



**Issue Date: 12 February 2021 CASE NO.: 2016-STA-61**

In The Matter Of

**MICHAEL FORD,**  
Pro Se Complainant,

v.

**PLUS WAY TRANSPORT, INC.,**  
Pro Se Respondent

**BEFORE: PATRICK M. ROSENOW**  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises under the Surface Transportation Assistance Act (the Act)<sup>1</sup>, and the regulations promulgated thereunder,<sup>2</sup> 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 original complaint against three trucking companies<sup>3</sup> with the Occupational Safety and Health Administration (OSHA) in May 2016. OSHA dismissed the complaint and Complainant requested a de novo hearing before the Office of Administrative Law Judges. I conducted an initial scheduling conference call with all parties on 15 Aug 16 and issued a scheduling order setting the hearing for 14 Nov 16. Consistent with my order, Complainant filed a document setting out the specific alleged protected activities and adverse actions on 19 Sep 16. All three companies filed their answers a few weeks later, but then the case was plagued with repeated extensive delays either requested or caused by Complainant. Eventually, Zebra and TCM filed Motions for Summary Decision. Although I granted multiple extensions, Complainant failed to comply with my orders and never submitted any response to

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<sup>1</sup> 49 U.S.C. § 31105 et seq.

<sup>2</sup> 29 C.F.R. Part 1978.

<sup>3</sup> Respondent, Zebra Carriers, and TCM Transport.

the motions. I therefore granted the motions and dismissed his complaint as to Zebra and TCM and directed him to arrange for a call to address scheduling the remaining claim against Respondent.<sup>4</sup>

Instead of following my instructions, Complainant appealed all three cases to the Administrative Review Board, depriving me of authority to continue to adjudicate his claim against Respondent. On 13 May 19, the Board dismissed his appeals as to Zebra and TCM,<sup>5</sup> returning the remaining claim against Respondent to me in July. That led to an additional extended period to attempt to find a hearing date acceptable to Complainant and further scheduling difficulties caused by the national pandemic. Ultimately, I held a video conference hearing at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.<sup>6</sup>

My decision is based on the entire record, which consists of the following:<sup>7</sup>

Witness Testimony of

Complainant  
Respondent  
Vanessa Flores

Exhibits

Complainant's Exhibits (CX) 1-100<sup>8</sup>  
Respondent's Exhibits (RX) 1-22; 24A; 26-28<sup>9</sup>

**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;

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<sup>4</sup> 2016 STA 62 & 2016 STA 63 (22 Jun 18).

<sup>5</sup> ARB 2018-57 and 2019-23 (13 May 19).

<sup>6</sup> Respondent declined the opportunity to submit a brief at the closure of the hearing. Complainant indicated he might submit a brief but failed to do so.

<sup>7</sup> 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.

<sup>8</sup> Complainant did not identify specific exhibits but simply offered all of his documents paginated 1 through 100.

<sup>9</sup> Respondent did not submit RX-23, 24, or 25.

(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 ...

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.<sup>10</sup>

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 he 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.<sup>11</sup>

Although it is not necessary that a complaint expressly cite the specific motor vehicle standard that it alleges 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 Act, a Complainant must show that he reasonably believed he was complaining about the existence of a safety violation.<sup>12</sup>

Where 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 the operation of a vehicle would actually violate safety laws under his reasonable belief of the facts at the time he refused to operate the vehicle. The reasonableness of the refusal must be subjectively and objectively determined.<sup>13</sup> If the refusal is based on an apprehension of injury, it must be reasonable.<sup>14</sup>

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<sup>10</sup> 49 U.S.C. § 31105.

<sup>11</sup> 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).

<sup>12</sup> *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-23, slip op. at 8 (ARB Dec. 31, 2007); *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 11 (ARB Sept. 14, 2007); *Ulrich v. Swift Transportation Corp.*, 2010-STA-41 (ARB Mar. 27, 2012).

<sup>13</sup> *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No 10-001, Sept. 30, 2011; *Sinkfield v. Marten Trans. Ltd.*, ARB No. 16-037 (ARB Jan. 17, 2018).

<sup>14</sup> *Roadway Exp., Inc. v. Dole*, 929 F.2d 1060, (C.A.5 1991).

## EVIDENCE

### *Complainant testified at hearing<sup>15</sup> and deposition<sup>16</sup> and stated<sup>17</sup> in pertinent part:*

He currently works for Gevi Trans in Laredo, Texas and is hoping to purchase a home. His goal is to eventually purchase a tractor trailer and get owner operator pay. He is currently paid \$0.38 a mile, for both loaded and empty. Every company is different on whether they pay different rates for empty and loaded. However, they should tell you before you leave and dispatch. He cannot recall the last job he had that he wasn't paid the same for empty and loaded.

He has worked for various companies as a truck driver. He resigned from a number of them because of disputes over pay or because they were violating Federal regulations. He was also fired from some jobs. One company had an employee who didn't want to train him because he's black.

He worked for Zebra before he went to Respondent. He had problems with Zebra, filed a complaint with the Department of Labor, and eventually had a settlement with them in which they agreed to provide a neutral reference. However, Zebra told other employers that he had been late three times. He called the Department of Labor to complain that they breached the settlement.

Before he worked for Respondent, he worked for Padilla Trucking. They refused to fix a bald front tire and he refused to drive the truck. He wrote a ticket on himself to force the issue. It took three days to get the tire fixed. They were unhappy that he refused to drive. He understands that Padilla told Respondent that he was very aggressive, confusing, and combative. He thinks that's incorrect.

He does not recall when he started working for Respondent. Someone recommended that he contact Respondent about getting runs to Michigan. While he was talking to Respondent about working for them, he told them he had previously had problems with Zebra, had been fired, and was trying to get a settlement from them. He told Vanessa he had had problems with his other employers, but just wanted to work. Vanessa told him that was okay and Respondent would hire him anyway. One of the people he had trouble with at Zebra, Sara Chapman, had previously worked for Respondent.

He applied, but at first, Vanessa would not hire him because he kept electronic logs. He mentioned that he had trouble with Zebra and he might have some bad references, even though they promised in a settlement that they would give him a neutral reference. He also told Vanessa that he had lost his job at TCM. Someone asked if he knew Sarah from Zebra, because she previously worked for Respondent. Vanessa told him that even though Sara once worked for Respondent, the problems he had with Zebra were not a problem for Respondent. Eventually, she said she would hire him, even with the

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<sup>15</sup> Tr 11-31; 72-82.

<sup>16</sup> RX-28.

<sup>17</sup> RX-24A; CX-21-23.

electronic logs. CX-94 should have the correct hire date. They assigned him a truck that was at the shop and gave him a check to pay the mechanics.<sup>18</sup>

After he left on his first dispatch, he found out they were going to pay a lower rate when he drove empty. That was a problem because he should have gotten the same rate for empty and full. They ended up paying him the higher rate for both empty and full. He worked for them for about a week.

His protected activity was raising hours of service and Vanessa pressured him. His first dispatch was from Laredo to Livonia. He was halfway back to Laredo from Michigan. Then he had a load of sugar to Toledo, Ohio. He lost five hours because the shipper said they smelled an odor in the trailer, so it had to be cleaned. He had arrived at the property on time, but was not told where to check in, and the consignee complained that the delivery was late. He had to call the police to get an incident report to show he was not late. Then he left for a pickup in Delphi, Indiana.

He told Vanessa he was out of hours, supposed to have a ten hour break, and could not legally leave. She said they don't condone that or tell drivers to do that. But then another guy called him to tell him to drive even though he also told that other guy he couldn't drive and was going to call OOIDA (Owner Operator Independent Drivers' Association) in Missouri. He doesn't know if that guy on the phone was Rocha or someone else in the office. He thinks it was more than one phone call.

Actually, he had to stop for the night and he had no hours. He doesn't remember, because he doesn't have his log book. He could call ACT trucking and get those files if they still have them, but if he remembers correctly, he had his own tablet. He's not sure. It sounds appropriate to say that during the time he worked for Respondent, he was out of hours but they wanted him to drive anyway. He doesn't have any logs, but it was something of that nature.

To the best of his knowledge, he was on his break or something, but they wanted him to go, he guesses. He had to stop for his ten hour break, but he doesn't recall, although he knows they were trying to force him to drive and he told them he couldn't drive. That's why he called OOIDA. He told them he was being told to drive and they said it was coercion and advised him to suggest to her that they do a relay. He's got that phone call recorded showing that Vanessa told him that they don't condone drivers who drive illegally. He said he could not legally get the southbound load delivered, but could legally take a load and was willing to go back north. Vanessa ended up telling him to take the load to Memphis, so they could have another driver meet him to do a relay. They ended up doing that, and he went back north, even though he was supposed to be going to Laredo for his time off.

Originally, the delivery was supposed to be on Thursday, but the customer changed it. He isn't sure whether it was a ten hour break or 34 hour reset. He's not sure which town he stopped in, but thinks it was Peoria, Illinois.

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<sup>18</sup> CX-20, 76-78, 86-89.

When he left Delphi, Indiana, he set his cruise control on the legal speed. He saw another of Respondent's drivers go speeding by. That driver could get away with it because he was using paper logs and cheating. Respondent can make more money with drivers who do that. Respondent also hires employees with no commercial driver's license.

He never refused to give Vanessa his location more than once or twice a day. Vanessa has his location all the time, anyway. They did not have a tracker in the tracker trailer he was driving.

The truck he had was having problems with the regen unit. He was told the truck had been in the shop multiple times for that problem. Rocha gave him a check to get the truck from the shop. He got the truck out of the shop and the regen light started coming on. He doesn't remember how long it took for the light to come on.

He has extraordinary experience in driving tractor-trailers with those new trucks that have the regen units. Those units deal with the exhaust system. He took pictures on his phone every time the light came on. There are instructions on the sun visor on what to do when the light comes on. If the light is flashing, the operator should stop the vehicle and push the regeneration button. It may take fifteen or twenty minutes to do a regeneration. He pushed the button, but the regeneration wasn't working. He doesn't know how often he ended up pushing the button. He is not an expert, but he has used regeneration units before. They are trying to say that he was the problem, but the problem was the equipment, not him. It was a faulty lemon truck.

The regeneration unit can cause the truck to stop. He was in the middle of traffic and the light was coming on. He couldn't drive the truck because he was in construction zones and barricaded. He had no way to pull over and stop the truck to do a regeneration. They needed to do a regen, which involves cleaning exhaust. He got off the interstate at the nearest truck stop and called Vanessa. She put one of the guys on the phone and he said to keep pushing the button. That might have been the wrong thing. They didn't want him to take it to a dealership because of the money. He was somehow able to nurse the truck so it didn't break down and have to be towed. It isn't fair to discredit him because Rocha's piece of crap vehicle didn't work.

He came back and they told him to drop off his trailer, because they didn't need him anymore because the company is too small. He asked them what he did wrong. Rocha took him into a room with some other guys. It was the first time he had seen Rocha. Before that, he had only dealt with Vanessa. Rocha just straight up fired him. Rocha said, "You sue everybody and we're too small for you." He told Rocha he brought the load back safely and asked why Rocha was firing him. Rocha said it was the regen unit.

The protected activity with Zebra was one of the reasons Respondent ultimately blacklisted him by firing him. Jorge Rocha told him all he does is go around and make complaints. He believes they discriminated against him and that's why he filed a complaint with the EEOC. He also had protected activity by complaining about the

equipment in the beginning. They fired him because they are a small company, because he had a lawsuit against Zebra, and because he's black.

***Jorge Rocha testified at hearing in pertinent part:***<sup>19</sup>

He is the owner of Respondent. Complainant was hired by a man named Ramos. He believes they hired Complainant in May 2015. He is unaware of any complaints made about hours of service to Ms. Flores related to a load going from Michigan to Laredo. The only concern he had was that Complainant had a very bad reference from Padilla Trucking. They said he was very intolerant, but not with regard to complaining about safety or hours of service. He was also aware that Complainant had worked at Zebra and was suing them. He did not know why he was suing Zebra.

He hired Complainant anyway and decided to give him one opportunity to see if Complainant was as aggressive as Padilla's reference said he was. It only took one week to find out how troubled Complainant was and he decided not to continue with Complainant. When one of his staff called Padilla, Padilla said Complainant was intolerant and aggressive. They never mentioned anything about making safety complaints or anything like that. He had no information about the details of Complainant's work with Padilla. What happened in the past was of no concern to him.

Vanessa told him that Complainant was saying they were pushing him on the trip to Michigan. He told Vanessa not to say anything to Complainant because Complainant always changes the version. He told Vanessa to use text instead and not to push him. Vanessa said she was not pushing him. He told Vanessa to just get another driver.

He was aware that Complainant was reporting problems with the regeneration system. They fixed it before he left and when he said there was a problem, they told him to bring it back and they would have it fixed under the warranty.

He finally decided they could not put up with any more. Complainant would always jump on people and was very rude to Vanessa. Vanessa has 35 drivers to deal with and dispatch. He took up a lot of time but often didn't really make any sense. He does not believe that Complainant thinks very clearly. The fact that he mentioned feeling pushed had nothing to do with his decision to fire Complainant. It's company policy that no one can push a driver. That's not the way he does things.

He would've let Complainant go no matter what, just because Complainant was very aggressive, especially toward a woman, and very disrespectful. He could not afford to pay Complainant the same rate for full and empty loads. He normally does not pay drivers the same rate for running full and empty loads. However, he did pay Complainant the same rate on the one trip Complainant had.

When he fired Complainant, he told him they no longer need his service because they are a very small company, he asked for too many things that they don't have, and he is very

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<sup>19</sup> Tr. 47- 71.

aggressive and sues everybody. He also told Complainant to leave the property before the police arrived and not to come back. He did that because Complainant was very arrogant. He did not give Complainant a write up or warning and went straight to termination because of Complainant's temper. They would not rehire him. They spent a lot of money fixing the truck and on the attorney.

***Vanessa Flores testified at hearing in pertinent part that:***<sup>20</sup>

She has been working for Respondent for four and a half years. Before she started with Respondent, she worked for Payless Shoes. This was her first job in the trucking industry. She never hired any drivers. She did not tell Complainant that he had been hired. She didn't have anything to do with bringing drivers on board in terms of scheduling drug tests or anything like that. The northbound coordinator would have given Complainant orientation. Her first official interaction with Complainant was to assign him a load. She did see him when he arrived to file his application. The person in charge of hiring drivers was out so she told him to leave his application on the desk. That was all until she learned that he had been hired and assigned him a dispatch.

She never asked Complainant to drive a trip without sufficient hours. She is not aware of anyone else calling him and telling him to drive. She recalls a load that he drove from South Bend, Indiana to Laredo, Texas in May 2016, sometime around the week of 16 May. They never told Complainant that he had to deliver, but worked with him. They got another driver for the load and sent him up north to pick up the load and deliver to it Laredo. They never pressured Complainant.

That trip started with a load in Laredo that was headed to Michigan. Once he got to Michigan, they looked for a load to get him closer to home. They sent him to pick up a load in Ohio and deliver it to Plymouth, Indiana. From there, they sent him to Dephi, Indiana. Complainant never said anything about being out of hours or tired. He did mention hours of service when she asked him what his ETA would be to Laredo. He told her he would get there, but it would be in the evening, which meant it would be late. There was no way he could get the load to Laredo in time legally. That's when they decided to send another driver up to pick up Complainant's load to bring to Laredo. That would allow the load to get to Laredo on time and Complainant to get his rest. Then Complainant would take the other driver's load the rest of the way to Michigan. Complainant said he could do that, but would have to do a 70 hour restart in Michigan. She told him that was fine. That was the only discussion they had about hours of service.

She never talked to him for long, because he always talked over her. He would talk to her very strongly. She has dealt with a lot of drivers but he was by far the only one that would talk to her like that. He would not let her coordinate where he needed to go and would talk over her.

There was a time that he mentioned regeneration. He told her he was having issues with it. When she got to work, the mechanic told her what to tell Complainant. That was that.

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<sup>20</sup> Tr. 30-46.



The reason he was fired is that they had a disagreement over pay rates. He wanted to be paid the same rate whether he was driving loaded or empty. They just don't do that. All of that was between him and Mr. Rocha. She had nothing to do with the decision to fire him.

***Respondent's dispatch records state in pertinent part:***<sup>21</sup>

During his employment, Respondent dispatched Complainant

<b>From</b>	<b>To</b>
Laredo, TX	Livonia, MI
Livonia, MI	Toledo, OH
Toledo, OH	Plymouth, IN
Plymouth, IN	Delphi, IN
Delphi, IN	West Memphis AR
West Memphis AR	Livonia, MI
Livonia, MI	Shelbyville, IN
Shelbyville, IN	Laredo, TX

Respondent dispatched Complainant to drive a load of produce from Laredo, Texas to Livonia, Michigan with a pickup on 14 May 16 and delivery at 11:00 AM on 17 May 16.

Respondent dispatched Complainant to drive a load of sugar from Toledo, Ohio to Plymouth, Indiana with a pickup at 1:00 PM 17 May 16 and delivery at 7:00 AM 18 May 16. Complainant arrived at 8:00 AM for the load pickup.

Respondent dispatched Complainant to drive a load from Laredo, Texas to Livonia, Michigan, with a pickup date of 17 May 16 and a date of delivery of 21 May 16 at 11:00 AM.

Respondent dispatched Complainant to drive a load from Shelbyville, Indiana to Laredo, Texas with a pickup date of 23 May 16 and a delivery date of 26 May 16.

Respondent dispatched Ricardo Urbina to drive a load of hams from Delphi, Indiana to Laredo, Texas with a pickup and delivery 20 May 16.

***Respondent's Gmail records state in pertinent part:***<sup>22</sup>

On 19 May 16, between 1:00 and 2:00 PM, Vanessa Flores and Complainant discussed pay rates. She informed him he would be paid \$0.37 per mile loaded and \$0.28 per mile empty. He complained that there was no written pay scale, but he was told he would be paid the same for loaded and empty and did not agree to drive at a lower rate for empty,

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<sup>21</sup> RX-1-15; CX-94.

<sup>22</sup> RX 16-17.

since he had never been paid a lower rate for driving empty. She responded that she had spoken to the owner and he said not to worry because he will look into the pay issue. Complainant responded that he has 32 years driving experience and has always gotten the same rate for loaded and empty miles.

At 8:27 AM on 22 May 16 Complainant reported his restart was completed at 6:45 AM and he was available with the full 70 hours on his time clock. Flores informed him that he had a 10:00 AM pick up on 23 May 16 in Shelbyville, Indiana. The load was to be driven to Laredo, Texas for inspection at Respondent's facility at 8:00 AM, after which it would be delivered to the recipient. She instructed him to ensure the trailer was washed out and clean with no odor. He asked for a \$50 advance for a truck wash. At 8:42 PM on 22 May 16, he reported that he arrived at the shipper. She instructed him to arrive as early as possible the next morning so he could get loaded and depart.

On 23 May 16, at 6:07 AM, Complainant reported to Flores that the shipper said the freight would be ready to load sometime after 8. At 10:01 AM, he informed her that he had been explaining how many miles he could do a day within state and federal rules and that the end of the day or twice today he would provide his location. She responded that that was not a problem, no one was making him run illegally, his delivery date remained 26 May 16, and he should feel free to provide his location. He answered that she was claiming he was talking over her, but would do his miles and was only explaining himself about the hours of service. At 10:08 AM, she confirmed that he had reported by phone that he was loaded and his arrival time to Laredo was pending.

At 11:11 AM, he told her that once he reported he was loaded, she put pressure on him to get to Laredo. He restated that it was state and federal law, but told her he would keep posted on his location. She responded that there is never any pressure and they follow the rules at all times. He responded that he would only speak for himself about being pressured on delivery time and other drivers could speak for themselves, but he felt that way the other day about the load he had to drop in West Memphis. She explained that they took him off the load and he should really look at his emails. He responded that he was finished talking about hours of service and told her go to a website to look at the hours of service tickets Respondent's drivers got.

***Complainant's cell phone text records state in pertinent part:***<sup>23</sup>

On 15 May 16, at 3:29 AM, Complainant reported his location as New Boston, Texas with one hour and 30 minutes left on his available time. At 1:35 PM, he reported his ten-hour break was over and he would be departing. At 12:25 AM on 16 May 16, he reported his location was Ina, Illinois.

On 17 May 16 at 6:23 AM, he reported empty and his 10 hour break was completed. At 12:55 PM, Flores gave him a pickup appointment for 18 May 16 between 8:00 AM and 12:00 PM in Delphi, Indiana with a delivery on 23 May 16 in Laredo.

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<sup>23</sup> CX-81-83.

On 19 May at 3:40 PM, he reported his location as a Pilot Service Station in West Memphis. She responded that she would send it to her driver. At 10:47 PM, he reported his location as Effingham, Illinois. He reported he was 6 hours and 35 minutes away from Livonia with a balance of 12 hours and 45 minutes left on his 70 hour clock.

On 20 May 16 at 7:01 AM, he reported that he was 6 hours and 35 minutes from Livonia with a balance on his 70 hour clock of 12 hours and 45 minutes. At 7:12 AM, she responded that he would not have a reload until Monday morning on the 23rd and would therefore have time to reset his hours and run legally. He thanked her. At 2:18 PM she instructed him to follow the steps that they asked him to do before. At 8:50 PM. he reported arriving in Livonia.

On 21 May at 7:22 AM, he reported empty in Lavonia. Complainant reported his restart was completed at 6:45 AM and he was available with the full 70 hours on his time clock. At 7:25 AM, she instructed him to head to a truck stop 30 miles away and she would assign him a return load later. He responded that she should call him now and it was urgent.

On 23 May 16 at 11:22 AM, Flores texted that they do not put pressure on the drivers; they follow the rules and run legal. They discussed how to pay for putting the truck on the scale. At 5:10 PM he reported that he arrived at Mr. Fuel in Indianapolis, Indiana at 11:00 AM and they discussed how to wire him money.

On 24 May 16 at 7:27 AM, he reported that he was in Effingham, Illinois. At 11:57 AM he reported his current location as Hayti, Missouri. At 1:01 PM, Flores advised him that the mechanics recommended he follow the same steps as they had done for regeneration. At 1:04 PM, he answered that regeneration was finished and he had 3 hours and 19 minutes of drive time remaining. She responded that his delivery remained the same for Thursday morning and he acknowledged. At 6:00 PM, she told him they understood, but he should just try to do the same steps as they asked to get him back to Laredo. At 5:43 PM, he again responded that the regeneration was finished. At 8:43 PM, he reported his current location as Texarkana, Texas.

On 25 May 16 at 8:03 AM, he reported he needed a spare fuse kit. At 9:05 AM he reported that the bulb was installed, regeneration was complete, and he would logon duty. He also reported the lady in the service department said the truck must be regenerated one time a day. At 12:45 PM, he reported his location as Dallas, Texas on lunch break. At 9:39 PM, she texted him to arrive the next morning for inspection on the trailer and then proceed to drop off the trailer at the given address. He acknowledged.

On 26 May 16 at 12:08 AM, he reported he had a code directing him to stop the truck and he wishes the gate had been opened. At 12:55 AM, he again reported the code on the truck and asked for a mechanic ASAP. At 8:55 AM, he reported regeneration complete. At 9:27 AM, she told him to go to Intercontinental Forwarding in Laredo and he said okay, thank you.

***Respondent's maintenance records state in pertinent part:***<sup>24</sup>

On 1 Jun 16, French Ellison Truck Center inspected Complainant's truck. They determined that the regeneration switch had been used in the soot level 75 times, the regeneration switch had been inhibited four times, the soot level high had triggered twice, and the Delta P pressure had measured too high 18 times. It appeared that regeneration was interrupted using the inhibit switch, which causes excessive soot accumulation. The related fault code had two possible causes: (1) faulty original switch or wiring or (2) the driver enabled the inhibit switch when the system was requesting an active regeneration of the after treatment system.

***Respondent's Personnel records state in pertinent part:***<sup>25</sup>

Complainant reported in his application employment history over 15 previous trucking companies. He gave a number of various reasons for leaving those companies, including not being given the proper bill of lading, having child support withdrawn from his pay without permission, disagreement with multiple employers over pay, multiple employers' refusal to repair his truck, being incorrectly trained.

In February and March 2017, Complainant filed a complaint with the Equal Opportunity Employment Commission that Respondent had discriminated against him because of his race, sex, age, and status as a whistleblower.

## **DISCUSSION**

There is no dispute that Respondent took adverse action against Complainant by terminating him. Consequently, in order to prevail, Complainant must show by a preponderance of the evidence that he engaged in protected activity and the protected activity contributed to Respondent's decision to terminate him. If he is able to meet that burden, his claim will nonetheless fail if Respondent is able to show by clear and convincing evidence that it would have terminated him even in the absence of the protected activity.

Through the course of this litigation, it has been difficult at times to effectively communicate with Complainant. His communications were often disjointed and at times nonresponsive, while at the same time very forceful. He tended to jump from topic to topic and view his case in a holistic manner, making it a challenge to address specific discrete issues. As a result, it was difficult to determine with clarity or certainty exactly what Complainant was alleging. Nonetheless, it appears that the protected activities he alleges contributed to Respondent's decision to terminate him were (1) his previous whistleblower complaints against other trucking companies, (2) his communications regarding possible hours of service violations during the few days he worked for Respondent, and (3) his "complaints about the equipment in the beginning."

The record leaves little question that Complainant filed a whistleblower complaint against Zebra. Similarly, there is no dispute that Complainant reported to Respondent his concerns about hours

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<sup>24</sup> RX 18-22.

<sup>25</sup> RX 26; CX 1-3.

of service. That would leave only the question of whether his concerns were reasonable and Respondent's decision to dispatcher a relay driver is strong evidence that they were. Finally, the record shows that Complainant also reported concerns about equipment, including the regeneration system. The record indicates those concerns were reasonable and Respondent did not suggest otherwise.

Therefore, Complainant carried his burden of proof and established protected activity in the form of his previous whistleblower complaints and communications about hours of service and equipment. That raises the question of whether any of those protected activities contributed to Respondent's decision to terminate him.

That question hinges largely on the testimony of Vanessa Flores and Jorge Rocha. In that regard, I note that I found their testimony to be highly credible, notwithstanding some language difficulties related to the fact that they were testifying in English. I found Complainant's testimony somewhat less reliable, not because of any lack of candor or intent to deceive, but because of the generally disjointed recollection and forceful approach to his testimony.

Both Flores and Rocha testified that Rocha was solely responsible for making the determination to terminate and the record as a whole certainly demonstrates that was the case. Consequently, Rocha's testimony is highly relevant to the question of what role any protected activity played in his decision to fire Complainant.

The record contains nothing to indicate that Complainant's report about equipment had anything to do with the decision to terminate him. Rocha did testify that he knew Complainant had reported problems with the regeneration system, which had been repaired before he left. Rocha added that they simply told Complainant to return the truck so they could have it fixed under the warranty. Flores similarly testified that when Complainant mentioned the regeneration problems, they simply passed along the instructions they got from the mechanic.

Indeed, the reports from the mechanics on the post-trip repairs indicate that the problems with the system may have resulted from Complainant's improper operation. Complainant testified that Rocha told him he was being fired because of the regeneration system. Consequently, there is some evidence in the record that Complainant's improper operation of the system, not his report about the system may have contributed to the decision to terminate. In any event, the record is insufficient to establish that any reports or complaints about faulty equipment contributed in any way to the decision to fire Complainant.

Rocha initially testified that he was unaware of any complaints made about hours of service to Ms. Flores related to a load going from Michigan to Laredo. However, he later testified that Flores told him that Complainant was saying they were pushing him on the trip to Michigan. Consequently, he was aware of that protected activity. His response was to tell Flores to use text rather than voice calls with Complainant, because Complainant always changes the version. He also told her not to push him and just get another driver. Finally, he testified very credibly that his company policy is that no one can push a driver, because that's not the way he does things and the fact that Complainant mentioned feeling pushed had nothing to do with his decision to fire Complainant. Accordingly, I find the record insufficient to establish that it is more likely

than not that Complainant's protected activity related to hours of service contributed to his termination.

That leaves the previous whistleblower complaint against Zebra as the remaining protected activity. Rocha testified that while he knew Complainant was suing Zebra, he did not know why. He stated that before he hired Complainant, the only concern he had was a very bad reference from Padilla Trucking, who said Complainant was very intolerant and aggressive, but never mentioned anything about making safety complaints or anything like that. Rocha decided what happened in the past was of no concern to him, and he would give Complainant one opportunity to see if he was as aggressive as Padilla's reference said he was.

Rocha testified further that it only took one week to find out how troubled Complainant was and he finally decided they could not put up with any more. Complainant would always jump on people and was very rude to Flores, who has 35 drivers to deal with and dispatch. He took up a lot of time and often didn't really make any sense. He does not believe that Complainant thinks very clearly.<sup>26</sup>

That was consistent with Flores' testimony that she never talked to Complainant for long, because he always talked over her and would talk to her very strongly. She added that she has dealt with a lot of drivers but he was by far the only one that would talk to her like that and would not let her coordinate where he needed to go.

Rocha also testified that he could not afford to pay Complainant the same rate for full and empty loads. He added that even though he does not pay drivers the same rate for running full and empty loads, he did pay Complainant the same rate on the one trip he made. That is consistent with Flores' testimony that the reason Complainant was fired was a disagreement over pay rates. She explained that Complainant wanted to be paid the same rate whether he was driving loaded or empty and Respondent just does not do that.

Complainant testified that Rocha told Complainant they didn't need him anymore because he sues everybody and Respondent is too small for him. Rocha testified that he told Complainant they no longer needed him because they are a very small company, he asked for too many things that they don't have, and he is very aggressive and sues everybody. Accordingly, the two versions are largely consistent, although Complainant omitted the part about him being aggressive and wanting too many things that Respondent does not have.

The testimony that Rocha told Complainant he was firing him at least in part because Complainant sues everyone is relevant and direct evidence that Complainant's suit against Zebra played a role in the adverse action decision. However, simply suing an employer is not a protected activity under the Act. I found Rocha's testimony that although he was also aware that Complainant had worked at Zebra and was suing them, he did not know why. Consequently, the evidence fails to establish that Rocha was aware that Complainant had engaged in protected activity with Zebra. As a result, the evidence is insufficient to establish that Respondent had knowledge of the protected activity that contributed to its decision to terminate Complainant.

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<sup>26</sup> That description of Complainant's interactions is consistent with his behavior throughout this litigation.

However, Rocha also testified that he would've terminated Complainant no matter what simply because of Complainant's arrogance, aggressiveness, and disrespect toward Flores and because he could not afford to pay Complainant the same rate for full and empty loads. Therefore, even in the event that Rocha had understood Complainant's suit against Zebra to be a whistleblower suit, and therefore protected activity, I find clear and convincing evidence that Respondent would have nonetheless fired Complainant in the absence of the Zebra lawsuit.

### **ORDER**

The complaint is denied.

**ORDERED** this 11<sup>th</sup> day of February, 2021, at Covington, Louisiana.

**PATRICK M. ROSENOW**  
**Acting District Chief 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 the administrative law judge's decision.

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration, and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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).

**Important Notice About Filing Appeals:** The Notice of Appeal Rights has changed because the Board has implemented a new eFile/eServe system (“EFS”), which is available at <https://efile.dol.gov/>. If you use the Board’s prior website link, <https://dol-appeals.entellitrak.com> (“EFSR”), you will be directed to the new system. Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

*Filing Your Appeal Online:* Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at <https://login.gov/> (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their <https://login.gov/> username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at <https://efile.dol.gov/system/files/2020-11/file-new-appeal-arb.pdf> and the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>.

Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for <https://login.gov/> and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed. You are still responsible for serving the notice of appeal on the other parties to the case.

*Filing Your Appeal by Mail:* You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address: U.S. Department of Labor, Administrative Review Board, Attn.: Office of the Clerk of the Appellate Boards (OCAB), 200 Constitution Ave. NW, Washington, D.C. 20210-0001.

*Access to EFS for Non-Appealing Parties:* If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at: <https://efile.dol.gov/support/boards/request-access-an-appeal>.

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*Service by the Board:* Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.