

**U.S. Department of Labor**

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**Issue Date: 23 September 2008**

**CASE NO.: 2008-STA-11**

**IN THE MATTER OF**

**BARRETT RIESS**  
**Complainant**

**v.**

**NUCOR CORPORATION-**  
**VULCRAFT-TEXAS**  
**Respondent**

**APPEARANCES**

**Dennis G. Herlong, Esq.**  
**On behalf of Complainant**

**John K. Linker, Esq.**  
**David M. Mincez Esq.**  
**On behalf of Respondent**

**BEFORE**

**Clement J. Kennington**  
**Administrative Law Judge**

**RECOMMENDED DECISION AND ORDER**

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (Act) of 1982 as amended and recodified by, 49 U.S.C.A. § 31105 and the implementing regulations at 29 C.F.R. § 18.1 *et seq.*, 29 C.F.R. § 1978.100 *et seq.* (2001) and those of the 9/11 Commission Act of 2007, Pub. L. No. 110-053. Under Section 31105 (a) of the Act a person is prohibited from discharging, disciplining, or discriminating against an employee

regarding pay, terms or privileges of employment because the employee has filed a complaint or begun a proceeding related to a violation of commercial motor vehicle safety regulations or refuses to operate a vehicle because to do so would violate a regulation, standard, or order of the United States related to commercial motor vehicle safety or health, or the employee has a reasonable apprehension of serious injury to the employee or public because of the vehicle's unsafe condition.

The Act protects employee complaints about vehicle safety related issues ranging from voicing concerns to one's employer to the filing of formal complaints related to commercial motor vehicle safety. 49 U.S.C.A § 31105 (a)(1). *See Young v. Schlumberger Oil Field Service*, ARB No. 00-075, ALJ No. 2000 STA-28, slip op. at 308 (ARB February 28, 2003).

## **I. STATEMENT OF THE CASE**

### **A. Procedural Background**

On February 15, 2007, Complainant, Barrett Riess (Riess) filed a complaint with OSHA against Respondent, Nucor Corporation, Vulcraft-Texas located in Grapeland, Texas (Vulcraft) alleging that Vulcraft vice president and general manager, James R. Landrum terminated him on January 15, 2007, for reporting violations of the Federal Motor Carrier Safety Regulations (FMCSR), Title 49 § 396.17 by Vulcraft personnel regarding the operation of two tractor-trailer rigs on public highways without valid annual inspections followed by additional reports on January 10 and 11, 2007, of trailer rigs operating with faulty break linings, leaking wheel seal, defective wiring and reflectors problems in violation of Sections 393.47, 393.9, 393.11 and 393.13 of FMCSR. On October 15, 2007, OSHA issued its findings and dismissed the complaint since in its opinion the preponderance of evidence showed that Claimant's protected activities were not a contributing factor in his discharge.

Riess filed timely objections to OSHA's finding and requested a hearing which was held before the undersigned on April 1, 2008 and May 28, 2008 in Houston, Texas. Both Riess and Vulcraft were represented by counsel. Riess testified, called supervisor James Landrum and introduced 25 exhibits including Vulcraft's pre-hearing statement, safety policy, personnel policy on discipline and discharge, exit interview of McArther Walker, e-mail from Landrum to Ham Lott concerning Riess' termination, Joey Word's voluntary termination of employment, Vulcraft employee relations seminary booklet, salary recommendations for Riess; Vulcraft leadership development survey and summary of Riess' most distinctive characteristics, graphs showing Vulcraft's increase in tons per load, Mercer Human Resource Consulting Report, job posting for traffic manager position, problems and complaint procedure, Nucor newsletters, Texas oversize/overweight trip permits. Riess certificates of achievements, Nucor safety policy, vehicle repair records, Word signed policy certification and phone records.

Vulcraft called witnesses Stephen G. MacNair-Semands, McArther Walker, Sue Larue, Laverne Zwingman, Alan Cheatham, and James Landrum and introduced 19 exhibits including Vulcraft leadership development survey, Texas oversize trip permit, Vulcraft safety policy, review of DOT compliance status by Vulcraft by RMR Consultants, professional driver

guidelines, Riess' answer to interrogatories, documents from personnel files of Vulcraft employees Walker, Word and Sue Larue and Riess, Vulcraft complaint procedure. Affidavits of Walker, Larue, Cheatham were admitted but only for impeachment purposes.

Riess contends (1) he worked 14 years for Vulcraft of which the last 4 ½ years as traffic manager he had a spotless record until January 9, 2007 when in reporting directly to vice president and general manager, James Landrum, he informed Landrum that truck shop supervisor, Joey Word had allowed two trailers to be driven without update annual inspection stickers; (2) during this same meeting Riess informed Landrum that Word had submitted his resignation because Riess was too pushy about safety rules enforcement and he (Word) could not and would not do anything to stop the usage of trailers without. updated inspection stickers; (3) Landrum replied that it was ok if safety violations occurred occasionally and took no action to correct the problem even though Riess continue to bring the problem to his attention on January 10 and 11, 2007; (4) rather than insure safety compliance Landrum told Riess to leave Word alone, not to post his job and on January 15, 2007 terminated him.

Vulcraft, on the other hand contends that Riess termination had nothing to do with his enforcement of safety rules but rather was due to his refusal as traffic manager to listen to or consider employee concerns such that they did not trust or respect him. Riess did not value the work or opinions of two valued truck shop supervisors, Mac Walker and his replacement Word which in turn caused them to resign early. Riess berated another long time and respected 20 year clerical, Sue Larue to such a point that she seriously considered quitting. In addition, Riess lost the trust of his supervisor James Landrum when he falsely told him that supervisors and employees supported his decision to purchase Peterbilt rather Kenworth trucks and thereafter told employees if questioned about his truck purchase by Landrum not to answer his questions because in so doing it made Riess look bad. From January 9 through 11, 2007, Landrum confirmed these facts and sought higher management approval and support for Riess' termination in order not to loose other valued employees. Landrum already knew Riess had communication problems and had in fact enrolled him in a leadership program to improve his supervisory skills but with little success.(Tr. 25, 26).<sup>1</sup>

Concerning the lack of trailer inspection stickers, Vulcraft contends it was Riess' responsibility to ensure safety compliance and shortly after the incident was reported the trailers in question were inspected and repaired at minimal cost. Further it had no economic incentive to use out of date or unsafe trailers because Vulcraft had a surplus of 88 trailers and only 14 trucks which was more than enough trailers to do its business. When confronted with the trailer issue Landrum simply told Riess to get them inspected and that was the end of it. However, Landrum was very concerned that with Word's departure he was losing another valuable supervisor and became even more concerned when he learned that Larue was seriously thinking of resigning due to Riess' mistreatment of him. (Tr.27-34).

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<sup>1</sup> References to the record are as follows: hearing transcript-Tr.; Complainant exhibits- :CX; Respondent exhibits- RX; Joint Exhibit- JTX.

## **B. Stipulations of Fact**

At the beginning of the hearing, the parties submitted the following joint stipulations of fact:

1. Vulcraft promoted Riess to the position of Traffic Department Manager of its Vulcraft Texas Division on August 4, 2002.
2. Riess held the position of Traffic Department Manager from August 4, 2002 until his termination on January 15, 2007.
3. At the time of his termination Riess made an annual salary of \$86,500.00 excluding bonus pay and receive health care, 401K, stock options, profit sharing, college scholarship funds for his children, life insurance and vacation pay.
4. During the days immediately preceding Riess' termination, James Landrum, Riess's immediate supervisor spoke to Hamilton Lott, executive vice president of Nucor Corporation and Landrum's immediate supervisor, about his desire to terminate Riess.
5. Joey Word gave notice of his intent to resign from Vulcraft on January 9, 2007. (JTX)

## **C. Testimony of Barrett Riess**

Vulcraft, a manufacturer of steel joists and steel decking for commercial buildings, hired Riess on February 17, 1992 to work in its Grapeland, Texas engineering department as a shop order technician. Riess had a B.S. in Geology from the University of Texas at Austin and a M.S in Geology from Stephen F. Austin State University in Natchitoches. Riess worked for 9 months as a shop order technician after which he was promoted to regional sales manager responsible for sales acting as a liaison between customers and Vulcraft personnel when problems arose. Riess held this position until August 4, 2002 when promoted to Traffic Department Manager, a position he held until his termination on January 15, 2007.(Tr. 37-39).

Before hiring Riess Vice President and general manager Jim Landrum posted the traffic department manager position and listed the following minimum qualifications:

1. Commitment to Safety with proven Safety record.
2. Secondary education required (post secondary preferred).
3. Supervisory experience.
4. Strong leadership skills (proven leader)
5. Excellent written/ verbal communication skills
6. Knowledge of shipping industry preferred. (CX-16)

The duties of this job included the safe transportation of manufactured product to customers as well as safe receipt of raw materials from suppliers. The shipment of manufactured

product frequently required the use of oversized loads ranging from two to fifteen per day which required special permits from DOT or TEXDOT and use of stretch trailers of which Vulcraft had 83 . (Tr. 42).

Riess reported directly to Landrum and supervised 45 employees. Reporting directly to Riess were the loading/receiving supervisor and the truck shop supervisor. Riess' peers consisted of departmental managers from engineering, sales, and production who also reported to Landrum. Vulcraft has 6 other divisions similar to the Grapeland Division where Riess worked. There are located in Ft. Payne, Alabama; St. Joe, Indiana; Chmung, New York; Florence, South Carolina; Brigham City, Utah and Norfolk, Nebraska. (Tr. 43,44).

While Riess was traffic manager, Walker and then Word were the truck shop supervisors who reported to Riess. Walker and Word in turn supervised three truck shop mechanics who worked on Vulcraft tractors and trailers. As traffic manager Riess spent about 25% of his time on safety compliance, 50% of his time on general operational duties and the remaining 25 % on special projects including logistic committee and computer development committee who interacted with other Vulcraft divisions. (Tr. 45). On safety compliance Riess audited all driver logs providing feed back every two weeks. (Tr. 46). Every 90 days Riess conducted a driver training session in which he covered a variety of issues including load securement, driver fatigue, road rage, and compliance with all laws and safety.(Tr. 47; CX-22).

As departmental manager Riess had overall responsibility for all aspects of safety in his department; including safety program development training, auditing and enforcement. Walker and Word were responsible for training and enforcement of safety rules in their shops and by their crews, improving the system, pointing out problems and offering solutions in constructive ways. (CX-22, p.2; Tr. 48). At Vulcraft safety was considered its most important policy (Tr. 51) Riess kept up with his safety responsibilities by attending various safety training sessions and seminars throughout the year. (Tr 52-54 CX-21). Riess received a base salary, incentive bonus, profit sharing, healthcare, life insurance, and disability and was subject to an annual performance review (Tr. 51).

Each year Landrum gave Riess an performance review and approved general wage increases resulting in salary increases from \$ 65,000.00 to \$86,500.00 in August 2006 (CX-9, Tr. 56).. On his last review on June 12, 2006, Landrum allegedly told Riess he was doing a good job and to keep up the good work. (Tr. 57). At no time did Landrum indicate to Riess that he needed to improve his performance (Tr. 58). In fact Landrum signaled out Riess for his purchase of new Peterbuilt trucks which were the safest Vulcraft had. (Tr 59). About a month before his discharge Landrum complimented Riess on a Pittsburgh Logistics Report. (Tr. 61, CX-12).

In August, 2006, Riess participated in a leadership development survey along with 8 other Vulcraft employees. The program was designed to be taken over a long period of time commencing with a leadership survey in which strengths and weaknesses were assessed. Riess received his survey results in early November, 2006 followed by a meeting with his coach and another meeting with his supervisor in December 2006 at which Riess discussed his plans to improve his leadership skills (Tr.64,65). Landrum allegedly told Riess he was doing a good job and made no suggestions about ways to improved. (Tr. 66, 67, CX-10, 11).

Concerning the events immediately before his discharge, Riess testified that on January 9, 2007, he was making his rounds in the yard when driver Billy Kendrick called him over to a trailer he had been using and said the trailer had an expired inspection sticker and driver James Abshire, Jr. was about to use the same trailer for the second shift of the day. Riess told both drivers the rig could not be used any longer that day. (Tr. 67). Riess then sought out truck supervisor Word but was unable to find him whereupon he talked to a truck shop mechanic who informed him he was aware that a trailer had been pulled for an expired inspection sticker while other equipment had also been operated without updated inspections. (Tr. 68). Riess told the mechanic he would have to get the other trailer inspected and drop it in the unsafe trailer area.

Riess eventually contacted Word by phone who allegedly admitted frequently using such trailers and stated he would not and could not do anything to stop it. (Tr. 69). Following the phone conversation Word came into Riess' office and told him he was going to quit on March 30 and go into business for himself. Further Word found Riess "too pushy with enforcing safety rules." After this conversation Riess concluded he had a big safety problem in that such conduct violated FMCSR section 396.17 which required all commercial equipment to be inspected at least once every 12 months as well as Vulcraft's safety policy. (Tr. 70).

Riess decided that he needed to talk to Landrum about the safety problem. Riess found Landrum in Dan Wilson's office and relayed what Word had said about quitting and the safety violations (Tr. 71). Landrum allegedly said it was okay if the safety violations occurred occasionally. Riess reminded Landrum that according to Word such violations occurred all the time and he could not do anything to stop. (Tr. 72). According to Riess it was Word's responsibility to actually make the annual inspections and by not doing it Word was allowing unsafe trailers to go on the road. (Tr. 73, 74).<sup>2</sup> Landrum asked Riess if there were any other reasons for Word leaving and did not allegedly tell Riess how to handle the trailer inspection issue. (Tr. 78).

On January 10, 2007, Riess called the traffic manager for Vulcraft's Nebraska Division, Vern Zwingman, at about 10:30 a.m., described the problem and asked for his opinion about what to do. Zwingman told Riess the problems he described were severe and had to stop and that it was a good thing for Word to quit because he was not the kind of employee Vulcraft wanted (Tr.79, 80). Riess went to lunch with Landrum at about 12.30 p.m. and informed Landrum what Zwingman said whereupon Landrum asked Riess if he had posted Word's job. Riess replied he had not posted the job whereupon Landrum told Riess not to do so and to leave Word alone. (Tr. 81, 82).

On January 11, 2007, Riess went to Landrum's office late in the evening to discuss Word's situation and the safety violations. Riess told Landrum he had some suggestions to solve the problem. Rather than discussing the issues Landrum allegedly told Riess he needed to look for another job and was too strict with Word regarding safety violations or safety enforcement. Riess refused to resign (Tr. 83, 84). On the following Monday, January 15, 2007, Landrum called Riess into his office. Controller Dan Wilson was also present. Landrum told Riess he had

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<sup>2</sup> CX-23 shows the repair of trailer X-520 for defective break liners or shoes and leaky wheel seals and trailer X-510 for defective reflector taping. These were Respondent's trailers that Word allowed to operate with expired inspection stickers (Tr. 75,76).

given him a chance to resign and since he had refused to do so, he (Landrum) was terminating him immediately. Riess said he did not understand why he was being terminated. Landrum replied it was because of the reasons they had talked about last week. Riess said he thought he had done a good job and have never been talked to or written up for any problems. Landrum replied that the rules on progressive discipline did not apply to him. (Tr. 86). Subsequently Landrum filled out a termination of employment form indicating Riess had been terminated due to a failure to fulfill department manager responsibilities. (CX-3)

Riess testified he was never told by Landrum that his termination had anything to do with the resignation of Mac Walker or Joey Word or Sue Larue's thoughts about resignation. (Tr. 98, 99). In fact, Mac Walker retired on January 4, 2006 and stated in his exit interview that he had very good supervisors during his employment with Vulcraft (CX-6). Word replaced Walker and when informing Riess of the reason for leaving stated he was leaving on March 30, 2007 because he was going into business for himself and had earned \$125,000.00 from his side business the year before (Tr. 100). In addition Word told Riess he was pushy about enforcing safety rules. (Tr 101). In Word's exit interview which took place on April 6, 2007, Word did not mention Riess but did state the following suggestion for improvement:

It was difficult to work with the truck drivers. They do not accept responsibility for checking equipment and written documentation  
Vulcraft should enforce written post trip inspections when problems arise.  
(CX-7).(Tr. 101-103).

Riess denied ever being told that Sue Larue wanted to quit because of him. Larue had worked for Riess during his entire time as traffic manager and according to Riess he had a good relationship with her (Tr. 104).

Concerning the final reason for his discharge, Landrum's lack of confidence in Riess, Riess admittedly attended a leadership development seminar or survey in the fall of 2006 which was attended by other Vulcraft managers and supervisors. (Tr. 104) The survey identified Riess' strengths and development needs with scores ranging from 1 to 5 with 3 being average. (CX-10 ). Riess had an overall average performance score of 3.8 as rated by Landrum and 3.93 when others such as peers were considered. (Tr. 108, 109). Landrum rated Riess with 4.0 in getting quality work done; and 3.0 as an effective leader. Landrum rated Riess as a 5 for acting with integrity and persisting in face of obstacles with 4s in 16 other categories including enforcing safety rules and regulations but only 1's in willing to listen to other concerns, having the confidence and trust of others, encouraging others to express their views.(CX-10, p.26,27, 29). Riess was encouraged to listen to others, build relationships and foster teamwork. Landrum later noted that Riess was very committed to personal improvement and sincerely wanted to be an effective manager. Further Riess was well organized and willing to do whatever it took to improve himself. (CX-10, p.46; Tr. 110-113).<sup>3</sup>

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<sup>3</sup> The numerical scores had the following values: 1-not at all; 2-to a little extent, 3- to some extent, 4-to a great extent, 5-to a very great extent.

While traffic manager Riess was charged with replacing the truck fleet. Beginning 2003 Riess started his research in order to coordinate this purchase with two other Vulcraft divisions. (Tr. 116). Riess met with drivers and other employees in his department along with other traffic managers and with the Alabama division purchased a fleet of 32 Peterbilt trucks with 14 going to the Grapeland facility (Tr. 117). Landrum was happy with the purchase. (Tr. 118) Also as traffic manager Riess was responsible for securing raw material from Nucor Steel in Jewett, Texas. Riess dispatched trucks to pick up the requisite material and on occasion had face to face meetings with Nucor Steel manager Alan Bracey in order to expedite the timely loading of material. Loading at the Jewett facility took 2 to 3 hours causing some drivers to be unable to take their loads for the next day because they ran out of service hours. Riess talk to Bracey and never intentionally offended Bracey during these encounters. (Tr. 119-121, 160, 161).<sup>4</sup> However, Bracey was apparently irritated by Riess' comments and went to his boss who in turn called Landrum to make sure there was not going to be any friction between the divisions. (Tr. 167).

On cross Riess admitted that Landrum sent an e-mail to his boss, Hamilton Lott in which outlined the following reasons for terminating Riess:

1. Riess has been unable to gain the respect of other departmental managers and most of the employees in the traffic department despite Landrum's attempt to work closely with Riess in developing communication and leadership skills.
2. Former truck shop supervisor, Mac Walker retired early in 2005 due to constant and overbearing pressure from Riess.
3. Word, Mac Walker's replacement turned in his resignation early last week because of Riess' overbearing and unreasonable behavior and refusal to listen to and respect his employees.
4. Last week Sue Larue considered quitting immediately because of Riess' aggressive and disrespectful conduct towards her.
5. Stephen McNair-Semands, Riess' management and leadership coach, advised Landrum after Landrum reported to him Riess' disrespectful and unreasonable

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<sup>4</sup> Riess told Bracey "You say that Vulcraft Texas is your number one customer but it's obvious that's not the case?" (Tr. 162). The Jewett facility supplied 95 % of Grapeland facility's raw materials. Delays in loading raw materials caused Grapeland drivers to run out of driving service hours for the following day. (Tr. 214, 215). In turn up to three Grapeland drivers would not be able to provide scheduled customer deliveries causing customers to incur needless costs of crane rental and extra pay for ironworkers. (216)

conduct towards Walker, Word and Larue that Riess was not capable of changing. In fact his actions were more related to his personality rather than habit.

6. Riess told Word and other employees they should not give information to Landrum if Landrum requested it because it made Riess look bad. (CX-4).

Riess admitted Walker was a dedicated and experienced truck shop supervisor. (Tr. 137). According to Riess Walker retired when he did because he was 62 years old and was eligible for Social Security as well as military benefits and did not need to work any more. (Tr. 139). Riess also admitted Landrum learned for the first time about Word quitting when Riess brought up the issue of inspection stickers. (Tr. 144). However, when Riess mentioned the issue of inspection stickers he also told Landrum that such conditions happened all the time and he would not do anything about it (Tr. 145). Notes taken by Riess on January 9, 2007 also show Word retiring because "Barrett pushed too much." (RX-8, page 43). Word told Riess that he, Riess, pushed too much regarding safety, i.e. Riess demanded Word follow the safety rules. (Tr. 148-151).

On the issue of the leadership survey Riess admitted that his job required the ability to foster teamwork and that Landrum had rated him at 2.29 which was below average but his overall average was 3.08. (Tr. 170,-174, RX-1, pp.414, 424). However, despite this and other scores Landrum told Riess he was doing a good job. (Tr. 178). Riess admitted however that Landrum in the leadership survey told him that in order to be more effective Riess needed (1) to develop better listening skills as he communicates with other departmental managers and employees; (2) to engage team members to get them more involved in developing solutions; (3) to develop the trust and respect of those he works with, both peers and subordinates. (RX-1, pp. 455; Tr. 180). However, despite these comments Landrum told Riess he was doing a good job every time he got a raise. (Tr. 193). Riess was the only manager to be terminated by Vulcraft (Tr. 211).

#### **D. Testimony of James Landrum**

Riess called Landrum as an adverse witness. Landrum confirmed the fact that on January 9, 2007, Riess reported that two tractor trailer rigs made trips without the proper annual inspections and that this constituted serious safety violations. (Tr. 218, 219). Landrum did not recall whether Riess told him that similar violations had occurred in the past. However, he remembered Riess telling him that one of the trailers had defective breaks and had been repaired. (Tr. 220). Landrum did not inquire into the condition of the other trailer because he assumed that if it or other trailers required repairs such had been done according to company practice. Word as truck shop supervisor was ultimately responsible for trailer inspection. (Tr. 224).

Landrum asked Riess why Word was quitting. Riess replied that Word told him he was unable to work with him because Riess was hard headed, and would not listen to input from his supervisors. (Tr. 225)

Prior to January 9, 2007, Landrum had never thought about terminating Riess and had never terminated any other managers and could not recall Vulcraft terminating any manager in its seven divisions. However he had counseled Riess on a number of occasions but kept no record of such sessions (Tr. 225-227, 232). Further Vulcraft's progressive disciplinary policy did not apply to department managers. (Tr, 228; CX-5). In listing the reason for Riess' termination, Landrum cited Riess' "failure to fulfill department manager responsibilities. (CX-3, Tr.229, 230).

On January 9, 2007, Landrum commenced an investigation about conditions in the traffic department. This investigation did not focus on any safety issues.(Tr. 235). According to Landrum the safety issue was dropped when Word told him the trailer inspections had been made (Tr. 236). Landrum decided to terminate Riess because he had lost Landrum's trust by telling employees not to answer his questions, by causing two truck shop supervisors to quit and by possibly causing a long term clerical employee to quit .(Tr. 247).

Landrum admitted meeting with Riess for about 10 minutes in December 2006 to discuss development of his managerial skills. (Tr. 249) Landrum told Riess that he wanted him to focus on communications, teamwork and leadership. (Tr. 273).<sup>5</sup> Landrum also told Riess on a number of occasions that Riess needed to gain the support of his employees and peers and other managers and listen to and follow their suggestions rather listening to and ignoring their suggestions (Tr. 280, 281). Landrum rated Riess with low scores on listening to others.

Before terminating Riess Landrum contacted industrial psychologist, Dr. Mc Nair Semans to see if Riess could overcome his management deficits and Dr. Semans opined Riess could not accomplish that task.(Tr. 251- 254). Landrum also admitted not inquiring about other safety issues with Word prior to Riess' termination allegedly because he was not aware of any other problems until Word's exit interview of drivers not doing post inspection reports. When Landrum learned of the problem he a told the current manager, Jeff Jeffcoat to look into this matter to insure drivers were filling out the required reports. Jeffcoat never testified and Landrum offered no documentation to support his assertion. (Tr. 260-264).

Concerning his evaluation of Riess during the leadership survey, Landrum testified about his lowest scores for Riess as follows. Landrum rated Riess as an one or not willing to listen to employee concerns. Landrum saw Riess as not developing trust and confidence. (Tr. 283,284 ). Landrum had rated other managers in the past but had not rated any as low as Riess. Three was the lowest score Landrum had given other employees. In fact, it was because of Riess' management deficiencies that Landrum asked Riess to take the leadership course. (Tr. 315). On December 6, 2006, when Riess met with Landrum concerning his leadership survey, Landrum told him he needed to work on his communication and leadership skills. (Tr. 287).

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<sup>5</sup> Landrum rated Riess low in management skills because he had not used input from former traffic manager, Cheatham, the drivers or mechanics in purchasing the Peterbilt trucks which had a horizontal exhaust system, and less ground clearance, making them more vulnerable to construction site obstructions. (TR. 277-279).

Landrum also rated Riess with ones or possessing no confidence and trust of others and not encouraging others to express their views to having only a little ability in 15 other categories ranging from involving others in shaping plans to building relationships (RX-1, pp. 416,435). Landrum testified that Riess became argumentative anytime there was a discussion about interaction with other employees.(Tr. 288). On one occasion Landrum counseled Riess about trying to send out trucks on highways without proper permitting. (Tr. 289, 290). Landrum never applied the progressive disciplinary policy to any manager and neither did other officials of Vulcraft. (Tr. 291, 292). On another occasion Riess insulted truck shop supervisor, Mac Walker who was on call 24 hours a day when he attempted to charge Walker a half day of vacation when Walker took a few off a few hours one afternoon to take care of personal business. (Tr. 293). Landrum met with Riess and told him he was not going to allow Riess to charge Walker with vacation time.

Landrum cited other examples of Claimant's lack of communication skills in dealing with other divisional supervisors such as Alan Bracey and Chad Utamark of Vulcraft's Jewett Mill. On one occasion, Jim Darcy, vice president and general manager of the Jewett Mill called Landrum and reported Riess as being very aggressive and offensive with Utamark and Bracey when discussing delays in loading raw material for delivery to the Grapeland facility. Following the call Landrum counseled Riess about treating personnel at the Jewett Mills more professionally. On other occasions Riess irritated contractor to such an extent that they did not want to do business at the Grapeland facility. (Tr.294-299).

Concerning the retirement of Mac Walker, Landrum testified that Walker told him he initially wanted to retire at age 65 but he had decided to leave early in January 2006 because he could not deal with Riess any longer. (Tr. 301). Landrum asked Walker to reconsider but Walker refused to do so citing the instance when Riess wanted to charge him for vacation time when he needed to take off a couple of hours for personal business. Walker gave other examples when Riess called him back to the plant on weekends for relatively menial things or asking him late in the day to take a test ride with a potential driver candidate(Tr. 301-304).

Concerning the events of January 9, 2007, when Riess reported the lack of annual inspection stickers, Landrum testified he had never terminated anyone for reporting a safety concern. (Tr. 305, 306). In fact Landrum had a monthly inspection of the Grapeland facility with their safety coordinator during which employees approached and raise safety issues. Landrum further testified that he never told Riess it was acceptable for trailers to leave without being inspected. In fact Landrum told Riess that the lack of inspection was unacceptable just as the issuance of improper permits. (Tr. 307). Landrum denied any knowledge of trailers leaving the premises without updated inspections.

On the morning of January 10, 2007, Landrum called Word into his office. Word told Landrum he was fed up with Riess nitpicking and overbearing attitude. Word complained about Riess calling him into the plant while he (Word) was on vacation in order to prepare a purchase requisition (Tr. 310). Word also told him that Sue Larue had accused Riess of yelling at and berating her for not being a team player when she took off time to go to a funeral. (Tr. 311). After meeting with Larue and confirming what Riess had reported including the fact that Larue wanted to quit Landrum was convinced that Riess had a problem in dealing with employees. (Tr.

312). On January 11, 2007, Landrum told Riess that he needed to seek employment elsewhere because he (Landrum) could not trust or tolerate him as a departmental supervisor because two departmental supervisors had resigned because of him and a third employee had almost quit because of him (Tr. 313).<sup>6</sup>

Landrum testified he never gave Riess a merit increase. All the wage increases Riess received were annual or general increases. (Tr. 315, 316). Landrum terminated Riess so he would not lose other quality employees. (Tr. 317). Landrum based his decision to terminate Riess on his communications and workings with Riess over a 4 ½ year period which included Landrum's observations of Riess' interactions with others and his lack of trust in Riess. (Tr. 665). Landrum denied ever telling Riess he was doing a great job. (Tr. 668)

### **E. Testimony of Dr. Stephen G. Macnair-Semans**

Dr. Semans is a licensed psychologist with specialties in counseling and consulting psychology. (Tr. 351). In the summer of 2006, Landrum contacted Dr. Semans and arranged for him to meet with Riess and several other individuals and have them participate in a leadership development program. A key part of that program was a survey designed to provide participants with an understanding of their leadership strengths and weaknesses so that a development plan could be formulated for improve performance. (Tr. 357). The survey provided participants with feedback from their boss and peers, and other divisional managers (Tr. 358, 366, 377). In August, 2006, Dr. Semans met with Landrum and Riess to address Landrum's concerns about Riess' need to develop listening skills incorporating employee input into decisions affecting them. (Tr. 359, 365,366). Landrum provided input into Riess' evaluation in either late October or earl November 2006. (Tr. 371).

Landrum rated Riess poorly in use of sound judgment, managing execution, providing direction, fostering teamwork, and motivating others. (Tr.372). Riess' scores were quite low for a departmental manager who normally score 4 or above. (Tr. 373, 374.). Dr. Semans went over the survey results with Riess on October 31, 2006 . (Tr. 376, 377, 383 ). Riess considered his relationship with Landrum as strained with Landrum providing a lot of advice. (Tr. 378). Riess was concerned about the low ratings but not as concerned as Dr. Semans sees from other managers in similar circumstances. (Tr. 383). Riess' 20 lowest ratings were very low ratings for a departmental manager.(Tr. 385). Riess understood Landrum's concerns about his performance. (Tr. 396).

On January 11, 2007, Riess spoke with Dr. Semans and told him he had not been effective in some areas of listening. Reiss told Dr. Semans that his relationship with Word had been strained with Word objecting to his management style. (Tr. 397). On the same day Dr, Semans talked to Landrum. Landrum expressed concerns about Riess' management style (Tr. 399). Dr. Semans told Landrum about Riess' progress in the coaching process telling him it was going to take a long time for Riess to meet Landrum's expectations. (Tr. 401-403). While Riess was working

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<sup>6</sup> In talking with Word and Larue, Landrum learned that contrary to what Riess told him , employees did not support the purchase of Peterbilt trucks . In fact Riess told employees not to answer questions or issues Landrum had about the truck fleet. (Tr. 673)

on improving himself, he did not see the need for change to be critical and thus was apparently making little progress. Dr. Semans told Landrum he did not feel as though Riess would be making any significant changes soon because Riess conduct was connected to (intractable) personality traits such as being tough minded self centered and unlikely to be seen as emotionally supportive. (Tr 405-407, 433).

#### **E. Testimony of McArthur Walker**

Walker is a former Army veteran where he served on active duty from 1964 to 1967 and 1971 to 1989 and in the reserves from 1967-1971. (Tr. 453). As first sergeant in the Army he was responsible for all company functions including 120 trailers and 60 tractors. (Tr. 454). Vulcraft hired Walker in February 1992. Walker left Vulcraft in November, 2005. (Tr. 455). Walker spent his entire time with Vulcraft working as a truck shop supervisor. (Tr.456). Walker reported directly to Riess. During this time Vulcraft had 88 trailers and 14 trucks. Before reporting to Riess, Walker reported to Alan Cheatham, Riess' predecessor as traffic manager. (Tr. 457).

As traffic manager Riess unlike other traffic manager would not listen to or accept employee suggestions (Tr. 458). For example, when purchasing trucks Riess did it on his own without consulting Walker. (Tr. 459). Unlike other traffic managers, Riess did not listen to or seem concerned about employee opinions. (Tr. 461). In Walker's opinion Riess was not able to gain employee respect. (Tr. 463).

On one occasion Walker, who worked from 7 a.m. to 5 p.m. and was on call 24 hours, needed to get off at 3 p.m. for personal business. Walker informed Riess of his situation. Instead of telling Walker to just take off as other traffic managers had, Riess told him to take 4 hours of vacation. (Tr. 464). When Walker received his pay voucher Riess had charged him with 4 hours for an hour and a half that he had taken. At that point Walker decided to quit because Riess did not respect him or his on call work 3 to 4 times a week at night or a weekend. (Tr. 465).

However, what really motivated his desire to quit was Reiss' decision to purchase a fleet of trucks which he and most of the traffic department did not want. Walker had initially planned to leave at age 65 (Tr. 470). Walker and the other drivers and mechanics preferred Kenworth trucks for which they were familiar and had the tools to repair. Walker told Reiss that the Peterbilt trucks had a horizontal exhaust system that causes clouds of white rock to occur on construction sites creating unsafe conditions. In addition the muffler which was under the truck was hot creating delays before mechanic could safely make repairs. The Peterbilt muffler cost about \$2,000.00 versus a hundred dollars for the vertical Kenworth muffler. Riess ignored Walker's concerns and purchased the Peterbilt trucks instead which had less ground clearance and required special tools to work on the Peterbilt caterpillar engines.(Tr. 476-480). Subsequently Walker told Cheatham and Landrum that Riess was part of the reason for his early leaving. (Tr. 481). Walker also told Landrum that contrary to what Riess had said he did not support the purchase of the Peterbilt trucks. (Tr. 483-484). On his exit interview Walker did not list Riess as one of the reasons for leaving so as not to burn bridges behind him. (Tr. 485-486).

## **F. Testimony of Sue Larue**

Larue is a long term 22 year employee of Vulcraft's Grapeland, Texas facility. Larue has worked for 15 years in the Grapeland traffic department. Larue reported to Riess as traffic manager during his entire 4 ½ year tenure in that position. (Tr. 520). Larue described Riess as disrespectful and one who talked down to employees. Riess did not seem interested in learning what employee jobs entailed. (Tr. 521).

In late 2004 and early 2005 Riess bought some Peterbilt trucks. That decision was unpopular with the drivers and mechanics, all of whom expressed a desire to continue purchasing Kenworth trucks that had no major problems. (Tr. 522). Vulcraft mechanics were familiar with Kenworth's Cummins diesel engines and had ample parts in stock for these engines. Larue cited examples of Riess' rudeness to detailer Tim Howard who had a question about a job he was doing. While Howard was waiting for an answer Riess turned around and told Howard to leave so that his staff could conduct business. (Tr. 522, 523). On another occasion driver Darren Harris was attempting to schedule a morning training session so he could make a long trip that afternoon to either Albuquerque or El Paso. Riess told Harris to take his training as apparently scheduled or lose his job. (Tr. 524).

When the issues of truck purchase arose Riess was rude most of the time and talked down to employees treating them as though they were stupid. (Tr. 525). In turn morale suffered because Riess refused their advice. On the other hand Alan Cheatham, who worked for 8 years prior to Riess as traffic manager, had employee respect by asking and listening to employees suggestions and when not following their advice telling them why. (Tr. 526). Riess discouraged employees from making suggestions and one occasion reprimanded driver Bobby Thomas for complaining to Landrum about problems he was having with the new trucks. (Tr. 527). On one occasion when Larue asked Landrum why he purchased the Peterbilt trucks, Landrum replied: "Its was time for a change and because I can." (Tr. 528).

On another occasion in the fall of 2006 when Vulcraft was upgrading its computer system, Larue and other personnel had to take on additional billing and dispatch work. This required Larue to come in early and stay late. In order to take on this additional work Larue dropped off the safety committee and auditor team. When Riess learned of Larue's decision he insulted her by accused Larue of not being a team player.(Tr. 531-534). On a Thursday in January 2007, Larue needed to take off a few hours to attend the funeral of a close friend. Larue worked seven hours leaving at 1 p.m. and returning at 5 p.m. and working to 8:15 p.m. The following day Riess came into Larue's office and accused her of not doing her share of the work and poor planning and lying by telling Larue he had worked until midnight when in fact he left right after Larue did. At this point Larue was ready to quit. Later that week Larue told Landrum what had transpired and how she had considered quitting but had changed her mind so as not to leave Vulcraft in a bind. Larue also learned from Word that he was going to quit because of Riess. (Tr. 535-543).

## **Testimony of Laverne Zwingman**

Zwingman works for Vulcraft-Nebraska as traffic manager. (Tr. 557). Zwingman has held this position for 12 years performing similar duties to Riess. Zwingman considers his primary duty to provide employees with a safe environment, listen to their concerns and gain their respect without which he cannot do his job. (Tr. 558). Zwingman had a good relationship with Riess talking with him 6 to 7 times a year. (Tr. 559). Zwingman testified that the progressive discipline policy has never applied to supervisory employees. Rather Vulcraft uses this policy when disciplining non supervisors. (Tr. 561-563). Departmental manager pay starts at about 70 to 80 % of their maximum pay and increases each year over a 3 to 4 year period until maximum or top pay is achieved. Once at top pay supervisors generally received a 2 ½ to 3 % pay increase each year. (Tr. 563, 564). Riess' pay increases followed this pattern. (Tr. 567).

Concerning Riess relationship with Landrum, Zwingman testified that he attended and Riess attended a traffic manager meeting in April 2006 in Norfolk, Nebraska along with managers from 4 other divisions.(Tr. 573). Riess told Zwingman that he and Landrum were not on the same page, and he was unable to make Landrum happy. (Tr. 574). Later in November 2006 at a Charlotte North Carolina meeting of traffic personnel Riess discussed his feedback from the leadership survey and said that Landrum felt Riess had a lot of improvement or work to accomplish (Tr. 577, 578). Zwingman denied ever being told by Riess that Word allowed trailer violations to occur all the time without trying to prevent such. (Tr. 579).

## **G. Testimony of Alan Cheatham**

Cheatham has worked for Vulcraft for 32 years and is currently a production manager. As production manager Cheatham supervises 10 supervisors and 185 employees in the production of joist, girders and decking. Cheatham reports directly to Landrum along with 4 other departmental managers. (Tr. 597). As production manager Cheatham received general but no merit pay increases. (Tr. 598). Before his current assignment Cheatham was traffic department manager to whom a truck shop supervisor, loading crew supervisor, office ladies, dispatcher, billing and traffic clerks and 22 drivers reported. (Tr. 600).

Cheatham supervised LaRue whom he regarded as a very dependable and knowledgeable employee. (Tr. 601). She was never rude or abusive to others and was never disciplined. (Tr. 602). Cheatham also supervised Walker and regarded him as a great supervisor. (Tr. 604). On occasion Walker complained to Cheatham about Riess when the latter became his supervisor. Among the complaints were Riess's insurances he take vacation time for leaving the plant early one Friday when he (Walker) put in considerable time at the plant and Riess' purchase of Peterbilt trucks without listening to or considering any input from Walker. (Tr. 607). Riess ignored not only Walker's input but Cheatham's advice as well even though Cheatham had been involved in prior truck supervisors (Tr. 609, 610). Contrary to Riess' assertion, Cheatham had hired an outside consultant to come in and review driver logs. (Tr. 611).

Concerning Larue, Cheatham testified Larue complained to him about Riess not listening to and talking down to her. (Tr. 619) He also described difficulty in working with Riess regarding

the pulling of fiber optic cable from the guardhouse to receiving bay to a panel a distance of 700 feet. Instead of assisting production supervisor Jimmy Martin by having a contractor pull the cable part of the way from the cable box to the end of the receiving bay, Riess had Martin's crew unravel 700 feet of wire and take it back to the end of the receiving bay causing additional but unnecessary work for Martin's crew had Martin's suggestion been followed (Tr. 623). In turn Cheatham reported his difficulty in dealing with Riess to Landrum on several occasions within 7 to 10 days of Riess' termination. (Tr. 627-630). In Cheatham's words, Riess did not have the respect or trust of management. (Tr. 632-633). In fact Word told Riess he was quitting because he was too hard to work for and would not listen to any employee opinions. (Tr. 634).

## II. DISCUSSION, CONCLUSION AND RECOMMENDATION

Prior to August 3, 2007, in order to prevail on a claim which was fully litigated a complainant must prove by a preponderance of evidence that he: (1) was a covered employee and engaged in protected activity; (2) employer was aware of the protected activity; and, (3) employer discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action. *B.P.S. Trans. Inc., v. US. Dept of Labor*, 160 F. 3d 38, 45 (1st Cir. *Yellow Freight Sys. Inc., Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). Complainant may show that protected activity likely motivated the adverse action by showing not only protected activity, employer's knowledge of it and adverse employment action, but also the existence of a "causal link" or "nexus" that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Kahn v. United States Sec'y of Labor*, 64 F.3d 261, 277, (7th Cir. 1995). Discriminatory motive can also be inferred by a showing of pretext when the above elements are established. *St. Mary 's Honor Center., v. Hicks*, 509 U.S. 502, 511. (1993).

Amendments implemented on August 3, 2007, slightly alter a complainant's burden such that in order to prevail on a claim which was fully litigated a claimant must now prove by a preponderance of evidence that he: (1) engaged in protected activity; (2) employer knew he engaged in the protected activity; (3) he suffered an adverse employment action; and (4) the protected activity was a contributing factor to the adverse employment action. See, 49 U.S.C. §31105, *as amended by* Implementing Regulations of the 9/li Commission Act of 2007, Pub. L. No. 110-053 (amendment adopting legal burdens of proof found in AIR2 1); See also, *Clemmons v. Ameristar Airways, Inc.*, ARE Nos. 05-048, 05-096, AU No. 2004-AIR-il. Should a complainant prove these four elements by a preponderance of evidence, employer must then articulate a legitimate, non-discriminatory reason for terminating complainant. *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, AU No. 2004-AIR-i 1 (citing *Peck v. Safe Air International, Inc.*, ARB No. 02-028, AU No. 2001-AIR-3). Once employer articulates a legitimate, non-discriminatory reason for terminating complainant, complainant must prove by a preponderance of evidence that the employer's articulated reason is pretext for discrimination. See *e.g., Moon v. Transport Drivers, Inc.*, 836 F. 2d 226 (6th Cir. 1987); See also, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253(1981). A complainant can show pretext by proving that the articulated reason is false and discrimination is the more likely reason for the adverse action. *St. Mary 's Honor Center v. Hicks*, at 515. Should complainant satisfy this burden of proof, employer must prove by clear and convincing evidence that it would have taken the adverse employment action regardless of any protected activity in order to avoid liability

under the Act. *Clemmons v. Ameristar Airways, Inc.*, ARE Nos. 05-048, 05-096, AU No. 2004-AIR-i 1. Even where an employer is motivated by prohibited and legitimate reasons, it can escape liability by establishing by clear and convincing evidence it would have taken the same adverse action in the absence of protected conduct. *Wright v. Southland corp.*, 187 F.3d 1287 (11th Cir. 1999); *Byrd v. Consolidated Motor Freight* 97-STA-9. (ARB May 5, 1998); *Hobson v. Combined Transport Inc.*, 2005-STA-35 (AU Nov. 10, 2005).

In this case I find that Riess has established by a preponderance of evidence he engaged in protected activity by raising safety concern with Landrum on January 9, 2007; (2) Employer was obviously aware of this activity; and (3) he suffered adverse action, i.e., termination. However, Riess failed to present any credible evidence that his protected activity was the reason or a contributing cause or that Vulcraft's reasons for termination were pretextual.

Contrary to Riess's assertion there is ample evidence showing that he was repeatedly warned or counseled by Landrum about his failures as a supervisor to listen to or respect the opinions or concerns of employees or other supervisors. When Landrum learned that he had prematurely lost valued supervisor, Walker, was about to prematurely lose supervisor Word, and had almost lost another valued and long term employee, Larue because he did not listen to, respect, value, or treat them appropriately and further that he had discouraged employees from answering Landrum questions about their lack of support for the purchase of Peterbilt trucks Landrum lost his trust in Riess and decided to terminate him rather than lose other employees.

In regards to credibility, I find Landrum to be a credible witness using reasonable and legitimate reasons for Riess' termination. Contrary to Riess arguments., pretext was not shown by the timing of his termination because of documented evidence showing Landrum's subsequent discovery of intervening events that convinced him of the need to terminate Riess. The failure to apply Vulcraft's progressive disciplinary policy to Riess did not establish pretext because Vulcraft never applied that policy to supervisors. Neither did the context of the termination amid Riess' attempt to enforce safety regulations because the entire context of those meeting shows Landrum was not upset with Riess' attempts at safety compliance but rather his abrasive Management style which Word described as "nitpicking, too strict, and overbearing." Indeed Riess said nothing about safety when talking to Cheatam about Word's resignation or on a note he wrote about the resignation immediately after talking to Word.

In as much as Riess was fired for legitimate cause and not either in part or because of his protected activity in raising safety issues, I recommend dismissal of the instant complain

**A**

**CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE**

**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, Suite S-5220, 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).

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 inquiries and correspondence in this matter should be directed to the Board.