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Issue Date: 17 June 2014

CASE NO.: 2013-STA-63

IN THE MATTER OF

RAMIRO SEGOVIA,
Pro-se Complainant

vs.

TM EXPRESS,
Pro-se Respondent

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (hereinafter the STAA) and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to the terms and conditions of employment because they refused to operate a vehicle when it would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

On 16 Jan 13, Complainant filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent had fired him on 14 Dec 12 in retaliation for his refusal to operate a vehicle after reporting violations of a safety regulation. OSHA conducted an investigation, and on 22 Jul 13 issued a decision finding for Complainant and ordering Respondent to pay Complainant $730.00, to expunge any adverse references in Complainant's records, and to post a notice. On 30 Jul 13, Respondent's president, Mr. Gene Pilgrim, objected to the findings and requested a *de novo* hearing. The matter was referred to OALJ for hearing and on 10 Sep 13, I conducted a conference call with both parties, who agreed to waive an in-person appearance and conduct their hearing by telephone.

The hearing was conducted on 12 Feb 14. Both parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, and make arguments. Both parties also submitted additional documents after the hearing.[1] Neither party elected to file a post hearing argument. My decision is based on the entire record, which consists of the following:[2]

[1] CX-2 and RX-1.
[2] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

Witness Testimony of
Complainant
Gene Pilgrim

Exhibits
Claimant's Exhibits (CX) 1- 2
Respondent's Exhibits (RX) 1

FACTUAL BACKGROUND

Complainant worked for Respondent from October through December of 2012 as a truck driver. On 14 Dec 12, while driving truck for Respondent, he was cited and fined for being overweight and having a defective tail light.

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

At his hearing Complainant insisted that his primary complaint is that he was promised that if he took a truck and was cited, Respondent would pay the resultant fines. However, in response to questions, he added that he wanted to include in his case his allegation that he was terminated by Respondent for complaining about maintenance issues with the trucks and refusing to drive a truck with a suspension or mud flap problem. Nonetheless, he also stated that he was able to get other employment, lost no wages, and does not want to return to work for Respondent. The only relief he is seeking is an order that Respondent reimburse him for those fines.

Respondent counters that Complainant never complained about maintenance problems or refused to drive a truck. It maintains that his overweight ticket was a result of his failure to follow proper practice, which would have been to take the truck to the nearest scale to check the weight and, if need be, return to the origin or stop along the way and fix the weight. Respondent insists that if Complainant had done that, he would not have been cited for either violation. Respondent also argues that Complainant was not terminated, but rather simply walked off the job on his own and subsequently taken off the payroll.

LAW

The Act provides that

> (a) Prohibitions.--(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
>
> (A) the employee … has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety … regulation, standard, or order, or …
>
> (B) the employee refuses to operate a vehicle because--
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security;
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition; [3]

To prevail on his claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the respondent took an adverse employment action against him, and that his protected activity was a contributing factor in the unfavorable personnel action. If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.[4]

Although it is not necessary that a complaint expressly cite the specific motor vehicle standard, which it is alleged has been violated, the complaint must "relate" to a violation of a commercial motor vehicle safety standard. For a finding of protected activity under the complaint clause of the STAA, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation.[5] If a complainant's protected activity is a refusal to drive because it would have resulted in a violation of a regulation, standard, or order, he must prove that was the case; his belief, even if in good faith, is irrelevant.[6]

An adverse action is anything an employer does that could well dissuade a reasonable worker from engaging in protected activity.[7] The implementing regulations prohibit as adverse action and make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]"[8] A respondent

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[3] 49 U.S.C. § 31105.
[4] *Salata v. City Concrete, LLC*, 2008-STA-12 and -41 (ARB Sept. 15, 2011).
[5] *Ulrich v. Swift Transportation Corp.*, 2010-STA-41 (ARB Mar. 27, 2012).
[6] *Minne v. Star Air, Inc.*, 2004-STA-26 (ARB Oct. 31, 2007).
[7] *Strohl v. YRC, Inc.*, 2010-STA-35 (ARB Aug. 12, 2011).
[8] 29 C.F.R. §§ 1978.102(b), (c).

constructively discharges a complainant when working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign.[9]

Employers found in violation may be ordered to take affirmative action to abate the violation; reinstate the complainant to the former position with the same pay and terms and privileges of employment; pay compensatory damages, including backpay with interest and for any special damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney fees; and pay punitive damages in an amount not to exceed $250,000.[10]

Unless it is impossible or impractical, reinstatement is an automatic remedy under the Act and respondent employers must make a bona fide reinstatement offer.[11] However, reinstatement may be waived.[12] Respondents may be ordered to compensate complainants for having experienced depression and hardship, if the weight of the evidence supports such an award.[13] Respondents may also be ordered to expunge or correct a complainant's work record[14] and post a workplace notice.[15]

EVIDENCE

Respondent testified at hearing and his OSHA submission state in pertinent part:[16]

> He worked for Respondent, which is a common carrier that hauls freight. He is a truck driver and started working for them in October 2012. The trailers and the tractor were not in good condition. He would advise the local manager, Rick Salinas. It was every day or every other day that they had problems, not only him, but the other drivers too. At one point he told Salinas he would stop driving because of the condition of the rigs. This was happening on and off in October, November and December of 2012.
>
> There were problems with the tail and head lights not working or missing and missing chunks from the tires. The tires were not in good condition. They were missing mud flaps, too. There was a hard mud flap that the DPS Trooper brought to the attention of another driver. That's why he didn't want to drive that tractor. It was missing like a hard mud flap behind the cab, where there are four tires.
>
> He mentioned all this stuff to Salinas, but Salinas would just laugh and tell him to go to the warehouse and call the mechanic, but the mechanic didn't want to come because he wouldn't get paid. About two or three times, the mechanic did come and fixed the problem.

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[9] *Earwood v. D.T.X. Corporation*, 88-STA-21 (Sec'y Mar. 8, 1991).
[10] 49 U.S.C. § 31105(b).
[11] *Dickey v. West Side Transport, Inc.*, 2006-STA-26 and 27 (ARB May 29, 2008).
[12] *Young v. Park City Transportation*, 2010-STA-65 (ARB Aug. 29, 2012).
[13] *Id.*
[14] *Shamel v. Mackey*, 85-STA-3 (Sec'y Aug. 1, 1985).
[15] *Scott v. Roadway Express, Inc.*, 1998-STA-8 (ARB July 28, 1999).
[16] Tr. 7-31; 48-70; CX-1 p8-9.

Sometimes he did take the truck even when it wasn't fixed. There wasn't a day that he took the trailer that it wasn't missing a required clearance light on top of the front of the trailer. Salinas told him to take the trailer on the way to Round Rock and then they would take it to Houston and fix it there.

There was a weight problem, too. When he started, he told them that he needed to meet real weight. The first day that he started working, he took a trailer with 46,000 pounds and Salinas told him, "Come on, the other guy took 50 to 2000 pounds upright and nothing happened." Rick Salinas told him that the scales were always closed in Texas. He cannot say if he was overweight or not because they don't have scales there in the yard. One day they gave him 46,000 pounds and he told them he needed to weigh the trailer. Rick Salinas told him that Respondent would pay the overweight. The scales were closed in Divine. He was 47,000 pounds. He needed to scale the trailer. That happened three or four times.

He had a trip on 14 Dec 12. He completed a Driver's Vehicle Inspection Report DVIR at Round Rock, Texas. He would always fill out the pre-trip before leaving. In Laredo, he would leave it there with Rick Salinas. He took the truck to a scale near Round Rock. He was 8,620 pounds over. Starting in Round Rock headed to Laredo on 35 and then 281 he got stopped in Divine. Since he was overweight, they pulled him over and checked everything on the tractor and the trailer. They tagged him for a defective turn signal lamp. It was blinking properly, but on the left side, it had a little vibration on the left side. They told him that it looked like it was a hazard. He asked them to drop that part, but they said to fight it in court. The overweight fine was $565.00 and the defective turn signal lamp fine was $165.00. They also gave him some other warnings.

When he leaves he needs to check the weight on the trailer within five or ten minutes. He cannot drive an hour or an hour and a half to scale the trailer. He also needs a forklift so he can adjust the weight. He asked Salinas and even talked to his co-workers. They said the nearest scale is an hour or an hour and a half away near San Antonio. He doesn't know the nearest scale or if it's in Round Rock. Forty miles is too far to go driving overweight. If he needs to fix the weight with a forklift does he drive 40 miles back? There are places he can do that in Austin and San Antonio, but he needs the forklift to fix the freight. He needed to weigh that trailer immediately. He doesn't think the DPS would forgive him for being overweight. They don't forgive you. They didn't forgive him for the light and it was working. That's why he didn't want to go far away from the yard. He understands that he needs to work out the freight there in Respondent's yard.

If he would have stopped in San Antonio, it's a Bee Line and not Respondent yard. The Bee Line, that's another business. It's not Respondent. He didn't know if he had permission to use the forklift there. He doesn't think they would give him a chance to fix out the trailer. It's a 53-foot trailer with a lot of freight.

He is pretty sure he passed some scales, but that day he didn't want to move far away from the warehouse. Rick Salinas told him not to scale because Mr. Pilgrim would pay the ticket.

Every load isn't like about 14 to 20 holes that you can move the tandems. Every hole is 250 pounds from the hole to hole. The truck was overweight 8,620 pounds, so moving the axles wasn't going to fix it

On 13 Dec 12, everything was working. All the lights were working in the trailer until he got to the scale. The light was working, but had a little vibration on the left side. That's what the DPS said. The reason the DVIR doesn't show a problem with the light is because it was fine. The only thing is it had a little vibration, that's it.

When he got stopped, He called Rick Salinas, who called the mechanic supervisor in Dallas, but he said there were no funds on the credit card and without funding, they couldn't send anybody. He stayed there for a little at the scale trying to fix the light. He told DPS that he couldn't fix the vibration, so they let him go anyway and just said to make sure it was fixed. He doesn't know if Respondent fixed it or not. They have to sign the ticket when it's been fixed.

Mr. Salinas told him to fill the things that he got on the ticket on the pre-trip and turn it in to Mr. Pilgrim. Salinas told him to back date the inspection report and to put it in the package.

He finished the load and came back home to Laredo. He kept calling Salinas and DPS to see if Respondent paid the tickets. DPS told him Respondent hadn't called to see how much the tickets were. DPS told him that if he didn't pay, it would be on his record. He eventually even called Gene Pilgrim. Pilgrim said if he paid the ticket Respondent would reimburse him. He had money in his savings, so he paid it in full. He put everything together and sent it to Respondent, but never got paid. His complaint for this case is that he just wants to be reimbursed for his overweight and the defective turn signal lamp. But he wants to make the other problems part of his complaints too.

It was on New Year's Eve that the tractor was trembling. Actually, it was on 30 Dec 12. He had told Rick Salinas about it several days earlier. There was something trembling under the suspension of the cab. He would hear a noise. He asked Salinas if he fixed the tractor and Salinas said he hadn't, but to take it anyway. He told Salinas he didn't want to drive anymore. Salinas said to take the other tractor, but he asked if they had changed the mud flaps. They hadn't so he said he didn't want to drive that one either. So on 2 Jan 13, Salinas called and told him if he wasn't going to drive, he should turn in his keys and get his last check. Salinas said they had no money for maintenance.

He found another job pretty quick with Felice Trucking. He works for Gaga Transportation now and didn't really lose any money. He does not want to go back to work for Respondent. He just wants to be reimbursed the $165.00 and the $565.00 for the ticket.

It really boils down to Mr. Salinas telling him not to scale and that if he did happen to get caught, Respondent would pay the fine.

State and Local Government records state in pertinent part:[17]

On 14 Dec 12 at 5 AM, on I-35 at mile post 119 in Medina County, Complainant was issued a $565.00 ticket for overweight and a $165 ticket for a defective taillight on Respondent's truck. Complainant paid those fines on 6 Feb 13.

Respondent's vehicle inspection records state in pertinent part:[18]

On 20 and 31 Dec 12, Complainant noted that tractor 9146 had an unsatisfactory suspension system.

Gene Pilgrim testified at hearing in pertinent part:[19]

On 13 Dec 12, Complainant took off from Laredo, went to Round Rock, did a meet and turn where he swapped trailers with another person, and returned to Laredo. The only DVIR he has from Complainant is one that was created on 14 Dec 12. From looking at the mileage from when Complainant filled up and the mileage that he put on the DVIR, he can tell that the DVIR was created while he was sitting at the weigh station.

Complainant was also cited at that time not for an overweight trailer, but an overweight axle. There are four axles that carry the load on a trailer and each is allowed 14,000 pounds. The citation means that the trailer was loaded improperly before private transport and the weight wasn't properly distributed. That goes on a lot with the freights that allows other companies to load.

A truck driver doesn't know how the trailer is loaded in every situation and it's his responsibility to go to a scale and make sure that he is legal. The shipper can't do that. The trucking company can't do that. The receiver can't do that. The truck driver has the responsibility to go to a scale to see if he's legal. In this particular case, had Complainant done that, he could have turned right back around, gone back to the warehouse and reworked the freight on that trailer. Since Complainant didn't do that, he got caught at the station. There are many scales between Round Rock and the one in San Antonio. There is a scale at the TA at Mile Marker 191 which is about 40 miles from Round Rock and there's another one right across the highway at Mile Marker 189. Every single truck stop on route has a scale. There are eight of them between Round Rock and Laredo easily.

There are probably others that are closer than 40 miles; he'd have to look them up and see. The driver would have to find a forklift to adjust the load. They have an opportunity to rework the freight in Austin or in San Antonio.

[17] CX-1 pp. 1-5.
[18] CX-1 pp. 6-7.
[19] Tr. 31-48.

There are very few trucking companies or even shippers that have a scale on site. DOT understands that and if you pull out with a heavy load; they'll overlook it if you're on your way to a scale. They might follow you to make sure you said what you're going to do, but as a driver, if you have not had the opportunity to correct a problem or identify a problem, they're going to have some leeway and make sure that you have that opportunity. If you haven't passed five scales, then you're fine because you don't know what you don't know. However, Complainant passed at least two scales, probably four and after those scales, the facilities that can be reworked and then he got to the weigh station. So he passed all these opportunities and got to the weigh stations. Complainant picked this trailer up at Round Rock. It would take five minutes to back it in and rework the freight at that facility if he had taken the opportunity to do so. In this particular case, Complainant did not take advantage of the opportunity to identify it or take care of it and then he ended up in a weigh station later on after her passed those opportunities.

Complainant's first opportunity to go get that load checked was about 50 miles. He would have expected Complainant to first move his axle back to readjust the weight. These trailers have sliding cans on them and you can move the wheels to distribute the weight more evenly. It might make the truck more difficult to drive, but Complainant could have done that. It would have been a very simple five minute operation. For that not to work, he'd have to have been totally overweight. Except using the tandems would not help him in this case, so his second option would have been to stop at Respondent's operation in San Antonio, which was probably 20 miles down the road from the weigh station or 20 miles from the scale. He could have backed in and there's a forklift there. He could have moved the freight forward into the trailer and be done with it. Respondent drivers stop at Bee Line every single night. Respondent picks up and drops off right there and use their facility and their dock. It is part of Respondent's operations. Complainant stopped in San Antonio at that dock more than 20 times in his employment during that time period.

The DOT is very strict in South Texas. Any time you run up and down I-35 or 281 you're probably going to get stopped a few times a month just for inspections. If the quality of the vehicles were so poor, Complainant would have gotten more than just the one citation. The truck was a 2012 vehicle with only 120,000 or 150,000 miles on it. In this industry, where vehicles travel up to a million miles, that's relatively new. If there's a mechanical problem under a warranty, they're going to get it fixed because it's free.

On 31 Dec 12, they were closed and did not run freight out. A DVIR for 31 Dec12 would be a fabricated document. Complainant could have arrived early on 31 Dec 12. The DVIR says nothing about lights or about any of the other complaints that he had. There are no details about the suspension.

By 3 Jan 13, he'd heard from Mr. Salinas that Complainant hadn't shown up for a work a couple of days. Mr. Salinas said he had a conversation with Complainant on New Year's Day and Complainant did not want to run that night. Mr. Salinas didn't say why. On 7 Jan 13, Complainant had still not showed up for work. They assumed that Complainant

had abandoned his job and terminated his employment. That was not based on any type of complaining. Mr. Salinas does the hiring. In this particular case, there wasn't anything to do as far as the termination goes. When Complainant didn't show up for work for three or four days in a row, they assumed that he abandoned his job and just hired another driver.

They have a very small operation in Laredo and he doubts very seriously that the supervisor there would shoot himself in the foot by reducing his staff by 50 percent. They have loads and without a backup plan, he can't imagine why Mr. Salinas would say, "Don't show up," knowing they can't move those loads.

Rick Salinas' sworn statement states in pertinent part:[20]

On 14 Dec 12, Complainant returned to Laredo from his nightly run and turned in a DOT inspection form that had citations for a tail light not working and overweight axle. He asked if Complainant had done an inspection report for his trip and Complainant handed him one. It did not look like it was completed prior to the trip because the mileages on it did not add up. Complainant indicated that he did not load the trailer, but admitted he did not scale the load. He has had no further conversations with Complainant about those citations.

Complainant worked for Respondent for the next two and a half weeks doing the same run. He does not recall any specific conversations with Complainant about poor maintenance on his truck. It was a relatively new truck that was only about a year old, so he doubts that there was much that could have been wrong with it. He also doesn't recall any unusual items Complainant reported on his nightly DVIR. Complainant was a quiet guy and a good employee up to that point and did not complain about anything to him.

On 1 Jan 13, Complainant was scheduled to take a load from the dock in Laredo and do a meet and turn in New Braunfels. He got a call at 0300 from the south bound driver asking where Complainant was. He tried to call Complainant but could not reach him after many attempts. He got up and went to the office to see if Complainant's truck and trailer were there and they were. Complainant had not shown up to work that day. He talked to Complainant the next day and asked why he didn't answer his company phone. Complainant didn't say anything about refusing to drive the truck because of maintenance. Complainant said he knew he had made a mistake, handed in his keys, and left. He never talked to Complainant again.

[20] RX-1.

Complainant's sworn statement states in pertinent part:[21]

> On 1 Jan 13, Salinas asked him if he would drive. He asked if the suspension on the truck was fixed. Salinas said no, but mentioned the other truck. He told Salinas the other truck had a mud flap problem that DPS had told another driver should be fixed, so he wouldn't drive that one either. The next day Salinas called him and told him if he wasn't going to drive, he should turn in his keys and pick up his check.

DISCUSSION

Complainant seeks only to be reimbursed for the $730.00 in fines that he claims Respondent promised to pay. However, he made it clear he didn't want to waive any other complaints. The real questions are (1) whether Complainant quit or was discharged (either directly or constructively) and (2) whether any discharge or failure to pay those fines was an adverse action taken against Complainant because of any protected activity.

Protected Activity

There are three possible protected activities reflected in Complainant's testimony: (1) his communications to Salinas about the mud flaps, head and tail lights, mud flaps, and clearance lights from October to December of 2012[22]; (2) his complaint about driving an overweight truck on 14 Dec 12; and (3) his refusal to drive on 1 Jan 13.

General Complaints

Complainant testified that he would advise Salinas about problems with the tail and head lights not working or missing, missing chunks from the tires, missing mud flaps, and clearance lights. Complainant also testified that Salinas would just laugh and tell him to call the mechanic, who usually didn't want to come because he wouldn't get paid.

Gene Pilgrim testified that if the state of repair of RP's vehicles was so bad, they would have gotten many more citations. He also pointed out the trucks did not have that many miles and it would not cost anything to fix them under warranty.

Rick Salinas stated that he does not recall any specific conversations with Complainant about poor maintenance on his truck, but it was a relatively new truck that was only about a year old and he doubts that there was much that could have been wrong with it. He added that Complainant was a quiet guy and a good employee up to December of 2012 and did not complain about anything to him.

[21] CX-2.
[22] There is insufficient evidence to find a refusal to drive during that period.

The form of Salinas' statement makes it less convincing, particularly as he didn't testify live and answer questions. Gene Pilgrims' testimony was generally credible, as was Complainant's. The evidence leads me to conclude that it's more likely than not that Complainant did on occasion raise to Salinas concerns about the lights, flaps and tires. However, the evidence does not show that Complainant ever refused to take a truck (at least until January). Thus, it appears that Complainant's communications seemed to be more along the lines of periodic complaints about chronic problems. Nonetheless, they do qualify as protected activity.

Overweight and the 14 Dec 12 Citations[23]

The record shows that Complainant and Respondent appear to have had differences about how to address possible overweight loads. Gene Pilgrim testified credibly that DOT understands few trucking companies or shippers have scales on site and drivers have to go a reasonably short distance to get to a scale to determine their weight. DOT then expects drivers to return the short distance to fix any weight problems. Respondent is essentially arguing that Complainant's concerns about being overweight were not reasonable in that context, particularly since he passed at least two scales and probably four scales, before being cited.

Complainant's testimony disputed the premise of Pilgrim's point that DPS would afford him some cushion to get an initial weight. Complainant also did not agree with whether there were available scales or terminals to adjust the weight. However his testimony was not as credible as Pilgrims in that regard and I find Complainant failed to establish that he had a reasonable concern that would qualify his communication as a protected activity.

1 Jan 13 Refusal

There is a significant factual dispute as to the events surrounding Complainant's refusal to drive. Complainant testified he told Salinas that he wouldn't drive unless the suspension or mud flap was fixed and Salinas told him if he wasn't going to drive he should turn his keys in and pick up his check. Salinas, conversely, denied any such conversation and stated that he first knew there was a problem when a driver who Complainant was supposed to meet called to find out where Complainant was. Salinas says Complainant simply failed to show up to work and when asked about it, apologized and handed in his keys.

Gene Pilgrim knew nothing about what happened beyond what he was told by Salinas, but testified about some inconsistencies in the dates Complainant gave and noted that Respondent doesn't drive on New Year's Eve, so any DVIR for 31 Dec 12 would be a fabricated document. He conceded that Complainant could have arrived very late on 31 Dec 12, to drive on 1 Jan 13, but then notes the DVIR says nothing about lights or about any of the other complaints that he had and gave no details about the suspension problem. He also testified that he heard from Salinas that Complainant hadn't shown up for work a couple of days and that Salinas said he had a conversation with Complainant on New Year's Day and Complainant did not want to

[23] Complainant testified that there was nothing illegal about the condition of the light and he shouldn't have been cited for it.

run that night. He added that since Complainant was not coming to work, they assumed he abandoned his job and hired another driver. Pilgrim also observed that they have a very small operation in Laredo and he doubts very seriously that Salinas would have reduced his staff by half.

Pilgrim's testimony that Salinas told him Complainant had said he did not want to run is significantly inconsistent with Salinas' statement that he had no idea why Complainant had not met the other driver. Pilgrim's testimony that they assumed he abandoned his job and hired another driver is significantly inconsistent with Salinas' statement that Complainant apologized and handed in his keys.

Thus, on a relatively sparse record, I find that the more probable version is that Complainant did say something about the suspension and flaps. It may have been largely in the general grousing about the lack of proper maintenance, but it appears more likely than not that Complainant told Salinas he didn't want to drive because of the flaps and or suspension, neither of which Salinas believed were significant enough to justify refusal to drive.

For Complainant's refusal to drive to constitute protected activity, he must establish either (1) to have driven with the suspension or mud flap would have violated a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security; or (2) he had a reasonable apprehension of serious injury to himself or others because of the vehicle's hazardous safety or security condition.

Complainant testified there was something trembling ("not good") under the suspension of the cab and he would hear a noise. He also testified that the missing mud flap was in front of the first rear tire on the cab and a DPS had told another driver to fix it, but apparently did not issue a citation. The record is insufficient to carry his burden of proof and establish that driving with the suspension or mud flap would have violated a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security. Other than the refusal to take the truck, there is no evidence related to his apprehension of serious injury. Moreover his refusal to drive as circumstantial evidence of disrepair is countered by Respondent's refusal to take the truck out of service. It is also noteworthy as an indication of how serious the problems were that Complainant's major concern has been to be reimbursed for the fines, not that his or others safety was at risk.

Consequently, I find the record does not establish the refusal to drive as a protected activity. Nonetheless, with the finding of the general complaints as protected activity I turn to adverse action.

Adverse Action

The two possible adverse actions in this case are (1) Respondent's refusal to pay the fines and (2) Complainant's discharge.

Fines

Complainant testified credibly that one day when they gave him 46,000 pounds and he told them he needed to weigh the trailer, Rick Salinas told him that Respondent would pay the overweight. It wasn't clear whether that was the case on the 14 Dec 12 trip or whether that was a general understanding. In any event, neither Pilgrim nor Salinas addressed the specifics of the alleged promise to pay for any fines. Consequently, on the basis of a very thin record, I find that in the course of discussing weight issues, Complainant and Respondent had a difference of opinion about how far a driver can go before checking his rig for weight. In the context of that dialogue, Salinas told Complainant that if he does it the way Respondent wants and gets a ticket anyway, Respondent would pay the ticket. The promise to pay did not extend to equipment problems; or, in this case, to unjustified fines.

I also find that Respondent declined to pay the fine, because it believed Complainant had failed to do what he had been told and stop at a nearby scale to check the weight. Had he done so he would not have been cited. Therefore, I find that the failure to pay the weight fine was not an adverse activity, because it was consistent with the predicate of the promise. However, even if it was an adverse activity, it was based solely on his failure to stop and weigh earlier.

Discharge

Whether or not there was an adverse action as to his termination depends on whether Complainant was discharged or simply quit, and if he did quit why. Consistent with my findings in the context of whether the refusal to drive was a protected activity, I find that Complainant did not quit, but was told to turn in his keys and pick up his check. Accordingly, his termination was an adverse action by Respondent.

Contributing Factor

That presents the question of whether the protected activity (his communications to Salinas about the head and tail lights, mud flaps, and clearance lights from October to December of 2012) was contributing to the adverse activity (his discharge).

The record shows that Complainant went to Salinas about the state of the trucks at various times while he worked for Respondent. Salinas was caught between drivers who wanted rigs fixed and an owner who had limited money for maintenance. Salinas would suggest that Complainant go see if the mechanic would fix the problem. Sometimes the mechanic would fix it and sometimes he wouldn't. In any event, it does not appear that Complainant refused to take any trucks until New Years of 2013.

The reason Respondent discharged Complainant was that Complainant refused to drive. The refusal to drive does not qualify on the record as a protected activity and I do not find that the general complaints were a contributing factor to that termination decision.

Contributing Factor

However, even if I had found that the general complaints were a contributing factor to the decision to terminate Complainant, I also would find by clear and convincing evidence that Respondent would have terminated him even in the absence of the general complaints. The evidence shows that Respondent and Salinas really didn't care that Complainant kept raising the problems as long as he would show up to drive. It was the refusal to drive that led to the termination and again, this record fails to establish the refusal was a protected activity.

may be that under contract law, Respondent is liable to Complainant for the $730 in fines Complainant paid. However, this record fails to establish a valid whistleblower cause of action under the Act.

The compliant is **dismissed**.

SO ORDERED.

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

PATRICK M. ROSENOW
Administrative Law Judge

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, 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(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).