U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 October 2015

CASE NO.: 2015-STA-6

IN THE MATTER OF

RICKEY C. NEWELL,
Pro-se Complainant

vs.

AIRGAS, INC.,
Respondent

APPEARANCES:

THOMAS B. HUGGETT, Esq.,
for Respondent

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act (the Act)[1], and the regulations promulgated thereunder,[2] which are employee protective provisions. 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 their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

Procedural Background

Complainant filed his initial complaint with the Occupational Health and Safety Administration (OSHA) on 4 Jun 14. OSHA dismissed the complaint on 18 Sep 14. Complainant objected and requested a de novo hearing before the Office of Administrative Law Judges. On 7 Apr 15, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

[1] 49 U.S.C. § 31105 et seq.
[2] 29 C.F.R. Part 1978.

My decision is based on the entire record, which consists of the following:[3]

Witness Testimony of

Complainant
J.T. Ary
Susan Durbin

Exhibits

Complainant's Exhibits (CX) 2-5, 7-16, 18-22[4]
Respondent's Exhibits (RX) 1-12, 32

STIPULATIONS

Respondent stipulated that it employed Complainant and at all relevant times was subject to the Act.[5]

FACTUAL BACKGROUND

Complainant worked for Respondent as a local delivery truck driver from October 2011 until he was fired on 28 Mar 14.

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

During our initial scheduling conference call, I asked Complainant to specifically describe in writing each of his protected activities so that everyone would have a clear understanding of his allegations, what law applies, and what facts would be litigated. The document he subsequently submitted tends to focus on what he alleges to be Respondent's illegal conduct, rather than the times he complained about it or refused to engage in it. Nonetheless, between that document and his testimony and statements at hearing, it is possible to distill that he submits that he complained on multiple occasions about hours of service violations and at least on one occasion refused to drive in violation of hours of service. He then argues that he was terminated because of those complaints.

Respondent argues that Complainant never engaged in any protected activity because he was vague and never actually communicated any concerns about hours of service. Respondent also maintains that Complainant never refused to drive a route that would have been in violation of hours of service. It also submits that the decision makers on the termination had no knowledge

[3] 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.
[4] Complainant attached nine documents to his briefs as exhibits, but I did not consider them as part of the evidentiary record.
[5] Respondent's brief p. 2.

of any protected activity and that Complainant was terminated because he violated the hours of service and broke safety rules prohibiting cell phone usage while operating a vehicle.

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;…
>
> b) Filing complaints and procedures.--(1) An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred. [6]

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.[7]

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.[8] 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.[9]

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[6] 49 U.S.C. § 31105.

[7] 75 Fed. Reg. 53545, 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii); *Salata v. City Concrete, LLC*, 2008-STA-12 and -41 (ARB Sept. 15, 2011).

[8] Bethea v. Wallace Trucking Co., ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 8 (ARB Dec. 31, 2007); Calhoun v. United Parcel Serv., ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 11 (ARB Sept. 14, 2007); *Ulrich v. Swift Transportation Corp.*, 2010-STA-41 (ARB Mar. 27, 2012).

[9] *Minne v. Star Air, Inc.*, 2004-STA-26 (ARB Oct. 31, 2007).

An adverse action is anything an employer does that could well dissuade a reasonable worker from engaging in protected activity.[10] The implementing regulations prohibit an 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[.]"[11]

"Contributing factor" causation may be proven indirectly by circumstantial evidence such as "temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity."[12]

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.[13]

Unless it is impossible or impractical, reinstatement is an automatic remedy under the Act and respondent employers must make a bona fide reinstatement offer.[14] However, reinstatement may be waived.[15] Respondents may be ordered to compensate complainants for having experienced depression and hardship, if the weight of the evidence supports such an award.[16] Complainants are entitled to back pay from the date of discharge to the date when the employer makes a bona fide, unconditional offer of reinstatement, with a reduction in liability for other earnings[17] and an adjustment for pre and post judgment interest.[18] Punitive damages are appropriate where the respondent has acted with reckless or callous disregard or intentionally violated the law.[19] Respondents may also be ordered to expunge or correct a complainant's work record[20] and post a workplace notice.[21]

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[10] *Strohl v. YRC, Inc.*, 2010-STA-35 (ARB Aug. 12, 2011).
[11] 29 C.F.R. §§ 1978.102(b), (c).
[12] *DeFrancesco v. Union R.R. Co.*, 2009-FRS-009, (ARB Feb. 29, 2012); *See, e.g., Id.; Bobreski v. J. Givoo Consultants, Inc*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011).
[13] 49 U.S.C. § 31105(b).
[14] *Dickey v. West Side Transport, Inc.*, 2006-STA-26 and 27 (ARB May 29, 2008).
[15] *Young v. Park City Transportation*, 2010-STA-65 (ARB Aug. 29, 2012).
[16] *Id.*
[17] *Hobson v. Combined Transport, Inc.*, 2005-STA-35 (ARB Jan. 31, 2008).
[18] *Dale v. Step 1 Stairworks, Inc.*, 2002-STA-30 (ARB Mar. 31, 2005).
[19] *Smith v. Wade*, 461 U.S. 30, 51 (1983); *Ferguson v. New Prime, Inc.*, 2009-STA-47 (ARB Aug. 31, 2011).
[20] *Shamel v. Mackey*, 85-STA-3 (Sec'y Aug. 1, 1985).
[21] *Scott v. Roadway Express, Inc.*, 98-STA-8 (ARB July 28, 1999).

Federal regulations define hours of service limits for drivers

> a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:
>
> (1) More than 11 cumulative hours following 10 consecutive hours off-duty;
>
> (2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of § 395.1(o) or § 395.1(e)(2).
>
> (b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—
>
> (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
>
> (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.
>
> (c)
>
> (1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or
>
> (2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours. [22]

The regulations also impose record keeping requirements

> a) … every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24 hour period using the methods prescribed in either paragraph (a)(1) or (2) of this section.
>
> (1) Every driver who operates a commercial motor vehicle shall record his/her duty status, in duplicate, for each 24–hour period. The duty status time shall be recorded on a specified grid ….[23]

However, the regulations also allow an exception to the grid log requirement:

> (e) Short-haul operations—
>
> (1) 100 air-mile radius driver. A driver is exempt from the requirements of § 395.8 if:
>
> (i) The driver operates within a 100 air-mile radius of the normal work reporting location;

[22] 49 C.F.R. § 395.3.
[23] 49 C.F.R. § 395.8.

(ii) The driver, except a driver-salesperson, returns to the work reporting location and is released from work within 12 consecutive hours;
(iii)(A) A property-carrying commercial motor vehicle driver has at least 10 consecutive hours off duty separating each 12 hours on duty; …
(iv)(A) A property-carrying commercial motor vehicle driver does not exceed the maximum driving time specified in § 395.3(a)(3) following 10 consecutive hours off duty; …and
(v) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:
(A) The time the driver reports for duty each day;
(B) The total number of hours the driver is on duty each day;
(C) The time the driver is released from duty each day; and
(D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.[24]

EVIDENCE

Complainant testified at hearing in pertinent part:[25]

Before he moved to work for Respondent, he lived just outside of St. Louis for about six years. He drove a pump truck and cleaned septic tanks and grease traps, doing some pretty nasty work. Before that, he had driven a truck delivering batteries. He worked at a machine shop for quite a while and attended school, taking several mathematics courses and working on a degree. He moved to the Monroe area in 2011 so his wife could be with her ailing father. He immediately got a job with a pumping company down there, but he had no benefits, so he was hired by Respondent in October 2011, even though he would have to drive from West Monroe to Shreveport every day for work. He did that for six months before he was able to move to the West Monroe branch when somebody had quit.

His day to day was to deliver cylinders of gas by truck. It was local delivery only. He would only occasionally drive 100 miles. It was lots of stop and go. He understood the rules to be that drivers cannot work more than 14 hours a day. It must be less than 14 hours from the time they clock in until the time they clock out. Once they are off of work, they must have 10 hours of rest before they can come back into work.

There's an exempt log and a grid log. The grid log is a more detailed log and shows every stop and how long he was there, etc. An exempt log merely has clock in and clock out. The only exception to writing a grid log is if they are under 12 hours of work and under 100 miles. If he works between 12 and 14 hours, he must write a grid log for that day. Both he and Respondent keep a copy of the logs.

[24] 49 C.F.R. § 395.1.
[25] Tr. 29-102.

From the first day when he was trained by Josh out in Shreveport, he learned that if he had worked 12 hours, logged out, was in his 10 hour rest period, but was called by Respondent anyway; Respondent expected him not to clock in, but just do the job and Respondent would pay him for that later. He told Respondent they couldn't do that, but was assured by every one of his co-workers and his manager that situation would probably never happen. While he worked in Shreveport, it didn't, because there were many more drivers. He did not have any hours of service complaints while he worked in Shreveport.

He went to West Monroe either the last week of February 2012 or maybe the first week of March of 2012. His manager for the next eight months was Joseph Hughes. The next manager, Brian Herrington, showed up after Christmas. It had to be around January, but he's not positive on that date and could be off by a month before or after. There was a time period when there was no manager between Brian Herrington and J.T. Ary. JT didn't start until August and he believes Brian was there until May or June.

When he started at Monroe, Respondent immediately sent him straight back out to Shreveport to pick up medical oxygen. By the time he got back to find out where to deliver that to, the other driver in Monroe got mad and quit, so he was the only driver for West Monroe. Daily scheduling was in turmoil with almost too many stops to count. He worked at least 12 hours a day and he doesn't know if there were a lot of violations at that point. He wasn't worried about it, since it was only a couple of minutes here and there and he would play ball, no problem.

The manager and the sales manager, Joseph Hughes and Joe Walker told him he would have to go make deliveries to Angus Chemical, which was a big account. He said that he didn't have the hours and they said they'd pay him later. He never got a 0200 hours call, but every week on Tuesday, there was a long drive of around 300 miles. He would be over 12 hours. That could have been averted if Respondent had gotten the tickets to him earlier, but nothing was ever done to curtail that problem, either by giving the dispatcher some more help or taking a few of the deliveries off of Tuesday and putting them on different days. There were four instances overall where he was actually over 14 hours, and two of them, 25 Oct 13 and 21 Mar 14, occurred while JT was the boss. Even when he wasn't over 14 hours, they told him not to turn in a grid log and if he got back after 12 hours, they would clock him out and put the hours on a different day. He objected to it all the time. Respondent told him it was a requirement of the job and if he did not comply, he would not be there very long.

This went on the entire time he was there. February of 2012 to March of 2014 on various occasions and with some regularity, Respondent told him not to fill out the grid log even if he went over 12 hours. He complained about it every single time. It happened almost every Tuesday and maybe another once or twice a month for a total of about five or six times a month.

All of the allegations that he identified regarding failure to complete a grid log in 2012 and 2013 were prior to JT becoming branch manager in West Monroe and prior to Susan becoming area branch operations coordinator. Susan didn't take over until sometime after JT had become manager.

There was also the 34-hour rule. If he worked six or seven days, he had to be off for 34 hours before he could restart. If he worked till Friday at 2100, he had to count 34 hours if he didn't work on the weekend. If he worked Saturday as well, he'd have to still count the 34 hours before he came in. He had to have 34 hours restart time. The only 34-hour restart problem was in July of 2013, also before JT and Susan were involved.

There was a period in July 2013 that he actually worked 12 days in a row and Respondent would not let him take off that Monday. He worked seven days in a row and did not get Monday off because Respondent gave him work for that day and told him to make sure he got it all done. He did an eighth day without a 34-hour recess. That only happened once, the week before the 20 and 21 Jul 13. He complained vehemently. He didn't get a day off until the following Saturday. They told him he wouldn't be around long if he didn't do it, since there are guys coming in every week looking for a job.

The people telling him he wouldn't be around long if he didn't work were Joseph Hughes, Brian Herrington, Joe Walker, Pat Nicholas, and whoever was in charge. Pat Nicholas is the area manager. Joe Walker is the sales manager. In Joe's defense, it had always been done that way. Joe's old school was just going with the flow. Pat Nicholas, however, knew very well what was going on and did nothing to stop it.

For the period where the no 34-hour restart rule was broken he got bereavement pay on a weekend, but that was a way to justify paying him without having the records show he was driving.

In the time around August of 2013, a new edict came, that he should write a grid log between 12 and 14 hours, but still couldn't work over 14 hours. He thinks Mike Burton, the safety man, happened to off-handedly mention it one day, but it might have been an official policy slightly before. When he told Burton that they didn't want grid logs, Burton said go ahead and write a grid log, they were supposed to now. There was no discussion about old policy. That's when they signed a paper saying they knew the law and would never violate it again. Tommy and him both sat through a meeting as JT went over the rules very succinctly. He knew how to write a grid log, but each company might have certain specific things they like to see. Respondent complained about every one he wrote.

He had not done any grid logs during 2012 or up to that point in 2013. After August of 2013, he started completing grid logs whenever necessary under the 12 hours or 100 miles rule. The 100 mile rule is 100 air miles in a circle from the base of operations. He thinks there was one occasion when he should have completed a grid log based on exceeding the 100 mile circle, but at that point, they were not doing grid logs.

Afterwards, he doesn't think they went back to that particular Dollar General in Washington, Mississippi, which was 101 or 102 miles away.

CX-8 has the 100 air mile exempt driver's daily logs he completed at Airgas. At the bottom they all say, "If the time from reporting for duty to the time released from duty is greater than 12 consecutive hours, you must complete a grid log book for that day."

The following day, Tuesday, J.J. Dahlum told him that he had to go by Shreveport or El Dorado. He just stopped him in mid-sentence and there was no way to do that and they had just gone over it yesterday. There was a big fit on the phone with JT and everybody was mad. He told them there was no way he was going to do that and just took his regular tickets and did his regular runs, until Friday when he got fired.

That Friday night, he received a call from someone that wasn't even Respondent's customer at the time, although they used to be. They were whining about the fact that their current supplier had run out of nitrogen. He told them it was too late to do this job. He called his manager, JT, who told him three times to make that delivery even over his objections. It was Friday night, 21 Mar 14. He went ahead and made the delivery and went over 14 hours, clocking in and out correctly. They had been told about a year before that if they don't clock in and out for callouts, they would not be paid.

He still had his driver's log book. They didn't turn them in until Monday because they might have to go out on Saturday. When he saw JT the next Monday morning, JT said the people in Tulsa were unhappy that he violated hours on Friday night. JT then said they were going to have to go over the hours of service rules and he went over them very succinctly. Tommy signed his copy and he signed his copy. He went on about his business. That's pretty much the last he heard of it that day. JT was going to go out of town for the rest of the week.

The following day he came in and J.J. Dahlum asked about driving somewhere. It was either Shreveport or El Dorado every time they made an extra pickup. He cut JJ off and said he wasn't going to do that again. His typical Tuesday would be to go from West Monroe to Tallulah, back to Winnsboro, down 425 to Natchez with stops at several places along the way, down Highway 84, go over to Gina, go to a nursing home or two, and then maybe a bunch of Dollar Generals. It was a nightmare of a day. Assuming it was 1000 in the morning, there was no way he could go all the way out to Shreveport or El Dorado. That's the opposite direction. So, he went ahead and made his regular Tuesday run with a couple less stops getting back at 1600 or 1700. The Tallulah stop wasn't there that day, but he had no way to know that ahead of time.

He received RX-3 while he was a driver for Airgas and was trained on the subject. The second paragraph states, "While operating equipment, drivers and/or operators will not answer incoming calls, texts or Facebook messages." He did not think that that rule applied regardless of whether or not the truck was on the highway, because following that, it says, "When conditions allow, they should move equipment to a safe area away from normal traffic flow and only then retrieve messages and return calls and messages."

On the Wednesday of the alleged phone violation, he was a little late leaving. He went immediately over to the Raceway Gas Station where he went every single morning to fill the truck. He was going up the same direction as Tallulah, and heard a clang and a thud in the back of the truck. That happens once in a great while. He pulled right up in front of the building and kind of arched the truck up so all he'd have to do is let it roll back into his bay so he could get out and look. He didn't want to be in violation of the get out and look rule.

About that time, his phone rang and he stopped the truck, hopped out of the truck, walked behind the truck, and circled twice while talking to a customer on the cell phone. He was fielding a company call on his phone for some reason while doing a get out and look. He finished the phone call, got in the truck while still holding the phone, let it back up about 20 or 30 feet into his bay, and nobody got hurt. He was off the road. He signed the paper because he knew he'd be fired if he did not. They suspended him without pay for a day.

It was when the discipline was issued that he was told later that JT observed him with the cell phone in his hand while backing the truck up on 25 Sep 13. He did have the cell phone in his hand while the truck was running and rolling backwards. The backup alarm was sounding, but he was safely off the road. There was no one around the truck. It was a completely safe maneuver.

Operating the truck is a pretty ambiguous term. Driving the truck down the highway talking on the phone is illegal and it's the wrong thing to do. Letting the truck roll a few feet backwards in the parking lot while holding a phone that you're not even speaking on at the time is a completely different matter.

There was a conference call with him and Respondent where he tried to defend himself. They said he was observed backing up the commercial vehicle while on his cell phone, but he was not on the phone, just holding it. It is incorrect when it says he thought that he'd be exempt from the cell phone usage because he was off the street.

He signed the disciplinary notice and one day suspension, and did not allege to anyone at that point in time that the disciplinary notice and suspension were in retaliation for any protective conduct, because there would be no reason for him to have done that at that point.

On 25 Oct 13 there was a 14-hour violation when he completed his normal route for the day at around 6 and returned to the branch within a 12-hour time frame. Up to that point there were no issues with hours of service. Everyone was gone. He clocked out as soon as he walked in and saw a note that said, "Winfield Nursing Rehabilitation needs oxygen. They're completely out." He thinks JT wrote the note. He called JT who told him that he had to go. They never specifically talked about hours of service, because it wasn't necessary. He is sure he complained to JT before he left. He complained to JJ when calling to get the address. He complained to Joe when he left a message to find out the address and Joe called back later.

J.J. Dahlum is the dispatcher, not a manager. Joe Walker is the sales representative. Outside of those three individuals, he didn't speak to anyone else about this issue and was not disciplined in any fashion for that delivery.

On Friday, 21 Mar 14, he was on call for the weekend. He had completed his normal delivery route earlier in the day and clocked out around 1530. He got a call for a delivery around 1900 while he was out with his wife for dinner. He told the guy at the other end of the phone he probably couldn't make the delivery. He would have to talk to his manager, go home, get ready, and get to work first. He did go home, dropped his wife off, put boots on, and drove back to work. He didn't put a uniform on.

He went to the branch even though he had told the customer that he probably wasn't going to be able to make the delivery, because he expected JT to tell him to make that delivery. He was praying JT wouldn't, but he knew what was coming. When he got to the branch, he parked in front of the building and made a call to JT around 2124. He told JT they had gotten a call from a former customer that wanted a whole bunch of nitrogen, several cradles, and all the loose bottles they had. He added that it was too late to make this delivery now and they didn't have what the customer wanted anyway. JT said to take them what they did have and he mentioned saving some of their regular customers. JT said to save some and take the rest. That's when he told JT he was going to clock in and JT said okay. He never actually mentioned the phrase, hours of service or working beyond 14 hours in a day. JT knew what time he was there that morning so he didn't have to mention that.

He didn't need to specifically mention hours of service, because the phone call was in and of itself a discussion of hours of service. There was no other reason to call a manager at night, other to let him know somebody wants something. He is asking the manager to make a decision on whether he makes the delivery.

He was required to call the manager every single time regardless of hours. A customer might call him on the company phone, but he'd have to go to the manager and relay the request. The manager would know the hours situation and if he told the manager he didn't want to do the delivery, the only reason would be hours. He never said he didn't want to do it because of hours. He just said he didn't want to do it. It's not hard work. It's not hard to do and it's actually enjoyable in some cases, so the only reason would be it would be unlawful to do it.

He filled out a log for that day and turned it in on Monday morning. RX-9 are the hours of service rules that JT went over with him on that Monday. None were new and he knew about them. He has not seen any verifiable evidence that there was in fact an audit that revealed that he was working overtime that night on the 21st.

On Tuesday, 25 Mar 14, JT was off on bereavement leave. He was waiting on paperwork from JJ at approximately 1000. JJ raised the possibility of making a pickup somewhere between 1000 and 1015. He remembers thinking there was absolutely no way to get that

done legally. They just signed the paper about it yesterday with a big to do, so it was not going to happen. He was probably being very forceful about it and thinks JJ just decided not to press the issue. He doesn't think it was a mutual agreement, but was kind of forced on JJ.

RX- 32 is the driver's daily trip report he completed from 25 Mar 14. The trip start time is 0855 which is when he pulled out of the lot at the Airgas branch in West Monroe. He could have been waiting around to receive this route. The time stamp on the next page which is the reverse side of that page, says 0911. So, at around 0900 is when this ticket was printed. He might have left at 0855 to go to the Dollar Tree. He probably went to the Raceway and bought fuel and then probably went to this Dollar Tree after swinging back by to pick up these tickets. He's not sure exactly how it went.

RX-32 has a receipt there for Raceway, at 0832. He bets there was somewhere nearby that he wrote off a stray ticket, which does happen on occasion. He could have bought gas at 0832 before starting his daily trip report at 0855, because ASC, a medical facility, needed gas right way. So he took the ticket and then probably bought gas first, then went by the other place and dropped something off. He then came back by and got these tickets or maybe printed these tickets while doing something else first. He understands that the 9:11:15 a.m. print date is an Eastern Standard Time print date. He has no explanation for that, but maybe it was 0900 when he was saying he couldn't do that. Maybe it was a quarter till 0900. All he knows is it did in fact happen and he wouldn't go to El Dorado or Shreveport on that date.

On Friday 28 Mar 14, when he came into work, he was told to come to the conference room for a conference call with everybody, including JT from Tennessee. They went over a couple of things that had happened and talked about the incident in general and asked him what he thought he was doing by making the delivery. He told them he was doing exactly what he had been made to do since the first day he started by bosses from Mike Pate on. Mike Thomas, the vice-president, wasn't a big fan of Mike Pate and said he didn't doubt that about Pate, whom he had fired a while back.

Then they asked why JT sent him out to do the job and Ryan Bobsein, the safety director, said because JT didn't know the law. JT responded that he knew it was something about 10 hours and 14 hours, but wasn't sure what. There was no mention of 25 Oct 13 or specific instances from prior to August of 2013, although he mentioned that he had been told to make deliveries beyond the hours of service beginning with Mike Pate. They weren't interested in hearing about that. The 25 Sep 13 cell phone issue wasn't discussed either. They just added that on to the termination memo.

After JT's answer, they sent him out of the room. He pretty much knew what was coming and went to the computer to download every clock in and clock out and winded up giving all those copies to Angela Fisher from OSHA. Susan Durbin came to him and said due to the seriousness of the violation, he was fired.

That was his last day of work with them and he was making $16.85 an hour. He was making $45,000 to $46,000 a year from Respondent. The first thing he did was to go by the unemployment office. Then he went home and got online with the unemployment office and started looking for another job, putting out as many feelers as he could. He basically looked for a job and took care of his garden.

In September, he got a job driving a concrete truck, which is not his cup of tea. He has a bad back and can't climb that ladder every day for the rest of his life. He makes maybe $30,000 a year. The big cut is the insurance benefits, which are nowhere near the same. It could be thousands a year because his wife has certain things she needs done.

He has not required any medical care because of stress or aggravation or anxiety, but he is just about to because his wife has told him in no uncertain terms that he needs some anger management classes or something and it's a direct result of this, because he was always the nicest guy in the world until this happened. In addition, he is starting to get depressed. It's not as bad today because he is actually getting a chance to tell what happened to someone that can actually do something about it. Looking for a job, it became obvious that even though Respondent is required by law to not give a bad recommendation, it does not gush over with excitement about him and new employers get the picture clearly. Employers were very excited about him working for them until he mentioned any of this stuff with Respondent. He wants to go back to work for Respondent.

J.T. Ary testified at hearing in pertinent part:[26]

He has been employed by Respondent since August of 2013. He attended college for approximately a year and a half, has managed several restaurants, and worked for three years with Satellites Unlimited as a manager before coming to Respondent. Compressed gas delivery by truck is the majority of the business and how Respondent makes money. He has never held or studied for a commercial driver's license. When he was hired by Airgas, he sat through a brief driver based summary by going through a large 2-inch binder during the driver portion of New Employee Training. They covered all the paperwork and criticals that they needed to sign and turn in.

His understanding of the rule at that point was that only driving time counted toward the 12 hour limit and if the driver clocked out for hours in between it did not count. He understood that driving time on the road had to be less than the 12 or 14 hours and drivers needed to complete a grid log if they were clocked in for more than 12 hours. When he started, the drivers were in fact completing grid logs. His only understanding of the grid rule was that drivers on the clock for more than 12 hours after clocking in had to fill out a grid log. He has no explanation for why he was not trained for one of the most important things his job entails.

[26] Tr. 103-136.

On 25 Sep 13, he was in the showroom with Pat Nicholas. There was a very large window out to the bay and parking and docking area. They saw Complainant pull into the parking area and align his truck with the bay, get out, answer his phone, keep the phone to his face, walk around for his get out and look, get back into the truck still holding the phone, put the truck into reverse, and back the truck up to the dock still holding the phone. They could hear the backup alarm. He could see clearly into the cab of the truck and Complainant holding the phone. He could not hear Complainant saying anything or specifically see Complainant's lips moving. He decided that Complainant should be reprimanded for that because Respondent's policy is that as long as the vehicle is in motion, the driver is not supposed to be on the phone.

He and Pat discussed it and then had a discussion with Complainant. They set up a phone call for a safety review and after the safety review, issued a reprimand for violation of the cell phone policy. Complainant never complained that this suspension discipline was being issued in retaliation for prior complaints. Complainant did respond that he wasn't on the highway. There was no further discussion of that disciplinary event between that point in time and Complainant's termination on 28 Mar 14.

He was working on 25 Oct 13. Complainant ran a normal route that day and when Complainant got back, they had a call from a nursing home that needed medical oxygen. He does not recall who was on call that weekend, but he left a note for Complainant that they needed to make that run. Complainant called and said he didn't know where the delivery location was. It seemed Complainant had decided to go and he had no reason to stop Complainant. He told Complainant to get with Mr. Barmore or Mr. Walker for that information. Complainant never said anything about hours of service being an issue for that delivery and at that point, he didn't know hours of service was a problem for Complainant making that delivery. Complainant made the delivery.

The delivery was made on Friday evening, but the paperwork indicated Saturday. That's how he'd seen it done before, although he can't remember when. That was to make sure that the driver was paid fully for their callout. If drivers are called out at all, even if it's only 30 minutes, they're guaranteed a minimum of four hours pay. He considered it to be a callout because it was after normal business operating hours. The delivery actually wound up taking a little over four hours. He learned later during the investigations in the following March that what he did was wrong, but at the time, he did not know it was an improper recording. He did not move the hours to Friday in order to avoid an hours in service violation.

On 21 Mar 14 their operating day went as usual. Drivers left and at 1700, they locked the store down, secured everything for the weekend, and left. That evening, he received a call from Complainant about a call Complainant had received from Bobby Jones about a prior customer who had run out of gas. It was an opportunity to possibly get the customer back if they could take care of the situation for them.

Complainant said he was on his way to the store to take care of it and he told Complainant that was fine. When Complainant got to the location, he called, and they talked about needing to keep some gas in stock for their regular customers. He decided on an amount and told Complainant to take it. The only other part of the discussion was Complainant saying he wasn't real comfortable driving at night on unfamiliar roads. They had no discussion of hours of service or mention that he would be over 14 hours in a day. He didn't realize it was an issue, because he still had the understanding that it was only the actual drive time that counted.

Every Monday as branch manager, it's his job to take all the logs and daily investigation reports, check them, and send them to Tulsa to be checked for errors or problems. On this Monday, 24 Mar 14, he contacted Susan Durbin to ask how to fill out the grid log for this trip, since it was past midnight. She told him to put everything on hold and she would get back with him.

He received a phone call from his area vice-president, Mike Thomas, who questioned him on his knowledge of the 14 hour rule. He explained what he understood it was and Thomas said not to roll any trucks and someone would get back to him. He then got a separate phone call from Ryan Bobsein, the safety director, who again questioned him about the 14 hour rule. He gave Ryan the same answer. Bobsein told him he was wrong and to immediately get some training and clarification on the subject from Ms. Durbin. She then sent the proper paperwork and told him he needed to review it, have a meeting with both drivers before they left that day, and have them sign the policy statement. Then he would receive further training. When he found out how the rule really worked in March 2014, he did not think to tell the people in charge that they had broken it back in October.

He had both drivers come into his office. They had a meeting and reviewed the paperwork word for word and then handed them the signature portion to sign.[27]

After the drivers signed the paperwork, they went on their routes that day. He was told that there would be some more investigation. He sent in all the information he had on it, including the log prepared by Complainant. He left that evening to attend a funeral in Tennessee and didn't have any communication with anyone at the branch on Tuesday.

At some point he was told there would be a phone call on Friday that he needed to be on. During the call, they discussed the previous Friday's delivery and all the circumstances involving it. He was again questioned about his understanding of the rule and asked if hours of service had come up during the discussion. He said it had not. He stayed on the call, but was not involved in any decision making regarding that incident. There were no discussions about any prior complaints by Complainant and they decided to fire Complainant and give him a final written warning for failure to know the proper policy and to make sure that it was followed. The warning also included his failure to properly document the cell phone incident from 25 Oct 13.

[27] RX-9.

Susan Durbin testified at hearing in pertinent part:[28]

She is an area branch operations coordinator for Respondent and oversees the operations on a day-to-day basis of 16 to 17 branches. Her primary focus is SAP, their computer system, and any additional training required by associates. She has held that position since about October of 2013. Until January or February of 2014, she was still managing both locations in Shreveport. Respondent had not gotten a full-time manager yet.

The first she heard there were any hours of service issues at the West Monroe branch was JT's phone call to her on 24 Mar14. He wanted to know how to write up the grid since Complainant's hours extended into Saturday morning. It would have been clear violation of hours of service. JT said Complainant went back in at like 2145 Friday night and clocked out at approximately 0215 Saturday morning. JT wanted to know how to record that on a grid. She told him to keep both drivers there and shut down truck operations immediately until he heard further. She told him to do that because it was obviously an hours of service violation. JT had no formal training as a manager with responsibility for those requirements.

She called vice-president Mike Thomas and explained the situation to him. Thomas said to sit tight, while he got with safety director Ryan Bobsein and JT. Her next involvement was sending out training documentation and making sure that from that point forward, JT had a clear understanding of DOT rules and regulations. It became obvious that JT did not know the rules. She believes she got a call from Mike Thomas telling her to make sure that the training was completed.

The first person to be trained was JT. She did the training with Mike Burton, who came in at a later date to do follow-up training and make sure everything was clear. That was all she did. The safety department of Ryan Bobsein and Mike Gibbs were reviewing the paperwork involved. Her next involvement with that would have been when she received notification on 26 Mar 14 that they would have an in hours service violation conference call concerning West Monroe.

She was an observer on the call. They discussed how it came to their attention with JT's phone call to her and discussed again the hours of service and violation that occurred. Joe Walker, the account manager, was on that call from West Monroe.

After Complainant made his statement, there was probably some further discussion about the hours of service. Mr. Walker and Complainant were asked to leave the room. Then there was conversation held between Ryan Bobsein, Mike Gibbs, Tom Sprunger, and Mike Thomas. They decided to terminate Complainant because of the hours of service violation and its seriousness and discussed discipline for JT. The decision was made to give him a written final warning.

[28] Tr. 136-154.

After the telephone call, she was instructed by Mike Thomas and Tom Sprunger to go to the West Monroe branch with Complainant's termination papers, which she did. At no point did anyone mention the fact that Complainant had made any complaint about hours of service issues. She never heard any complaint from Complainant himself about hours of service issues or heard anyone report that Complainant had concerns about hours of service issues.

Prior to 28 Mar 14, no one ever told her that the West Monroe branch was told not to complete a grid log. Neither Pat Nicholas, Joseph Hughes, Brian Herrington, nor Joe Walker were involved in the decision to terminate Complainant. None of those people had any supervisory or recommendation position or wrote any efficiency reports or anything concerning Complainant.

Joe Walker was the account manager and had no supervisory authority or input over Complainant, even though he had previously acted as branch manager in that location before October of 2013. Mr. Herrington and Mr. Hughes had also been previous branch managers at that location, but were no longer there in March of 2014 and were not there at all during her tenure supervising that branch. Pat Nicholas was the former area branch operations coordinator with responsibility for West Monroe and she replaced him.

She had nothing to do with the decision for termination. She was informed of that decision by Tom Sprunger, Ryan Bobsein, and Mike Thomas after they finished that conference call. There was discussion about how serious the hours of service violation was. Tom Sprunger is the Director of Human Resources.

Jeremiah (JJ) Dahlum testified at deposition in pertinent part:[29]

When customers called, Respondent did what it could to service them. Some companies are big and they didn't want to say no. Safety rules get broken at Respondent, but Respondent is almost fanatical about safety.

Various things about the timing of paper would routinely make his job difficult. There were sometimes he couldn't do anything to make it go any faster. It just took however long it took. He heard Complainant and Tommy complain a lot about getting paperwork late and having to come back late. He remembers Pat Nicholas saying they were going to straighten it out and it was going to get better.

In the couple of years Complainant worked for Respondent, he probably went to El Dorado/Shreveport ten times. That trip is once a month or every other week or once every other month.

[29] CX-18.

He does not recall on 25 Mar 13 asking Complainant if Complainant could go to either El Dorado or Shreveport and Complainant cutting him off, saying that he wasn't doing that, because they just signed a paper the day before saying they were not going to break the law. He recalls Complainant having a Natchez run that day and there wouldn't have been any time.

He recalls Complainant getting a note to go to Winfield N&R on a late night thing. He does not recall Complainant not wanting to go and JT telling him he had to. He recalls Complainant getting the address off of the internet.

The only thing he recalls in terms of writing grid logs is that they had to adjust time for lunches. He doesn't know anything about Complainant going over fourteen hours. He was aware that Complainant had gone over hours, but at the same time, he didn't know the requirements, because he was not a driver or a manager and really didn't have to know those things.

He remembers JT telling Complainant to not ever go over JT's head again, but wouldn't say JT was screaming. He recalls JT telling him that he wouldn't go down alone and would get somebody fired with him.

When Complainant transferred from Shreveport to West Monroe, deliveries were kind of a mess. Complainant was a pretty good thing to have happened to that branch. Complainant pretty much did both delivery routes for a couple of months before they hired Tommy Barmore.

The date CX-21 in the bottom left-hand corner is an automatic time stamp. He can only assume that it's central time.

Raymond Hughes testified at deposition in pertinent part:[30]

He has worked for Respondent for ten years. He was not trained to be a manager. He is a manager now. He did not falsify his driver's time logs. They explained the 14 hour rule within two weeks of his start with Respondent. He was the branch manager for eight months, up until August of 2012. He kept doing some payroll work when Respondent was between managers. He can't remember who Respondent's most important customers were at the branch when he was manager. Angus Chemical, Entergy, and maybe a lot of the medical clients were very important customers.

He wouldn't say that if they got a phone call from one of those customers needing something it was pretty much going to happen. If Entergy was on the phone saying, they need hydrogen the most important thing to do would be to shift things around to make sure somebody can get to them as fast as possible. He has told a client they couldn't make a delivery because of scheduling.

[30] CX-19.

He remembers once when Complainant wasn't paid four hours that he had worked over a weekend and he promised to fix it. He doesn't remember anything about bereavement pay or getting a call from Pat Nicholas asking why it was bereavement pay. He has never adjusted or falsified time clock records. He was not aware that he could be fired for falsifying records.

He guesses he made the "web manager, 1900 hours," entry on CX-18, but doesn't really have an explanation as to how that happened and has never heard of it happening before. It was not something that he did on purpose.

He doesn't remember sending Complainant to Angus to make a delivery that was late on 13 Apr 13. He doesn't remember Complainant calling later that night to say he was at the point of no return and needed to either leave now or break the law. He did not say he didn't care what Complainant did as long as Complainant made the delivery.

He doesn't remember Complainant complaining about the hours at Airgas.

Tommy Barmore testified at deposition in pertinent part:[31]

When he started working for Respondent and he came back after his route of twelve hours, they told him not to clock out. He knows Complainant was repeatedly told to break the 10/14 hour rule, because they adjusted Complainant's time. When he started working for Respondent, he was told by Joseph the manager to only turn in exempt logs, not grid logs. That changed after JT started. He was sent to either El Dorado or Shreveport about eight times.

When on call, they are supposed to answer the phone. If it was Respondent and it was 2:00 in the morning, he answered the phone and probably was going to make a delivery.

Several times a week Complainant complained about getting paperwork late, making them late throughout the day. He has seen someone forge paperwork. There was a meeting when they were chastised about all the paperwork mess-ups. They would change the rules on how to fill out the paperwork. When he or Complainant would complain about the hours or paperwork to Pat Nicholas and sometimes Joseph Hughes, they would hear that it's going to get better.

There have been safety compliance violations at the branch.

He recalls Complainant telling him JT said Complainant better not ever go over JT's head again. He heard JT say he needed to fire someone.

[31] CX-22.

Joe Walker testified at deposition in pertinent part:[32]

He sat in on the conference call on Complainant's last day at Respondent. He does not recall what JT said when asked why he sent Complainant out that night to make an illegal delivery.

He remembers that Pat made some deliveries in his pickup.

If the on-call phone rings and it's an important customer, they would make the delivery, assuming that they were not over their DOT hours. He doesn't recall anyone saying "Angus calls, you go. It doesn't matter about the hours." Drivers on call were to call the manager of the store, who would make the final decision.

One time there was bad hydrogen that he and Brian had to go pick up. They took it to Brian's stepfather's farm, drove way out into a pasture, grounded it, turned on the valve, and then got just as far away from it as they could. It vented for approximately thirty to forty minutes. Then they picked the cylinder up and brought it back to the store. Ryan Bobsein, the safety director, told them to do that. It was dangerous.

When Complainant transferred from Shreveport to West Monroe, the delivery schedule was probably not in very good condition. It was the regular delivery schedule, but they were having difficulty at that time because it was one driver doing two routes. Complainant ran both routes before they hired Tommy. It could have been a couple of months. When Complainant transferred he was a good fit.

The grid log only came into play if the driver exceeded twelve hours in a day. He never heard of an exempt log being turned in instead of a grid log.

They try not to break safety rules at the West Monroe branch, but in the course of business he is sure that there are occasions where that happens, although he doesn't know of any specific incidents.

[32] CX-21.

Complainant's Driving Logs state in pertinent part:[33]

Date	Trip Start	Trip End	Report for Duty	End of Duty
3 Jul 12	0915	1915	0712	1900
25 Sep 12	0900	1800	0700	1858
26 Sep 12	1130	2030	0708	1900
5 Feb 13	0930	1917	0708	1900
6 Feb 13	1015	2005	0713	1900
26 Feb 13	0907	2110	0705	1900
5 Mar 13	0910	1913	0707	1900
12 Mar 13	0938	*	0716	1900
18 Mar 13	0952	2030	0712	1707
11 Apr 13	0943	1835	0719	1848
12 Apr 13	1055	1830	0716	1849
15 Apr 13	0920	1820	0710	1838
17 Apr 13	0910	1700	0703	1800
18 Apr 13	0952	2030	-	-
15 Jul 13	0930	1530	0710	1705
16 Jul 13	0950	1910	0718	1914
17 Jul 13	0915	1605	0709	1723
18 Jul 13	0925	1335	0711	1641
19 Jul 13	0820	1735	0709	1745
22 Jul 13	1035	1801	0703	1828
23 Jul 13	0850	1703	0706	1730
24 Jul 13	0855	1200	0715	1704
25 Jul 13	0940	1400	0717	1628
26 Jul 13	0803	1530	0717	1705
18 Apr 13	-	-	0704	1900
25 Oct 13	0855	1815**	0715	1848
26 Oct 13	0800	1200	0735	1202
19 Mar 14	0942	1718	-	-

* No end trip time, but departed Jena at 1915
** Complainant purchased gas at 1942 at Chatham, LA.

Complainant's Pay Records state in pertinent part:[34]

Complainant's first pay period for Respondent started on 1 Oct 11.

For each of the periods ending 21 Jul 13, and 22 Dec 13, Complainant was paid 4.7 hours of bereavement pay.

[33] CX-7-11.
[34] CX-2, 12 (p2), 13, 14 (p2).

On 19 Mar 14, Complainant was paid for 9:35, from 0730 to 1735, with a break from 1405 to 1435.

For 2013, through 22 December, Complainant earned $46,439.44 in pay and $6,227.26 in medical, $567.23 in short term, and $121.16 in vision care insurance premiums, along with $1,593.33 and $796.66 matching in 401k contributions.

For 2014, through 30 March, Complainant earned $11,875.21 in pay $201.07 in matching 401k contributions.

Respondent's Records state in pertinent part:[35]

On 11 Oct 11, Complainant went through new employee training that included cell phone policy and received a copy of the handbook covering hours of service.

On 23 Apr 12, Respondent issued a memorandum reminding drivers not to use cell phones while operating vehicles. On 21 Dec 12, 13 Feb 13, and 5 Sep 13, signed certifications that he was aware of the rules related to operating cell phones.

On 30 May 12, Complainant attended a class covering DOT regulations and turning in required logs. It included a handout covering the grid log, 14 hour, and 34 hour rules.

On 24 Sep 12, Complainant attended a class covering cell phone usage.

On 11 Sep 13 he was given a one day suspension and written warning for backing his truck while on his cell phone on 4 Sep 13, even though he was not on the street.

On 24 Mar 13, Complainant signed a review of the hours of service rules.

On 28 Mar 14, Complainant was terminated for having violated the 10/14 hours of service rules on 21 Mar 14 and having a second driving violation since September 2013.

Complainant's phone records show in pertinent part:[36]

Complainant made a call on 21 Mar 14 at 2125 lasting about 2 minutes.

Discussion

In this case, Complainant must prove by a preponderance of the evidence that: (1) he complained to Respondent about what he reasonably believed to be violations of the hours of service and reporting regulations and/or refused to drive because to do so would have actually been in violation of the regulations; (2) Respondent knew about those complaints and/or refusal; (3) Respondent's knowledge contributed to its decision to fire him. Respondent can nonetheless

[35] CX-3-5; RX-1-12.
[36] CX-12.

avoid liability if it can show by clear and convincing evidence that it would have fired him even in the absence of the protected activity.

I first note that Complainant continuously overreached in the pro se presentation of his case, repeatedly straying into irrelevant areas and attempting to make sophisticated legal arguments where none were necessary. However, when he was simply testifying as to the facts of what happened and what he heard, saw, and did while working for Respondent, I found him to be candid and relatively credible. Indeed, there are not many significant fundamental factual disputes between his hearing testimony and the testimony of the other witnesses in the case. The disputes arise over largely subjective issues such as knowledge and intent and the legal consequences resulting therefrom.

Protected Activity

Complainant essentially alleged that he engaged in multiple protected activities over the time he worked in Respondent's West Monroe facility. Some were a continuing course of complaints and some were individual instances. They can best be identified as: (1) complaints about (a) the failure to use complete grid log reporting documents; (b) the failure to clock in/out on callouts and exceeding 14 hours; (c) violating the 34 hour rule and (2) refusal to drive in violation of the hours of service rule.

Grid Log Procedures

Complainant testified that on various occasions from February of 2012 to March of 2014 and with some regularity, Respondent told him not to fill out the grid log even if he went over 12 hours. He said it happened almost every Tuesday and occasionally on other days for a total of five or six times a month. Complainant stated that he complained about it every single time, but was told if he did not comply, he would not be there very long.

On the other hand, Complainant also testified that around August of 2013, Respondent imposed a new edict requiring a grid log between 12 and 14 hours. Complainant said that when he told the safety man who mentioned it that Respondent didn't want grid logs, the safety man said Respondent wanted them now. Complainant described sitting through a meeting about following the grid log rules and signing a paper saying he knew the law and would never violate it again. Complainant also said that although he had not done any grid logs up to that point, he started completing grid logs whenever necessary.

Complainant's testimony was corroborated by that of Tommy Barmore, who also said that when he started working for Respondent, he was told by the manager to only turn in exempt logs, not grid logs. Barmore also confirmed that policy changed after Ary started.

The only other testimony on that issue consisted of general denials of knowledge about grid log violations. The logs that were offered show a number of days where Complainant logged out just short of 12 hours. An argument could be made that those log are circumstantial evidence that no grid logs were required, but I find the testimony of Barmore and Complainant more persuasive.

The weight of the probative evidence establishes that it is more likely than not that Complainant engaged in protected activity on various occasions up until August of 2013 by objecting to the failure to complete required grid logs.[37]

Clocking in/out on callouts and 14 Hours

In Shreveport

Complainant testified that when he started working for Respondent in Shreveport, he was told that if he worked 12 hours, he should log out. If he then got called by Respondent, they expected him not to clock in, but get the job done and Respondent would pay him later. He testified that he told Respondent they could not do that. Complainant added that he was assured by everyone that it would probably never happen and admitted that while he worked in Shreveport, it did not and he had no hours of service complaints while he worked there.

Complainant's testimony was not contradicted and his objection was reasonable, since it was in response to an instruction to violate the regulation, should the need arise. The fact that he was never confronted with the situation does not change the nature of his communication. I find the relevant facts established by a preponderance of the evidence to constitute protected activity under the Act.

In West Monroe

Complainant testified that Hughes and Walker told him to make deliveries to Angus Chemical and when he told them he did not have the hours, they said they would pay him later. Complainant added that even when he was not over 14 hours, if he got back after 12 hours, they would clock him out and put the hours on a different day. Complainant said he objected to it all the time, but was told it was a requirement of the job. Hughes testified that he didn't remember anything about sending Complainant to make that delivery or Complainant calling to say he was out of time. Walker likewise denied telling Complainant to go to Angus regardless of the hours. I find Complainant's specific testimony to be more credible than the general denials of Hughes and Walker and therefore determine that it is more likely than not that Complainant engaged in protected activity by objecting to the practice of exceeding 14 hours and clocking out with false information.

Complainant reported that there were four instances overall where he was actually over 14 hours, two of them while Ary was the boss: 25 Oct 13 and 21 Mar 14.

[37] Respondent observed that those activities took place more than 180 days before the complaint was filed and suggest the complaint was untimely as to those protected activities. However, the 180 day filing deadline begins to run not with the protected activity but with the retaliatory adverse action.

25 Oct 12

Complainant testified that on 25 Oct 13 he completed his normal route for the day at around 1800 and returned to the branch within a 12-hour time frame. He clocked out as soon as he walked in and saw a note that said a nursing home needed oxygen. He thought Ary wrote the note and called him. Complainant said Ary told him to go and while he is sure he complained, Complainant conceded he never specifically mentioned hours of service. Complainant also admitted he discussed the matter only with Ary, dispatcher Dahlum, and sales manager Walker.

Ary testified that at that time, he thought only driving time counted toward the 12 hour limit and if the driver clocked out for hours in between it did not count. He corroborated Complainant's testimony about the note and testified that since Complainant called to ask about the delivery location, he assumed Complainant was taking the trip. Ary said that since Complainant never mentioned hours of service and he did not understand the rules, he had no reason to think that Complainant was objecting to taking the trip at all, much less because of hours.

Dispatcher Dahlum recalled Complainant getting a note on 25 Oct 13 to go on a late night delivery and getting the address off of the internet. He did not recall Complainant not wanting to go or Ary telling him he had to.

21 Mar 14

Complainant said that Friday, 21 Mar 14, he completed his route and clocked out around 1530. Around 1900 he got a call from a former customer asking for an urgent delivery. Complainant testified that he told them he probably could not make the delivery, but then went ahead and drove back to work, because he expected Ary to tell him to do it. Complainant said he told Ary it was too late and they did not have the quantity the customer wanted, but Ary said to deliver what they could. Complainant testified that he told Ary he was going to clock in, but never actually mentioned the phrase, hours of service or working beyond 14 hours in a day, because Ary knew Complainant had been there earlier that day. Complainant said he went ahead and made the delivery, going over 14 hours, but clocking in and out correctly.

Ary testified that on 21 Mar 14, after the normal operating day, he received a call from Complainant about a request from a prior customer. Ary added that Complainant mentioned it was an opportunity get a customer back and said he was on his way to the store to take care of it. Ary said he told Complainant that was fine and Complainant's only hesitation was about having to drive at night on unfamiliar roads. Ary testified that there was no discussion of hours of service or exceeding 14 hours in a day.

The real question is whether Complainant engaged in protected activity by communicating objections about hours of service to Respondent. He argues he didn't need to specifically mention hours of service, because Respondent's manager would have known Complainant's schedule and the rules relating to hours of service.

It seems unlikely that Respondent's manager would be unaware of one of the most basic safety rules relating to an area directly within his purview. Nonetheless, I found Ary's testimony credible in that regard. The fact that Respondent suspended him is further corroboration that he was ill-equipped to be in that position and truly had no basis from which to infer that any reluctance from Complainant was an indication of Complainant's concern about hours of service. Even if Ary would have known the rules, the fact that he either asked for or acquiesced to a violation for those rules by Complainant, would still involve a breach of safety regulations. However, it does not constitute a protected activity until Complainant complains about it.

The weight of the testimony fails to establish that Complainant did so complain. He admitted that he never mentioned hours of service. Complainant's actions were consistent with his testimony that he knew he was going to be told to go, so he just went ahead. Neither Ary nor Dahlum heard or saw anything that indicated any reluctance on Complainant's part to go, except for concerns about directions and available canisters. Even had Ary known the rule as Complainant had assumed, the evidence is insufficient to establish that Complainant communicated any objection or concerns about hours of service. Thus, I find no protected activity on those dates.

34 Hour Rule Violation

Complainant testified that in July 2013, he worked seven days in a row (Monday, 15 Jul 13 – Sunday, 21 Jul 13) and did not get the next Monday off because Respondent gave him work for that day and told him to make sure he got it all done. Complainant said he did not get a day off until the following Saturday, making it 12 days in a row without a 34-hour recess. Complainant explained that Respondent paid him bereavement pay for the weekend. Complainant also testified that he complained vehemently, but was told by Joseph Hughes, Brian Herrington, Joe Walker, Pat Nicholas, and whoever was in charge that he would not be around long if he did not do it, since there were guys coming in every week looking for a job.

The driving records show Complainant worked 15 Jul 13 through 19 Jul 13 and 22 Jul 13 through 26 Jul 13. Pay records show Complainant was paid bereavement pay during that week, but only 4.7 hours. Significantly, Respondent offered no testimony on the issue.

Raymond Hughes testified that he recalled being asked to fix a problem where Complainant was not paid for fours of work over a weekend. Hughes did not recall anything about bereavement pay or Complainant complaining about hours.

I find the relevant facts alleged by Complainant to be established by a preponderance of the evidence and to constitute protected activity under the Act.

Refusal to Drive

18 Mar 14

Complainant testified that on Tuesday, 18 Mar 14, the dispatcher told him to go by Shreveport or El Dorado, but he stopped the dispatcher mid-sentence, said there was no way to do that, and explained they had just gone over the rules the day before. Complainant also testified that there was a big fit on the phone with Ary and everybody was mad. Complainant said he told them there was no way he was going to do that and just took his regular tickets and did his regular runs.

25 Mar 14

Complainant then testified that at 1000 on Tuesday, 25 Mar 14, he was waiting on paperwork from the dispatcher, who mentioned the possibility of a pickup somewhere, and was thinking there was absolutely no way to get it done legally. Complainant stated that he was probably being very forceful about it and thinks the dispatcher just decided not to press the issue. Complainant reviewed the records for that day and conceded they were a little confusing, but emphasized that he knows it did in fact happen and he would not go to El Dorado or Shreveport on that date. Dispatcher Dahlum testified that he does not recall asking if Complainant could go to either El Dorado or Shreveport or Complainant cutting him off because there was not enough time.

Notwithstanding any reasonable belief, Complainant bears the burden of establishing that the two instances would have more likely than not resulted in violations. The evidentiary analysis becomes somewhat circular however, because the credibility of Complainant's testimony that the trip would have violated the rules is obviously a function of how reasonable that testimony appears. In this instance I find he was credible and in the absence of credible contrary evidence, I find that that the evidence shows it was more likely than not that the trips would have violated the rules. Accordingly, the refusals to drive are also protected activity.[38]

In summary, I find Complainant established the following protected activities: (1) objecting to the failure to complete required grid logs on various occasions until August of 2013; (2) objecting to the clock in policy while in Shreveport; (3) objecting to the clock in/12 hour violation related to Angus deliveries; (4) objecting to the 34 hour violation in July 2013; and (5) refusing to drive.

[38] The fact that the dispatcher did not press the issue and simply switched trips does not mean Complainant did not refuse to take the offending trip. It does mean it is much less likely that anyone else knew or cared about the refusal.

Adverse Action and Nexus to Protected Activity

Given the clear adverse action of Complainant's termination by Respondent, Complainant needs only to show that his protected activity contributed to that termination to shift the burden to Respondent. Implicit in establishing that contribution is showing that the person making the decision to terminate was aware of the protected activity or relied on advice or recommendations from someone who did.

Susan Durbin credibly testified that she first heard of any hours of service issues on 24 Mar 14, when Ary asked a question that revealed a clear violation of hours of service. She called Respondent's vice-president Mike Thomas and was told to train Ary in DOT rules and regulations. She said that her next involvement was a 26 Mar 14 conference call on which she was an observer. Durbin noted that Joe Walker was on the call and said that that after Complainant made his statement, there was further discussion about the hours of service, Walker and Complainant were asked to leave, and Ryan Bobsein, Mike Gibbs, Director of Human Resources Tom Sprunger, and Mike Thomas then decided to terminate Complainant because of the hours of service violation and to give Ary a written final warning. Durbin added that there was no mention of Complainant complaining about hours of service issues. Durbin said she never heard that Complainant had any complaints about hours of service or that the West Monroe branch was told not to complete a grid log.

Durbin further testified that neither she nor Pat Nicholas, Joseph Hughes, Brian Herrington, nor Joe Walker were involved in the decision to terminate Complainant. She added that none of them held any supervisor position or recommendation position or wrote any reports or efficiency reports or anything concerning Complainant.

There is very little other evidence in the record related to whether or not the person (or persons) who had a part in making the decision to fire Complainant were aware of any of his protected activities. Complainant did testify that when he was asked on the conference call why he broke the rules, he answered that he was doing exactly what he had been made to do since the first day he started by bosses beginning with Mike Pate on down. Complainant did not testify that he told Thomas and the others about his protected activities and that he had complained about the things that were going on.

While temporal nexus often offers probative circumstantial evidence of knowledge, it does not in this case. The grid log complaints are so far removed in time as to have no impact. Management interest was a consequence of the call from Ary to Durbin that revealed Ary did not understand the rules. The subsequent telephone conference was clearly hastily arranged and appears to have been solely focused on that single event.

Attitudes toward compliance can also serve as circumstantial evidence of nexus. However, Complainant himself testified that when he told vice-president Thomas that Mike Pate had him break the rules, Thomas was not surprised, and had previously fired Pate. Moreover, Dahlum testified that although rules do get broken, Respondent is almost fanatical about safety. That is inconsistent with an organizational attitude that would discourage communications about compliance.

I also considered pretext as circumstantial evidence that Respondent's decision makers were aware of the protected activity. While the cell phone incident seemed to be added as an afterthought to give more context to the termination, it clearly did happen. Notwithstanding Complainant's protestations to the contrary, his conduct violated the rules. Complainant appeared to think it was de minimis violation (if a violation at all), but he did operate the vehicle contrary to the rules. In any event, the real reason Complainant was fired was because he violated the hours of service rules on 21 Mar 14. That was not a pretext and certainly insufficient to infer that the decision makers must have known about the protected activity, because they would not have actually fired him for the stated actions.

I further considered whether there was any animus toward Complainant as circumstantial evidence that Respondent's decision makers were aware of the protected activity. The record does not show anything indicating animus. The fact that Complainant was fired while Ary was not appears to reflect Respondent's conclusion that Complainant should have known better, whereas Ary had not been trained.[39]

The weight of the evidentiary record does not rule out the possibility that the managers who decided to fire Complainant knew about any of the five protected activities Complainant was able to establish. However, the burden is on Complainant to prove not that it is possible that they knew, but that it was more likely than not that they did.[40] The weight of the evidence, in particular Durbin's testimony, is that it is more likely than not that they did not know anything about Complainant's protected activity.[41]

[39] It is remarkable that Respondent, which, according to Dalhum was fanatical about safety would have a manager who was essentially clueless about fundamental operational rules.
[40] Or relied on the advice or recommendation of others who did.
[41] Complainant's termination for violating hours of service was ironic, in that he had made complaints about being asked to violate those rules. However he failed to clearly explain his objections to Ary, who did not understand the rules. His often vague complaints and subsequent acquiescence meant that no one who had a hand in his termination was aware of any protected activity. More vocal objections may have allowed Respondent's senior managers to discover they had an incompetently trained manager in Ary.

Since the evidence shows that it is more likely than not that the persons who made the decision to terminate Complainant were not aware of his protected activity, it equally shows that it is more likely than not that the protected activity did not contribute to the adverse action.

ORDER

The complaint is dismissed.

ORDERED this 2nd day of October, 2015, at Covington, Louisiana.

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).