U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 17 October 2014

Case No.: 2013-STA-00037

In the Matter of:

KERMIT PATTENAUDE,
Complainant,

v.

TRI-AM TRANSPORT, LLC,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("the Act" or "STAA"), and implementing regulations set forth at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the discharge, discipline of, or discrimination against an employee in retaliation for the employee engaging in certain protected activity.

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law.

PROCEDURAL AND FACTUAL BACKGROUND

On March 7, 2013, the Secretary issued findings dismissing Mr. Kermit Pattenaude's ("Mr. Pattenaude" or "Complainant") complaint. On April 2, 2013, Complainant timely objected to these findings and requested a hearing before an administrative law judge. Complainant filed a pre-hearing brief ("CB"), as did Respondent ("RB"). Respondent also filed a "Statement of Issues to be Decided ("RSI"). I held a hearing in this matter on October 23, 2013, in Detroit, Michigan. At that hearing, without objection I admitted ALJ Exhibits 1-4 into the record and Respondent's Exhibits ("RE") A-L, which the parties stipulated were authentic; Complainant did not submit any other exhibits. (Tr. at 6-7).

Mr. Pattenaude began working for JTW Transport Access Point, a company for which he had the same responsibilities as he did for Respondent, in 2009. (Tr. at 17-18). In approximately July 2011, Mr. Pattenaude began working for Respondent as a tanker driver, which involved driving an empty truck from to a steel mill called Severstal (the "Severstal mill"

or "Severstal") to a facility called "DTE" (the "DTE facility" or "DTE"), loading up a tanker with pulverized coal, and then taking the coal back to Severstal where it would be unloaded; Mr. Pattenaude would repeat the DTE-Severstal mill circuit several times each day. (Tr. at 18-19; 27; 30-31). Mr. Pattenaude normally worked five 12-hour shifts and one 10-hour shift per week, for a total of 70 hours. (Tr. at 19). Respondent suspended Mr. Pattenaude on July 5, 2012, and terminated him on July 16, 2012. (RE H; RE K).

Three witnesses testified during the hearing. First, Mr. Pattenaude testified. He discussed his job with Respondent, outlining his duties and describing incidents where he raised safety issues with Respondent, including an incident on July 4, 2012. He also stated that other employees of Respondent had been caught sleeping while loading or unloading pulverized coal and were not terminated as a result. Finally, he described his suspension and termination.

The second witness was Mr. Darrick Wilson, Respondent's controller and an additional supervisor who helps manage Respondent's drivers. He testified as to the responsibilities of Respondent's drivers, an incident on July 4, 2012, and the reason Respondent terminated Mr. Pattenaude.

Finally, Mr. Lawrence Bowers, one of Respondent's supervisors, testified. He testified as to the responsibilities of Respondent's drivers and the reason Mr. Pattenaude was terminated.

Mr. Pattenaude's Testimony

Mr. Pattenaude began his testimony by describing his duties as a driver for Respondent. Mr. Pattenaude typically worked the morning shift, arriving at the Severstal mill at 4:00 a.m. (Tr. at 21). He would perform a "pre-trip" safety inspection, which included checking the air pressure in the tires of the truck to which he was assigned. (Tr. at 22). He would then drive the truck to the DTE facility and load the truck with pulverized coal. (Tr. at 22-25). Mr. Pattenaude testified that the process of loading coal was partially automated: he would connect the tanker to Respondent's coal chute. (Tr. at 25-26; 113). Then, Mr. Pattenaude would flip a switch that began the process of loading the coal. (Tr. at 25). Mr. Pattenaude testified that when the switch was engaged, Respondent's machinery "[did] everything by itself." (*Id.*). He would wait for the tanker to load in a small room overlooking the trailer, with a glass door with a view of the trailer. (*Id.*; *see also* RE I, p. 2). The glass door was obscured a "majority of the time" by coal dust. (Tr. at 85). This room was not a "control room" with computers that automated the loading process; that room was two flights below the small waiting room. (Tr. at 29; 67; 109-10). There were emergency override controls near the small waiting room, but Mr. Pattenaude testified during cross-examination that they were not functional because they would become covered in coal dust. (Tr. at 64; 109-10). Mr. Pattenaude testified that employees were not required to stay in the room and monitor the loading process but could walk out onto a catwalk. (Tr. at 65; 85).

After the tanker was loaded, Mr. Pattenaude would disconnect the tanker, perform a "post-trip" safety inspection, which also included checking the tires' air pressure, and return to the Severstal mill, where the coal was unloaded into a hopper. (Tr. at 26-27). Mr. Pattenaude testified that during the unloading process he would wait in a small "control room" with a computer that monitored the unloading. (Tr. at 28). Once the coal was unloaded at the Severstal

mill Mr. Pattenaude would return to DTE to repeat the process. (Tr. at 31). Mr. Pattenaude estimated that on a typical workday he would load and unload coal four to five times. (*Id.*).

Mr. Pattenaude testified as to a business practice of Respondent's known as "slipping seats." (Tr. at 69-75). Sometimes employees drove the same truck and tanker throughout the day and loaded and unloaded coal, but when slipping seats a supervisor at Severstal might unload the coal while the employee returned to DTE in a previously unloaded truck left waiting for the driver, and at DTE the driver might "slip seats" into a previously loaded truck. (Tr. at 72). The practice allowed Respondent to haul coal to the Severstal mill more quickly. (Tr. at 69). Mr. Pattenaude testified that he considered the practice to be unsafe, because it required him switch to trucks that he was less familiar with, because it required that the trucks be operated by persons without the licenses to drive hazardous materials, and because he could not be confident that the trucks he was required to slip seats into had been properly inspected. (Tr. at 75-76).

Mr. Pattenaude testified about workplace safety issues he noticed as an employee for Respondent prior to his reporting low air pressure in a truck tire on July 4, 2012. He testified that he and a co-worker had verbally complained to Mr. Bowers about a lack of water near the loading area to wash off caustic chemicals. (Tr. at 41; 125-26). He testified that supervisors discouraged employees from recording problems with tankers or trailers in pre- or post-trip inspection logs; instead, he testified, management required that employees note problems on a dry-erase board from which they would be erased. (Tr. at 43-46). He testified that Mr. Bowers proposed several times that he work more than seventy hours within an eight day period, but that he rejected these proposals. (Tr. at 46-48). He testified that several weeks before he was terminated he had raised concerns to Mr. Wilson, Mr. Bowers, and to another supervisor about supervisors driving tankers loaded with hazardous materials, but that his supervisors told him that it was legal to do so. (Tr. at 62-63).

Mr. Pattenaude testified about disciplinary action his supervisors had taken before July 4, 2012. (Tr. at 48-61). Mr. Pattenaude acknowledged that his supervisors filled out "Driver Disciplinary Action" incident reports citing his misconduct four times: on June 21 and 29, 2012, for tardiness (Tr. at 52; 59; *see* RE D; G); on June 22, 2012, for "dereliction of duty" for only hauling four loads (Tr. at 55-56; *see* RE E); and on June 27, 2012, for being outside a truck without wearing safety glasses (Tr. at 57-59; *see* RE F). Mr. Pattenaude stated that he was not punished, beyond being written up for any of these incidents, and the record confirms his testimony. (Tr. at 48-61; *see* RE D-G). He refused to sign all of the incident reports except for the June 21 incident report. (Tr. at 60; *see* RE D-G). He testified that he did not consider his employment to be in jeopardy following the June 27 and June 29 incidents. (Tr. at 59; 60).

Mr. Pattenaude then testified about two incidents that occurred on July 4, 2012: first, his reporting low air pressure in a truck's tire, (Tr. at 72-84), and second, Mr. Wilson finding him sleeping in the waiting room during the loading process. (Tr. at 85-92). On July 4, 2012, at Severstal, Mr. Bowers told Mr. Pattenaude that he was to slip seats. (Tr. at 72-74). Accordingly, Mr. Pattenaude drove an empty truck to DTE where Mr. Wilson told him to drive a truck preloaded with 44,000 pounds of pulverized coal back to the Severstal mill. (Tr. at 76-77). Mr. Pattenaude performed a pre-trip inspection on the loaded truck and observed a tire with low air pressure. (Tr. at 77). He reported the low air pressure to Mr. Wilson who, Mr. Pattenaude

testified, asked Mr. Pattenaude what he wanted to do about. (Tr. at 77). When Mr. Pattenaude insisted that it be changed before he drive it, Mr. Wilson "turned around and walked away." (*Id.*). He testified that Mr. Bowers then called and inquired as to whether Mr. Pattenaude could drive the truck, and Mr. Pattenaude insisted again that the tire be changed. (Tr. at 78). Mr. Bowers arrived at DTE, and both he and Mr. Wilson were "kind of upset" that Mr. Pattenaude was not driving the truck with the tire with low air pressure back to the Severstal mill. (Tr. at 79). Mr. Pattenaude testified that he could tell that they were upset because Mr. Bowers returned from Severstal to DTE very quickly, because Mr. Bowers was "pacing" at the facility, and because Mr. Wilson simply walked away when Mr. Pattenaude told him he could not drive the truck. (*Id.*). When moving the truck away from the loading area, Mr. Pattenaude observed a bolt in the tire that he believed had low air pressure, which confirmed his belief that the truck was not safe to drive. (Tr. at 80-81). Mr.Pattenaude then parked the truck with the low tire and took another truck once its tanker was loaded. (Tr. at 83).

Mr. Pattenaude then drove to Severstal and unloaded the tanker [despite the fact that employees were slipping seats] (Tr. at 83), before proceeding to DTE to reload it. (Tr. at 84-85). He then went into the small waiting room at DTE, sat on a chair, and put his legs up. (Tr. at 85). Some short time later, Mr. Wilson walked into the room:

> Q [Mr. Harris, attorney]: And what happened?
> A [Mr. Pattenaude]: When he came through this door he hit me, you know, like . . . brushing the door.
>
> . . .
>
> Q: … Darrick entered that room?
> A: Yeah. He says, "Hey, wake up." And he kept right on walking through, and he walked through where the truck was at, and that's all he said.
> Q: What did you say, if anything?
> A: I just started laughing. Because it was just like, you know, because that's what we do, you know. You can stun people. We normally knock on the door before we walk into the little room. Because, especially at Severstal because if the guy is snoozin' because you're all cramped up there, there's nothing to do if he's snoozin'; he's normally leaning up against the door. If you open up against the door, you'll flop out on the ground. Well, the guy would get made, so we had a habit of knocking on the door before opening it up.
> Q: When you say "we," are you referring to yourself?
> A: Every driver and even supervision.
> Q: Okay. When you say supervision, who are you referring to?
> A: I'm referring to Larry, and referring to at the time, Dave Baker.

(Tr. at 85-86). Mr. Pattenaude testified that the loading had not completed at this point, and so he waited for the tanker to load before disconnecting and driving to Severstal. (Tr. at 87).

Mr. Pattenaude completed the rest of his shift, and returned to work the next day. (*Id.*). At the end of his shift on July 5, Mr. Pattenaude went to punch out, at which point his

supervisors informed him that he was being written up for sleeping on the job. (Tr. at 88-90). Mr. Bowers asked that Mr. Pattenaude sign the incident report, which he did (Tr. at 91; *see* RE H). Mr. Wilson informed Mr. Pattenaude that he would be suspended, and asked for his badge and gate pass. (Tr. at 90). Mr. Pattenaude testified, however, that he was told that the suspension would not result in termination. (Tr. at 92). Mr. Pattenaude acknowledged that exhibit RE J was a letter dated July 5, 2012, from Mr. Wilson to Respondent's owner, John Shepard, recommending Mr. Pattenaude's termination (Tr. 95-96), and the record shows that Mr. Shepard followed this recommendation and terminated Mr. Pattenaude on July 16, 2012. (RE K).

Mr. Pattenaude concluded his direct testimony by testifying that he did not believe that he was terminated for sleeping on the job, but rather for raising safety concerns, and specifically for "downing" (*i.e.*, taking out of service) the truck that he had identified as having a tire with low air pressure. (Tr. at 93). Mr. Pattenaude stated that he believed this was the case for two reasons: because he believed Mr. Wilson and Mr. Bowers had become disgruntled with his having reported safety concerns (Tr. at 93-94), and because other employees and supervisors slept on the job without any repercussion. (Tr. at 96-103). In fact, Mr. Pattenaude testified, he had caught both Mr. Wilson (Tr. at 96-98) and Mr. Bowers (Tr. at 99-103) asleep while at work, a few weeks before he was terminated. He testified that he had found Mr. Wilson asleep in the small waiting room at DTE approximately four weeks before he was terminated and that he had to wake Mr. Wilson up. (Tr. at 96-98). Similarly, he testified that a few weeks before he was terminated he found Mr. Bowers asleep in his pickup truck at the Severstal steel mill at a time when Mr. Bowers was supposed to be supervising the employees. (Tr. at 96-101). He testified that he reported this incident to Mr. Wilson and was not sure how it was resolved; however, he knew that neither Mr. Wilson nor Mr. Bowers were terminated (Tr. at 98; 103). Thus, Mr. Pattenaude stated, he didn't believe that he was in fact terminated for sleeping on the job, but for reporting low air pressure in the truck's tire.

On cross-examination, Mr. Pattenaude admitted that he had received from Respondent copies of federal regulations governing the transport of hazardous materials; specifically those found in the *Hazardous Material Compliance Pocketbook*, RE A, and in the *Federal Motor Carrier Safety Regulations Pocketbook*, RE B. (Tr. at 105). He stated that he understood that those regulations required that drivers be "alert at all times" when transporting hazardous materials. (Tr. at 106). Mr. Pattenaude admitted that sleeping while coal was being loaded into a tanker may have violated federal regulations because he was not alert while sleeping, but he answered affirmatively that sleeping on the job was "included within [the] job description" because "we did, yes [ignore federal regulations]" by sleeping at work. (Tr. at 114). He stated that he did not believe that sleeping while the tanker was being loaded was dangerous if the driver only slept during the automated process: "[w]hen you start it up and get under pressure [*i.e.*, at the beginning of the loading process] . . . that's when something is going to happen." (Tr. at 113).

Mr. Pattenaude also testified on cross-examination as to Respondent's business practice of changing tires. (Tr. at 115-17). He testified that "if the tire was low" that "a lot of times they would come out and they'd air the tire up . . . . We'd say look, we need someone out here to change this tire. It's going down the road and every day we come in the tire is lower, so we'd

have to air it up." (Tr. at 116). He testified that tires would be filled "about a week or two after" employees pointed out that they had low air pressure, and that in the interim drivers would fill the tires themselves "every time [they] took off." (*Id.*). He stated that although sometimes drivers would take trucks out even if they had low pressure, he had never done so. (Tr. at 117).

Mr. Wilson's Testimony

Mr. Wilson began his testimony by testifying as to his position with Respondent and Respondent's business model. (Tr. at 129-31). Mr. Wilson testified that he had been employed by Respondent as a controller who paid bills and reviewed contracts, and also supervised drivers. (Tr. at 129). He testified that Respondent has a single customer, the Severstal steel mill, and that its only business was to deliver pulverized coal from DTE to the mill. (Tr. at 130-31). He emphasized the importance of delivering coal to the mill in a timely fashion, both for Severstal, which would have to switch to natural gas if deliveries went unfulfilled, and for Respondent, which stood to lose its single customer if it failed to do so. (Tr. at 131).

Mr. Wilson outlined the basic responsibilities and expectations of Respondent's employees. (Tr. at 132-37). Of particular relevance was a policy circulated in an intra-company bulletin, dated June 13, 2012 (and signed by Mr. Pattenaude), that stated that: "Leaving your trailer unsupervised during the off-load and/or loading process is grounds for immediate termination." (Tr. at 137; *see* RE C). That policy was in keeping with the *Hazardous Material Compliance Pocketbook*, Mr. Wilson testified, which states:

> There are attendance requirements for cargo tanks that are being loaded and unloaded with hazardous materials. Such a tank must be attended at all times during loading and unloading by qualified personnel. The person who is responsible for loading the cargo is also responsible for seeing that the vehicle is attended . . . .
>
> . . .
>
> A person qualified to attend the cargo tank during loading and/or unloading must be: alert; within 25 feet of the cargo tank; have an unobstructed view of the cargo tank and delivery hoses(s) to the maximum extent practicable . . . .

(Tr. at 133-34; RE A). Furthermore, Mr. Wilson testified, Respondent's stated policy that leaving a trailer unsupervised was grounds for immediate termination was in keeping with Federal Motor Carrier Safety Regulation 49 C.F.R. Part 397.5(a), which states: "[A] motor vehicle which contains a Division 1.1., 1.2, or 1.3 (explosive) material, must be attended at all times by its driver or a qualified representative of the motor carrier that operates it." (Tr. at 135; RE B).

Mr. Wilson then testified about Mr. Pattenaude alerting him of low air pressure in a truck tire on July 4, 2012. (Tr. 140-41). He corroborated Mr. Pattenaude's testimony that on that day drivers were instructed to slip seats. (Tr. at 140). He stated that Mr. Pattenaude was instructed to drive a truck loaded with coal to the Severstal steel mill, but that Mr. Pattenaude "went over [to the truck] and the next thing, like maybe five minutes later, he comes back and he says,

'Dar[rick], we've got a major problem.'" (Tr. at 140-41). Mr. Pattenaude told Mr. Wilson that the truck had a tire with low air pressure, and Mr. Wilson testified that, "I says, okay . . . and the next thing I know that he had moved the truck out of the way. I assumed that he called Larry. He moved the truck out of the way and then he went into the other truck and began unloading that one." (Tr. at 141).

Mr. Wilson testified that Respondent routinely dealt with flat tires on its fleet of vehicles. (Tr. at 141-43). He estimated that Respondent changed tires "every day-and-a-half." (Tr. at 141). He stated that it was Respondent's business practice when a driver reported a flat tire during pre- or post-trip safety inspections to record the flat and send an invoice to the customer, to whom it charged the costs of replacing the tire, "plus make a profit from it." (Tr. at 142).

Mr. Wilson then testified about finding Mr. Pattenaude asleep in the waiting room at DTE and the disciplinary actions Respondent took. (Tr. at 143-47). He stated that he saw Mr. Pattenaude arrive in the unloaded truck, and that he heard the loading process complete. (Tr. at 143). When he did not see Mr. Pattenaude exit the loading area, Mr. Wilson testified, he "went up to check to make sure that everything was okay and [Mr. Pattenaude] was sleeping. And there's a difference in my mind visually between dozing off and sleeping and Kermit was sleeping." (*Id.*). Mr. Wilson stated that he was "appalled" to find Mr. Pattenaude asleep because "it was unexpected." (*Id.*). He attempted to awaken Mr. Pattenaude:

> Q [Mr. Herstein, attorney]: How did you initially attempt to wake him up?
> A [Mr. Wilson]: I yelled his name.
> Q: Did he respond?
> A: No, sir.
> Q: And then what happened?
> A: I raised—with a louded [sic] voice, Kermit, wake up.
> Q: Did he respond?
> A: Yeah. He woke up.

(Tr. at 144).

Mr. Wilson testified that he called Mr. Bowers and then the president of the company, John Shepard, to report the incident. (Tr. at 145). Mr. Shepard asked if the operation could continue without Mr. Pattenaude, but Mr. Wilson informed the president that it could not. (Tr. at 145-46). Mr. Wilson testified that he prepared two reports detailing finding Mr. Pattenaude asleep: a letter to Mr. Bowers and a letter to Respondent's president, Mr. Shepard. (Tr. 146-47). Mr. Wilson testified that he recommended to Mr. Shepard that Mr. Pattenaude be terminated. (Tr. at 147; *see* RE I-J). Mr. Wilson concluded his direct testimony by stating that the only reason that Mr. Pattenaude was terminated was because he had fallen asleep on the job in violation of company policy and the federal regulations, that Respondent took safety regulations seriously, and that Respondent would have terminated any employee found asleep. (Tr. at 147-48).

On cross-examination, Mr. Wilson testified that another driver had been terminated for violating federal safety regulations after Mr. Pattenaude was terminated; the driver was

terminated for skirting a railroad crossing gate. (Tr. at 152-53). This was the only other employee Mr. Wilson could recall being terminated for violating safety regulations. (Tr. at 153).

Mr. Wilson testified that he could not recall any other instance of a truck being taken out of service during a shift when its tires had low air pressure; he also testified that he had no motive as controller to investigate such incidents. (Tr. at 153-54). In response to my questioning, Mr. Wilson testified that he recalled one instance of a truck being taken out of service because a GPS-device blocked the driver's view. (Tr. at 155-59). In that instance, Mr. Wilson could not recall whether the truck had previously made the circuit between DTE and Severstal, but that the driver did complete his shift that day. (Tr. at 159).

Mr. Wilson was then questioned about the practice of "slipping seats" and its compliance with federal commercial motor vehicle licensing regulations. (Tr. at 159-63). Mr. Wilson testified that supervisors engaged in the loading and unloading process when slipping seats, although they were not licensed to drive commercial motor vehicles and lacked the endorsements required to transport hazardous materials. (Tr. at 159-60; *see* Tr. at 138). Mr. Wilson testified that he believed that this practice conformed with the federal regulations based on the interpretation of a consultant. (Tr. at 159-60). He also testified that Respondent had contacted a federal agency, although he could not recall the name of the agency or the person who had contacted the agency, and stated that the agency's advice was "verbal." (Tr. at 160-61). The agency's advice was that so long as Respondent's supervisors were transporting hazardous materials on private property, no certification was required. (Tr. at 161). Mr. Wilson testified that Respondent had never been fined for allowing unlicensed supervisors to operate vehicles. (Tr. at 163).

Mr. Wilson was then questioned about his decision to allow Mr. Pattenaude to complete his shift on July 4 and to work on July 5 after being found asleep. (Tr. at 163-64). He stated that he did not make the decision to allow Mr. Pattenaude to continue working on July 4 and that the decision was necessary because Respondent was short-staffed. (Tr. at 164). He stated that he allowed Mr. Pattenaude to work on July 5, despite continuing to be "appalled" at finding him sleeping on the job and despite having a full fleet of drivers on July 5. (*Id.*).

Finally, Mr. Wilson unequivocally denied that Mr. Pattenaude had reported Mr. Bowers sleeping at work, or finding Mr. Wilson asleep at work. (Tr. at 164-66).

> Q [Mr. Harris]: [Y]our testimony is that [Mr. Pattenaude reporting that he found Mr. Bowers sleeping at work] did not happen?
> A [Mr. Wilson]: Yes, sir.
> Q: And I assume your testimony then is also that when [Mr. Pattenaude] testified that he came up to you and he found you and you were nodding off that that didn't happen either?
> A: That is correct.

(Tr. at 165).

I then asked Mr. Wilson about the letter sent to Mr. Bowers (*see* RE I); specifically, why the letter did not include a description of Mr. Pattenaude pointing out the flat tire shortly before he was found asleep. (Tr. 166-67). Mr. Wilson stated that "I did not know that the tire was going to be the highlight of the incident . . . . It's like for us changing tires, it's like me getting an email. I can't get mad because that happens. It's just a matter of daily routine." (Tr. at 167). He reiterated that he had not included the tire incident because "I didn't realize that changing the tire was a matter of contention until months later." (*Id.*).

I also asked Mr. Wilson if he could explain why no disciplinary incident reports for Mr. Pattenaude existed before June 21, 2012. (Tr. at 167-70). Mr. Wilson testified that in April 2012, Respondent began investigating "ways to better structure the operation in a way that says more documentation, more proof of documentation . . . ." (Tr. at 169). Mr. Wilson testified that this decision was a response to complaints from drivers about human resources (Tr. at 168), high employee turnover (Tr. at 169), and a loss in productivity (*Id.*).

Mr. Bowers's Testimony

Mr. Bowers began his testimony by testifying as to his position and responsibilities with Respondent. (Tr. at 170-73). He stated that he was a supervisor and that his job included monitoring "day-to-day" operations for "safety" and "maintenance." (Tr. at 171). He stated that maintenance of Respondent's fleet of trucks was routine, and that it "can be a day-to-day thing." (Tr. at 172). "There's always something going on where we're switching around and if there's no repairs, [the trucks] still get broken apart, greased, and put back together." (*Id.*).

Mr. Bowers testified further that Respondent followed federal safety regulations and required its drivers to remain alert on the job. (Tr. at 172-73). He stated that drivers were not allowed to sleep or doze during the loading or unloading process. (Tr. at 173). He described the repercussions for an employee found asleep at work: "they would be written up, suspended, an investigation started, and more than likely termination." (*Id.*). He stated that Respondent had made it clear to the drivers that they "must be in sight of the equipment to push the emergency stop" when loading or unloading so that the driver could monitor the process. (Tr. at 173-74).

Mr. Bowers testified that Mr. Wilson informed him that Mr. Pattenaude was found asleep at work. (Tr. at 174-78). He stated that Mr. Wilson called him to report that Mr. Pattenaude was found sleeping while a truck was being loaded, an activity not "tolerated" by Respondent. (Tr. at 175). After being informed, Mr. Bowers informed his own boss of the incident. (*Id.*). He testified that he did not make any decisions regarding Mr. Pattenaude's employment, but rather that "my bosses" had decided to discipline Mr. Pattenaude. (Tr. at 179).

Mr. Bowers testified that Mr. Pattenaude was required to sign an incident report acknowledging that he was found sleeping at work; in fact, Mr. Bowers testified, Mr. Pattenaude verbally admitted that he had been found asleep at work when he was asked to sign the incident report. (Tr. at 178). Mr. Bowers stated that drivers must be alert when conveying materials (whether hazardous or not), that a driver sleeping on the job was not in compliance with federal law, and that he believed Mr. Pattenaude was terminated for sleeping on the job. (Tr. at 181-82).

Mr. Bowers testified that "tire maintenance" was a "regular part" of Respondent's business practices. (Tr. at 179). He stated that "on any given day you can do one tire or multiple tires." (*Id.*). Furthermore, on "some occasions when [drivers are] en route, they get a flat . . . but it's no big deal. We actually get paid a service charge to repair that, so we call out a tire truck and have it repaired." (*Id.*).

On cross-examination, Mr. Pattenaude testified as to Respondent's enforcement of company safety policies. (Tr. at 182-88). Mr. Bowers stated that a truck loaded with pulverized coal had never been taken out of service because of a flat tire other than on July 4, 2012. (Tr. at 183). He stated that drivers were disciplined for not being in line of sight of their trucks when they were being loaded, including a driver who had the night before been "put off for a couple days" because he was "[s]itting in his truck while it was loading." (Tr. at 185). He testified that this driver was not terminated because he was not sleeping and so he could still effect emergency procedures if needed. (Tr. at 185-86).

Mr. Bowers testified as to Respondent's "slipping seats" business practice. (Tr. at 188-92). Mr. Bowers testified that he would drive trucks loaded with hazardous material and that he did not have the license or endorsements required to do so, but because he only drove trucks at the Severstal mill and DTE, *i.e.*, on private property, that no license was required. (Tr. at 188-90). He testified that his understanding of federal commercial motor vehicle licensing regulations was based on advice he had received from state troopers who had performed inspections of Respondent's operations. (Tr. at 190-91). He also testified that Severstal transportation management had told him that no license was necessary (Tr. at 191), but that no governmental authority had given him this advice (Tr. at 192).

Finally, Mr. Bowers testified that he had "possibly" slept in the pickup truck he drove to the Severstal steel mill, but that if he had slept it was not while loading. (*Id.*). Furthermore, he took care to only sleep in the truck off the premises, just as he would if he was taking a smoke break. (Tr. at 192-93). He stated that "I smoke, I go outside. And, yeah, I could be putting my arms back or leaning back, but I work longer hours than they do. So [that's OK]." (Tr. at 193). He stated that he could not recall Mr. Pattenaude finding him asleep, and that he would be aware of that happening if it had; Mr. Pattenaude's testimony as to finding Mr. Bowers asleep was untrue, Mr. Bowers testified. (Tr. at 193-94).

ISSUES

Respondent does not dispute that it is an employer; that Mr. Pattenaude was an employee; that Mr. Pattenaude engaged in protected activity under the provisions of the STAA by reporting low air pressure in a truck's tire; and that Mr. Pattenaude's suspension and termination were adverse actions. (RSI at 1-2).

The following issues remain to be decided:

1. Whether Mr. Pattenaude's protected activity in reporting low air pressure in a truck's tire was a contributing factor in his suspension and subsequent termination;

2. If so, whether Respondent has shown that it would have suspended and terminated Mr. Pattenaude absent his protected activity.

DISCUSSION

A. Applicable Standards

In a STAA proceeding the initial burden of proof is on the Complainant, who must establish by a preponderance of the evidence that the employer took adverse action 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). The protected activity need only be a contributing factor to the employer's decision to terminate the Complainant. 29 C.F.R. § 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."). Thus, Complainant must show (1) that he engaged in protected activity; (2) that Respondent took an adverse employment action against him; and (3) that his protected activity was a contributing factor in the adverse personnel action. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 6 (ARB Feb. 29, 2012); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008- STA-052, slip op. at 5 (ARB Jan. 31, 2011); 29 C.F.R. § 1978.109(a). If complainant makes this showing, the Respondent may escape liability only by showing by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant's protected activity. *Warren*, ARB No. 10-092, slip op. at 12; 29 C.F.R. § 1978.109(b).

B. Complainant Has Shown that Protected Activity was a Contributing Factor in His Termination

Mr. Pattenaude has shown, by a preponderance of the evidence, that his complaint to Mr. Wilson and Mr. Bowers regarding low air pressure in his truck tire was a contributing factor in his suspension and termination. A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams*, ARB 09-092, slip op. at 6.

Mr. Pattenaude has shown that his complaint regarding low air pressure affected Respondent's decision to suspend and terminate him via indirect evidence; namely, temporal proximity. If a Complainant "does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment." *Warren*, ARB No. 10-092, slip op. at 11 (*citing Williams*, ARB 09-092, slip op. at 5). The ARB has held that "temporal proximity" between a protected activity and an adverse action can indirectly evidence a causal link:

> One of the common sources of indirect evidence is "temporal proximity" between the protected activity and the adverse action. While not dispositive, the closer the temporal proximity is, the stronger the inference of a causal connection. This

indirect or circumstantial evidence can establish a causal connection between the protected activity and adverse acts.

Warren, ARB No. 10-092, slip op. at 11 (*citing Reiss v. Nucor Corp*., ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010)).

Mr. Pattenaude complained about low air pressure in his truck's tire on July 4, 2012, and it is not disputed that Mr. Pattenaude's complaint was protected activity under the STAA. Mr. Pattenaude was suspended the following day, and was terminated on July 16. Again, it is not disputed that his suspension or termination were adverse employment actions. I find that the very close temporal proximity between Mr. Pattenaude's complaint and the adverse employment actions at issue is indirect evidence of a causal connection between the protected activity and the suspension and firing. Accordingly, based on the temporal proximity, I find that Mr. Pattenaude met his burden to show by a preponderance of the evidence that his protected activity was a contributing factor in his suspension and termination.

C. Respondent Has Shown that It Would Have Taken the Same Adverse Actions Absent Complainant's Protected Activity

1. Respondent Has Carried Its Burden

Respondent has carried its burden of demonstrating, by clear and convincing evidence, that it would have suspended and terminated Mr. Pattenaude even if he had not complained about the truck tire's low air pressure. I find credible Mr. Wilson and Mr. Bowers's testimony that Mr. Pattenaude was terminated because he was found sleeping on the job. The testimony is corroborated by ample evidence demonstrating Respondent's zero-tolerance policy for sleeping on the job. The intra-company bulletin dated June 13, 2012, clearly states that "leaving your trailer unsupervised during the off-load and/or loading process is grounds for immediate termination." (RE C). The bulletin conforms with regulations found in two handbooks that were distributed to all of Respondent's employees, the *Hazardous Materials Compliance Pocketbook* (RE A) and the *Federal Motor Carrier Safety Regulations Pocketbook* (RE B). The former requires that drivers of hazardous materials be "alert at all times." (RE A at 3). The latter cites 49 C.F.R. Part 397.5, which states that "a motor vehicle which contains [explosive] material must be attended at all times by its driver or a qualified representative of the motor carrier that operates it." The regulation continues: "[a] motor vehicle is attended when the person in charge of the vehicle is on the vehicle, awake . . . or within 100 feet of the vehicle and has it within his/her unobstructed field of view." *Id.* Clearly, sleeping is equivalent to "leaving your trailer unsupervised," and is out of line with Respondent's policies and the federal regulations.

I also find probative Respondent's evidence that maintaining air pressure in truck tires and replacing tires as needed was a routine aspect of its business. For example, Mr. Wilson testified that "changing tires" was, for Respondent's supervisors, like "getting an email" and for that reason he did not include Mr. Pattenaude's complaint on the July 4 incident report. His testimony is corroborated by Mr. Bowers's description of the maintenance performed on the trucks, and by Mr. Bowers's letters to Mr. Bowers and Mr. Shepard, in which Mr. Wilson did not note that Mr. Pattenaude had reported a flat tire that resulted in the truck being "grounded." I

note that Mr. Pattenaude testified that Respondent's supervisors were not concerned with maintaining adequate air pressure in the tires and would only fix the problem "about a week or two after" employees complained. However, Mr. Pattenaude was a driver, not a supervisor, and although he performed pre- and post-haul safety inspections, his knowledge of Respondent's maintenance and safety practices would necessarily be more limited than that of his supervisors. Furthermore, Mr. Pattenaude's testimony in this regard is uncorroborated, while the testimonies of Mr. Wilson and Mr. Bowers corroborate one another and are reinforced by Respondent's exhibits.

2. Complainant Has Failed To Demonstrate Pretext

Mr. Pattenaude has argued that the stated rationale for his suspension and termination is a pretext for discriminatory retaliation. (Tr. at 9-10; 198-200; CB at 5-6). A complainant may

> prove or buttress a whistleblower claim by proving that employer's proffered reasons were pretextual (not credible), but such a showing is not required. However, where the employee presents evidence that the employer's adverse actions *were* pretextual, this may warrant a finding by an ALJ that the employer failed to prove by clear and convincing evidence that the adverse action would have occurred even absent the protected activity.

Warren, ARB No. 10-092, slip op. at 11 (ARB Feb. 29, 2012) (citing *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sep. 30, 2011)). Thus, if Mr. Pattenaude can demonstrate that the stated reasons for his termination were pretextual, I should find that Respondent has failed to prove by clear and convincing evidence that Mr. Pattenaude would have been suspended and terminated absent his complaint.

Mr. Pattenaude suggests that Respondent's explanation for his termination is pretextual for two reasons. First, he testified that Mr. Bowers, Mr. Wilson, other drivers and (possibly) other supervisors fell asleep at work and did not face adverse actions: the "very same individuals" who terminated him "engaged in the same conduct [*i.e.*, sleeping] and were not terminated." (CB at 5). The only evidence that other employees were found asleep, however, is Mr. Pattenaude's uncorroborated testimony. Mr. Wilson and Mr. Bowers, on the other hand, corroborated one another when they testified that they had never been found asleep on-duty by Mr. Pattenaude. Furthermore, I find their testimony to be, on the whole, more credible than Mr. Pattenaude's. I therefore give greater weight to the corroborated testimony of Mr. Wilson and Mr. Bowers and reject Mr. Pattenaude's claim that other employees were found asleep on the job.

Mr. Pattenaude also argues Respondent's supervisors violated federal commercial motor vehicle licensing regulations by "slipping seats" and therefore, Mr. Pattenaude argues, "it is simply incredible that the individuals who terminated Pattenaude did so because he nodded off." (CB at 5). Mr. Pattenaude states that "[t]hese individuals required Pattenaude to engage in their egregious violations of federal commercial motor vehicle regulations when they insisted that he 'slip seats' and allow them to operate [the trucks without licenses]." (CB at 5-6). In essence, Mr. Pattenaude argues that if his supervisors did not take federal safety regulations governing

commercial driver licensing standards seriously and in fact encouraged drivers to violate them, I should not credit their explanation for terminating him for a violation of a safety regulation. In his pre-hearing brief, Mr. Pattenaude cites 49 C.F.R. § 383.23(a): "No person shall operate a commercial motor vehicle unless such person has taken and passed written and driving tests for a … CDL [commercial driver's license] that meet the Federal standards contained in subparts F, G, and H of this part for the commercial motor vehicle that person operates or expects to operate." (CB at 6). At the hearing, his attorney argued,

> The federal regulations unequivocally state that if you are going to operate a commercial motor vehicle, you must have a CDL and the appropriate endorsements. There are exceptions …. [b]ut none of those exceptions identify private property as being appropriate for a basis of saying you know what, I'm going to drive this tanker full of combustible coal dust and let it blow up and see what happens because it's on private property.

(Tr. at 200).

I find this argument unpersuasive because it not only assumes that Respondent violated 49 C.F.R. § 383.23, but also because it would only be relevant here if Respondent either knowingly or recklessly violated that regulation. In other words, even if I found that Respondent violated 49 C.F.R. § 383.23 by allowing supervisors to operate trucks on private property when slipping seats, this violation would only be probative of retaliatory discharge if Respondent knowingly—or, at least, recklessly—violated the regulation.[1] That is, if Respondent mistakenly violated the regulation for commercial driver licensing standards while reasonably believing it was conforming to those standards, there would be nothing inconsistent in Respondent terminating Mr. Pattenaude for violating federal regulations, and thus Complainant would not have demonstrated pretext. Mr. Bowers and Mr. Wilson testified credibly that they relied on multiple sources, including a consulting agency, the state troopers who inspected their facilities, and their client's management, for the belief that supervisors could lawfully operate trucks on private property. Furthermore, Respondent's supervisors had never been fined for engaging in this practice. I find that the belief that allowing supervisors to operate commercial motor vehicles on private property without CDLs was therefore subjectively and objectively reasonable, and thus, even assuming *arguendo* that Respondent violated 49 C.F.R. § 383.23, there is no evidence that the putative violation was done knowingly or recklessly.[2] Thus there is

[1] Mr. Pattenaude implies this *mens rea* when he describes Respondent as engaging in "egregious violations" (CB at 5).

[2] While I do not make any finding as to whether Respondent actually violated regulations concerning federal regulations concerning the operation of commercial vehicles on private property, I am aware of the following interpretive guidance from the Federal Highway Administration (FHWA). In "Regulatory Guidance for the Federal Motor Carrier Safety Regulations," the agency posed hypothetical questions to interpret regulations under 49 C.F.R. Part 383. In interpreting Section 383.3, which governs general applicability of the Title 49 regulations, the agency posed the question:

> **Question 5**: May a person operate a CMV [commercial motor vehicle] wholly on private property, not open to public travel, without a CDL?
> **Guidance**: Yes.

no inconsistency between Respondent believing that it took safety seriously and complied with all safety regulations (even if that belief was incorrect) and punishing an employee for violating a safety regulation. Accordingly, Complainant has not presented evidence that would demonstrate that Respondent's stated reason for his suspension and termination was a pretext for discriminatory retaliation.

CONCLUSION

Although Mr. Pattenaude has carried his burden of demonstrating by a preponderance of the evidence that his protected activity was causally linked to his suspension and subsequent termination, Respondent has demonstrated by clear and convincing evidence that those adverse actions would have been taken even if Mr. Pattenaude had not engaged in a protected activity. Therefore, in taking those adverse actions Respondent did not violate the STAA.

ORDER

For the foregoing reasons, the complaint of Kermit Pattenaude is **DISMISSED.**

SO ORDERED.

Digitally signed by PAUL R. ALMANZA
DN: CN=PAUL R. ALMANZA,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

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62 Fed. Reg. 16,370 (April 4, 1997). And in interpreting Section 383.23, which governs the standards for commercial driver licensing standards, the agency posed the question:

> **Question 3**: Is a CDL required for CMV operations that occur exclusively in places where the general public is never allowed to operate, such as airport taxiways or other areas restricted from the public? **Guidance**: No. FHWA regulations would not require a CMV driver to obtain a CDL under those circumstances.

Id. at 16,396. These Q&As are, of course, merely interpretive guidance, and I do not read them unequivocally to hold that Respondent did not violate the 49 C.F.R. Part 383 standards by slipping seats. Nevertheless, this guidance from FHWA raises serious doubts regarding whether this practice violated the regulations. If Respondent did *not* violate the regulations, then Mr. Pattenaude fails to show that Respondent's stated reason for his termination was incredible (and therefore pretextual): if he cannot show that Respondent was a scofflaw, then there is nothing incredible about Respondent's taking steps to ensure its employees followed the law.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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 may be found to have waived 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, 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(b). 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(b).