

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

Issue Date: 22 October 2018

ALJ NO.: 2018-STA-00013

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*In the Matter of:*

KERVIN JEANTY,  
*Complainant,*

v.

LILY TRANSPORTATION CORPORATION,  
*Respondent.*

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**DECISION AND ORDER DISMISSING COMPLAINT**

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act (“STAA” or “the Act”), 49 U.S.C. § 31105, and the implementing regulations. 29 C.F.R. § 1978. Kervin Jeanty (“Complainant”) asserts his former employer Lily Transportation Corporation (“Respondent” or “Lily”) retaliated against him for protected activity when it suspended him on September 20, 2016 and terminated his employment on October 10, 2016.

I. PROCEDURAL HISTORY

A hearing was held in Poughkeepsie, New York on April 4, 2018. Complainant was self-represented. Respondent was represented by Peter Crowley, Senior Vice President of Operations for the company.<sup>1</sup> At the hearing, Complainant’s exhibits (“CX”) A-F and Respondent’s exhibits (“RX”) 1-7 were entered into evidence. Hearing Transcript (“TR”) at 14-16, 269.<sup>2</sup> The parties’

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<sup>1</sup> Neither party was represented by counsel.

<sup>2</sup> Complainant’s Exhibits are identified as follows:

- A. Load Sheet/Delivery Invoices for some, but not all days, Complainant worked during the period 8-3-16 through 9-29-16.
- B. Log Sheets – Driver’s Daily Log for two days, September 19, 2016 and August 31, 2016.

Joint Pre-Hearing Statement was entered as JX 1. TR 8. The official documents were identified as ALJ exhibits (ALJX) 1-7 and admitted. TR 16. The parties presented closing arguments at hearing and declined to file post-hearing briefs.<sup>3</sup> TR 259-268. Post-hearing via e-mail dated April 10, 2018, the Complainant submitted his U.S. Income Tax returns for 2016 and 2017. Respondent has not objected. The tax returns are hereby marked as CX G and admitted.

Complainant alleges his employment was terminated in violation of the employee protection provision of the STAA. For the reasons outlined below, I find Complainant has failed to establish protected activity under the STAA. Therefore, the claim is dismissed.

## II. Issues In Dispute

This matter presents the following issues:

1. Did Complainant engage in protected activity under STAA by refusing to drive the second delivery on September 30, 2016 because he was either ill or fatigued and or because he lacked sufficient hours under the hours of service regulations;
2. Did Complainant suffer an adverse employment action when he was suspended on September 30, 2016 and subsequently terminated on October 10, 2016;
3. Has Complainant established by a preponderance of the evidence that the protected activity was a contributing factor in Respondent's termination of his employment; and
4. If so, can Respondent show by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.

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- C. Pay Stubs for some (5), but not all, pay periods between July 3, 2016 and October 1, 2016.
  - D. Medical Records dating from August 2, 2017 reflecting treatment for depression.
  - E. Laws, Codes, Regulations including the employee protection provision of the Surface Transportation Act, 42 U.S.C. § 31105 and 49 C.F.R. § 390.13.
  - F. Demand/Damages

Respondent's Exhibits include:

1. Professional Driver Training from Lily
2. Receipt of Required Training –Driver Training certificate signed by Complainant
3. Progressive Discipline record
4. HOS Log for 9/30/16 titled PeopleNet Fleet Manager
5. PAF Form/Manager Statement - Termination
6. Decision and Order State of NY, County of Dutchess Small Claims court decision 2/23/2017.
7. Complainant's original (10/10/16) and amended (7/6/17) complaints to the Occupational Safety and Health Administration (OSHA).

<sup>3</sup> Because both Complainant and Lily elected not to retain counsel in this proceeding, and declined to file post-hearing briefs, neither party identified controlling legal authority or case law to assist the undersigned in resolving this dispute.

### III. Stipulations of Fact

The parties offered the following four stipulations which I accepted:

1. Lily Transportation Corporation, founded in 1958, engineers and operates highly efficient service-dedicated logistics systems throughout the United States and Canada. Lily has an operation based at a customer location in Stormville, NY.
2. Complainant was hired by Lily on July 5, 2016.
3. Lacking the skills required for a full-time driver, Complainant enrolled in the Lily professional driver training academy as a driver trainee. Over the following six weeks Complainant participated in a comprehensive training program focused on safe, professional driving. His training began with a thorough ongoing process, including system training, a review of the safety handbook, FMCSA<sup>4</sup> compliance statement, unauthorized passenger notice, hours of service regulations and driver wellness. Additionally as part of his orientation and training, Complainant was informed of his rights relative to the whistleblower protection, which outlines employee rights to question safety practices of an employer without the risk of losing a job or being subjected to reprisals simply for stating a safety concern.
4. Upon completion of the six week training program, Complainant became certified as a full time regular driver. Participation in this program represents a \$6,000 investment by Lily Transportation.<sup>5</sup>

TR 6-8; JX 1.<sup>6</sup>

In addition to the stipulations, the following facts are undisputed:

5. Complainant worked out of Respondent's customer location in Stormville, NY. TR 6, 20, 258.
6. Within a few days of beginning the driver training program, Complainant complained to Respondent about what he perceived were ethnic comments and

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<sup>4</sup> FMCSA stands for the Federal Motor Carrier Safety Administration, which is within the U.S. Department of Transportation and issues regulations for improving safety in the trucking industry. 49 C.F.R. §§ 385, 386, 395.

<sup>5</sup> Based upon the parties' four stipulations and the record before me, I find Respondent is a covered employer, as it is engaged in business affecting commerce between states using commercial motor vehicles to conduct such business and it employs drivers to operate the business. I also find Complainant was a driver of a commercial motor vehicle as defined by the STAA. 29 C.F.R. § 1978.101(h).

<sup>6</sup> The documents attached to JX 1, which are Lily's exhibits, were not admitted as part of JX 1. TR 7-8.

sexual harassment from the trainer assigned to him. TR 18, 83-85. Respondent assigned another trainer to Complainant and Complainant testified he was excellent. TR 18-19. Complainant's training included hands on training in the truck for a period of time, which included learning to load and unload the truck, driving conditions, how to maneuver the truck, delivery conditions, dealing with traffic, followed by periods of riding along with another driver. *Id.* Complainant completed the training program and was given his own assignments as a professional driver. TR 19-20.

7. Respondent operated a 24 hour a day operation. TR 20. Complainant reported to the Stormville location each day, proceeded to the office to get his delivery slip informing him where the delivery was going and which trailer to take. TR 20, 23. At the end of each day's assignment Complainant would be back at the Stormville location, go to the office and learn the assignments for the next day. TR 21. The next day's delivery slips were assigned based upon the time an employee returned to the yard the previous day to make sure drivers had 10 hours off duty so a driver had available hours for the next day's delivery assignments. TR 21.
8. PeopleNet is an electronic onboard system in the trucks which can prepare the driver's DOT Hours of Service log and can be used for logging in and out of work. TR 24, 140-141, 184-85, 187-88, 190.
9. In the twelve weeks Complainant was employed by Respondent, of which six were in training, he received discipline for covering the drive cam in the truck and was given a last chance agreement for a confrontation with a co-worker. TR 90, 199, 218-220, 244-245.

#### IV. SUMMARY OF TESTIMONY

##### A. Testimony of Complainant

Complainant's delivery assignments were primarily to New York City, mainly to Brooklyn. TR 23. He testified there was not a general standard shift. TR 22. He stated they were going "so many different places, and with traffic, everything is constantly varies because of traffic." *Id.* He said he generally worked at least 13 hours a day and on occasion over 15 hours. *Id.* Complainant was generally assigned two loads or deliveries each day. TR 28. Complainant explained the PeopleNet system was an electronic onboard device for a driver's log, the U.S. Department of Transportation ("DOT") Hours of Service log, and it was also a way to clock in. TR 24. Complainant stated right before he left for a delivery he accessed the PeopleNet system. *Id.* If the PeopleNet system was not working he would have to use a paper log. *Id.*

Complainant explained once he obtained his delivery assignment he went to the yard, identified the trailer he was assigned, hooked the trailer up to the tractor (truck), and performed the required inspection of the truck. TR 26-27. This entire process took approximately 45

minutes to complete. *Id.* The delivery tickets would include a time when the customer would expect delivery. TR 27-28. If a driver faced delays in making the delivery on time due to traffic or an accident, the driver was required to contact the dispatcher to let him/her know. TR 28-29. Complainant testified he experienced delays on a regular basis. *Id.*

On the morning of September 30, 2016, Complainant did not recall what time he started working. TR 29, 65. But he recalled he returned to the yard at approximately 11:00 a.m. after completing his first delivery to Brooklyn that day. TR 29-30. He stated he did not recall having any difficulty with the first delivery. TR 30.

Complainant said when he returned to the yard at 11:00 a.m. he was feeling ill and tired. TR 30. He testified he told Andre (Duncan)<sup>7</sup> he wasn't feeling well and asked if he could go home. TR 30, 33, 42. Complainant testified "his body just was not feeling well. It could have been due to the fact that I had been working so many hours. So I may have created something that they call 'sleep dep,' meaning you're up so much and everything, eventually your body is gonna say, ok, you know, you need to have a rest." TR 30.<sup>8</sup> He stated Mr. Duncan said he could not go home as there was no one else to cover the run. *Id.* Complainant testified he told Mr. Duncan he would do the run, but was going to take his lunch first before getting the next load.<sup>9</sup> TR 30, 69-70. Complainant initially testified that by the time he arrived back at the yard at 11:00 a.m. he had been driving at least five or six hours already. TR 31-32. He said he began lunch around 11:30 and said he took 40 minutes or so. TR 33.

Complainant stated he went back on duty at 12:15 p.m. TR 33. At that point he already had the next delivery slip and needed to locate the trailer. TR 34. He located the trailer and then he had to connect the tractor (truck) to the trailer. TR 34-35. Connecting the tractor to the trailer requires the driver to maneuver the tractor toward the trailer. TR 34-35. In order to see whether the tractor/truck can be backed underneath to connect to the trailer, the driver needs to get out and see whether the trailer must be raised first before the tractor can be backed in to connect to the trailer. *Id.* Complainant stated he thought he could back right into the trailer to connect it, but the trailer got stuck. TR 34-35, 76. He explained once this happens and the kingpin gets positioned behind the fifth wheel one can't simply pull the trailer out. TR 34-35.<sup>10</sup> One must either lower the fifth wheel or raise the tractor, depending upon how it is stuck. *Id.* He testified it took him 15-20 minutes to get out of the high hitch the first time. TR 35. Complainant testified

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<sup>7</sup> At the time, Andre Duncan was operations manager for Lily supervising drivers at the Stormville, NY facility. TR 143-43, 188.

<sup>8</sup> When pressed on cross-examination as to whether he was ill or fatigued, Claimant explained he had been working a lot of hours in September, was tired, and his body didn't feel well. TR 68-69.

<sup>9</sup> On direct, Complainant stated he told Mr. Duncan he was going to take his lunch and a quick nap. TR 30. On cross-examination he clarified he told Duncan he was going on lunch and sometimes on lunch one takes like 15-20 minutes of relaxing, not going to sleep. TR 69-70. On September 30 his "nap" in his personal vehicle lasted 15-20 minutes. TR 70.

<sup>10</sup> The parties later referred to such a situation as a high hitch. TR 34-36, 211-213, 249-251.

on his second attempt to connect the truck to the trailer he had a second high hitch situation in which the truck got stuck again. TR 35-36. This time he said it took 10-15-20 minutes to extricate himself from the situation. TR 36-37. Complainant agreed that when the kingpin gets behind the fifth wheel it is a danger for damage to property and vehicles. TR 77. Complainant acknowledged he did not notify anyone at Respondent that he had had two high hitches delaying him at the time they occurred. TR 81. It was only “after the fact when I was questioned about it...” that he told Respondent. *Id.*

Complainant stated he then had to strap the load in the trailer but does not recall any details. TR 37. When he completed strapping the load it was 1:15 p.m. TR 37. Next he proceeded to get fuel, but the tractor he was in did not have the fuel fob, so he went back inside the office to get a fuel key. TR 37. Complainant said there were two trucks in front of him getting fuel. TR 38. Complainant does not recall the sequence of the next events, that is, whether he ever actually got fuel or whether he went back in the office to talk to Mr. Duncan while waiting in the fuel line or after he obtained fuel. TR 38-39. At any rate Complainant said it was 2:00 p.m. when he went to see Mr. Duncan and told Mr. Duncan, he did not have enough time to complete the second run as it was getting late now. TR 38-39. Complainant told Mr. Duncan “I’m not leaving here now. I’m not doing this now.” TR 42. Complainant said Mr. Duncan was irate. TR 38-39, 42. Complainant testified Mr. Duncan told him to get out of his office and suspended him for five days. TR 42, 43. He recalled Willie Shackelford being in the office when Mr. Duncan told him to get out. *Id.* Complainant stated Willie Shackelford took the truck. TR 43. Complainant was told to remove his belongings from the truck, and then he left the facility and went home. TR 43.

Complainant testified he would not have enough hours, stating the run would have taken at least 2 1/2 to 3 hours, and on top of that it was a Friday, so it would have taken three hours just to get to the delivery location. TR 39-40. He testified that by 2:00 p.m. that afternoon when he refused the load he had already spent 7 or maybe 8 hours driving that day. TR 40. He claimed that if he left at 2:00 p.m. he would arrive in Brooklyn at the delivery location at 5:00 p.m. and then not get back until 8:00 p.m. and he knew he did not have enough hours for 8:00 p.m. TR 40. He stated he has gone over hours on a regular basis. TR 40-41. He asserted that one day he worked 17 hours and it is reflected in his Exhibit A. TR 41. Complainant understood he had a total of 14 hours for September 30. TR 45, 47. As noted, he does not recall the time he began working that morning. TR 45. He said his first delivery was to Brooklyn and he was back at the yard in Stormville by 11:00 a.m. TR 45-46. Complainant testified that first delivery took anywhere from five to seven hours driving. TR 46. He understood his lunch break did not count toward the 14 total hours for the day. TR 46. Complainant initially said that under the DOT regulations, time spent on breaks did not count toward the 14 hour driving time as that was “off duty” time, but time spent in the yard connecting the trailer, time spent in traffic or time driving all count as “on-duty” time. TR 46-47.

Complainant returned to work on or about October 10 at about 9 or 10 a.m. He went into the office looking for a delivery assignment and Andre told him his employment was terminated. TR 44-45.

Complainant stated he has gone over hours several times working for Respondent and no one said or did anything. TR 41. Complainant testified to incidents he viewed as Respondent's attempts to get him to work in violation of the DOT hours of service or drive when he was off duty. TR 58-61. He described one incident on September 6, 2016, in which he returned to the yard late and was to have 10 hours off duty which would have ended at 6:00 a.m. the next morning. TR 58. However, he saw he had a delivery slip assigned for the next day that was to start at 6:00 a.m. TR 57. He called Mr. Duncan to let him know he was getting back to the yard late and that his 10 hours off duty ended at 6:00 a.m. the following morning which would interfere with the delivery time assigned to him the next morning. *Id.* That is, he would be late to the delivery. TR 57-58. Complainant stated Mr. Duncan replied don't worry about it, do the delivery and Mr. Duncan made a note of it. TR 57-58. Complainant replied "ok." TR 58. Complainant went to sleep in his personal vehicle parked in the yard at the Stormville location.<sup>11</sup> TR 58. He was sleeping in his personal vehicle and at 5:00 or 5:30 a.m. that next morning a co-worker, Mr. Pulicano, banged loudly on his vehicle asking for the delivery slip paperwork. TR 58-59. Complainant stated he was startled by the loud banging and was irate and swearing at Mr. Pulicano. TR 59. He told Mr. Pulicano he was taking the load and Mr. Pulicano told Complainant Andre Duncan told him to take the load. *Id.* Complainant gave the delivery slip to Mr. Pulicano and there was a back and forth between them as Mr. Pulicano then told Complainant he could take the load if he wanted. TR 58-60. However Complainant recalled Mr. Pulicano took the load. TR 59-60. When I inquired if he worked that day Complainant replied "I do not recall. I may have been suspended or something that day." TR 60. When pressed as to whether he remembered if he was suspended that day Complainant testified "I don't think I – I'm not sure if I was suspended. I was given some type of paperwork. There was a dispute. There was a dispute. I know that much." TR 60. Although he said he could not recall exactly why he was suspended to the best of his recollection it was because of the incident arguing with another employee. *Id.*<sup>12</sup>

Complainant also testified he was given an unsafe vehicle to drive. TR 61-62.<sup>13</sup> He described an incident he said occurred during his last week on the job in which he was told to take a load, and when he did his walk around check of the truck he noticed it had one flat tire and was told it was ok, go ahead and take it. TR 62. He refused to take the truck with the flat tire and was not required to do so by Respondent. *Id.*

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<sup>11</sup> Complainant explained he was already having financial difficulties and did not have a place to stay, his family was staying with friends at that point and he was sleeping in his car. TR 57-58.

<sup>12</sup> Complainant explained he has an older vehicle and Mr. Pulicano's banging caused some "paint and stuff to come off." TR 60-61. Complainant took the company to Small Claims Court in the State of New York, Dutchess County, for the damage to his vehicle, among other issues. TR 6; RX 6. His small claims court matter was dismissed. RX 6.

<sup>13</sup> Complainant's complaint to OSHA does not include an allegation he was given an unsafe vehicle to drive. *See* OSHA Complaint; TR 61. Nor did Complaint say anything about an unsafe vehicle on September 30, the day he was suspended.

Complainant acknowledged, on questioning by Respondent, that it was company policy to notify dispatch for any delays on a delivery. TR 64. Complainant did not recall being 45 minutes late in arriving at the first delivery on September 30. TR 65-67. He maintained if he had been late, he would have called Andre Duncan. *Id.*

On cross-examination Complainant agreed the pre-trip inspection drivers are required to perform is a very specific inspection required by the U.S. DOT that includes specific safety items that must be checked. TR 63-64. Complainant also corrected his prior testimony and agreed the allowable driving time on a given day is 11 hours and the “on duty” time is 14 hours. TR 71.

In response to Respondent’s exhibit RX 4<sup>14</sup> titled PeopleNet Fleet Manager which purports to be an electronic reflection of what a driver does on a specific day and is generated off the tractor’s (truck’s) engine movement, Complainant acknowledged the document for September 30, 2016 indicates he had a total of 5.36 hours on duty including driving time that day. TR 24, 72-74; RX 4. However, Complainant disputed the accuracy of the information reflected in the document. TR 73. He stated he would only believe RX 4 was authentic if Respondent also had a delivery slip (for that day) with his signature like ones he submitted in his exhibit CX A. *Id.*

Complainant was suspended on September 30 and terminated on October 10, 2016. RX 3 at 1; TR 89. The termination form titled Final Incident Report indicates the final incident resulting in termination was “Refused load after sitting in the yard for a three hour break.” RX 3 at 1. The Final Incident Report also lists prior corrective actions taken involving Complainant. *Id.* Complainant agreed there had been a prior issue with the drivecam and he received verbal counseling. TR 90. Complainant also acknowledged he was disciplined for the confrontation with Mr. Pulicano on September 7, 2016 and for leaving the Yard without notifying dispatch. TR 90. He was suspended for three days for this incident. TR 91; RX 3 at 4. Complainant testified he did not recall having a fuel spill on September 15, 2016. TR 91-93; *see* RX 3 at 2; RX 7 at 4. Nor did he recall discipline for a fuel spill. TR 93-94, 104; *see* RX 3 at 2.

Complainant agreed that if the PeopleNet log is accurate for September 30, 2016, then when he returned to the yard at 11:00 a.m. after completing the first delivery, he had used five hours and 36 minutes of the total 14 hour on duty time for that day, meaning he had 8 hours and 24 minutes left of the on-duty time for that date. TR 96-97, 100; RX 4. Within the 5 hours and 36 minutes on duty time, he had driven a total of 4 hours and 14 minutes that morning, so he had 6 hours and 46 minutes left of the total 11 hours driving time for that day. TR 94-95.

Complainant conceded that at 2:00 p.m. that afternoon, after the 3 hours which included a lunch break and time spent hooking the trailer and getting fuel, he still had the same 6 hours and 46 minutes “drive time” as he had not driven during that 3 hours, but he only had a total of 5

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<sup>14</sup> The transcript of the hearing reflects Respondent referred to this document as RX 41 and 42. TR 72. However, the correct reference to the document is RX 4 which contains pages 1 and 2. RX 4.



hours and 24 minutes on duty time left of the 14 hour limit.<sup>15</sup> TR 100-101. Complainant disputed Respondent's assertion he could have completed the afternoon delivery within the hours of service when he told Mr. Duncan he did not have enough hours at 2:00 p.m. to complete the second delivery assigned. TR 101-102. Complainant stated the delivery distance and return was approximately 150 miles. TR 101. He disagreed with Respondent's assertion that at 50 miles an hour he could have completed the delivery in 3 hours. *Id.* At 2:00 p.m. that afternoon he refused to take the delivery stating he did not have enough hours. TR 102.

Complainant testified he was earning approximately \$1200 gross or \$800 net per week at Lily. TR 47, 55. He stated he expected to earn \$1500 - \$2000 per week based upon statements Lily made to him. TR 55. He explained he was not paid hourly but rather by mileage. TR 55. But if there was a delay in a delivery, the driver would contact Respondent and note how much time he was delayed, so Respondent could compensate the driver for the delay. *Id.*<sup>16</sup>

Following his termination, Complainant has held several jobs. He initially returned to driving a school bus part-time from approximately October 25, 2016 until February 2017. TR 48. He estimated he earned approximately \$500 per week.

Complainant said he next worked for Sysco LTD driving delivery trucks on a full-time basis beginning in March 2017 through May 2017 when he was discharged. TR 49-50. He earned between \$23 and \$25 per hour for 40 hours a week. TR 50. Next Complainant worked at American Shoring for about a month earning \$18 per hour for a full-time schedule.

Complainant began work with Decision Pipeline Solutions, a utility company, as a driver/laborer from mid June 2017 through September 2017, earning \$23 per hour on a full-time basis. TR 52-53. He said he was let go after making a few complaints. TR 52.

Complainant stated he had not worked in the period September 2017 to April 4, 2018, the date of hearing, but was to begin a new job the following week at Wires and Frieze with a starting pay rate of \$21 per hour on a full-time schedule. TR 53-54.

## B. Testimony of Aaron Pulicano

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<sup>15</sup> If Complainant's testimony that break times such as his lunch break on September 30 are not counted toward the 14 hour on duty time was accurate, then at 2:00 p.m. he still had 6 hours and 9 minutes of on duty time remaining (8 hours and 24 minutes – 2 hours and 15 minutes (if assume 45 minute lunch break) = 6 hours and 9 minutes). However, as noted above, he then contradicted this testimony when he stated that at 2:00 p.m. he only had five hours and 24 minutes of on duty time left which would mean the entire three hours between 11 a.m. when he returned from the first delivery and 2:00 p.m. when he refused the second load including his 45 minute lunch are included in calculating the 14 hours "on duty" limit.

<sup>16</sup> In his closing argument Complainant stated had Respondent paid him \$1500 to \$2000 a week as he expected to earn when he went to work for Respondent, he "probably would have ignored all these DOT issues..." TR 261-262.

Mr. Pulicano is a driver for Respondent. TR 113. Complainant asked him to recall the dispute the two had in the parking lot early on September 6. TR 107. Mr. Pulicano testified that on September 6, he was acting as a supervisor watching the yard to make sure all the drivers came in, got their delivery tickets and loads went out. TR 107-108. As more drivers left, he noticed a truck and trailer left in the yard. TR 108. He looked on the schedule and noticed the trailer assigned to Complainant that day was in the yard, but the paperwork was not in Complainant's box in the office. Mr. Pulicano stated he called his general manager at the time, Andre Duncan, and told him Complainant's assigned truck was in the yard and his personal car was there, the trailer/load was still there, but the paperwork was not there (in Complainant's box). TR 108-09. Mr. Pulicano testified Mr. Duncan told him Complainant was in his car sleeping and that he had to go get the paperwork from Complainant. TR 109, 110.

Mr. Pulicano recalled he approached Complainant's vehicle, along with a driver who had returned from his morning delivery, and could take the load that had been assigned to Complainant. TR 109-111. He stated the windows of Complainant's vehicle are tinted so he could not see inside. He denied he banged on the car and testified he knocked on the window and asked "Kervin, are you there" a couple of times. TR 109. He said he "saw kind of rocking" so walked away. *Id.* Once he walked away Complainant came out of the car swearing at him for knocking on the car. *Id.* Mr. Pulicano stated he apologized and told Complainant he needed his paperwork, there was a load to get out, and he had a driver who would take the load. *Id.* Then he told Complainant if you want to take the load you can. TR 109, 111. Mr. Pulicano recalled Complainant replied "no," went to his car to get the paperwork, gave it to him and left the yard. TR 109, 111. Mr. Pulicano explained the policy was the paper was supposed to be in the box, so if Complainant had left it there the incident would not have occurred. TR 119-120. That is because he would have seen the paperwork in the box that morning and had another driver who could take the load. *Id.* Mr. Pulicano explained that by the time he approached Complainant's vehicle to obtain the paperwork for the load, the load would have been late arriving at the customer. TR 110.

At the time of the hearing, Mr. Pulicano had been working for Respondent as a driver for three years. TR 112. He stated 85% of the deliveries are in New York City, New Jersey and Upstate New York. *Id.* In response to Complainant's question as to whether there was traffic on a regular basis in NYC, Mr. Pulicano testified if one leaves early in the morning there is no traffic getting to the location, but leaving the city, rush hour yes, and if one leaves toward 2 or 3:00 p.m. it gets progressively worse because rush hour is occurring. *Id.* He stated however, that if one manages their time well most of it can be avoided.

Mr. Pulicano stated he had never gone over hours and did not have any knowledge as to other drivers. TR 113. He agreed the PeopleNet system has frozen on occasion, but stated there is a button to reset it. He said he had never had an issue with PeopleNet being completely nonfunctional. TR 113-114. He agreed with Complainant if PeopleNet does not work, drivers are to use a paper log to complete their day. TR 114.

Mr. Pulicano agreed the paysheet drivers fill out for their daily deliveries is reflected in Complainant's Exhibit (CX) A-1. TR 115. It logs the time a driver spends on each load and the mileage. *Id.* He believed there are three copies of the document. *Id.* He agreed if a driver ran into some type of delay that would be reflected on the paysheet A-1. TR 117.

Mr. Pulicano explained that taking the paperwork for a load to a driver's off-duty home or to his personal car is not normal procedure. TR 119-120.

#### C. Testimony of William Shackelford

Mr. Shackelford has worked as a driver for Respondent for four years as of the date of the hearing. TR 121-122. He recalled he had returned from a run and was in the office on September 30 to get paperwork for another load, when Complainant and Mr. Duncan had a discussion. TR 122-123. Mr. Shackelford acknowledged it was not a normal occurrence to overhear or be present if Mr. Duncan and a driver were having a discussion or disagreement. TR 124-125. But he claimed he did not pay attention to any discussion between Complainant and Mr. Duncan. *Id.* He also testified Mr. Duncan instructed him to park Complainant's truck after Complainant stated he was not taking the load. TR 123. Mr. Shackelford recalled Jamie Green was in the office during the encounter between Complainant and Andre Duncan. TR 124.

Mr. Shackelford testified most of the deliveries were in New York City or the New York City area. TR 125. He acknowledged he may have gone over hours once or twice but not on average. *Id.* He explained that on those occasions, the company did request the driver pull over. TR 126. However, he decided to continue, because he did not want to wait for a replacement driver, which would make his day longer. *Id.* He was not aware of other drivers going over hours. *Id.*

#### D. Testimony of Jamie Green

Ms. Green has worked as the assistant administrator for Respondent since 2013. TR 128-129. She handles payroll and answers the phone in the office. TR 130. She said drivers will call if there is traffic or a delayed stop. TR 132. Ms. Green explained Respondent has a one room office in their customer, Package Pavement's, building because Lily is a contractor for Package Pavement. TR 139-140. All others in the building work for Package Pavement. *Id.*

Ms. Greene testified if a driver gets in a situation of going over hours, the driver notifies Respondent and Respondent has someone come and rescue the driver. TR 129. Most of the time, it is traffic that causes a driver to go over hours. *Id.* If a driver goes over hours she stated "there's a verbal warning written, you know, stuff like that." TR 129. She eventually acknowledged her only role in any discipline of drivers is to write up the discipline Mr. Duncan instructed her to prepare. TR 131.

Ms. Green testified she uses the trip/pay sheet, as reflected in CX A-1, for payroll and to bill the customer. TR 132, 134.<sup>17</sup> In response to Complainant's questions she agreed CX A-1 and A-2, which are two trip/pay sheets for August 2, 2016, reflected Complainant worked 15.50 hours. TR 132-133. Ms. Green stated that is a concern but stated by law a driver may have one 16 hour day per week. TR 133. She maintained it is very rare for the PeopleNet to stop working in the middle of the day. She stated both she and the driver can make changes to PeopleNet, so that if a driver were to forget to log out of the system they call her and she makes the change in PeopleNet. TR 133-134. If in reviewing the pay sheet to bill the customer, she noticed a driver had gone over hours for the day, she would check PeopleNet to confirm the over hours and would notify Mr. Duncan. TR 134-135. If Mr. Duncan deemed it appropriate he would take action to coach or discipline the driver. TR 135.

Ms. Green recalled being in the office on September 30, 2016, when there was a disagreement regarding Complainant's hours of service. TR 139. She recalled Complainant came into the office after he had received the paperwork for the second load and said he did not have enough hours. *Id.* She testified she looked on PeopleNet to see how many hours Complainant had remaining that day.<sup>18</sup> TR 137, 139. Ms. Green testified that when Complainant first came into the office at 2:00 p.m. and said he did not have enough hours to make the delivery, she checked PeopleNet and Complainant did have the hours, and he left the office. TR 140-141. However, when Complainant returned to the office an hour later at 3:00 p.m. and stated he was not taking the load, Ms. Green testified in reply to a question as to whether Complainant had enough hours then, "[n]ot really, because the amount of traffic at 3 o'clock – it's pretty thick." TR 141. She recalled Mr. Duncan was upset with Complainant when he returned at 3:00 p.m. to say he was not taking the load, saying Complainant was delaying the load. TR 139. She noted Respondent's customer had come across the hall into the office to hear the conversation because Complainant was going to miss the delivery for the customer. TR 139-140.

#### E. Testimony of Andre Duncan

Mr. Duncan worked at Respondent as an operations manager supervising drivers, including scheduling and discipline, during the relevant periods. TR 142-143, 188. He initially began working for Respondent as a driver. TR 188. Mr. Duncan has not worked for Respondent since December 2017.<sup>19</sup> TR 143-144. In response to Complainant's question as to whether he was familiar with Complainant's Exhibit A-1, Mr. Duncan replied he was and testified CX A-1 is a pay sheet used for payroll. TR 145.

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<sup>17</sup> Mr. Pulicano referred to this same document CX A-1 as a pay sheet. *See*, TR 115. CX A will be referred to herein as pay sheets.

<sup>18</sup> She explained drivers enter their IDs from the truck when they leave the truck. TR 137. In the rare instance when PeopleNet may not be working drivers use a paper log. *Id.*

<sup>19</sup> His employment was terminated in December 2017. TR 143-145.

In reply to Complainant's question as to whether he was aware of Complainant going over the hours of service, Mr. Duncan stated there were a couple of times Complainant went over the hours of service, but asserted those incidents were by Complainant's choice. TR 145-146. Mr. Duncan explained that if a driver went over hours, he would first speak to the driver, and discipline them the first few times, stating "[i]t happens. I mean it's a trucking business. But you are allowed to go up to 16 hours on some days if it's warranted." TR 146.

Complainant next asked about the incident between Complainant and Mr. Pulicano on September 6, in which Mr. Pulicano went to Complainant's vehicle in the morning to obtain paperwork for a delivery. TR 146-150. Mr. Duncan's testimony was equivocal. TR 146-150. At first, he denied having any information, but on additional questioning he began to recall some details. *Id.*<sup>20</sup> He stated he did not recall a telephone conversation with Complainant the night before, but he acknowledged if a driver were to call to tell him the driver was late getting back, he would tell the driver to take the 10 hours off and then come back TR 148. So it's possible, if Complainant had called him he would have told Complainant that because his phone is on 24 hours. TR 148-149.

Mr. Duncan recalled that on September 30, the day Complainant was suspended and subsequently fired, Complainant began work at 5 or 5:30 a.m., he completed his first delivery, and was back at the yard at 10:30 or 11:00 a.m., early enough to do another load. TR 151. Duncan recalled he was surprised Complainant completed the first delivery so quickly.<sup>21</sup> TR 155. Complainant was given another ticket (delivery) and went out to the yard. TR 151, 209. Mr. Duncan stated Complainant did not tell him he was sick or fatigued when he gave Complainant the second load. TR 209. Mr. Duncan initially testified Complainant came back about 12 noon stating he was not doing the load, he didn't have enough hours. TR 151. A bit later in his testimony he stated it was 2:00 p.m. when Complainant came in saying he did not have enough hours to take the second run/delivery. TR 153, 215; RX 5. Mr. Duncan told Complainant he did have enough hours, he began that day at 5:00, he should be getting off at 7:00 p.m., it was noon, and Complainant had until 7:00 p.m. to be within the 14 hours on duty time.<sup>22</sup> TR 151-153. Mr. Duncan stated when Complainant came in at 2:00 p.m. stating he did

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<sup>20</sup> Complainant's testimony that he had spoken to Mr. Duncan the night before and told him his 10 hours off before he could drive again ended at 6:00 a.m. the next morning is corroborated by Mr. Pulicano's testimony that when he called Duncan to say Complainant's assigned load was still in the yard, Duncan told him Complainant was sleeping in his personal vehicle in the yard and to go get the paperwork from him. *See* TR 109, 110. Mr. Duncan recalled Complainant submitted an estimate for damage to his personal vehicle which he alleged Mr. Pulicano caused when he banged on the vehicle. TR 150. Mr. Duncan stated Complainant alleged Mr. Pulicano damaged his vehicle not Respondent and testified he did not tell Complainant anything in regard to the alleged damage estimate. *Id.*

<sup>21</sup> Mr. Duncan explained he was surprised Complainant was back so quick because Complainant would usually take his time returning and he always came in late, so if one comes in late they get back late. TR 155-156.

<sup>22</sup> Mr. Duncan pointed out he did not have the paperwork in front of him and he had not worked for Respondent for several months by the time of the hearing. TR 155, 217. As a result, his recall of some of the exact times of events on September 30 are inconsistent. For example, as noted, he testified Complainant first returned to the office at

not have enough hours, he thought Complainant had already left for the second delivery. TR 151-152. He stated Complainant had been in the yard for two hours, they have it on GPS. TR 152. Mr. Duncan and Complainant had a back and forth argument/discussion about Complainant's hours and where he had been since his return to the yard at 11 a.m. TR 152-153. He recalled Complainant was agitated and a little confrontational and the discussion lasted about 20 minutes. *Id.* In the discussion Duncan told Complainant he had enough hours to do the second run. TR 153. Mr. Duncan explained Complainant had been back at the yard since 11:00 a.m. and it was now 2:00 p.m. and he had not left for the second delivery. *Id.* Duncan explained if Complainant had left immediately after their discussion at 2:30 he could still have completed the load within the hours of service. TR 154.

In asserting that at 2:30 p.m. Complainant could still have done the run, Mr. Duncan explained that if Complainant got "down there [to the delivery location] and you can't make it back [within the hours of service] we'll come get you." TR 154. Mr. Duncan also maintained that in the two hours Complainant was in the yard, he would have expected him to connect the trailer and get fuel, tasks which take a total of 45 minutes at best. TR 154-155. When Complainant hadn't left, Mr. Duncan told him that he could not take the load at 3:00 p.m., and suspended Complainant for five days. TR 153, 216. At that time Mr. Duncan also informed its customer, Package Pavement, a representative of whom had walked across the hall into the Respondent's office, that Respondent would not make the scheduled delivery for Package Pavement on time. TR 153, 216.

Complainant asked Mr. Duncan several questions with regard to his work assignments on September 16, 2016 and September 19 and referencing pay slips at CX A-14, A-15, A-16, A-17 and A-18, in an effort to establish he worked over hours on those days. TR 156-174. Mr. Duncan agreed the pay slips are used for payroll and also for each delivery location or stop. TR 160-161. Mr. Duncan disagreed with Complainant's assertion the pay slips indicate he worked over 14 hours on September 16 and 19th. TR 161-170.

In reference to CX A-14 through A-16 all relating to September 16, Mr. Duncan testified Complainant handwrote the information on these exhibits, and stated except for notations Ms.

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noon and later stated Complainant returned at 2:00 p.m. stating he did not have enough hours. TR 151-153, 155. Duncan also stated Complainant only came back to the office once after he gave Complainant the second delivery ticket. TR 153. On examination by Respondent, Mr. Duncan was referred to a document RX 5, he prepared after the events in question in response to the OSHA investigation, which contained a sequence of events on the day Complainant was fired. TR 215-216. Based upon the sequence outlined in RX 5, Mr. Duncan testified he gave Complainant the second delivery assignment at approximately 11:10 a.m. and Complainant first returned to the office at 2:00 p.m. stating he did not have sufficient hours. TR 215. The sequence outlined in RX 5 states Mr. Duncan then checked the PeopleNet log and told Complainant he had plenty of hours. RX 5. Upon having Respondent's representative read him this statement, Mr. Duncan said "yes that is exactly what happened." TR 216. Mr. Duncan's testimony Complainant first said he did not enough hours for the second delivery at 2:00 p.m. is also corroborated by Ms. Green and Complainant. Ms. Green testified Complainant first returned to the office stating he did not have enough hours at 2:00 p.m. TR 137-140. Complainant stated his conversation with Duncan in which he stated he did not have enough hours for the second delivery occurred at 2:00 p.m. TR 39. Thus, I find the first time Complainant returned to the office stating he did not have enough hours was at 2:00 p.m.

Green would have made confirming hours to be paid, the handwritten entries do not seem consistent. TR 161-171. He testified these documents are confusing as there are handwritten cross-outs on the document and he cannot verify the accuracy of the information on these exhibits. TR 168. In this regard, Mr. Duncan noted CX A-14 indicates Complainant returned to the yard at 12:45 p.m., CX A-15 indicates Complainant arrived at the yard that same day at 1:45 p.m. and left at 2:45 p.m. He pointed out that under Customer Grid, the departure time looks like it was originally 1:45 p.m. but was changed to 2:45 p.m. Next that same document indicates Complainant arrived at the delivery to Glenwood Mason in Brooklyn at 5:00 p.m. and departed at 7:30 p.m. However, the next line which is marked through indicates Complainant was back at Package Pavement in Stormville NY (the Yard) at 7:45 p.m., and the last line indicated Complainant was in Brooklyn at Whitestone Construction at 7:45 p.m. CX A-16 line one states Complainant arrived at Package Pavement at 7:30, line two indicates he arrived at Whitestone Construction in Brooklyn at 7:45 and left at 9:00 p.m. The third line reflects Complainant arrived at Package Pavement in Stormville (the Yard) at 11:15 p.m. and left at 11:30 p.m. *See also* TR 161-170. Mr. Duncan said the Company has GPS system on the trucks and he could not verify the accuracy of the information on CX A-14 to CX A-16 because the documents were handwritten by Complainant. TR 168. Mr. Duncan explained the document reflects Complainant was in the yard from 1:00 to 2:45 p.m. and he does not know what Complainant did in that time. Specifically he stated that time could not have been spent strapping the load as Complainant attempted to suggest because if Complainant had been strapping the load he would have noted that on the document so he could get paid for the time. TR 169-170.

With regard to September 19<sup>th</sup> Complainant asked Mr. Duncan to review CX A-17 to A-19. TR 172. Complainant pointed to CX A-17 which he asserted showed him working a total of 9.75 hours although he acknowledged the “ending time is not too clear on this.” TR 172. Complainant then said “starting time at 3:45 a.m., up until about 2:00 in the afternoon or so – yes, nine hours.” TR 172.<sup>23</sup> When he asked Mr. Duncan whether he saw any red flags with that trip, Duncan replied “yes.” TR 172. He stated four hours to come back from Brooklyn was not normal. TR 172-173. He agreed with Complainant that it could be three hours with traffic. TR 173. Next Complainant asked Mr. Duncan to review A-18 also for September 19. TR 172- 173. Complainant asserted A-18 indicates he worked another 6.5 hours for a total of 16.25 (9.75 + 6.5) that day. TR 173. Mr. Duncan disputed Complainant’s assertion he worked 16.25 hours on this date. *Id.*

Next Complainant asked Mr. Duncan about Complainant’s assignments on September 15 which he asserts required he work 15 hours, as reflected on CX A-12 and A-13. TR 177-178. Mr. Duncan testified CX A-12 indicated Complainant arrived at that first delivery at 8:00 a.m. but because he arrived to work late, the delivery to the customer was late as it should have been delivered at 7:00 a.m. TR 177. But Mr. Duncan acknowledged the first trip reflects it took seven hours to Brooklyn and back and he stated that “looks normal.” TR 177.

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<sup>23</sup> I note that 3:45 a.m. to 2:00 p.m. totals more than either 9 or 9.75 hours.

Again for September 14, Mr. Duncan disagreed Complainant worked over hours. TR 178.<sup>24</sup> Mr. Duncan testified several of the CX A exhibits do not have an end time, as well as having other discrepancies. TR 178-179, 180-181. He explained it was unclear from looking at the CX A exhibits how many hours Complainant actually worked. TR 179. He noted drivers are not paid by time, they are paid by mileage, so it is not clear how many hours Complainant worked even if Complainant puts down he worked 14 and a half hours. TR 179. There are automatic time periods expected for fueling (15 minutes) and for strapping the load (45 minutes). *Id.* He stated the hours Complainant wrote on the CX A exhibits are not the hours he was paid for or actually worked. TR 179. As another example of the CX A exhibits being unclear, looking at CX A-1 and A-2 for August 3, 2016, Mr. Duncan noted CX A-1 at the top under start time states 4:45 a.m. and end time states 11:50 a.m. TR 180-184. Then CX A-2 also for August 3, 2016, lists a start time as 9:45 a.m. and an end time of 11:00 a.m. TR 180-181. Mr. Duncan could not make sense of these documents and he stated “how can you finish at 11:50 and then go back and start at 9:45.” TR 181. He suggested there is something wrong with the arithmetic. *Id.* Mr. Duncan said the documents show overtime on paper, not physically. TR 181. Mr. Duncan stated the numbers on the documents don’t match and are a falsification. *Id.* He is unable to tell from these two documents where Complainant was throughout that day. *Id.*

On re-cross, the Complainant returned to his effort to establish he worked over hours several days. He presented Mr. Duncan with a document titled Driver’s Daily Log. CX B-21, CX B-22. TR 226, 230. Mr. Duncan agreed the document is a log. TR 226. Complainant asserts the log for September 16, 2016 was over hours. TR 230; CX B-22. Mr. Duncan disagreed stating the driver’s log form indicates Complainant was back in the yard at 12:45 p.m and not leaving until 2:45 p.m., a period of two hours. TR 234; CX B-22.<sup>25</sup> Mr. Duncan maintained if Complainant had crunched that 2 hours down he would have been back 2 hours earlier that evening and would not have had a 16 hour day. TR 234. Mr. Duncan testified he does not know whether the documents at CX B are accurate. TR 237. The Respondent uses logs generated by PeopleNet to comply with DOT hours of service regulations. TR 237. However, the company only retains logs for six months, as required by DOT regulations, so PeopleNet logs for September 2016 are no longer available. *Id.* Mr. Duncan agreed that if the logs for September 16 and 19<sup>th</sup> were accurate they could be problematic in terms of compliance with hours of service regulations, if the days before and after were also showing 16 hours. TR 237-238.

As for the log for September 19, 2016, Mr. Duncan disagreed with Complainant’s assertion the log showed Complainant working 16.25 hours, which Complainant asserted is over the hours of duty. TR 227-230. Mr. Duncan pointed out the last hour that day from 7:30 p.m. to 8:30 p.m. indicates Complainant is on duty but not driving. Initially, he testified Complainant is

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<sup>24</sup> Complainant acknowledged CX A1-A19 are records he created. TR 178, 184.

<sup>25</sup> I note the pay sheet for that same day A-14 shows Complainant arrived back at the yard at 12:45p.m. CX A-14. The next pay sheet for that day A-15 indicates Complainant arrived at the yard at 1:45 p.m. (presumably for the second load of the day) and left the yard at 2:45 p.m. This is the same day as reflected on another document titled Driver’s Daily Log CX B-22, and the times on the documents are inconsistent.



allowed one day of 16 hours so subtracting the hour brings the total hours to 15.25. TR 227-228. The one hour on duty not driving does not count. *Id.* A few minutes later Mr. Duncan looked at the log again and testified it showed Complainant was on duty not driving from 7:15 p.m. to 8:30 p.m. a period of 45 minutes. TR 230.<sup>26</sup> So if the total adds to 16.25 hours the 45 minutes is subtracted and if a driver is in the yard working and over the 14 hours, but not driving, there is no violation of the hours of service regulations. TR 230.

Mr. Duncan testified the GPS or PeopleNet system regulates hours. TR 184. Drivers are required to log in each morning and sometimes Complainant did not do so. TR 185. If a driver forgets to log out, Respondent can fix it. *Id.* He explained PeopleNet is a computer program the company uses to log hours and it should match the paperwork, i.e. delivery or pay sheets, in forms such as CX A. TR 187-188. PeopleNet will generate the U.S. Department of Transportation's required hours of service log. TR 190.

On examination by Respondent, Mr. Duncan agreed the pay sheets, (such as reflected in the CX A exhibits), are used to capture information for payroll and for invoicing the customer more than for monitoring the hours of service. TR 189-190. For payroll the Respondent is looking at mileage, stops and delay time because drivers are paid by mileage, number of stops, and for delays. *Id.* The pay sheet is also used to bill the customer. *Id.* However, he stated whatever a driver writes on the pay sheet ought to match what PeopleNet generates. TR 190. He confirmed his prior testimony that the information on several of the CX A exhibits had been edited or changed and the Company would question that. TR 191. He also agreed one explanation for why it could take a driver an inordinate amount of time to leave the yard or be stuck at a stop was the driver took a nap, or got to the delivery location late and was made to wait.<sup>27</sup> TR 167, 191-192.

Mr. Duncan testified that there were numerous times when Complainant went to sleep in his personal vehicle, when Mr. Duncan thought he was working. TR 191-192. He explained if Complainant had been strapping a load during gaps in time reflected on the documents Complainant created in CX A, Complainant would have put that activity on the pay sheet, because if he did not, he would not get paid for that time/activity. TR 192. So if there is nothing on the pay sheet, Respondent is unaware of what Complainant was doing and he would not be paid. TR 192.

Mr. Duncan agreed the DOT 14 hour rule as it relates to hours of service, provides a driver cannot drive after 14 consecutive hours on duty. TR 193. In that 14 hour period, a driver cannot drive more than a total of 11 hours. *Id.* So the total of 14 hours includes driving and on-duty time. *Id.* Mr. Duncan agreed that after 14 hours in a day, a driver could continue to work

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<sup>26</sup> The time between 7:15 p.m. to 8:30 p.m. is a period of one hour and fifteen minutes. If this is subtracted from the alleged 16.25 hours the result is 15 hours.

<sup>27</sup> Duncan testified several of the documents in CX A exhibits reflected long periods of time in the yard, longer than would be expected to strap a load and get fuel. TR 191, 169.

but not drive. For example, a driver could work doing dock work or if there was strapping to do, other work that is not driving. TR 193-194. A driver could not go back to driving truck until 10 hours off. TR 194, 195. He testified the driver is responsible for complying with the hours of service regulations. TR 196. If a driver is getting close to exceeding the 14 hour limit, the driver can call Respondent, or get a hotel, but most drivers pull over and then Respondent sends two other drivers to get the driver who is out of hours, so that no hours of service violation occur. TR 196-198. He explained if a driver decides to keep driving back when he has exceeded hours of service that is the driver's fault, not the company's. TR 198. The Company is required to monitor hours of service as it has responsibility for drivers out of service. *Id.*

Mr. Duncan acknowledged that on September 27, 2016, another driver delivered a trailer to Complainant at the rest area in Bedford, NY. TR 175. The trailer had a flat tire. *Id.* Mr. Duncan told both drivers to return to the Yard. He stated Complainant brought the trailer back with the flat. TR 176. Mr. Duncan did not recall there had been another trailer breakdown on September 29 as reflected on Complainant's CX A-20. TR 176.

Mr. Duncan described the discipline Complainant received in the period he was employed by Respondent. Mr. Duncan stated Complainant received a verbal warning on August 8, 2018 for misusing company equipment by covering the drivecam. TR 199, 218-220; RX 3-1. Mr. Duncan explained the drivecam is located in the passenger seat of the truck. So for it to be covered someone driving the truck would have to cover it. TR 218-220. Complainant was also disciplined with a last chance agreement for the confrontation on September 7, 2016 with Mr. Pulicano involving Complainant's assertion his personal vehicle was damaged when Mr. Pulicano attempted to obtain paperwork from him, and for leaving the Yard without notifying the dispatcher. *Id.* On September 15, 2016, Complainant received a written warning for failure to report a fuel spill. TR 199; RX 3-2.<sup>28</sup> Mr. Duncan testified the fuel spill was caught on camera. TR 199-201; RX 3-2. Mr. Duncan said the spill was caused because Complainant walked away from the truck as it was refueling. TR 200. He explained fuel spills are serious because Respondent is located near a watershed for New York City and near the Appalachian Trail. TR 200-201. Complainant did not report the fuel spill. TR 203. Fuel spills are very serious and are a dischargeable offense, but he gave Complainant a break on this. TR 203-204. He said he tried to give Complainant another chance, "we didn't want to get rid of him and we tried to work with him." TR 203. Later, Mr. Duncan explained that although a last chance agreement is very serious, Respondent did not fire Complainant on September 15 for the fuel spill because the company was trying to keep the Complainant employed. TR 203, 225-226. Mr. Duncan recalled Complainant did not deny the fuel spill at the time. TR 203. The warning notice given to Complainant in response to the fuel spill was dated September 15, and Complainant never brought the document back which accounts for Duncan's signature on September 30 with the notation "refused to sign." TR 204-205.

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<sup>28</sup> Mr. Duncan acknowledged the fuel spill occurred on September 15, but his signature on the written warning is dated September 30. RX 3-2. He explained the written warning was given to Complainant but he refused to sign and that accounts for the different dates on the document. TR 203-204.

Mr. Duncan asserted that on the day Complainant was suspended Complainant never told him he was sick or fatigued when he gave Complainant the second load that day. TR 209. Nor did Complainant tell him that day that he had difficulty hooking the trailer or that he overshot the kingpin. TR 210-211.<sup>29</sup> Following the events of September 30 in which Complainant stated he would not take the second load Mr. Duncan informed Complainant he was suspended for five days. TR 216. Mr. Duncan explained he did not have authority to discharge a driver on his own. He is required to consult with his boss, the regional manager, Jack Poor. TR 205. Mr. Duncan asserted after he suspended Complainant on September 30, he prepared a written document, at the instruction of Mr. Poor, detailing all the issues he had experienced with Complainant in the 12 weeks Complainant worked for Respondent. TR 205-207; RX 3-7. He prepared this document for terminating Complainant's employment and had conversations with Mr. Poor.<sup>30</sup> TR 205, 207. Thereafter, Mr. Duncan reviewed that day's events along with other disciplinary incidents and Complainant's performance history with his supervisor Mr. Poor. TR 217. He stated Mr. Poor agreed with his recommendation to terminate Complainant's employment. *Id.*

#### F. Testimony of Peter Crowley

Mr. Crowley is the Senior Vice President of Operations and Compliance for Respondent. TR 239. He served as the lay representative for Respondent in this litigation. TR 4-5. He has worked for Respondent for five years and as vice president of operations for a year and a half. TR 239. Mr. Crowley agreed he was familiar with CX A-19 and other pay slip forms. TR 239-240. He testified the pay slips are used primarily to compile information for payroll and information for a portion of the customer invoice. TR 240. Respondent does not retain pay slips for longer than required by the retention schedule. *Id.* With regard to information used for payroll, the pay slips determine mileage, delay time, payable activity such as strapping the load. TR 241. He explained Respondent has a payroll system separate from the paysheets. *Id.*

#### G. Testimony of Justin Poor

Justin (Jack) Poor is the Regional Vice President of Operations and held that position in 2016. TR 241- 242. He has worked for Respondent for 11 years and in the industry for 44 years. TR 243. He began in the industry as a driver. *Id.*

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<sup>29</sup> Mr. Duncan explained one can overshoot the kingpin when attempting to hook the truck to the trailer if one is not paying attention. TR 211. The proper procedure requires the driver to back up to the trailer, stop, get out make sure the driver winds down to where the 5<sup>th</sup> wheel is located before coupling the truck. *Id.* If that procedure is not followed a driver can high-hook which can be difficult to get out of and risks damage to equipment and delay in delivery. TR 211-213.

<sup>30</sup> Mr. Duncan prepared a Final Incident Report which described the final incident as "refused load after sitting in the yard for a three hour break." RX 3-1. This document is dated September 30, 2016 and indicates Complainant was discharged. Because it is not disputed that Complainant was suspended on September 30 and not discharged until after Mr. Duncan had a discussion with Mr. Poor it is not clear Mr. Duncan prepared this document on September 30.

Mr. Poor was Mr. Duncan's boss. TR 243. He required all employee separations be discussed with him prior to any action being taken. *Id.* Mr. Poor was aware of the Complainant's suspension on September 30, 2016 and subsequent discharge on October 10, 2016. TR 243-244. *Id.* After the events of September 30 occurred, Mr. Duncan discussed with him Complainant's disciplinary record as well as the events that day as far as Complainant not completing a second delivery to Brooklyn. TR 244-246. Mr. Poor testified Mr. Duncan told him that when Complainant came into the office Duncan asked Complainant what he was still doing there. Mr. Poor recalled Duncan relaying that Complainant stated he had problems with the truck and took his break. TR 246. He understood Complainant's reason for not taking the second load was Complainant said he would not have enough hours. *Id.* He stated it does not take 2-3 hours to connect the truck to the trailer and get fuel. TR 246. Mr. Duncan also informed him Complainant had had a high hook that day. TR 246. Mr. Poor pointed out anytime there is an incident out of the ordinary especially at a facility, such as the Stormville facility, there is help, so Complainant should have sought help when he had a high hook. TR 246. He viewed Complainant's actions as excuses because Complainant simply did not want to make a second trip to Brooklyn on a Friday. TR 245-246. After reviewing the events on September 30, the record of Complainant's progressive discipline, and the fact all these issues occurred in a short period of time, he told Mr. Duncan Complainant was to be discharged. TR 246, 247-248.

Mr. Poor testified even if the hours of service issue had not arisen his recommendation to terminate Complainant's employment would not have changed. TR 247. He explained a driver is to "properly adhere to the rules and processes that we have in place" and "in his opinion, this was not going to be corrected by the employee at that particular time, and it was time to make a change." TR 248.

Mr. Poor maintained Mr. Duncan was not asking Complainant to do something on September 30 that would cause Complainant to exceed his available hours of service. TR 246-247. He stated Complainant failed to inform Respondent he wasn't taking the load to Brooklyn, the Company believed he had left for the second delivery, and Complainant came walking back in a couple hours later saying he did not have enough hours when he did. TR 248. He said it was normal that a driver may get two runs to Brooklyn in a day. *Id.*

In response to Complainant's inquiry as to how long it takes to detach from a high hook situation, Mr. Poor explained it depends on whether a driver has assistance or not. If one attempted to disengage on one's own it could take a significant amount of time, but doing so on one's own is unnecessary. TR 249-250. When pressed for an estimate, Mr. Poor stated it could take 10 minutes depending on circumstances. *Id.* Mr. Poor explained if proper procedures were followed and Complainant had called dispatch, someone would have come out to the yard to assist and it would have taken a few minutes to correct. TR 250. He also testified a high hook occurs because of the neglect of the driver for not properly aligning himself with the fifth wheel. *Id.* Mr. Poor agreed he would not want a fatigued driver operating his trucks on a highway. TR 251.

Mr. Poor testified he was familiar with the documents in CX A, which are pay slips. TR 252. He explained the purpose of the pay sheet was for the driver to log the appropriate information so Respondent can properly pay the driver and bill the customer. TR 252. In response to Complainant's question as to whether Mr. Poor was aware Lily did not have copies of the pay slips he had as CX A exhibits, Mr. Poor replied he was not aware. *Id.* In response to Complainant's inquiry as to whether he was aware that NY labor law required payroll records be kept for six years, Mr. Poor replied all of that is managed by the Corporate Office and he did not know the specifics. *Id.* He said the Corporate Office is responsible for complying with NY state labor laws and record retention requirements. *Id.*

Mr. Poor stated drivers working over the hours of service regulations is "absolutely not condoned." TR 253. The driver is to alert dispatch so the company can accommodate the driver to stay within the regulations, by sending another driver down to get the driver close to hours and take him off the road. TR 253. Mr. Poor stated it happens periodically out of the Stormville location due to circumstances beyond the Respondent's control. *Id.* For example, he said drivers can get tied up in Brooklyn, for various reasons. *Id.* But when a driver knows he can't get back, he needs to call dispatch so he can be accommodated. *Id.*

Complainant asked Mr. Poor to review the Driver's Daily Log for September 16 (CX B 22), which he maintains show he was on duty 16 and one-half hours that day. TR 253. Mr. Poor opined this document reflected a blatant violation of DOT hours of service regulations. TR 253-254. He explained the total number of hours worked 16.50 is not in compliance. TR 255. In reviewing the Daily Log for September 19, which indicates Complainant worked 16.25 hours that day, Mr. Poor testified those hours would violate DOT regulations. TR 255; CX B-21. He stated one would count non-driving but on duty and driving time in calculating the 14 hour daily limit. TR 255. A driver is limited to driving only 11 hours in that 14 hour limit. TR 256.

Mr. Poor stated he was aware of instances in which other drivers go over the hours. TR 257. The policy is the Company speaks with the driver, advises them they are not in compliance with DOT regulations, and the driver is issued a written warning. *Id.* If it happens again, in most cases the driver is discharged. *Id.* Mr. Poor asserted he was not aware of Complainant having gone over hours. *Id.*

## **V. ANALYSIS AND CONCLUSIONS OF LAW**

### **A. Statutory and Regulatory Provisions**

Congress passed STAA in 1982 to combat the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents" on America's highways. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (quoting remarks of Sen. Danforth and summary of proposed statute at 128 Cong. Rec. 35209, 32510 (1982)); *see also Lewis Grocer Co. v. Holloway*, 874 F.2d 1009, 1011 (5th Cir. 1989) ("Congress enacted the STAA to promote safe interstate commerce of commercial motor vehicles."). The STAA employee

protection provisions were intended to “encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles.” *Brock*, 481 U.S. at 258.

The STAA provides an employer may not discharge, discipline, or discriminate against an employee regarding pay, terms, or privilege of employment when the employee refuses to drive a vehicle because such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or 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. 49 U.S.C. § 31105(b)(i), (ii).

In order to prevail in an STAA whistleblower complaint, a Complainant must show, by a preponderance of evidence: (1) that he engaged in protected activity; (2) the Employer took an adverse employment action against him; and (3) that his protected activity was a contributing factor in the adverse action. *Williams v. Dominos Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). If a complainant makes this showing, an employer may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv). In the present matter Complainant and Employer agree the Complainant was suspended on September 30 and terminated on October 10, 2016. Thus, it is undisputed Complainant suffered adverse action under the STAA. The remaining issues are whether the Complainant engaged in protected activity, and if so, whether the protected activity contributed to the adverse action.<sup>31</sup> Respondent may then avoid liability by showing by clear and convincing evidence Complainant would have been terminated regardless of the protected activity.

#### B. Credibility

In deciding this matter, the administrative law judge is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. 29 C.F.R. § 18.12; *German v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 8 (ARB Aug. 1, 2002). In weighing the witnesses’ testimony, the judge may consider the relationship of the witnesses to the parties, the witnesses’ interest in the outcome of the matter, the witnesses’ demeanor while testifying, the witnesses’ opportunity to observe or acquire knowledge of the subject matter of the testimony, and the extent to which the witnesses’ testimony is supported or contradicted by other credible evidence. *Ass’t Sec’y & Mailloux v. R & B Transportation, LLC*, ARB No. 07-084, ALJ No. 2006-STA-12, slip op. at 9 (ARB June 16, 2009).

It is well settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness’ testimony, but may choose to believe only certain portions of the testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950); *Altemose Constr. Co. v. NLRB*, 514 F.2d 8, 16 (3d Cir. 1975). In the present matter the Complainant’s

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<sup>31</sup> Where a Complainant is a self-represented litigant, they must, of course, be given fair and equal treatment, but are charged with the same burdens of production and persuasion as complainants represented by counsel. *Worku v. Preflight Parkin*, ARB No. 07-028, ALJ No. 2006-STA-040, slip op. at 5 (ARB April 22, 2008).

case rest principally on his testimony and exhibits. At times I found his testimony credible in some regards, but unclear, inconsistent and unpersuasive concerning important factual issues in this case, and influenced by his frustration that Respondent was not paying him the wages he believed he was promised. A discussion of the most significant discrepancies and the resulting factual findings are outlined below.

In general, I found Mr. Duncan to be a credible witness. He was no longer working for Respondent, having been dismissed, and had no incentive to assist Respondent in his testimony.

### C. Protected Activity

This case involves a refusal to drive under Section 31105(a)(1)(B)(i). As reflected in the statutory provision set forth above, Section 31105(a)(1)(B)(i), the first subpart of the refusal to drive provision of the STAA, protects refusals to drive because operation of the vehicle violates a federal regulation relating to commercial vehicle safety, health, or security. Some Circuit Courts have held a refusal to drive claim under Section 31105(a)(1)(B)(i), requires a complainant to establish an actual violation of a DOT regulation. *Koch Foods, Inc. v. Secy of Labor (Bailey)*, 712 F.3d 476 (11th Cir. 2013); *Calhoun v. U.S. Dept. Labor*, 576 F.3d 201, 209 (4th Cir. 2011) (citing *Yellow Freight Sys., Inc. v. Reich (Yellow Freight II)*, 27 F.3d 1133, 1138 (6th Cir.1994)). The Second Circuit, in whose jurisdiction this claim arises, has stated in order to prevail in a refusal to drive claim under Section 31105(a)(1)(B)(i),<sup>32</sup> a driver must show “the operation [of the vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive - a mere good faith belief in a violation does not suffice.” *Yellow Freight Systems v. Martin [Spinner]*, 983 F.2d 1195, 1199 (2d Cir. 1993). However, the Court then went on to uphold the refusal to drive in which it was later determined the employee was mistaken as to the existence of a regulatory violation at the time of the work refusal. In doing so, the Court stated to “rule in hindsight that complainant should have operated the vehicle in apparent violation of the regulation would serve neither good public policy nor the intent of Congress – particularly when the misunderstanding could have been clarified with minimal cooperation of the dispatchers.” *Id.* Thus, it appears the Second Circuit is willing to accept a refusal to drive under Section 31105(a)(1)(B)(i) in some circumstances, even when there is not an actual violation of a federal motor vehicle safety regulation.

The Department of Labor’s Administrative Review Board (“ARB” or “Board”) has also held that under Section 31105(a)(1)(B)(i) of the refusal to drive provision, a complainant must establish an actual violation of a DOT regulation relating to commercial motor vehicle safety or security.<sup>33</sup>

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<sup>32</sup> The case involved an earlier version of the current Section 31105(a)(1)(B)(i) that does not differ from the current version in any relevant manner.

<sup>33</sup> *Brame v. Consolidated Freightways*, No. 90-STA-00020, slip op. at 3 (Sec’y Dec. June 17, 1992); *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-00026, slip op. at 10-11 (ARB Oct. 31, 2007); *Ricky D. Forrest v. Smart Transportation Services, Inc.*, ARB No. 08-11, ALJ No. 2007-STA-00009, slip op. at 4 (ARB Sept. 21, 2010) (citing *Harris v. Allstates Freight Sys.*, ARB No. 05-146, ALJ No. 2004-STA-00017, slip op. at 3 (ARB Dec. 29, 2005)).

However, more recently, the ARB modified its view and now holds a refusal to drive under Section 31105(a)(1)(B)(i) may be protected, if a complainant can demonstrate a subjectively and objectively reasonable belief of a violation, rather than an actual violation of a federal regulation. *Wayne Mauldin v. G&K Services*, ARB No. 16-059, ALJ No. 2015-STA-00054, slip op. at 4 n.12 (ARB June 25, 2018) (citing *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012) (noting that refusals do not need to be based on actual violations to be protected under STAA)).<sup>34</sup> In analyzing this matter, I am guided by the ARB's current view that a refusal to drive under Section 31105(a)(1)(B)(i) may be protected, if a complainant can demonstrate either an actual violation of a federal regulation relating to commercial vehicle safety, health or security or that he has a subjectively and objectively reasonable belief in such a violation.

To prevail under Section 31105(a)(1)(B)(i) in the present matter, the Complainant must establish either an actual violation of a DOT regulation or show he had an objectively and subjectively reasonable belief in a violation of those regulations to demonstrate protected activity. Giving a wide interpretation to the claim made by the self-represented Complainant herein, he appears to make two primary claims of protected activity under Section 31105(a)(1)(B)(i). First, he asserts he initially refused to drive the second load on September 30 because he was ill or fatigued.<sup>35</sup> Later that same day he alleges he refused to drive the second load because he did not have enough hours to complete the run.

#### 1. Refusal to Drive Due to Illness or Fatigue

Turning to the refusal to drive due to illness or fatigue, the relevant federal regulation provides:

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<sup>34</sup> In its recent *Mauldin* decision, the ARB acknowledged the Eleventh Circuit's decision in *Koch Foods, Inc. v. Sec'y Dep't of Labor*, 712 F.3d 476, 486 (11th Cir. 2013), vacating and remanding the Board's decision *Bailey v. Koch Foods, LLC*, ARB No. 10-0001, ALJ No. 2008-STA-00061, slip op. at 9-10 (ARB Sept. 30, 2011). The Eleventh Circuit rejected the Secretary of Labor's interpretation of Section 31105(a)(1)(B)(i) that held a complainant's refusal to drive, under that provision, which is based upon a subjectively and objectively reasonable belief in a violation, constitutes protected activity under Section 31105(a)(1)(B)(i). 712 F.3d at 482-485. The Eleventh Circuit held the portion of the STAA that prohibits an employer from discriminating against an employee because the employee refuses to operate a vehicle because the operation violates a regulation related to vehicle safety, (§ 31105(a)(1)(B)(i)), requires the driver to establish an actual violation. 712 F.3d 485. However, in its *Mauldin* decision, the ARB stated it was not bound by the Eleventh Circuit's opinion outside the Eleventh Circuit and would instead adhere to the Board's original opinion in that case, *Bailey v. Koch Foods, LLC*, ARB No. 10-0001, ALJ No. 2008-STA-00061, slip op. at 9-10 (ARB Sept. 30, 2011), holding a complainant's refusal to drive because operation of the truck violates a federal regulation, constitutes protected activity under the STAA, if the driver demonstrates he had a subjective and objective reasonable belief in a violation. *Mauldin*, ARB No. 16-059, slip op. at 5 n. 12.

<sup>35</sup> It is not clear whether Complainant is actually asserting a refusal to drive claim based upon illness or fatigue. However, because Complainant is self-represented, and in the interest of completeness, I construe Complainant's position as making such a claim.



No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. However, in a case of grave emergency where the hazard to occupants of the commercial motor vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the commercial motor vehicle to the nearest place at which that hazard is removed.

49 C.F.R. § 392.3.

Complainant asserts he told Mr. Duncan he was either ill or fatigued when assigned the second load; Duncan denies Complainant said he was ill or too tired to take the second delivery at approximately 11:15 a.m. on September 30. Even assuming Complainant told Mr. Duncan he was ill or fatigued after returning from his first delivery assignment, Complainant's testimony as to his illness or fatigue was vague and non-specific.<sup>36</sup> The ARB has stated it is not enough for a complainant to make a vague and unspecified statement that he is ill. *Herrick v. Swift Transportation Co. Inc.*, ARB No. 05-082, ALJ No. 2004-STA-00056 (ARB June 29, 2007); *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 2000-STA-00048 (ARB July 31, 2003). Complainant's testimony in this regard certainly did not suggest his "ability or alertness is so impaired, or so likely to become impaired through illness or fatigue...as to make it unsafe for him to begin or continue to operate the commercial motor vehicle." 49 C.F.R. § 392.3. Thus, even if Complainant had been ill or fatigued, he failed to appropriately raise the issue to invoke STAA whistleblower protection. Moreover, even if Complainant told Mr. Duncan he was sick or fatigued, he agreed to take the load, he took the paperwork for the load and left the office. Complainant stated he was going on lunch break before he started the second delivery. Any refusal to drive due to illness or fatigue was not protected under the "refusal to drive" provision when Complainant accepted the paperwork for the load and left the office at 11:15 a.m. with the stated intention to drive the load and make the second delivery. *Calhoun*, 576 F.3d at 209. Therefore, I find Complainant failed to establish he engaged in protected activity by refusing to drive the second delivery on September 30 due to illness or fatigue.

## 2. Refusal to Drive- Hours of Service

Turning next to Complainant's refusal to drive because he believed he lacked sufficient hours, the United States Department of Transportation ("DOT") Federal Motor Carrier Safety regulation titled "Maximum driving time for property-carrying vehicles" provides:

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<sup>36</sup> He merely suggested at hearing that he "may" have had "sleep dep." TR 30. He did not testify he specifically told Mr. Duncan he was sleep deprived or told Duncan that he associated his claim of "fatigue" to working many hours. Nor did the Complainant present any evidence as to how many hours he worked on the preceding four days September 26-29, 2016, which may have assisted Complainant in establishing any claim of fatigue.

(a) Except as otherwise provided in § 395.1, 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, regardless of the number of motor carriers using the driver's services, unless the driver complies with the following requirements:

(1) Start of work shift. A driver may not drive without first taking 10 consecutive hours off duty;

(2) 14-hour period. A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive-hour period without first taking 10 consecutive hours off duty.

(3) Driving time and rest breaks.

(i) Driving time. A driver may drive a total of 11 hours during the 14-hour period specified in paragraph (a)(2) of this section.

49 C.F.R. § 395.3.

Complainant asserted his refusal to drive later on September 30 at 2:00 p.m. is protected as doing so would have required him to exceed the hours of service regulations. Complainant contends he could not have made the second delivery and returned to Stormville N.Y. without exceeding the hours of service regulations in 49 C.F.R. § 395.1(a)(2) and (3).

It is notable Complainant did not provide either the pay/trip sheet or the Driver's Daily Log for September 30, even though he did offer the pay sheet for other days. In addition, he did not recall the sequence of some events on the afternoon of September 30, thus, the timing of events that day is based upon testimony of Complainant, Mr. Duncan, Ms. Green and the PeopleNet Log for that day.

Complainant stated he did not recall what time he began work on September 30. TR 29, 65. Mr. Duncan recalled Complainant began working that morning at either 5 or 5:30 a.m. It is undisputed Complainant was back at the yard at approximately 11:00 a.m. after completing the first delivery on September 30. TR 29-30, 151, 152-153.

The PeopleNet log for September 30 shows that when Complainant returned to the yard at 11:00 a.m. he had been on duty a total of 5 hours 36 minutes (of the total of 14 hours), and of that time he had been driving 4 hours and 14 minutes that morning, meaning he still had 6 hours and 46 minutes of driving time left for that day. TR 24, 72-74, 94-97; RX 4. He also had 8 hours and 24 minutes on duty time remaining. TR 96. Complainant did not concede the PeopleNet Log was accurate. TR 24, 72-74, 94-97; RX 4. However, Complainant, Mr. Pulicano, Mr. Duncan, and Ms. Green all acknowledged the PeopleNet system is an electronic system for

drivers to record their hours and that if the PeopleNet system freezes, or is not working drivers are to use paper logs to record hours. TR 24, TR 113-114,133-135, 137, 139,184-185, 187-188, 190. Complainant did not provide a paper log of his hours of service for September 30. The PeopleNet Log is an electronic onboard system in the trucks Respondent uses to track hours of service and for other business purposes. I find the information generated from the PeopleNet Log is accurate and credible. Thus, I find the PeopleNet Log for September 30 is accurate as to Complainant's total hours on duty and total hours driving at the time he returned to the Respondent's location at 11:00 a.m., as it is an electronic system, there is no evidence PeopleNet froze or was not working on September 30, Mr. Duncan's recollection Complainant began work at 5 or 5:30 a.m. that morning is generally consistent with the hours reflected in PeopleNet and there is no other definitive or persuasive evidence as to the hours Complainant worked on September 30. Thus, I find the evidence establishes Complainant had been on duty a total of 5 hours 36 minutes (of the total of 14 hours) when he returned to the yard at 11:00 a.m., and of that time he had been driving 4 hours and 14 minutes. He still had 6 hours and 46 minutes of driving time left for that day, and 8 hours and 24 minutes on duty time remaining. TR 24, 72, 74, 94, 96, 9; RX 4.

Based upon Complainant and Mr. Duncan's testimony, I find Complainant received the second delivery assignment from Mr. Duncan sometime between 11 and 11:15 a.m. Complainant testified he told Mr. Duncan he was going to get lunch. There is no contrary testimony and so I accept Complainant told Mr. Duncan he was going to grab lunch before heading out with the second delivery assignment. Complainant stated he came back on duty at 12:15 p.m.

He testified he was delayed leaving to make the second delivery because he had two high hitches in attempting to connect the truck to the trailer and needed to get fuel. Despite conceding the policy was for drivers to notify dispatch or a supervisor if there was a delay, Complainant did not notify anyone of the delay of approximately 2 hours in leaving for the second delivery. Nor did he inform anyone that he had a high hitch when it occurred or seek assistance in extricating himself from the situation.<sup>37</sup> A High Hitch incident is a serious event as it poses a danger of injury and/or damage to property. It is difficult to comprehend how Complainant could have experienced a second high hitch event immediately after extricating himself from the first incident had he followed the procedures he, Mr. Duncan and Mr. Poor described for properly hooking the truck to a trailer.<sup>38</sup> The fact Complainant caused two high hitches minutes apart that day and told no one at the time, lends credence to Respondent's belief Complainant delayed his departure because he did not want to make a second delivery to Brooklyn that day.

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<sup>37</sup> Jack Poor's testimony that had Complainant notified someone at Respondent's Stormville location of a high hitch situation when it occurred, the Company would have provided assistance in resolving the situation in an expeditious manner, was not disputed. I credit his testimony on this point.

<sup>38</sup> The Respondent later learned at some point that Complainant had at least one high hitch event that day as Mr. Poor testified Mr. Duncan told him Complainant had a high hitch. TR 246.

It is not disputed and I find the next time Mr. Duncan heard from the Complainant was at 2:00 p.m. when he was checking deliveries, realized Complainant had not yet left the yard, and Complainant came into the office telling Mr. Duncan he did not have sufficient hours under the hours of service regulations and was not taking the load.<sup>39</sup>

There is some confusion in the testimony as to the sequence of events. Complainant recalls it was at this point Mr. Duncan became irate and suspended him. Mr. Duncan testified that when Complainant came to office at 2:00 p.m. saying he did not have enough hours, Duncan had a 20 minute discussion in which he explained to Complainant that he did have enough hours to take the second delivery. Mr. Duncan's testimony is corroborated by Ms. Green who was in the office and stated she checked PeopleNet at 2:00 p.m. when Complainant said he did not have enough hours and PeopleNet reflected Complainant did have hours. Mr. Duncan's testimony is further supported by the document he prepared soon after the events of September 30 detailing the events of that day. RX 5. Complainant then left the office. Mr. Duncan says when Complainant had not left at 3:00 p.m. he told Complainant he could not go and assigned the load to another driver and suspended Complainant. Complainant acknowledged he was unsure of the precise sequence of events. I find Complainant first refused the load at 2:00 p.m. Indeed, in the proceeding before me Complainant consistently asserts he told Duncan he did not have enough hours and was refusing load at 2:00 p.m. Whether he refused the load again at 3:00 p.m. or whether Duncan removed him when he was still at the Stormville facility at 3:00 p.m., is not critical as Mr. Duncan and Ms. Green agree that at 2:00 p.m. Complainant had enough hours to make the delivery but by 3:00 p.m. Complainant did not have enough hours.

Complainant said that at 2:00 p.m. he did not have enough hours to complete the second run because by that time he had already been driving for 7 or 8 hours that day. TR 40. This statement by Complainant as to the number of hours he had already driven that day is not credible as it is contradicted by Complainant's earlier testimony, by Mr. Duncan's testimony and by the PeopleNet log, which I found to be accurate. Complainant acknowledged, that if PeopleNet was accurate, as of 2:00 p.m. he still had the same 6 hours and 46 minutes of driving time remaining that he had when he returned from the first delivery. However, he only had 5 hours and 24 minutes of the 14 hour on duty time left.<sup>40</sup> TR 101-102. Complainant maintains he

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<sup>39</sup> I credit Mr. Duncan's testimony that when Complainant appeared in the office at 2:00 p.m., stating he lacked hours, Duncan thought Complainant had already left to do the second delivery because he had been back from the first delivery since 11:00 a.m. and he had not reported any delays to Mr. Duncan or to Ms. Green. TR 152-153. Mr. Poor corroborated Duncan's view, asserting it does not take 2-3 hours to connect the truck to the trailer in the yard and get fuel. TR 246.

<sup>40</sup> That is because although he had 8 hours and 24 minutes of on duty time left when he returned to the Yard at 11:00 a.m., three hours later at 2:00 p.m., he had only 5 hours and 24 minutes on duty time remaining. TR 101.

It is worth noting there appears to be an inconsistency in the record which neither Complainant nor Respondent clarified. Complainant has also testified his 45 minute lunch break did not count as part of the 14 hour on duty time. TR.46. Mr. Duncan also seemed to suggest a lunch break period did not count for calculating the 14 hour on duty limit. He testified that at 2:00 p.m. when Complainant refused the load, Complainant "got back to the yard, sat there for two hours." TR 152, 154-155. If the 45 minute lunch break is subtracted from the three hour period between 11

could not have completed the delivery which he estimated was 150 miles round trip in the time remaining, because it was a Friday afternoon and it would take 2 1/2 to 3 hours just to get there based on experience he had on some other days. TR 39-40, 42, 101-102.

In support of his belief he could not have made the second delivery and returned within the hours of service regulation given his remaining hours, Complainant has maintained that in the month of September he worked over hours on several days. In particular he has stated he worked over hours on September 16 and 19<sup>th</sup> and pointed to CX A and CX B exhibits to support his statement. The testimony of Respondent's witnesses, Mr. Duncan and Mr. Poor, was inconsistent as to whether the Complainant worked over hours on September 16 and 19. Mr. Duncan said he did not, Mr. Poor stated the documents in CX B indicate he did. I acknowledge there are aspects of the CX A 1-19 exhibits which call into question the accuracy of the documents. As Mr. Duncan explained several of the entries for specific days include inconsistent and or overlapping start and end times, or no end times, and or cross-outs. (See CX A 14-A 15; CX A 1-A 2). With regard to September 16, I credit Mr. Duncan's testimony the documents cannot be relied upon to establish Complainant worked over hours over Mr. Poor's contrary view. I find Mr. Duncan's detailed critique of the accuracy of the documents in CX A14 - A15 for that day, pointing out the documents are confusing, contain cross-outs, and the arrival times and departure times for various deliveries are inconsistent and overlapping, persuasive. Whereas, Mr. Poor simply gave a conclusory opinion that Claimant's CX B for that day showed over hours.

For September 19, Mr. Duncan again challenged the accuracy of information reflected on the pay slips for that day CX A17 - A19, stating four hours to return from Brooklyn was not normal.<sup>41</sup> Mr. Poor looking at CX B 21 for September 19 stated it reflected over hours. Although Mr. Duncan stated four hours for return from Brooklyn reflected in CX A-17-A19 was not normal he later testified with regard to pay sheets for another day that seven hours to Brooklyn and back "looks normal."<sup>42</sup> TR 177. Thus, because Mr. Duncan stated that a "normal" trip to Brooklyn and back *could* take 7 hours, his testimony that four hours to return from Brooklyn on September 19 was not "normal" as grounds for stating the documents do not show Complainant worked over hours that day is unpersuasive.<sup>43</sup> On balance, I find Complainant has established he worked over hours on September 19. He has also shown that it *could* possibly take up to seven hours depending upon several potential, but uncertain, factors to drive from Respondent's Stormville, NY facility to Brooklyn and back.

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a.m. and 2:00 p.m., then Complainant would have had 6 hours and 9 minutes of on duty time remaining, not 5 hours and 24 minutes.

<sup>41</sup> I note Complainant conceded the ending time on CX A-17 "was not too clear." TR 172.

<sup>42</sup> This was in reference to the times reflected on CX A 12 - A 13 for September 15.

<sup>43</sup> If one were to credit Complainant's CX A1-A 19 documents fully, the documents also demonstrate it took far less than 7 hours to go to Brooklyn and back on several days. See CX A 5-A6; A7 -A 9; A10-A11; A 12-A 13.

I find Complainant has failed to demonstrate he engaged in protected activity when he refused to drive the second delivery at 2:00 p.m. on September 30, as he was not out of hours at that point, and could conceivably have made the delivery within the hours of service regulation barring any issues. Thus Complainant has not established an actual violation of the hours of service regulation.

I now turn to whether Complainant has established a subjective and objective reasonable belief in a violation of the hours of service regulation when he refused the load at 2:00 p.m.

Respondent has established there are specific time periods for drivers to complete tasks prior to beginning a delivery.<sup>44</sup> I credit Mr. Duncan and Mr. Poor's testimony it takes 45 minutes to hook the trailer and strap the load and up to 15 minutes to get fuel, if fueling is necessary. On September 30, it took Complainant 2 hours to complete these tasks.<sup>45</sup> It would not have taken that period of time had Complainant notified Mr. Duncan that he was in a high hitch situation. Complainant did not follow Respondent's established policy because he failed to notify anyone that he had a high hitch when it occurred. If he had notified Mr. Duncan, assistance would have been provided, it would have taken less time to correct the first high hitch, and very likely would have avoided the alleged second high hitch. Complainant's actions in causing one and possibly two high hitch situations by not following procedure for hooking the truck significantly contributed to the delay in his departure. Compounding this failure was Complainant's failure to notify Respondent of his high hitch so he could have been assisted in correcting the situation, which further delayed his departure and compressed the time he had available under the hours of service regulation to complete the second delivery.<sup>46</sup> His failure to follow policy, which would have reduced or even eliminated his delay in departing, undermines Complainant's claim of a subjectively and objectively reasonable belief in a violation of the hours of service regulation when he refused to drive.<sup>47</sup>

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<sup>44</sup> Drivers are paid for the time spent engaged in these activities.

<sup>45</sup> Complainant's decision to take 45 minutes to an hour for lunch further delayed his departure. Additionally, knowing he was going to Brooklyn, knowing it would take an hour to connect the trailer, strap the load and get fuel, and knowing traffic gets heavier in the afternoon, lends credence to Respondent's belief Complainant delayed his departure that day because he simply did not want to make a second trip to Brooklyn that day.

<sup>46</sup> Moreover, it also meant the delivery to the customer was late. Mr. Duncan was forced to inform the customer the delivery would not be on-time and assign a different driver.

<sup>47</sup> There is other credible evidence establishing Complainant's difficulty with following company policy. Complainant was employed with Respondent for a total of twelve weeks, six of which were in the training program. In the six weeks he actually drove, Complainant accumulated significant discipline under Respondent's progressive discipline policy. *See* RX 3. I credit Mr. Duncan's testimony that he attempted to work with Complainant to get him to follow the company's policies and procedures. On August 8, Complainant received a verbal warning for covering the drivecam. On September 7 following the altercation with Mr. Pulicano, Complainant was suspended and given a Last Chance Agreement. The Last Chance Agreement informed Complainant he must make "immediate and sustained improvement. Failure to do so will result in termination of your employment." RX 3 at 4. On September 15, Complainant caused a fuel spill in the yard. Mr. Duncan credibly explained that even though Complainant should have been fired after he had the fuel spill, he was trying to work with Complainant and save his job, and so

In addition, Mr. Duncan, Ms. Green and Mr. Poor all maintained that at 2:00 p.m. when Complainant refused to make the second delivery, he had sufficient hours within the DOT hours of service regulations to complete the delivery. Mr. Duncan and Mr. Poor explained if Complainant was in fact delayed in getting to the delivery location that afternoon, the policy was for him to notify dispatch and Respondent would send another driver down to get him so he would not violate the hours of service regulations. Complainant may well have been able to complete the second load in the remaining five hours and 24 minutes.<sup>48</sup> If he found he could not as the trip progressed, the policy was to pull-over, notify dispatch and another driver would be sent to get him. No violation of the hours of service regulation would have occurred.

After careful consideration of the evidence outlined above, I am not persuaded Complainant had a subjectively and objectively reasonable belief that a violation of the hours of service regulation existed or would occur when he refused the second delivery on September 30, 2016. Accordingly, Complainant has failed to establish protected activity under the STAA and his claim is dismissed.

### **ORDER**

The claim is dismissed.

**SO ORDERED.**

**COLLEEN A. GERAGHTY**  
Administrative Law Judge

Boston, Massachusetts

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he gave Complainant a written warning for this violation of Respondent's procedures rather than terminate his employment.

<sup>48</sup> As noted above, if the lunch break time is not counted in the 14 hour limit, then Complainant would have had 6 hours and 9 minutes of on duty time remaining. It is likely he could have completed the second delivery in this period of time.

**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](mailto: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).