to his employees about safety issues. Id. He also stated that he has never directly received a complaint from any employee regarding the safety of Blue Lakes' buses. Tr. at 182. On cross-examination, Mr. Cupp said he did not recall Complainant ever coming to him to discuss the safety of Blue Lakes' buses. Tr. at 183. Also on cross-examination, Mr. Cupp said neither he nor his employees drink alcohol on the premises or while driving buses, with the exception of the company Christmas party. Tr. at 215-18.

Further on cross-examination, Mr. Cupp stated that he had previously received a complaint from a group Complainant drove to Washington D.C. Tr. at 183-84. Mr. Cupp also stated that he believed Complainant received some thank you letters and had been requested by some of Blue Lakes' clients. Tr. at 187-88.

Further on cross-examination, Mr. Cupp stated that he did not know of another instance where passengers were left at Blue Lakes. Tr. at 193-94. Mr. Cupp stated that he would have given any driver a reprimand that left passengers at Blue Lakes. Tr. at 194.

Further on cross-examination, Mr. Cupp said he did not recall when he received Complainant's letter to the Department of Transportation, or when he read the letter. Tr. at 209-10. Mr. Cupp did not recall another instance where an employee sent a letter to the Department of Transportation. Id. Mr. Cupp also stated that if Complainant's termination letter was sent out the same day Blue Lakes received Complainant's letter to the Department of Transportation, it was a coincidence. Tr. at 211. Mr. Cupp explained that he believed Complainant wrote the letter because, "I think that you were turning in to some of the DOT, the DOD, OSHA, the Department of Labor, anybody you could in retaliation when you walked out and you told me I'll be sorry." Tr. at 212.

#### Testimony of Christopher Griffin

Mr. Griffin is employed as the controller of Blue Lakes. Tr. at 226. He has worked at Blue Lakes for seven years. Id. One of his duties is to prepare termination letters. Tr. at 227. Mr. Griffin was instructed to prepare a termination letter for Complainant by Mr. Cupp. Tr. at 227-28; RX D. Mr. Griffin did not send the letter right away because he remembered "reading that the COBRA and HIPAA rules had changed dramatically under Obama Administration . . . [a]nd I knew that we had to do those correctly." Tr. at 228-29. Mr. Griffin consulted Blue Lakes' insurance provider and received the necessary information about a week or ten days later. Tr. at 230. After Mr. Griffin received this information, he prepared a new termination letter that was "essentially the old letter with a new date." Tr. at 231; RX H. On cross-examination, Mr. Griffin explained that Complainant was meant to receive this information along with the termination letter, and that Deb Lyn, another employee at Blue Lakes, was charged with including this information. Tr. at 251-52. Mr. Griffin said he would be "absolutely astounded" to hear this information was not included with Complainant's termination letter. Tr. at 252.

While under investigation by OSHA, Mr. Griffin was able to show the original termination letter was prepared August 6, 2009 and that it was modified on August 17, 2009. Tr. at 233-34; RX G.

Further on cross-examination, Mr. Griffin explained that it was “completely a coincidence” that the termination letter was sent the same day Blue Lakes received Complainant’s Department of Transportation letter. Tr. at 254. Mr. Griffin also said that he had the termination letter ready before he saw Complainant’s letter to the Department of Transportation. Tr. at 260. Mr. Griffin admitted that he saw Complainant’s email to the Department of Transportation before he sent the termination letter. Tr. at 261. Mr. Griffin stated that he was unaware a letter could be dated back to an earlier day. Tr. at 263-64.

Mr. Griffin was aware there had been an incident between Mr. Cupp and Complainant. Tr. at 235. It seemed to Mr. Griffin that he was told to terminate Complainant right after this event. Id. On cross-examination, Mr. Griffin indicated that the complaint from the Daughters of Zion was the “final straw” for Mr. Cupp. Tr. at 246. Further on cross-examination, Mr. Griffin stated that he was not aware of when Complainant was told he was fired, but that he believed it was by phone. Tr. at 265.

Further on cross-examination, Mr. Griffin stated that he has seen employees drink in the office, namely James Neering. Tr. at 237-38. Mr. Griffin stated that Mr. Neering, “always gets his work done before he plays.” Tr. at 238. Mr. Griffin has also seen Mr. Cupp and some of the drivers drink in the office. Tr. at 239-40. Mr. Griffin did not know of drivers that have a drinking problem or who drink in the evenings and then drive in the morning. Tr. at 241.

CX 57, 58-A, 58-B

Complainant provided copies of certified mail receipts and U.S. Postal Service Track & Confirm information. These documents allegedly show the date and time Respondent received Complainant’s letters. These documents also allegedly show the date and time Respondent mailed Complainant’s termination letter.

RX G

Respondent provided a screen shot of the “properties” of Complainant’s termination letter. The screen shot showed that the document was first created on Thursday, August 6, 2009, and was again modified on August 17, 2009.

### **Findings of Fact**

1. Complainant was employed by Respondent from 2001 until he was terminated on August 17, 2009.
2. Complainant made raised a number of concerns to Respondent while an employee of Blue Lakes about the safety of its buses, Tr. at 56-57, 61, and drivers falling asleep, Tr. at 62-63. *See* CX 23-24.

3. On July 30, 2009, Complainant drove a Cedar Point Express trip, during which two minor passengers were left behind. Tr. at 21-22.
4. On August 3, 2009, Lloyd Zimmerman spoke to Complainant about the Cedar Point Express incident. Tr. at 111-13. Mr. Zimmerman repeatedly asked Complainant why he did not follow Blue Lakes' headcount policy, and Complainant became confrontational saying, "the next time, I'll have you come over and count my people." *Id.*; Tr. at 24-25.
5. The headcount policy was not a written policy at the time. Tr. at 128.
6. Later on August 3, 2009, Complainant drove the Daughters of Zion from Midland, Michigan to Detroit, Michigan. Tr. at 38.
7. On August 4, 2009, Mr. Zimmerman gave Complainant a reprimand and week off of work. Tr. at 25-26; CX 6-B. The reprimand cited Complainant's failure to do the required headcount and "total disrespect to our customers and myself." CX 6-B. This was Complainant's first reprimand and time off. Tr. at 26.
8. Complainant was angry upon receiving the reprimand and time off. Tr. at 116. Complainant told Mr. Zimmerman he would "be sorry." Tr. at 144. Mr. Zimmerman interpreted this comment as a physical threat, Tr. at 144, and became concerned that Complainant had become insubordinate. Tr. at 116-17.
9. Immediately after receiving the reprimand and time off, Complainant went to David Cupp's office. Tr. at 26. Mr. Cupp called Mr. Zimmerman in to join them. *Id.* Mr. Cupp asked Complainant to shake Mr. Zimmerman's hand and Complainant refused. Tr. at 27. Complainant walked out of Mr. Cupp's office and Mr. Cupp said, "maybe you'll have a few more days off than just the week." *Id.* At this point, Mr. Cupp believed that the issue had grown beyond leaving two minors at Cedar Point. Tr. at 177.
10. Shortly after this discussion, and still on August 4, 2009, Mr. Cupp received a complaint from Lois Tyler of the Daughters of Zion, alleging that Complainant was rude and threw their luggage. Tr. at 178; CX 6-D. Upon receipt of the complaint, Mr. Cupp decided to terminate Complainant, calling the Daughters of Zion complaint the "final straw." Tr. at 179.
11. Mr. Cupp instructed Christopher Griffin to prepare a termination letter for Complainant. Tr. at 227-28; RX D. Mr. Griffin began to draft the termination letter on August 6, 2009. RX G. The first printed copy of the letter was dated August 7, 2009. RX D.
12. Mr. Griffin did not mail the termination letter immediately because he wanted to ensure it complied with applicable HIPAA and COBRA rules. Tr. at 228-29.

13. On August 14, 2009, Complainant sent an email to Respondent complaining of violations of vehicle safety regulations. Tr. at 284; RX U. Complainant mailed a letter complaining of violations of vehicle safety regulations to Respondent on August 15, 2009. Tr. at 29; *see* RX E.
14. On August 17, 2009, after receiving the applicable HIPAA and COBRA information, Mr. Griffin mailed Complainant's termination letter. RX H; Tr. at 231.
15. On August 18, 2009, Complainant received the termination letter. Tr. at 29; CX 58-B. No HIPAA or COBRA information was included. Tr. at 283.

### **Conclusions of Law**

The STAA prohibits discharge, discipline, or discrimination against an employee because the employee has filed a complaint related to a violation of commercial vehicle safety or security regulations. 49 U.S.C. § 31105(a). In an STAA proceeding, the general burden of proof is on the Complainant, who must establish a prima facie case of retaliation by proving that: 1) the employee engaged in protected activity; 2) the employee was subjected to adverse employment action; and 3) there was a causal connection between the protected activity and the adverse action. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). Once the Complainant establishes a prima facie case of retaliation, the employer may rebut that showing with evidence of a legitimate, non-retaliatory reason for the discharge. *Id.* If the employer is successful, the Complainant has the ultimate burden of proof to demonstrate by a preponderance of the evidence that the legitimate, non-retaliatory reason is pretextual. *Id.* Once a case is tried on the merits, however, the relevant inquiry becomes whether Complainant has proved by a preponderance of the evidence that the employer discriminated against him for engaging in protected activity. *U.S. Postal Service Board of Governors v. Aiken*, 460 U.S. 711, 713-14 (1983); *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 8 (ARB Sept. 14, 2007) (explaining that "after a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity"). The protected activity need only be a contributing factor to the employer's decision to terminate the Complainant. 29 CFR Part 1979.109(a) ("A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."). If protected activity is a contributing factor, the employer can only prevail by showing that it would have taken the same adverse action in the absence of protected activity. *Caimano v. Brink's, Inc.*, 1995 STA-4, slip op. at 23-24 (Sec'y Jan. 26, 1996). Thus, at this stage of the proceedings, the Complainant must show (1) that he engaged in protected activity; (2) that Respondent knew of his protected activity; and (3) that took adverse employment action against him because of the protected activity. *See Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009); *Byrd v. Consolidated Motor Freight*, 97-STA-9 at 4-5 (ARB May 5, 1998).

Applying this framework to the facts of the case, I hereby make the following conclusions of law:

1. Complainant engaged in protected activity, both when he sent complaint letters to Respondent and the Department of Transportation, and when he made internal complaints to Respondent.
2. Respondent knew of Complainant's protected activity, in that it was the recipient of his internal complaints and of a copy of the letter he sent to the Department of Transportation;
3. Complainant was subjected to adverse employment action when he was reprimanded, given time off, and terminated.
4. Complainant's protected activities did not contribute to the adverse employment actions taken by Respondent against him.

### Discussion

#### 1. *Complainant Engaged in Protected Activity*

Under the STAA, an employee has engaged in protected activity if “the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding.” 49 U.S.C. § 31105 (a)(1)(A)(i). The complaint need not specify any particular motor vehicle safety or security regulation to engage in protected activity. *Nix v. Nehi-R.C. Bottling Co.*, ALJ No. 1984-STA-1, slip op. at 4 (Sec’y July 13, 1984). It is also well established that protection is extended to internal complaints. *See Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Moravec v. HC & M Transportation, Inc.*, 1990-STA-44 (Sec’y July 11, 1991).

Complainant drafted a complaint on or about August 10, 2009 alleging “cost cutting and short cuts” placing the safety of “drivers, passengers and the driving public” at risk. *See* Complaint Letter at 1.<sup>11</sup> This letter was sent via email to the designated recipients on August 14, 2009, Tr. at 284, and was sent via post office mail to the designated recipients on August 15, 2009, Tr. at 29. Further, Complainant testified that he made a number of internal complaints to Respondent, both written, Tr. at 56-57, and orally, Tr. at 61. Based on the foregoing, I find that Complainant engaged in protected activity, both when he sent a letter via email and post office mail to Respondent and the Department of Transportation, and when he made internal complaints to Respondent.

#### 2. *Respondent Knew of Complainant’s Protected Activity*

To prevail in an STAA matter, the Complainant must prove that the employer was aware of the protected activity. *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-5, slip op. at 4 (ARB Sept. 28, 2007, and reissued with corrections on Oct. 31, 2007).

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<sup>11</sup> “Complaint Letter” refers to Complainant’s letter, dated August 10, 2009, addressed to members of Blue Lakes Charters & Tours management, the U.S. Department of Transportation, and the Michigan Department of Transportation. It is followed by the page number.

Complainant testified that he made oral and written internal reports of safety concerns. Tr. 56, 277. Although Mr. Neering, Mr. Zimmerman, and Mr. Cupp could not recall discussing safety complaints with Complainant, Tr. at 78-79, 122-23, 183, I credit his testimony that he did so. Respondent had a system in place for drivers to report problems with their buses after each trip. Tr. at 56. Additionally, it is reasonable to believe that drivers would inform Respondent when they observed problems while operating the buses. It is equally reasonable that doing so is so routine that the employees who receive the reports would not recall the specifics of them.

In addition to making internal reports, Complainant sent Respondent a copy of his letter to the Michigan Department of Transportation, and the record is clear that Respondent received the letter. Accordingly, I find that Respondent knew of Complainant's protected activity.

### 3. *Complainant Was Subjected to Adverse Employment Actions*

The STAA provides that an employer "may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment." 49 U.S.C. § 31105(a). Complainant suffered three adverse employment actions. First, Complainant received a reprimand that was placed in his employee file. CX 6-B; *see* Tr. at 177. Second, Complainant was given time off and therefore lost wages for a period of time. *See* Tr. at 26. Third, Complainant was terminated. Tr. at 29. Therefore, I find that Complainant suffered adverse employment actions within the meaning of the Act.

### 4. *The Protected Activities Did Not Contribute To the Adverse Actions*

An employer may not discharge, discipline, or discriminate against an employee because the employee has filed a complaint related to a violation of commercial vehicle safety or security regulations. 49 U.S.C. § 31105(a). In order to establish a causal link between protected activity and termination, the decision to terminate must have been motivated at least in part by retaliation. *Clement v. Milwaukee Transportation Services, Inc.*, ARB No. 02-025, ALJ No. 2001-STA-6 (ARB Aug. 29, 2003); *see* 29 CFR Part 1979.109(a). Direct evidence is not required to establish a causal link. 49 U.S.C. app. § 2305(b).

Here, Complainant seeks to establish a causal link by pointing to the temporal proximity between the time Respondent received the complaint letters and the time Respondent mailed Complainant's termination letter. *See* Tr. at 33. When a complainant is discharged shortly after he engages in protected activity, an inference of retaliation is sufficiently raised. *See Toland v. Werner Enterprises*, ALJ No. 1993-STA-22, slip op. at 2 (Sec'y Nov. 16, 1993). However, Respondent has articulated a legitimate, non-discriminatory reason for Complainant's discharge: Complainant's "inept" performance and "insubordination." Resp. Br. at 1; *see* Tr. at 179.

Support for Respondent's position is found in the testimony and evidence provided by Respondent. Mr. Zimmerman explained that Complainant was confrontational when initially questioned about the Cedar Point incident on August 3, 2009. Tr. at 112. Complainant conceded a comment he made to Mr. Zimmerman during their August 3, 2009 meeting was sarcastic. Tr. at 25-26 ("I think that he thought because I said, well, next time I'll have you come over and count my people, I guess that was the disrespectful. I said, and that was a sarcastic remark by

myself . . .”). Mr. Zimmerman then consulted with Mr. Cupp regarding a response to Complainant’s behavior, and was told to give Complainant a reprimand and some “time off.” The next day (August 4, 2009), Mr. Zimmerman delivered the reprimand and notice of time off to Complainant who was reprimanded for displaying “total disrespect to our customers and [Mr. Zimmerman].” RX C.

At the time that Complainant was reprimanded and given time off, he had not yet authored the letter to the Department of Transportation. The protected activities in which he had engaged up to that point consisted of written and oral reports of safety concerns to Respondent’s employees. It is clear that those reports played no part in Respondent’s decision to reprimand Complainant and give him some time off. That decision was motivated by Complainant’s having left passengers behind during the Cedar Point Express trip, and his hostile response to the August 3, 2009 meeting with Mr. Zimmerman, when the latter addressed Complainant about the Cedar Point Express trip.

When Complainant received his reprimand and notice of time off, he told Mr. Zimmerman “you’ll be sorry for this.” Tr. at 144. Mr. Zimmerman interpreted this as a physical threat. *Id.* Mr. Zimmerman was also concerned about possible insubordination. Tr. at 116. Immediately thereafter, Complainant went to Mr. Cupp’s office to discuss the matter. Tr. at 26. Mr. Cupp asked Mr. Zimmerman to come to his office, and, when Complainant was asked to shake Mr. Zimmerman’s hand during this meeting, Complainant refused. Tr. at 27, 118, 177. Complainant then walked out of the meeting, and did not return when Mr. Cupp asked him to. Tr. at 177. Mr. Cupp’s initial reaction following this meeting was to fire Complainant. Tr. at 120. He decided, however, to think it over before doing so.

Very shortly after the meeting in Mr. Cupp’s office, and on the same day as the meeting, Respondent received a complaint from the Daughters of Zion describing rude behavior by Complainant. Tr. at 178; RX B. The complaint detailed Complainant’s rude behavior, including that he wore a headset playing loud music, argued with passengers over whether to stop for food, threw luggage, and told the group he “couldn’t believe that they were Christian people.” Tr. at 178. Mr. Cupp explained that this was the “final straw,” and then decided to terminate Complainant. Tr. at 179. He directed Mr. Griffin to terminate Complainant.

Respondent has established a legitimate, non-discriminatory reason for the adverse employment actions. The reprimand and time off were in response to Complainant’s insubordination when Mr. Zimmerman asked him about leaving passengers behind on the Cedar Point run. The termination was in response to (1) that insubordination, (2) the belligerence displayed by Complainant to Mr. Zimmerman when he received the reprimand and time off, (3) Complainant’s hostile behavior in Mr. Cupp’s office, consisting of his refusal to shake Mr. Zimmerman’s hand and his walking out of the office before the meeting ended, and (4) the receipt of the complaint from the Daughters of Zion regarding Complainant’s behavior.

In addition to showing legitimate, non-discriminatory reasons for the adverse employment actions, the evidence shows that there was no causal link between Complainant’s protected activities and his termination. The decision to terminate Complainant was made prior to Complainant drafting and sending his letters. *See* Tr. at 29, 284. A complainant fails to

establish a causal link between protected activity and termination if the decision to terminate was made prior to the protected activity. *See Bushway v. Yellow Freight, Inc.*, ARB No. 01 018, ALJ No. 2000-STA-52, slip op. at 3 (ARB Dec. 13, 2002).

Particularly, Respondent established that the decision to terminate Complainant was made on August 4, 2009 after the complaint was made by the Daughters of Zion against Complainant. *See* Tr. at 121-22. That evidence is bolstered by evidence that Complainant's termination letter was first prepared on August 6, 2009. Both of these events occurred days before Complainant drafted and sent his complaint letter to Respondent and the Department of Transportation. *See* Tr. at 233; RX G. As a result, the temporal proximity between Complainant's protected activities and his termination is insufficient to satisfy his burden of proof by a preponderance of the evidence. *C.f. Schulman v. Clean Harbors Environmental Services, Inc.*, ARB No. 99-015, ALJ No. 1998-STA-24, slip op. at 9 (ARB Oct. 18, 1999) (finding the temporal proximity between complainant's protected activity and termination insufficient to satisfy complaint's burden of proof because the evidence showed the decision to terminate complainant was made prior to the employer learning of complainant's protected activity).

The parties whether Complainant was informed of his termination before or after he sent his complaint letters. Respondent asserts that Complainant was informed of this fact by phone just a day or two after the August 4, 2009 meeting in Mr. Cupp's office. Tr. at 179-80. Complainant asserts that he spoke with no one from Blue Lakes' management until August 17, 2009, when he called the dispatcher to see if there was any work. Tr. at 28, 72. Complainant said he was first aware of his termination when he received the letter from Blue Lakes on August 18, 2009. *See* Tr. at 29. The precise date that Complainant was informed of his termination is not material, as the evidence establishes that the decision to terminate Complainant was made on August 4, 2009, before Complainant sent his letters. *See* Tr. at 121-22, 233; RX G.

It is true that Complainant made several internal reports of safety concerns before he was terminated; however, when an employer invites employees to mention safety concerns, an inference of retaliation based on those concerns is lessened. *Moon, supra*, 836 F.2d at 229-230 (finding temporal proximity between a safety complaint and termination did not alone support an inference of retaliation in the face of compelling evidence that the employer encouraged safety complaints). Here, Blue Lakes has a system whereby drivers fill out a form after each trip. Tr. at 56. On the form, drivers write down any complaints regarding the operation of the bus. *Id.* Accordingly, Complainant's internal complaints do not support an inference of retaliation.

The temporal proximity between Complainant's internal complaints and his termination also does not give rise to an inference of retaliation because of intervening events, namely Complainant's reaction to the Cedar Point incident. Complainant provided copies of a number of internal complaints filed using Blue Lakes' system, a few of which were made by Complainant. CX 21-57. The most recent one provided by Complainant appeared to be dated April 19, 2009, a little less than four months prior to the events in question here. *See* CX 24. While four months is sufficiently close in time to support an inference of retaliation, *Anderson v. Jaro Transportation Services*, ARB No. 05-011, ALJ Nos. 2004-STA-2 and 3, slip op. at 7 (ARB Nov. 30, 2005), intervening events may provide reasonable cause to terminate an employee. *Id.*



(the Board explained that intervening events provided reasonable cause to terminate the employee and that “a logical reason to infer a causal relationship between the protected activity and the adverse action no longer exists”). The Cedar Point incident, Complainant’s reaction to being counseled on the Cedar Point incident, and the complaint from the Daughters of Zion all served as intervening events. Additionally, Complainant had never received disciplinary action for submitting internal reports of safety concerns, and only received his first disciplinary action – the reprimand involved in this case – after his insubordination toward Mr. Zimmerman.

The evidence does not show that Complainant’s internal complaints played any role in Complainant’s termination, and Complainant himself focuses on his letters dated August 10, 2009.

Respondent has also explained the reason for its delay in sending Complainant his termination letter. Mr. Griffin explained that he remembered “reading that the COBRA and HIPAA rules had changed dramatically under Obama Administration . . . [a]nd I knew that we had to do those correctly.” Tr. at 228-29. As a result, Mr. Griffin required time to consult Blue Lakes’ insurance provider. *See* Tr. at 230. Mr. Griffin’s testimony was credible and consistent with the documentary evidence, and I credit it.

Further, the reason provided for Complainant’s termination did not change after Respondent received Complainant’s letters. Both the August 7, 2009 and the August 17, 2009 termination letters cite Complainant’s “negative behavior” as the reason for discharge. *See* RX D, H.

In conclusion, Complainant has failed to meet his burden to show by a preponderance of the evidence that his termination was motivated, at least in part, by his having engaged in protected activities. I find that Respondent has demonstrated that the adverse employment actions were for insubordination, the Cedar Point Express incident, and the complaint from the Daughters of Zion. Respondent therefore has provided a legitimate, non-discriminatory reason for Complainant’s termination. Respondent has also shown that its decision to terminate Complainant was made prior to receipt of Complainant’s letters. As such, there is no causal link between Complainant’s protected activity and the adverse action. Finally, I conclude that, even if there were such a link, Respondent has demonstrated by clear and convincing evidence that it would have taken the adverse employment actions even in the absence of Complainant’s protected activities.

### **Conclusion**

Because Complainant has failed to meet his burden to show an essential element of his complaint – that his protected activities were a contributing factor to the adverse employment actions – the complaint must be denied.

## ORDER

It is hereby **ORDERED** that the Complaint is **DENIED**.

**SO ORDERED.**

**A**

Paul C. Johnson, Jr.  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix

(one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).