

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 December 2006
CASE NO.: 2006-STA-00028

In the Matter of:

MICHAEL ANDERSON,
Complainant,

v.

ROBINSON TERMINAL WAREHOUSE CORP.,
Respondent.

Appearances:

John E. Davidson, Esq.
Charles M. Henter, Esq.
For the Complainant

Thomas Beck, Esq.
For the Respondent

Before: Stephen L. Purcell
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises from a claim under the Surface Transportation Assistance Act ("STAA" or "the Act"), 49 U.S.C. § 31105 and the implementing regulations found at 29 C.F.R. Part 1978. Michael Anderson ("Complainant") alleges that he was fired by Robinson Terminal Warehouse Corporation ("Respondent" or "RTW") because he reported safety violations to RTW management and to a Virginia state trooper. RTW contends that Complainant voluntarily resigned from his employment with RTW.

A formal hearing was held in this case on July 24, 2006 in Washington, DC at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. At the hearing, Complainant offered Exhibits 1 through 10, which were admitted into evidence.¹ Respondent's Exhibits 8 through 10 were also admitted into evidence at

¹ The following abbreviations will be used as citations to the record: "CX" for Complainant's Exhibits, "RX" for Respondent's Exhibits, "Tr." for Transcript, "Comp. Br." for Complainant's Post-Hearing/Closing Brief, "Resp.

the hearing.² Both parties subsequently filed post-hearing briefs; and Complainant then filed a reply brief. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. STIPULATIONS

The parties have stipulated and I find that:

1. The parties are subject to the Act. *See, e.g.*, “Complainant’s Pre-Hearing Submission” at 1; Respondent’s Pre-Hearing Submission at 1.
2. Complainant received his last paycheck from Respondent on January 14, 2006. *See, e.g.*, Tr. at 142.
3. The value of Complainant’s benefits over the year of the relevant time period would have been \$20,000.00; and the value of Complainant’s loss of benefits are to be pro-rated from January 14, to March 27, 2006, should he prevail. Tr. at 143-144.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Complainant engaged in activity protected by the Act.
2. Whether Respondent took adverse employment action against Complainant in violation of the Act.
3. If Respondent is found to have taken adverse employment action against Complainant, whether such action was causally related to any putative protected activity in which Complainant engaged.
4. If a violation is found, the appropriate remedies for a violation of the Act, pursuant to subsection (b)(3).

See, e.g., Complainant’s Pre-hearing Submission at 1-2; Respondent’s Pre-hearing Submission at 1-2.

Br.” for Respondent’s Post-Hearing/Closing Brief, and “Comp. Reply Br.” for Complainant’s Rebuttal Post-Hearing Brief.

² Although Respondent identified several additional exhibits with its pre-hearing statement (RX 1-RX 7 and RX 11), it elected not to seek their admission into evidence at the hearing. *See* Tr. at 303.

III. STATEMENT OF THE CASE

Summary of the Evidence

Testimony of Michael Anderson

Complainant, Michael Anderson, testified that he is 35 years old, and has been a commercial truck driver since 1988 or 1989. Tr. at 78. His employment with RTW³ began in May, 1998, when he was hired as a warehouseman. *Id.* at 79. By the end of his first year of employment, Complainant became a driver for the company. *Id.* He remained in that position from the end of 1998 through the end of his employment with RTW. *Id.* at 79-80.

Complainant testified that, at the time of the events leading up to this case, he primarily reported to RTW's Springfield, Virginia location and drove heavy loads. Tr. at 81. He stated that in early 2005 he injured his back in a work-related accident and has been receiving treatment ever since. *Id.* at 81-83. Due to the incident, Complainant explained, he has had a heightened sensitivity to work safety issues, and throughout 2005 he encountered certain situations at RTW which raised safety concerns. *Id.* at 83. His two primary concerns were the "operation of the docks" and the "shaking of the vehicles." *Id.*

He explained that the shaking of the vehicles had been a problem for a while, but became more so after his accident, when the shaking began to aggravate his back injury. *Id.* at 83-84. He said that in addition to it being painful, he was concerned from a safety standpoint because the shaking caused parts on the truck to become loose. *Id.* at 84. According to Complainant, "bolts, sun visors would fall off. The mirrors would loosen up so that they'd spin around." *Id.* Complainant testified that the shaking often rendered useless the side-view mirrors, which he relied on to safely change lanes. *See Id.* at 84-85. He remarked, "it'd shake so bad, you couldn't see in your rear view mirrors." *Id.* at 90. He further testified that the tires on one of the trucks were misshapen and not truly round. *Id.* at 87.

Complainant testified that he first reported his concerns to Kent Barnekov, RTW's President, and Paul Cupka, RTW's head truck mechanic, in the summer of 2005. Tr. at 85-87; 147-148. He said that he demonstrated the shaking to both men. *See Id.* at 85-89.⁴ According to Complainant, Mr. Barnekov responded that Complainant would be getting a new truck and would not have to tolerate the shaking for long. *Id.* Complainant said that at the time he showed the shaking to Mr. Barnekov, he was supposed to have already received a new truck two weeks earlier. *Id.* at 90-91. However, he said he did not get a new truck for another two months after raising his safety concerns. *Id.* at 91.

Complainant further testified that he remained concerned about safety problems throughout the fall of 2005. Tr. at 91-92. He explained that the docks were being operated in a potentially hazardous manner. *Id.* at 92. In addition, he said he continued to be assigned to

³ RTW is a subsidiary of the Washington Post and stores newsprint in its warehouse facilities for the Washington Post and other companies. Tr. at 79.

⁴ Complainant said that prior to the summer of 2005, he addressed his concerns to RTW by way of inspection reports and in driver meetings. Tr. at 89.

trucks that were shaking violently. *Id.* He claimed that he brought these problems to the attention of RTW, but they persisted. *Id.*

Complainant testified that, on December 1, 2005, he was discharged from treatment by his physical therapist after he missed one of his appointments due to a busy work schedule. *Id.* at 93-94. He said that this event prompted him to schedule a meeting with Mr. Barnekov the following day. *Id.*

At the December 2nd meeting, according to Complainant, he informed Mr. Barnekov that Respondent's management needed to "get a grasp on a lot of the neglect that's going on at the facility and in the trucks." Tr. at 94-95. Complainant said that he complained to Mr. Barnekov about the excessive, and possibly illegal, hours he believed employees were being required to work, as well as the ongoing shaking of the trucks. *Id.* at 96. He maintained that he also complained that the manner in which the drivers were being dispatched "was a little hectic," and repeated his concern about the unsafe docks. *Id.* at 97-98. In addition to voicing his safety concerns at the meeting, Complainant stated that he also encouraged Mr. Barnekov to speak with his management team about these matters. *Id.* at 98. He said that Mr. Barnekov's response to his concerns was "'You've laid a lot on me. I'll have to get back to you.'" *Id.* at 99.

According to Complainant, after Mr. Barnekov failed to follow-up with him, he reported his concerns to the Washington Post ethics hotline,⁵ on December 4, 2005, and to First Sergeant Pettyjohn, of the Maryland State Police, sometime between December 2 and December 14, 2005. Tr. at 99-100, 187. Complainant maintained that Sergeant Pettyjohn verified that the shaking was a safety concern, and he instructed him to report such shaking to officials in whichever state he happened to be driving. *See Id.* at 100.

Next, Complainant testified that approximately a week later, on December 14, 2005, he was driving another RTW truck. According to Complainant:

[It's] mirrors were violently shaking, everything on the floor board was moving around on the floor. The seat was broken loose from the floor on the passenger side. The stack was shaking around up there. It seemed to be broken. And after thoroughly examining the vehicle, I found that there were cracks in the frame.

Id. at 101. He said that he brought these issues to the company's attention, but was assigned the same truck the next day.⁶ *Id.* at 162. In addition, Complainant testified that he was not contacted by anyone from RTW regarding these issues.⁷ *Id.* at 102. Complainant stated that he then

⁵ Complainant testified on cross-examination that in response to his call to the hotline, Lynell Neptune, a Vice President at the Washington Post, met with him for approximately two-and-a-half-hours on December 9, 2005 to discuss Complainant's safety concerns. *See* Tr. at 189.

⁶ Complainant explained that the truck he was driving at the time of the inspection was a spare truck, and not his regularly assigned truck. Tr. at 162.

⁷ On re-direct examination Complainant was questioned about the "Driver's Inspection Report" (CX 10) he completed on December 12 or 13, 2005. Tr. at 207. The Report notes the poor condition of the mirrors, clutch and suspension on Truck number 86, the truck Complainant was driving on the day of the Report, and again on December 14, 2005, the day of the inspection. *Id.* Complainant said he gave the Report to RTW. *Id.* at 208.

decided to call the Virginia State Police, as he had been instructed to do by Trooper Pettyjohn. *Id.*

Complainant's call was answered by Trooper Tershak. Tr. at 102. According to Complainant, he told Trooper Tershak that he wanted his truck inspected, and he was instructed to proceed to the Van Dorn Inspection Pad. *Id.* at 103. He said he told Trooper Tershak that he reported the issues with his truck several times to no avail, and he wanted an outside opinion and to make sure that any necessary repairs would be taken care of.⁸ *Id.*

Complainant then testified that while Trooper Tershak was performing the inspection, Paul Cupka, RTW's lead mechanic, arrived uninvited at the inspection site. Tr. at 104. Complainant said Mr. Cupka's arrival was "a little suspicious," and that he accepted Trooper Tershak's offer to tell RTW that Complainant was randomly pulled in for an inspection. *Id.* at 106. Complainant stated that Mr. Cupka and Trooper Tershak spoke to each other, but he was not privy to their conversation. *Id.* at 105. He said that he did, however, observe Mr. Cupka obtain contact information from Trooper Tershak. *Id.*

According to Complainant, on December 15, 2005, the day after the inspection, his supervisor, Richard Clutter, spoke to him about the incident. Tr. at 107. Complainant described the encounter as follows:

He walked up to me at the end of my shift and he told me, said, "I want to talk to you for a minute." . . . And he said he wanted to ask me a couple questions about what had transpired the day before. . . . I believe that he brought up first the reason why I didn't have my telephone because he tried to get a hold of me the day prior and said that he couldn't reach me on my cellphone. And I told him that I was out with the inspection and that I didn't hear it. I did see that it was a missed call after I got in and I was just about at the terminal then. But he asked me whether I had called the trooper or whether or not I had been called in by the trooper. And I told him that the trooper had called me in. And I believe he cut me off abruptly and said, "Well, we know to the contrary." He said, "Robinson Terminal has talked to the trooper and the trooper says that you called him." I said, "No -- okay, yeah, then I did." So I commenced to explaining to him why I did and told him that these problems had been in the inspection reports and they'd been an ongoing problem for quite some time and it seemed like a futile effort. . . . [And he said], "You don't need to put those type of things in inspection reports and you don't need to call up the state police. You can just let us know and we'll get the problem taken care of."

Id. at 107-109.

Complainant said that the next day, December 16, 2005, he was caught in a traffic jam on the Beltway and it took him almost eight hours to drive to Gaithersburg, Maryland and back.

⁸ Complainant said that after he pulled into the inspection site, he thought he saw Willie Taylor, RTW's operations manager, drive past him in the opposite direction. Tr. at 103-104.

Tr. at 109. During that time, he said he received several phone calls from RTW management requesting to meet with him. *Id.* at 109-110. He stated that when he returned to the terminal, Mr. Barnekov approached him and brought him into a meeting. *Id.* at 110-111. According to Complainant, Mr. Taylor was present and observed while Mr. Barnekov showed Complainant a document detailing various concerns with his performance.⁹ *Id.* at 111; *see also* RX 10. Complainant maintained that he did not expect to be confronted with such issues, and that his back was hurting from sitting in traffic for so long. *Id.* at 112. Due to these reasons, and because he believed some of the information presented to him was inaccurate, he said he asked Mr. Barnekov if he could go home and refer to his notes before responding. *Id.* at 112-113. Complainant stated that Mr. Barnekov then told him that if he did not make certain verbal commitments at that time, he could not return to work. *Id.* at 113-114. Complainant said that when he again asked for time to go home and look at his notes, Mr. Barnekov asked him to leave. *Id.* at 114. He said that he believed he was suspended until he agreed to make the commitments about his performance. *Id.* at 115. He described what happened next as follows:

[I] went out to my truck, gathered up all the property that belonged to the company, all of my personal belongings . . . and things that had a little bit of value to them that I owned, got my personal things, put them in my vehicle like I normally do. And I laid the keys, the ID badge and [the company cell phone] on the dispatcher's desk.

Id. at 114. In response to being asked why he returned his company property at the time, Complainant stated, "I didn't know whether or not anybody was going to be in my truck or not [over the weekend or the following Monday], so I didn't want to leave anything in there that I'd be responsible for that might not be there when I get back in it." *Id.* at 115. Then, in response to being asked why he requested to have his name removed from the security system, Complainant said:

[The security system] documents who's accessed the building and what times and so on and so forth. And at that time a couple of us, because it was a new security system and had some bugs in it, and some of us were forgetting our security codes, couple of us were sharing the numbers. . . . And what I was concerned about, because I knew approximately what type of system it was, and it doesn't come up as a number, it comes up as a person's name when you access the building, so I wanted to make sure that my name wasn't being documented as accessing the building when I was a suspended employee.

Id. at 116-117. Complainant maintained that he did not tell Mr. Barnekov or anyone else at RTW that he "quit" or "resigned" that night. Tr. at 117. He said that it was not his intention to resign then, as he was not in a financial position that enabled him to do so. *Id.* at 117-118.

Complainant went on to testify that he saw a doctor at Rappahannock Family Physicians the next day, on December 17, 2005, and that his physical condition had worsened. Tr. at 118, 121. He stated that he visited a nurse practitioner at the same practice three days

⁹ *See infra* note 25 and accompanying text.

earlier who had given him prescriptions for pain killers and “lida-derm patches.” *Id.* at 118-119. According to Complainant, he told the doctor that the prescriptions were not working for him, and the Doctor recommended that he take four to six weeks off from work.¹⁰ *Id.* at 119; *see also* CX 3 (Doctor’s “Certificate for Return to Work”).

Complainant was then asked about the note his wife, Kim Anderson, had transcribed and edited for him, that explained why he needed time off from work. *See* Tr. at 122; *see also* CX 5. He said that his wife drove him to RTW to deliver the note, along with the doctor’s certificate, on Monday morning, December 19th, the next business day after the meeting which led to his alleged suspension. *See Id.* at 124-125. He said that he also dropped off a “direct response to what had transpired on the 16th.” *Id.* at 126. He maintained that when he got to RTW, he was informed by Bernie Owens, the foreman, that Mr. Barnekov and Mr. Taylor were out of the office until that Thursday. *Id.* at 125. Complainant then left the documents with Mr. Owens, who initialed them and noted the delivery date. *Id.*; CX 3, CX 5.

Complainant testified that he was paid sick time for the remainder of December through the first or second week in January. Tr. at 127. During this time, he said that he believed he was on sick leave.¹¹ *Id.* He stated that since Mr. Barnekov had been unavailable to meet with him when he dropped off the above-mentioned documents, he figured he would discuss his suspension with him when he returned from sick leave. *Id.* He testified that throughout the time he was on sick leave, nobody at RTW ever asked him if he resigned or quit; nor did he tell any RTW employees that he had done so. *See Id.* at 127-128. In addition, he testified that nobody from RTW indicated to him that they thought he had quit. *See Id.* at 128.

According to Complainant, on December 27, 2005, while he was on sick leave, Willie Taylor phoned him, requesting that Complainant meet with Mr. Barnekov on January 10, 2006. Tr. at 128-129. Complainant stated that Mr. Taylor never indicated over the phone that Complainant had quit or resigned; nor did Complainant say he had done so. *Id.* at 129. He went on to testify that the scheduled meeting never occurred because Mr. Barnekov would not permit Complainant’s attorney to attend. *See Id.* at 132. Complainant stated that due to the fact that he was on medication, and pursuing a workmen’s compensation claim, he was advised by his attorney not to attend the meeting without representation. *See Id.* at 131; *see also* CX 6. Complainant maintained that he believed he did not have to perform work duties, including attending meetings, while he was out on medical leave. *See* Tr. at 133. He said, however, that he was willing to attend the above-mentioned meeting had his attorney been able to accompany him. *Id.* at 134.

¹⁰ Complainant testified that another doctor and his physical therapist had already recommended that he take four to six weeks off from work. Tr. at 119. Complainant was asked about the letter from his physical therapist, Brian D’Orazio, to his physician, Dr. Dana Brown. (CX 4). Tr. at 121. The letter stated that until Complainant could be taken out of work for four to six weeks “to have the patient realize consistent resolution to symptoms,” Mr. D’Orazio would no longer treat him. CX 4. Complainant testified that he saw the letter in early December, but knew that if he ended up taking time off from work he would put RTW, already short-staffed, into a “tight situation.” *Id.*

¹¹ During the time he was on sick leave, Complainant testified that he was in fact getting medical treatment. Tr. at 128. He said that he was on 500 milligrams of the medication Loraset. *Id.*

Complainant went on to testify that he was seen by his primary physician, Dr. Brown, on January 10, 2006. Tr. at 134. He said that Dr. Brown extended his medical leave until February 10, 2006, and that he provided the doctor's note to his worker's compensation attorney. *See Id.* Complainant said that he therefore believed he was considered by RTW to be on sick leave. Tr. at 134. He then testified that he received an unexpected letter from Mr. Barnekov on January 12, 2006, confirming that he had resigned his employment on December 16, 2005. *Id.* at 135; *see also* CX 8. He said that until that point, nobody at RTW had told him that they thought he quit on December 16th, or at any other time. *Id.* at 136. He had visited RTW twice to collect checks, he said, and none of the RTW employees, including his friends, mentioned anything about him having resigned. *Id.* at 136-137.

Complainant stated that he felt betrayed when he received the January 12th letter from Mr. Barnekov. Tr. at 138. He said that as the "sole provider" for his family, he felt "extremely vulnerable and shocked and scared" when he relayed the contents of the letter to his family. *Id.* at 139. He stated that as a result of the letter from RTW, he has not slept well, has acquired "a very large distrust for loyalty to people outside your family," and that his emotional response continues through today. *Id.*

Complainant testified that after he received the letter from Mr. Barnekov, he immediately began to look for a job. Tr. at 140. He said that on a job application to CVS, he indicated that he still worked for RTW because he was "under the impression that I had a doctor's note that was good through February 15th, and I was still employed."¹² *Id.* at 141. According to Complainant, he struggles now with job applications. *Id.* at 140. He said, "I have a choice to either put down Robinson Terminal as a past employer, that they claim I abandoned my position, or I don't address them at all. . . you have to provide ten years of. . . employment history to your future employer, if you're going to be driving a truck." *Id.* at 140.

Complainant further testified that he received his last paycheck from RTW on January 14, 2006. Tr. at 142. He said that he took a job with Lockheed Martin on March 27, 2006, and until then he was without pay and benefits, although he was aggressively looking for another job. *Id.* He said that for the three months beginning in January, 2006, in which he was unemployed, his rate of pay would have remained the same as it was the previous year. *Id.* at 142-143.¹³

On cross-examination, Complainant testified that while he was employed by RTW, he never refused to drive a truck due to safety concerns. Tr. at 189. He stated that RTW had spare trucks available for drivers to use if their regularly assigned truck was being repaired. *Id.* at 152. He said that he did not request a spare truck when his assigned truck was shaking, but that he "asked them to take care of the rattling and the shaking and to repair the frame that was cracked [on his truck]." *Id.*

¹² The Court notes that Complainant testified earlier that the doctor's note was extended to February 10, 2006. *See* Tr. at 134.

¹³ At this point in the testimony, both parties stipulated that the value of Complainant's benefits over the year of the relevant time period would have been \$20,000.00; and the value of Complainant's loss of benefits would be prorated from January 14, to March 27, 2006. Tr. at 143-144.

Complainant further stated that he may have told Bernie Owens, a RTW manager, about the conversation he had with Maryland State Trooper Pettyjohn. Tr. at 155. He said that he had “no idea” how any of the other RTW management would have found out about his conversation with Trooper Pettyjohn. *Id.* at 157. He also said that when he spoke with Trooper Tershak on December 14, 2005, he was on his way back from his last load of an eight-hour day. *Id.* at 159. He said that he waited until the end of his work day to get the truck inspected because he had reported the shaking to RTW the day before and he “was giving the company ample opportunity to contact [him] to tell [him] to pull [the truck] into the truck shop.” *Id.* at 159.

Complainant was next questioned about the document (RX 10) that Mr. Barnekov started to review with him in the December 16, 2005 meeting.¹⁴ Tr. at 167. He testified that he declined to make any of the verbal commitments requested of him that day. *Id.* at 173. Specifically, he said that he did not make a commitment to change the way he operated the company equipment, or to participate in the merit performance review process each year. *Id.* at 173-174. Complainant further testified that he believed Respondent’s management mentioned to him in the meeting that they heard he was pulled in by a state trooper for an inspection. *Id.* at 174. He said that he believed they knew at that time that he had requested the inspection since Richard Clutter had asked him about it the day before. *Id.* at 176. He said also that Mr. Clutter told him that someone at RTW spoke with Trooper Tershak. *Id.* at 177.

Complainant was asked about the October 26, 2005 discussion he had with Mr. Clutter and Mr. Taylor.¹⁵ Tr. at 177. He said the discussion occurred after Mr. Clutter assigned him “to a 14 hour day in a spare truck,” an assignment he did not want. *Id.* at 178. During the conversation, he admitted that he “very well could have” called Mr. Clutter a “f---ing idiot.” *Id.* at 181. He also confirmed that he was initially talking just with Mr. Clutter that day, but that as a result of their disagreement, Mr. Clutter called Willie Taylor out to Springfield. *Id.* He said that Mr. Taylor confronted him in the ensuing discussion about the harsh way in which he was operating company equipment. *See Id.* at 183-184.

Complainant was then asked why he turned in his company phone, keys and ID badge the night he believed he was suspended. Tr. at 200-201. He responded, stating, “Because I wasn’t going to be in my truck, I knew, first thing Monday morning. And I didn’t know whether or not they’d send my truck out as a spare truck or have somebody else driving it.” *Id.* at 201. He admitted, however, that he usually did not turn in his ID badge for safekeeping when he left work on other Fridays. *Id.* He also stated that when he was suspended in 2001 he did not return his key to the company facility for safekeeping because, he said, “I was already at home. That would’ve meant that Mr. Barnekov or somebody would’ve requested me to come all the way back.” *Id.* at 191. In addition, he explained that he did not request that his name be removed from the security system during his week off for vacation in 2005 because he was out of town “so there wouldn’t have been any worry about that.” *Id.* at 199-200. When asked why he wanted his name removed from the system when he believed he was suspended, yet not when he went on vacation earlier that year, Complainant stated the following:

¹⁴ See *supra* note 9 and accompanying text.

¹⁵ See *infra* note 28 and accompanying text.

I didn't want them to think that I might've been poking around earlier in the morning in the warehouse because it doesn't come up as a number. It comes up as an individual entering the building. And I didn't want them to see that Mike Anderson entered the building on the morning I was under the assumption I was suspended.

Tr. at 200. Complainant further affirmed that neither Mr. Barnekov nor Mr. Taylor ever used the word "suspended" in reference to his employment status. *Id.* at 202-203.

Next, Complainant was asked about his emotional health after he found out he had lost his job. Tr. at 204. He said that he sought medical treatment for his emotional state but lacked the funds to pursue it. *Id.* at 205. He said he now works for Lockheed Martin, but that he and his family no longer have medical benefits. *Id.*

Testimony of Virginia State Trooper Robert John Tershak

On direct examination, Trooper Tershak stated that at the time of the hearing he had worked for the Virginia State police for 21-and-a-half years. Tr. at 42. He said that for six-and-a-half of those years he was in the "motor carrier program," in which he conducted between 5,000 and 7,000 commercial motor vehicle inspections. *Id.* He explained that he first met Complainant on December 14, 2005, after he had "received a phone call from [Complainant] requesting an inspection of his tractor and trailer combination." *Id.* He noted that he was not certain where Complainant called from, but testified they spoke about "the situation" for about ten minutes over the telephone. *Id.* at 42-43. They then agreed to meet at the Van Dorn Street inspection pad off Interstate-495 in Fairfax County, Virginia. *Id.* at 43.

Trooper Tershak said that Complainant's concerns appeared valid, and he described Complainant's demeanor upon meeting as "very sincere, very honest, forthright, well spoken, intelligent." Tr. at 43. He explained, "[h]e didn't have anything derogatory to say about anything or anyone. He just had some safety concerns and wanted me to address them, and asked if I could meet him." *Id.* Trooper Tershak stated that while some drivers make derogatory statements about their employer because they have "an ax to grind," he did not "get that attitude" from Complainant. *Id.* at 43-44.

Regarding the actual inspection of Complainant's truck, Trooper Tershak explained his assessment process as follows:

I inspected the tractor and trailer combination. It's called a level one inspection, where you not only inspect the driver, make sure that his CDL is valid, that he has the right endorsements and classes to operate the vehicle, but then you also inspect all of the equipment on the tractor and trailer combination. Rather than just doing a walk around, you actually get under the tractor and trailer combination with a creeper, sometimes you use a pip, and you go underneath the truck and look at the components underneath the tractor and trailer, such as suspension and brakes, actually measuring brake adjustment to make sure the vehicle is in safe operating condition, and frame,

wheels, rims, tires, anything you can see underneath. So I did a full level one comprehensive inspection of the entire combination vehicle.

Id. at 44-45.

Trooper Tershak was then questioned about the “Virginia State Police Driver/Vehicle Inspection Report” (hereafter, “Inspection Report”) he completed on the day of his inspection of Complainant’s truck. *Id.* at 45; *see* CX 1. He explained that his report contains the safety violations that he found, and noted that these violations “were all equipment violations under code section 393, which deals with vehicle parts and accessories. They’re different parts to Title 49 of the Federal Motor Carrier Safety Regulations. And Part 393 deals with parts and accessories and safe operating condition of components.” *Id.* at 47. He said that Complainant pointed these defects out to him prior to his inspection, and he then verified that they were in fact safety violations. *Id.* According to Trooper Tershak, these violations were “major, affecting the safe operation of the vehicle.” *Id.* He said that normally for major violations that would affect a truck’s safety, he would have taken the truck out of service. *Id.* In this case, he explained, he did not do so because “I didn’t want to affect the company’s safety rating by putting an out of service order on the vehicle or having an out of service order safety violation on the record of the company.” *Id.* at 48. Instead of taking the truck out of service, Trooper Tershak reported that the violations were a potentially eminent hazard and that immediate repairs were necessary. *Id.* He explained that since RTW is located just a couple of miles from the inspection pad, he thought the fairest course of action was to have the truck driven immediately to that location and repaired. *Id.* He testified that he “left the Van Dorn Pad with the instructions that the vehicle would be driven immediately for repair to the nearest safe haven.” *Id.* at 51.¹⁶

Trooper Tershak testified that a representative of RTW showed up while the inspection was underway. *Tr.* at 49. Although he could not remember the name of the employee, he described him as having been “a little bit agitated . . . he appeared to be a little put out or angry, frustrated.”¹⁷ *Id.* According to Trooper Tershak, when he told the RTW employee that he pulled over Complainant’s truck,¹⁸ the employee “was a little bit suspicious. And he just seemed a little bit impatient. He was not unprofessional. He was not impolite. He was just a little impatient and suspicious.” *Tr.* at 50. Trooper Tershak noted that the employee’s behavior was “somewhat” unusual.¹⁹ *Id.* at 50-51.

Trooper Tershak testified that before he left the inspection, he gave the representative from RTW his contact information, including his cellular phone number. *Tr.* at 51. He said that he proceeded to go off duty and was about 10-12 miles away from the inspection site when he

¹⁶ On redirect examination, Trooper Tershak testified that the Van Dorn Inspection Station is about a five-minute drive from RTW’s Springfield, VA facility. *Tr.* at 74.

¹⁷ The testimony of Complainant and Paul Cupka established that Paul Cupka was the RTW representative referred to here by Trooper Tershak. *See Tr.* at 104, 218-220.

¹⁸ Trooper Tershak explained that Complainant asked him to tell RTW that he was stopped for a routine inspection (instead of reporting that Complainant requested the inspection). *Id.* at 50.

¹⁹ He explained that he usually speaks to company representatives over the telephone, and they are “very compliant and assure me that the repair will be made. And many times before my shift is over, the repairs will be made, and I’ll verify those repairs or certify those repairs, so that the carrier can continue operating.” *Tr.* at 50-51.

received a call on his cell phone from the representative.²⁰ *Id.* at 51-52. According to Trooper Tershak, this employee “directly questioned whether or not I had done a routine traffic stop, a routine inspection, or whether Mr. Anderson had requested it.” *Id.* at 52. Trooper Tershak testified that the employee commented that it seemed suspicious and unusual that Complainant’s truck was pulled over for an inspection, as Complainant’s trailer was almost new and RTW vehicles were not often inspected at that inspection pad. *Id.* Trooper Tershak said that he assured the RTW representative that the stop and inspection were routine, and that Complainant had not requested it. *Id.* at 52-53. He said that he and the representative went “back and forth for about five minutes” discussing only whether Complainant called for an inspection or was pulled over. *Id.* at 53.

Trooper Tershak stated that in his five-to-seven years in the motor carrier division, this was the first time he had received a call where an employer questioned the “suspicious circumstances” of the inspection. Tr. at 53-54.²¹ Ordinarily, he stated, “the telephone call goes very smoothly and the out of service orders or the safety violations are explained in full. And the companies comply. And there’s usually a very positive and compliant attitude. They just take care of the out of service order.” *Id.* He said that the RTW representative was “certainly not belligerent or unprofessional in any way,” and assured him that the situation would be taken care of. *Id.* at 55.

On cross-examination, Trooper Tershak reiterated that while employees often “have an ax to grind with an [e]mployer or a supervisor and they want violations . . . identified so they can seek some kind of retribution against the company,” he sensed that Complainant was “very sincere about what he was calling about.” Tr. at 56-57. He said that while some drivers point to concerns that ultimately turn out not to be safety violations, in this case, “Mr. Anderson took me right to these violations and showed them to me one by one, and I was able to verify the violations.” *Id.* at 57.

Trooper Tershak said that the inspection began at about 1:40 in the afternoon, and lasted approximately 50 minutes. Tr. at 57. He testified that he found no problems with the brakes, the wheels or the suspension. *Id.* at 57-58. He also said that he thought Complainant had his pretrip inspection (PTI) forms with him, in which Complainant documented the problems with his truck before he left his employer; but the Trooper could not recall whether the problems listed on the forms were the same violations that he actually found. *See Id.* at 59-60. In addition, Trooper Tershak said that Complainant did not point out any potential safety problems with the truck that were not documented on the completed Inspection Report. *Id.* at 60-61. He conceded that in this case, he did not take the truck out of service or provide for an escort to a safe haven or repair facility. *Id.* at 62-63. He said that he understood that following the inspection, Complainant was going to get in the truck and drive it back to Springfield. *Id.* at 63.

²⁰ I note that Willie Taylor later testified he was the one who placed the call to Trooper Tershak. *See infra* text p. 20.

²¹ Trooper Tershak also noted that all of the other post-inspection contact he has had with company representatives has been over the telephone. Tr. at 54. He said “this is the first person-to-person contact I’ve had with a general manager or a supervisor of an organization.” *Id.*

Next, Trooper Tershak reiterated that he could not recall the name or role of the RTW representative who came to the inspection site. *Id.* at 65. He was asked why he described the representative as “suspicious,” earlier in his testimony. *Id.* In response, he testified:

This [meeting with the representative] is my first person-to-person contact where I looked at them and lied to them and told them that I made a motor carrier stop on my own, and that the vehicle was inspected and this is what was found and this is what needed to be done. Over the telephone, I always receive very quick and certain responses as to what the company is going to do to remedy the problem. And from this employee, he just seemed irritated by having to be there.

Id. at 65-66. Trooper Tershak testified that he could not recall whether the RTW representative gave an explanation for his irritated manner. *Id.* at 66. He then testified that when he said he “lied” to the representative, he meant that although Complainant initiated the inspection, he told the RTW representative that he had pulled Complainant over to protect him. *Id.* at 66-67. He said that he “lied” again to protect Complainant when he received the cell phone call from someone whom he believed was the same RTW representative that was at the inspection site. *Id.* at 67.

When asked, Trooper Tershak responded that he believed the RTW representative assured him that the necessary repairs would be made to Complainant’s truck. *Id.* at 69. Although he reiterated that the representative seemed annoyed to be there, Trooper Tershak stated that he was professional and said “all the right things.” *Id.*

On re-direct examination, Trooper Tershak stated that while he was inspecting Complainant’s truck, he believed that either he or Complainant called RTW to inform them of the pending violations that could take the truck out-of-service, and to request that a supervisor report to the inspection site. Tr. at 74-75.

Testimony of Kent Barnekov

Kent Barnekov, President of RTW, was called initially as a witness for Complainant. Tr. at 209-214; *see also* Tr. at 275.²² He confirmed that Willie Taylor called Trooper Tershak on December 14, 2005 to ask the Trooper if Complainant had initiated the inspection. Tr. at 210. He said that Mr. Taylor agreed to make the call after he and Mr. Taylor discussed their surprise that a RTW vehicle was pulled in for inspection. *Id.* at 210-211. He further agreed that both Richard Clutter, as a supervisor of RTW drivers, and Paul Cupka, as the head of repairs, are in a good position to know how frequently RTW drivers and trucks are pulled in for inspection. *Id.* at 211.

Mr. Barnekov testified that Complainant received a “pretty good” performance evaluation in 2005. Tr. at 212. When asked whether, as president of the company, he continues to pay employees after they abandon their jobs, he responded, “I can’t tell you when I’ve had

²² Later, as a witness for Respondent, Mr. Barnekov testified that his job is to “oversee the whole operation” of the company. Tr. at 276.

anybody walk out on their job. . . . If there was certain circumstances. It just depends on the situation.” *Id.* at 213-14.

Mr. Barnekov was subsequently called as a witness for RTW. Tr. at 275. He testified that as far back as 2001, he dealt with Complainant regarding performance issues. *Id.* at 277. He said Complainant also brought up issues “concerning our equipment, about training, about hiring practices, a number of issues.” *Id.* at 277. He further testified that Complainant was a good employee “when he was focused on doing his job.” *Id.* at 278.

Mr. Barnekov was asked about the December 2, 2005 meeting in which Complainant addressed his concerns about RTW.²³ Tr. at 279. According to Mr. Barnekov, they discussed a number of issues, which may have included the “vibration in the tractors.” *Id.* at 279-280. Mr. Barnekov said that during the meeting he addressed Complainant’s unsafe methods in operating the company equipment, and Complainant refused to change his ways. *Id.* at 281. He further explained that Complainant was adamant in his refusal to participate in the mandatory merit performance system. *Id.* at 282. He said that after their conversation, it took him a few weeks to get back to Complainant. He explained, “I had a lot on my mind at that point. . . I wanted to make sure I was thinking about it properly, I was able to address it to him the right way, so it would be constructive.” *Id.* at 283.

Mr. Barnekov went on to state that he was made aware of Complainant’s call to the ethics hotline at some point in December, 2005.²⁴ *Id.* at 285. He explained that he was asked by Lynell Neptune, the person at the Washington Post to whom Mr. Barnekov reports, to analyze and respond to Complainant’s reported concerns. *Id.* He said that he provided Mr. Neptune an analysis on December 6, 2005 (*id.* at 286; *see also* EX 9) and told Mr. Neptune that he would hold a meeting with Complainant to “clarify the specifics of his continued employment here at RTW.” *Id.* at 286. According to Mr. Barnekov, that meeting between himself and Complainant took place on December 16, 2005.²⁵ *Id.* at 287.

Mr. Barnekov stated that the purpose of the December 16th meeting was “to make sure that [Complainant] was aware of what we were doing based on his issues that he had discussed with me earlier, equipment performance, the safety and those issues, but also to address these performance issues.” Tr. at 288. He said that at the time of the meeting he knew Complainant’s truck had been inspected two days earlier, but that the inspection was not the subject of the December 16th meeting. *Id.* at 289, 290. He said that he believed Complainant had been pulled over for a random inspection, and that he did not hear that Complainant had requested the inspection until RTW received the pretrial papers a month before the hearing. *Id.* at 290. According to Mr. Barnekov, he did not even mention the truck inspection at the December 16th meeting. *Id.* at 291.

Mr. Barnekov explained that during the meeting he went through a list of performance issues with Complainant, and he asked Complainant to make verbal commitments to improve on

²³ *See supra* text p. 4.

²⁴ *See supra* note 5 and accompanying text.

²⁵ Mr. Barnekov testified that Willie Taylor was also present at the December 16, 2005 meeting. Tr. at 288.

each of the issues. Tr. at 292. Again, Mr. Barnekov stated, that Complainant refused to change the way he operated company equipment and to participate in the merit performance system. *Id.* Mr. Barnekov said that he told Complainant “I can’t allow you to work again until you’re ready to make these commitments.” *Id.* at 294. He stated, “[w]hat I was saying to him was, ‘When you’re ready to make this commitment,’ which could’ve been five minutes from now, ‘I’m ready to let you come back to work.’” *Id.* He went on to state that he did not end the meeting as Complainant described, in that he did not tell Complainant, “‘I’m going to have to ask you to leave.’” *Id.* He described the end of the meeting as follows:

After he made it clear that he wasn’t going to make the commitment and I made it clear that I could not allow him to work again until he was ready to, we kind of looked at each other for about ten seconds, and I said, “Well, if there’s nothing else, if you’ve got nothing else to say, this meeting is done.” And he said, “Okay, I’m done.” And he got up and he walked [out].

Tr. at 295.

Mr. Barnekov testified that shortly thereafter, Complainant entered the room in which Mr. Barnekov was meeting with Richard Clutter and Bernie Owens. Tr. at 295-296. He gave the following description of what next occurred:

It was pretty brief. He walked in to the first desk there, Mr. Gantz’s desk, and he took the cellphone . . . took his company ID and took all of his keys to the facility and the tractor, and he placed them on the desk. He turned and he walked back to the door. But then he stopped and he turned around and he . . . looked like he was looking right at me. And he said, “and you can take my name out of the security system,” and he turned around and walked out the door.

Tr. at 296. Mr. Barnekov said that he understood Complainant’s words and tone to mean he had just resigned. *Id.* at 296-297.

Mr. Barnekov stated that after that episode, he instructed Willie Taylor to arrange a meeting with Complainant. He said that he “wanted to see if Mr. Anderson might have come to his senses” and “to give him an opportunity to come back and ask for his job back again.” Tr. at 297. He said that had Complainant “come in . . . and said, ‘Look, you know, I made a mistake, I didn’t mean to resign . . . and I see you’ve got these issues, these performance issues, I’m willing to make the proper commitments,’ if he had done that, there’s a darn good chance he would’ve had his job back.” *Id.* He stated, however, that because Complainant refused to attend without his lawyer present, the meeting, scheduled for January 10, 2006, never occurred. *Id.* at 298-299. He further testified that the reason he did not permit Complainant to attend with his lawyer was because it was a meeting solely regarding job performance and “it was not a legal issue.” *Id.*

Mr. Barnekov said he recognized that Complainant resigned when he failed to show up for the meeting, and that he mailed Complainant a letter confirming the resignation. Tr. at 299; *see also* CX 8. He further testified that neither he nor anyone else at RTW fired Complainant.

Id. Finally, he stated that none of his dealings with Complainant were motivated in any way by Complainant's safety complaints. *Id.*

On cross-examination Mr. Barnekov was further questioned about the letter, dated January 10, 2006, that he mailed to Complainant. Tr. at 300. He said that although Complainant walked off the job on December 16, 2005, he thought it possible that Complainant would return and ask for his job back. *See Id.* at 301. He said, however, that when Complainant failed to show up for the January 10, 2006 meeting, it was clear to him that Complainant had resigned, and he was therefore no longer permitted on company property. *Id.*

Mr. Barnekov testified that he knew Complainant had suffered a back injury at work, and that a doctor's note excused him from work through January, 2006. Tr. at 302. He said that he also knew that January 10, 2006, the date of his letter to Complainant, was within the time frame that Complainant was excused by his doctor's note. *See Id.* at 303.

Testimony of Paul Cupka

On direct examination, Paul Cupka, testified that he is an assistant foreman and in charge of maintaining RTW's equipment. Tr. at 216. He said that he has been in that position for approximately three-and-a-half years. *Id.* at 218. Prior to that, Mr. Cupka was a mechanic for 24 years. *Id.* He has been with RTW for a total of 29 years. *Id.*

Mr. Cupka testified that on December 14, 2005, he tracked Complainant down at the Van Dorn Inspection Pad after Richard Clutter phoned him inquiring as to the whereabouts of Complainant, concerned that his truck might have broken down. Tr. at 218. He said that after Mr. Clutter asked him to try and find Complainant, he recalled that other RTW trucks had been pulled over at that particular inspection pad over the years. *Id.* at 218-219. He explained that he proceeded to the site where he located Complainant along with the company truck. *Id.* at 219. He described what he saw there as follows:

As I pulled in, the state trooper was in his cruiser doing the paperwork that's associated with the inspection and Mike was just standing outside [the cruiser]. . . I'm assuming that the physical inspection was over. And like I said, he was doing the paperwork that's associated with that inspection. . . . I walked up [to Trooper Tershak] and he rolled his window down and he explained to me that he'd done an inspection on the truck, found some things that needed repair, and that he was writing it up. And he said that the company had a good reputation as far as safe equipment, and that he felt that Mr. Anderson was a very competent and safety conscious employee, so he had no reason to put the truck out of service. He felt confident that the repairs would be done. . . . I said that they would, like anything else, be done as soon as possible.

Tr. at 219-220. Mr. Cupka explained that Trooper Tershak showed him a piece of paper, explaining the violations he had found. *Id.* at 221. He stated that the truck was, in fact, brought down to the truck shop for repairs the following day. *Id.* According to Mr. Cupka, he had no

discussion with Complainant at the time, other than telling him he would follow him back to RTW to make sure he arrived safely. Tr. at 221-222.

Regarding the condition of the seats in the truck, Mr. Cupka testified that he observed “some cracks” in the passenger seat. Tr. at 222. He explained, “they’re associated with the type of seat that’s in there. It’s a tall back seat. So any kind of vibration, center of gravity being higher, it tends to put stress on the braces on it.” *Id.* He said that although Trooper Tershak thought something was loose in the driver’s seat, he did not know whether Trooper Tershak understood how the seat operated. *Id.* at 223. He explained:

I’m not sure he understood that in the driver’s seat, it has a floating situation that the driver can sit in. He can set the seat to where it kind of floats, rather than being rigid. And I’m not sure that he didn’t misunderstand that. But we did go over it. We didn’t find anything that was broken or loose or worn out in the seat itself [on the driver’s side].

Tr. at 223. Mr. Cupka testified that the trooper was well mannered and polite and that he had no reason to be upset with him. *Id.* He said that the discussion between them lasted a total of ten to fifteen minutes. *Id.*

On cross-examination, Mr. Cupka indicated that in his 29 years working for RTW, there have been many instances where the company’s trucks were pulled in for inspections. Tr. at 224. He was asked whether in his deposition he had stated that “Mike [Anderson] did not strike [him] as a particularly unsafe employee.” *Id.* at 225. He stated that statement was not accurate, and instead what he had said was, “in my opinion there were times that Mike went a little bit too fast for the conditions and the environment.” *Id.* Mr. Cupka further testified that he understood that Complainant “completed his loads and things he was asked to do,” but that he did not supervise Complainant and only saw him when repairs were needed. Tr. at 226. He stated that he did not remember any times when Complainant was ever insubordinate to him. *Id.* He also said that he did not think Complainant was more profane or difficult than other employees. *Id.*

Testimony of Richard Clutter

Richard Clutter testified on direct examination that he has worked for RTW for 17 years and has been the logistics and warehouse manager since January, 2006. Tr. at 227-228, 230. Prior to that, he was an assistant foreman for the company for approximately six years. *Id.* at 228. In the assistant foreman position, he oversaw the warehouse facilities and served as the backup dispatcher. *Id.* He testified that in August, 2005, he became the interim dispatcher when the regular dispatcher was out on sick leave and that Complainant was one of the drivers he supervised and dispatched on runs daily during this period. *Id.* at 228-229, 230.

Mr. Clutter further testified that on a day-to-day basis, he and Complainant had a good working relationship. However, he also testified that he had to hold “coaching sessions”²⁶ with

²⁶ Mr. Taylor defined coaching sessions as follows: “[A] coaching session is when you just sit down and talk to [employees] . . . about, some of the problems they’re having, or positive things they’re doing well.” Tr. at 258. He

Complainant regarding communication²⁷ and performance issues. Tr. at 230-231. He said that one of the performance problems he had with Complainant was one which he termed “freelancing,” *i.e.*, Complainant would deviate from arranged dispatch schedules. *Id.* at 231. According to Mr. Clutter, in October, 2005, Complainant refused to take an assigned run, referring to Mr. Clutter as “a f---ing idiot,” and Mr. Clutter was forced to get his supervisor, Willie Taylor, involved. *Id.* at 233. He said that Mr. Taylor came from another office to talk with both him and Complainant. *Id.* at 234.

According to Mr. Clutter, during the meeting, Complainant was agitated, and was told by Mr. Taylor that he “needed to settle down.” Tr. at 235. After the initial issue was resolved, Mr. Clutter said the conversation turned to Complainant’s handling of company equipment. *Id.* at 235-236. Evidently, according to Mr. Clutter, RTW’s management had received complaints about the rushed manner in which Complainant operated the equipment to load and unload products from his truck. See *Id.* at 235-236. Mr. Clutter testified that Complainant responded to these complaints by saying that he was a competent equipment operator and would not change the way he operated the equipment. *Id.* at 237. Mr. Clutter said he was insulted by Complainant on another occasion when Complainant “mentioned that I was a \$20,000.00 a year dispatcher trying to dispatch an \$80,000.00 a year driver, and that the sooner I learned the drivers could make or break me, the better off I would be.” *Id.* at 240.

Mr. Clutter testified that he was present at the December 16, 2005 meeting with management when Complainant entered the room and allegedly resigned. Tr. at 242-243. He described the event as follows:

He entered through the outside door of the dispatch office. . . . He came up to the desk closest to the door, placed his cellphone, his keys, his post ID badge on the desk, then proceeded to turn around, head back to the door, stopped just short of the door, turned around and asked that his security code and password be removed from the security system at Alexandria.

Id. at 243. According to Mr. Clutter, Complainant then left the office, and it seemed clear he was quitting his job. *Id.* at 243-244.

On cross-examination, Mr. Clutter stated that he had no more problems with Complainant than with other drivers. Tr. at 245. He also said that Complainant used no more foul language in the work place than other employees. *Id.*

Testimony of Robert “Willie” Taylor

Mr. Taylor stated that he has worked for RTW for 30 years and has been the operations manager for a year-and-a-half. Tr. at 247-248. He testified that, as the operations manager, he saw Complainant once or twice a week, and he stated that Complainant frequently complained

said coaching sessions differ from formal discussions, in which employees are informed that the discussion will be documented. *Id.*

²⁷ Mr. Clutter explained that Complainant failed to carry his company-issued cell phone with him, which made Complainant difficult to communicate with. Tr. at 231-232.

about issues in the workplace. *Id.* at 248-249. He said that some of the concerns involved safety matters but most were complaints about how the equipment operated. *Id.* Mr. Taylor testified that “when [Complainant] was focused on his job, he was a good employee” but that Complainant was not always focused on his job. *Id.* at 250.

Mr. Taylor next testified that Complainant became irritated in August, 2005 when Richard Clutter became his supervisor and dispatcher. *Id.* at 250. He said this was because Mr. Clutter would not permit Complainant to “freelance” and do as he pleased, as Complainant’s previous supervisor had allowed. *Id.* at 251. Mr. Taylor went on to state that on October 26, 2005, he had to leave a meeting and drive to another RTW office to mediate an argument between Mr. Clutter and Complainant.²⁸ *Id.* at 252. According to Mr. Taylor, when he arrived, he chided Complainant for using an inappropriate tone with Mr. Clutter and for calling him a “f--ing idiot.” *Id.* at 253. He stated that Complainant originally kept refusing to do a job he was scheduled to perform but after a while “[h]e finally calmed down.” *Id.* He explained that the conversation then shifted to Complainant’s improper handling of company equipment. *Id.* Specifically, he stated that “anything that Mike got on, he was reckless.” *Id.* He said there were “numerous complaints from the employees, from managers and from the mechanics,” and that Complainant caused breakdowns in the equipment and had damaged products while he was loading his truck. *Id.* at 254-255. According to Mr. Taylor, when he brought all of this to Complainant’s attention, Complainant denied the allegations and refused to change the way he operated the equipment. *Id.* at 255.

Mr. Taylor said that he documented the above-mentioned discussion in the company’s “Employee Recognition & Development Log” (RX 8), which is used to document coaching sessions with employees and for consideration in the merit performance review system. Tr. at 256. He made the entry on October 28, 2005, two days after his discussion with Complainant and Mr. Clutter; and he testified that it accurately reflected what occurred in the discussion. *Id.* at 257.²⁹

Next, Mr. Taylor described the December 16, 2005 meeting after which Complainant allegedly resigned. Tr. at 258. He acknowledged that the purpose of the meeting was to “go over some of the performance issues that we had brought up in previous meetings with Mr. Anderson.” *Id.* at 259. Mr. Taylor testified that at the time of the meeting he knew that Complainant’s truck had been inspected two days earlier, but he understood it to have been a random inspection. *Id.* at 258-260. He stated that the inspection was not the subject of, or reason for, the meeting and that neither he nor Mr. Barnekov mentioned the inspection during the meeting. *Id.* at 258.

Mr. Taylor explained that on December 14, 2005, after the inspection had occurred, he called Trooper Tershak to inquire about the incident. *Id.* He gave the following explanation for his phone call:

²⁸ See *supra* note 15 and accompanying text.

²⁹ RX 8 reiterates in slightly more detail the October 26, 2005 discussion Mr. Taylor described in his testimony. Of note, Mr. Taylor wrote that after he reprimanded Complainant for cursing at and being insubordinate to Mr. Clutter, Complainant “stated that he did not give a f--- whether or not he was sent home and if needed he would resign, he did not need this job and he was still refusing to do what was asked of him.” RX 8 at 1.

[The inspection] was something out of the normal. When we do have trucks inspected, the first thing a driver does is calls his dispatcher or calls one of the supervisors at the company and lets them know that they've been pulled into an inspection line and the trooper's getting ready to do an inspection on the truck. Mr. Anderson did not call. He would not answer his phone and nobody knew what was going on for about two hours there. When I got the inspection report back, I saw the trooper's name and phone number on the bottom of it, so I called the number.³⁰

Tr. at 260-261. When questioned as to why it mattered to him whether or not the inspection was randomly performed, he stated, "[o]ur trucks don't usually get pulled in the inspection line. We have a very good record with the Virginia State Police." Mr. Taylor reiterated that the company's good record, along with Complainant's refusal to answer his phone, prompted his call to the trooper. *Id.* at 261.

Mr. Taylor's description of the December 16th meeting and of Complainant's alleged subsequent resignation, echoed Mr. Barnekov's testimony.³¹ Tr. at 262-263. He said that from his observations, he concluded that Complainant was resigning his position at RTW. *Id.* at 265. He went on to state that he contacted Complainant on December 27, 2005 to request a follow-up meeting with him regarding the issues that were discussed on December 16th. *Id.* at 266-267. He maintained that although he believed Complainant had resigned, management was "trying to see if we could work things out with him." *Id.* at 266.

On cross-examination, Mr. Taylor stated that he knew by the end of December, before he called to schedule a follow-up meeting with Complainant, that Complainant had returned to RTW on December 19th and turned in medical notes, excusing him from work. Tr. at 267. Next, Mr. Taylor stated that Complainant's concern about not being able to see out of the side view mirrors was unfounded since Complainant's truck was brand new, and Complainant simply refused to adjust the mirrors correctly. *Id.* at 269-270. Mr. Taylor conceded that shaking could be a major safety concern depending on how severe it was. *Id.* at 271. Finally, he commented that Complainant was not the first person in the workplace to use the "f" word. He further said, however, that Complainant is the only employee who uses that word towards his supervisors. *Id.* at 271.

IV. DISCUSSION

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain

³⁰ Mr. Taylor estimated that he received the vehicle inspection report, prepared by Trooper Tershak, at approximately 3:00 pm on December 14, 2005. Tr. at 272. He said he obtained the report from Paul Cupka, the head of maintenance. *Id.*

³¹ See *supra* text p. 15. Mr. Taylor, too, testified that Complainant refused to make verbal commitments to improve his performance. Tr. at 262-263.

protected activity. 49 U.S.C. § 31105(a)(1)(A). Protected activity includes filing a complaint or beginning a proceeding “related to a violation of a commercial motor vehicle safety regulation, standard, or order.”³² *Id.*

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity under the Act, (2) the respondent was aware of the activity, (3) he suffered adverse employment action, and (4) there was a causal connection between the protected activity and the adverse action.³³ *See Coxen v. United Parcel Service*, ARB No. 04-093, ALJ No. 03-STA-13, slip op. at 5 (ARB Feb. 28, 2006) (*citing Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *BSP Trans, Inc. v. United States Dep’t of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003)). Each of these elements will be discussed in relevant part below.

Protected activity under the Act

Complainant contends that his safety complaints to Respondent, specifically those made to Respondent’s president on December 2, 2005, his subsequent report to Respondent’s ethics hotline on December 4, 2005, and his report of safety concerns to a Virginia state trooper on December 14, 2005, constitute protected activity under the Act. *See, e.g.*, Complainant’s Pre-Hearing Submission at 1; “Secretary’s Findings” at 2 (April 11, 2006).³⁴ Respondent argues that

³² The STAA also provides that protected activity includes the refusal to operate a vehicle in violation of a “regulation, standard, or order of the United States related to commercial motor vehicle safety or health” or because of a reasonable belief that operating the vehicle would be unsafe. 49 U.S.C. § 31105(a)(1)(B)(i)-(ii). However, since it has been established that Complainant never refused to drive a vehicle while employed by RTW, this section is not applicable here. *See* Tr. at 189.

³³ Where the case is fully tried on the merits, as it has been here, it is unnecessary to determine whether the complainant presented a *prima facie* case and whether the respondent rebutted that showing. Rather, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If he or she did not, it matters not at all whether he or she presented a *prima facie* case. If he or she did, whether a *prima facie* case was presented is irrelevant. *Ass’t Sec’y & Ciotti v. Sysco Foods Co. of Philadelphia*, 97-STA-30 (ARB July 8, 1998).

³⁴ The ARB has held that procedural due process requires that any additional issues not originally pleaded must be raised and litigated by implied consent of the parties. *See Kelley v. Heartland Express, Inc. of Iowa*, ALJ No. 1999-STA-29 (Mar. 24, 2000), *aff’d*, ARB No. 00-049 (Oct. 28, 2002). Implied consent has been found where the parties understood evidence presented at a hearing was aimed at an unpleaded issue. *See Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992). Throughout the record, other specific instances of Complainant’s protected activity not mentioned in the pleadings are suggested. One instance includes Complainant’s report of his truck shaking in a December 13, 2005 post-trip inspection report (CX 10). Tr. at 102, 207-208. Complainant also alleged that he left a voice mail that same day for Richard Clutter, his supervisor, stating his safety concerns with the cracks in his truck’s frame. *See* Tr. 162. A third instance is Complainant’s report of the shaking to Maryland State Trooper Pettyjohn sometime between his December 2, 2005 meeting with Mr. Barnekov and his December 14th inspection by Trooper Tershak, Tr. 99-100. The three instances here, while mentioned during the hearing as part of the relevant sequence of events, were not specifically stated in the Secretary’s April 11, 2006 Findings or alleged by Complainant in his May 4, 2006 appeal from the Secretary’s Findings as a basis for Complainant’s reasonable belief of retaliation by Respondent. In addition, they were never alleged in Complainant’s Pre-Hearing statement. Thus, since these instances were never pleaded and since there is no indication of implied consent to litigate whether these instances are protected activity, I will afford them no consideration as such.

Complainant did not engage in such protected activity, reasoning that “not every vague generalized complaint qualifies as protected activity.” Resp. Br. at 13. Respondent also contends that RTW never knew it was Complainant who requested the December 14th inspection by Trooper Tershak. Resp. Br. at 15.

As mentioned above, protected activity includes filing a complaint in relation to a violation of a commercial motor vehicle safety regulation. The Board has established that “the ‘filed a complaint’ language protects from discrimination an employee who communicates a violation of a commercial motor vehicle regulation, standard or order to *any supervisory personnel.*” *Harrison v. Roadway Express, Inc.*, ALJ No. 1999-STA-00037 (Mar. 30, 2000) (*aff’d*, ARB No. 00048 (Dec. 31, 2002) (emphasis added). Moreover, the Board has found that a complaint need not explicitly mention a commercial motor vehicle safety standard to be protected under the Act, because a complainant, typically a layman, “cannot be expected to cite standards or rules like a trained lawyer.” *Nix v. Nehi-RC Bottling Company, Inc.*, 1984-STA-00001 (Sec’y July 13, 1984), slip op. at 8-9. Finally, the Board has held that a complaint is to be liberally construed, and needs only to “relate” to a violation of a commercial motor vehicle safety standard. *See Id.* (quoting 49 U.S.C. § 31105(a)(1)(A)).

Here, Complainant’s December 2, 2005 statements regarding his safety concerns were made to Mr. Barnekov, President of RTW, who clearly is one of Respondent’s “supervisory personnel.” Complainant’s statements involved neglect of the facility and trucks, excessive working hours and shaking of the trucks.³⁵ Complainant’s numerous other complaints to the company also involved shaking of the trucks, and were made to supervisory personnel.³⁶ His concerns about the shaking were later determined by Trooper Tershak to amount to violations under Title 49, Section 393 of the Federal Motor Carrier Safety Regulations Act.³⁷ Moreover, the state trooper testified that the defects Complainant showed him were in fact safety violations which were “major, affecting the safe operation of the vehicle.”³⁸ I thus find that Complainant’s communications of his concerns to RTW, specifically to Mr. Barnekov on December 2, 2005, and his subsequent reporting of his concerns to Trooper Tershak, plainly “‘relate’ to a violation of a commercial motor vehicle safety standard” and therefore qualify as protected activity under the Act.

Likewise, I find that Complainant’s call to RTW’s ethics hotline on December 4, 2005 constitutes a protected activity under the STAA. Complainant maintained that after he met with Mr. Barnekov on December 2, he again voiced his safety concerns with the company’s ethics hotline, and then met with Lynell Neptune, Mr. Barnekov’s supervisor, to discuss the hotline call. Tr. 188-189; “Secretary’s Findings” (Apr. 11, 2006) at 2. Mr. Barnekov confirmed the call to the hotline, and he testified that Mr. Neptune asked him to respond to each element of it,

³⁵ *See supra* text pp. 3-4.

³⁶ Complainant alleged that he listed the shaking in several inspection reports and drivers meetings. *See, e.g.*, Tr. 86, 88-89; 104. On cross-examination, Willie Taylor, an RTW manager, admitted that Complainant complained of truck shaking on some of the inspection reports he reviewed, and that shaking could be a safety concern depending on the severity of it. *See* Tr. at 271. Complainant also testified that he demonstrated the shaking to Mr. Barnekov, RTW’s president, in the summer of 2005. Tr. 85, 87-89.

³⁷ *See supra* text p. 11.

³⁸ *See supra* text p. 11.

which he did in a memorandum (RX 9) dated December 6, 2005. Tr. 285. Although the memorandum does not specifically state that Complainant complained about trucks shaking during his call, it does note that Complainant expressed concerns about the safety of the company's equipment. RX 9 at 15. Thus, based on Complainant's repeated pattern of complaining about truck safety, and based on both Complainant's and Mr. Barnekov's testimony that Complainant's hotline call reiterated the concerns Complainant expressed in the December 2nd meeting, it is reasonable to conclude that the ethics hotline call also "related to a violation of a commercial motor vehicle safety regulation," and is also a protected activity under the Act.

As Respondent correctly points out, an employer cannot retaliate against an employee for engaging in a protected activity, unless the employer is aware of such activity. *See* Resp. Br. at 15 (citing *Yellow Freight Sys. V. Reich*, 8 F.3d 980, 983 (4th Cir. 1993), *Roadway Express, Inc. v. Admin. Review Bd.*, 116 Fed. App'x. 674, 679 (6th Cir. 2004)). Here, RTW was clearly aware of Complainant's complaints to Mr. Barnekov and his call to the ethics hotline. Claimant and Mr. Barnekov confirmed the sum and substance of the December 2nd meeting, and Mr. Barnekov testified that he spoke with Lynell Neptune regarding Complainant's ethics hotline call and was aware of its substance. This uncontradicted evidence establishes Respondent's knowledge of these two protected activities.

With respect to the complaint to Trooper Tershak, Respondent argues that it did not know Complainant initiated the contact with the trooper, believed that the inspection was randomly performed, and thus did not have prior knowledge of any reported safety violation by Complainant on December 14, 2005. *See* Resp. Br. at 15. The credible evidence of record refutes Respondent's contention.

Complainant testified that his supervisor, Richard Clutter, told him on December 15th, the day following the truck inspection, that RTW knew he had called the Virginia State Police. Complainant further testified that he then admitted having done so to Mr. Clutter. *See, e.g.,* Comp. Reply Br. at 3. As Complainant correctly points out, "[n]ot only did [RTW] choose not to cross-examine Mr. Anderson on this testimony, [RTW] did not even ask Mr. Clutter in his testimony to deny it." *Id.* at 3-4. In addition, Trooper Tershak testified that both Willie Taylor and Paul Cupka seemed highly suspicious of how the truck inspection came about. Tr. 50, 51-53. He specifically stated that when Mr. Taylor called him just after the inspection he "directly questioned whether or not I had done a routine traffic stop, a routine inspection, or whether Mr. Anderson had requested it." *Id.* at 52. Furthermore, Mr. Taylor testified that the reason he called Trooper Tershak is because he "wanted to know whether or not the inspection was a random inspection." Tr. 261. Even without the discussion on December 15th between Complainant and Mr. Clutter, which shows direct prior knowledge of the protected activity by one of Respondent's supervisors, the actions of Mrs. Cupka and Taylor surrounding the truck inspection strongly suggest that other supervisory personnel were aware of this activity as well.

Based on the foregoing, I find that RTW was aware of each of the three instance of Complainant's protected activity described above prior to the occurrence of any alleged adverse employment action.

Adverse employment action in violation of the Act

Complainant argues that he was retaliated against by Respondent in violation of the Act when he was suspended on December 16, 2005 and then discharged on January 10, 2006. (Complainant's Pre-Hearing Submission at 1.) Respondent counters that Complainant voluntarily resigned from his employment with RTW and thus no adverse action was taken against him. (Respondent's Pre-Hearing Submission at 1).

The relevant case law clearly establishes that Complainant suffered an adverse employment action under the Act. According to the Secretary:

Any employment action by an employer which is unfavorable to the employee, the employee's compensation, terms, conditions, or privileges of employment constitutes an adverse action. While an employer may have a non-discriminatory reason for taking the action and, therefore, ultimately prevail against a charge of illegal retaliation, that does not alter the fact that the employer took some step or action which adversely affected the employee's compensation, terms, conditions, or privileges of employment. Thus, regardless of the employer's motivation, proof that such a step or action was taken is sufficient to meet the employee's burden to establish that the employer took adverse action against the employee.

Long. V. Roadway Express, Inc., 1988-STA-00013 (Sec'y Mar. 9, 1990)(emphasis added).

Here, Respondent's president, Kent Barnekov, told Complainant on December 16, 2005 that Complainant was not permitted to work again until Complainant made certain verbal commitments regarding his work performance. *See, e.g.*, Tr. 294. Complainant maintains that when he refused to make the commitments until he went home and reviewed his notes, Mr. Barnekov told him, "I'm going to have to ask you to leave." *Id.* at 114. He therefore believed he was suspended. *Id.* at 115. Mr. Barnekov, however, states that he did not ask Complainant to leave, but that he was essentially telling Complainant "When you're ready to make this commitment, which could've been five minutes from now, I'm ready to let you come back to work." Tr. at 294. Whether or not Mr. Barnekov used the precise language Complainant alleges, he admits that he would not allow Complainant to continue working without making a commitment to change certain aspects of his conduct as an employee.

Complainant testified that he believed he was suspended when his dialogue ended with Mr. Barnekov on December 16th. Tr. at 115. The Board has held that, when no clear statements have been made by management regarding an employee's status, his or her status depends on the "reasonable inferences that the employee could draw from the statements or conduct of the employer." *Jackson v. Protein Express*, 95-STA-38 (ARB Jan. 9, 1997) (quoting *Pennypower Shopping News, Inc. v. N.L.R.B.*, 726 F.2d 626, 629 (10th Cir. 1984) (emphasis in original).) I find that Complainant's belief was reasonable in light of the fact that Mr. Barnekov told him he could not work again until he complied with RTW's request to make various commitments regarding his conduct. I thus find that Complainant suffered an adverse employment action when he was suspended on December 16th.

Causal relation between alleged adverse action and protected activity

As noted above, to be successful in a STAA case, a complainant must prove a causal relation between a protected activity and the employer's adverse employment action. Here, although Complainant has established that he suffered an adverse employment action, he has failed to establish by a preponderance of the evidence that the action was taken in retaliation for his safety complaints.

In a STAA whistleblower case, it is not an employer's burden to prove a legitimate, non-discriminatory, non-pretextual reason for its action in order to rebut evidence raising a reasonable inference of retaliatory discharge. Rather, if a complainant presents evidence raising a reasonable inference of retaliatory discharge, the employer need only articulate a non-discriminatory reason for its action. At all times, the complainant has the burden of establishing that the real reason for discharge was discriminatory. *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2748 (1993); *Shute v. Silver Eagle Co.*, 96-STA-19 (ARB June 11, 1997).

Complainant argues that the timing of his suspension on December 16th was extraordinary. He testified that the day after the December 14th inspection, his supervisor, Richard Clutter, confronted him about having called in the state police to perform the inspection, and that, after he admitted having done so, Mr. Clutter chastised him. *See, e.g.*, Comp. Br. at 13. Then, the following day, he was called into a meeting with Mr. Barnekov and Mr. Taylor, and he was told by Mr. Barnekov that he could no longer work until he agreed to make verbal commitments regarding his work performance. Tr. at 110-113. These circumstances raise a reasonable inference of retaliatory action by Respondent.

Although the timing of the December 16th suspension creates a reasonable inference of retaliatory action, Respondent has duly articulated a non-discriminatory reason for its action, *i.e.*, that Claimant refused to conform his conduct to acceptable standards of employee behavior. The evidence in the record before me confirms that Complainant has a documented history of unacceptable behavior and insubordination toward his supervisors, and that these actions led to his suspension on December 16, 2005.

For example, on October 26, 2005, about seven weeks before his suspension, Complainant called his dispatcher a "f---ing idiot" for assigning him a job he did not wish to take. RX 8 at 1; Tr. 181. When Willie Taylor, a supervisor, arrived at the scene and reprimanded Complainant, Complainant said "he did not give a [f---] whether or not he was sent home and if needed he would resign, he did not need this job and he was still refusing to do what was asked of him." *Id.* During their meeting that day, Mr. Taylor discussed with Complainant the numerous complaints the company had received from other employees about his aggressive handling of the equipment which resulted in problems with the machines and damage to products. RX 8 at 1-2; *see also* RX 10 at para. 1. Mr. Taylor wrote in a report two days after the incident that Complainant "was the only driver with more than two rolls of paper delivered to the [Washington Post] with out-of-round damage. This is directly attributed to the aggressive way Mike loads products on his truck." *Id.* at 2. He further noted that Complainant refused to change the way he operated the equipment, at which time Mr. Taylor told Complainant that further action would be taken "if it kept on." *Id.*

Similarly, in a memorandum dated December 6, 2005 responding to Complainant's call to the company's ethics hotline, Mr. Barnekov stated that Complainant's safety complaints were "quite possibly an attempt to deflect attention away from his own job performance problems." RX 9 at 1. In the memorandum, Mr. Barnekov reiterated the above-referenced October 26, 2005 exchange between Complainant and Mr. Taylor. *Id.* He then noted that Mr. Taylor commented to him that "[Complainant] displayed particularly erratic and emotional behavior during the meeting," and confirmed that Mr. Taylor discussed with him Complainant's destructive handling of the company's equipment. *Id.* Mr. Barnekov went on to detail the meeting he had with Complainant on December 2, 2005. *Id.* at 2. He said that at the start of the meeting, Complainant asked how management planned to discipline him in light of his earlier exchange with Mr. Taylor. *See Id.*

Mr. Barnekov's December 6, 2005 memorandum responding to Complainant's hotline call also states that "this entire process is Mike's M.O. . . . Once anyone questions his job performance, or in any way suggests that he is less than perfect in the way he does his job, he becomes obsessed with developing and calling attention to any issue he can to deflect attention away from him and back on the management team." RX 9 at 2. Mr. Barnekov went on to state that Complainant's injury the previous spring, which allegedly caused Complainant to worry about safety issues, was mainly caused by Complainant's own dangerously aggressive driving. *Id.* at 4. Further, he noted that, at a recent company meeting when Complainant declared the reason for damaged products was due to the company's old, worn out equipment, another employee stated, "'it's not the age or condition of the equipment [that causes damage], it's how it is operated' . . . to poke at Mike for trying to blame the equipment for damage being done." *Id.* at 4.

Mr. Barnekov also noted in his memorandum that he believed Complainant called the ethics hotline because he was concerned about statements he had made to Mr. Barnekov during their December 2nd meeting. According to Mr. Barnekov, Complainant specifically said that he would not change the way he handled or ran equipment, and that he would resign if he had to. RX 9 at 6. He said that Complainant also refused to participate in the company's merit performance system, something that was required of all employees, and he opined that Complainant's refusal was due to the fact that the process calls to attention and formally tracks his deficiencies. *Id.*, *see also* RX 10 at para. 2. When the meeting concluded, Mr. Barnekov told Complainant that he would think about their conversation and get back to him, which he planned to do in the December 16th meeting. *See Tr.* at 283. Mr. Barnekov concluded his memorandum by stating the following:

After my discussion with Mike last Friday, I told him that he had given me quite a bit to think about. I also told him that after I had, I would reschedule another meeting with him to discuss issues further. I do plan to meet with him, but in the meeting, I will make sure he understands that he has overstepped his boundaries on job performance and I will clarify the specifics of his continued employment here at RTW. He will not tell management what he will or will not do, especially in relation to how he performs his job or his participation in job performance reviews.

RX 9 at 6.

Respondent correctly asserts that “when an employer makes a decision to take action *before* protected activity occurs, the fact that an employer proceeds with such a decision *after* the protected activity occurs is not evidence of causation.” Resp. Br. at 20-21 (citing to *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001)). Here, the documentation from both Willie Taylor and Kent Barnekov, as well as other evidence of record,³⁹ amply demonstrates that RTW was not satisfied with Complainant’s work performance, that Complainant was informed of this, and that the company planned to take action to resolve the problem. Mr. Barnekov and Mr. Taylor credibly testified that, at the December 16th meeting which led to Complainant’s suspension, no mention was made of the December 14th inspection. Tr. 290-291; 256. The credible evidence further demonstrates that the December 16th meeting was intended to address Complainant’s ongoing employment deficiencies, and to obtain from Complainant reasonable verbal commitments that he would change his behavior and correct these deficiencies. *See* RX 10.

Based on the foregoing, I find that Respondent has sufficiently articulated a non-discriminatory reason for taking adverse action against Complainant on December 16, 2005. I thus further find that Complainant has failed to establish a violation of the Act by a preponderance of the evidence.

RECOMMENDED ORDER

For the foregoing reasons, it is hereby recommended that the complainant filed with the Occupational Safety and Health Administration on February 14, 2006 by Michael Anderson against Robinson Terminal Warehouse Corporation be dismissed.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.

NOTICE OF REVIEW: The administrative law judge’s Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary’s Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

³⁹ For example, Complainant has acknowledged that he was given a three-day suspension from RTW in 2001. Tr. at 190.

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further