



Issue Date: 30 April 2008

Case No: 2007-SOX-00005

In the Matter of:

PATRICK J. GODFREY,
Complainant

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

**DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT**

This case arises out of a complaint of discrimination filed by Complainant Patrick J. Godfrey with the Occupational Safety & Health Administration (“OSHA”) on July 13, 2007, against Respondent, Union Pacific Railroad, pursuant to the employee protection provisions of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, *et seq.* (“SOX”).

I. Procedural History

Mr. Godfrey filed a complaint with OSHA on July 13, 2007. (Godfrey Memo, Ex. N).¹ The Complaint alleged that Mr. Godfrey’s senior manager, Charles J. Bussard, instructed Mr. Godfrey and other employees to purchase items using their company Visa purchasing cards and break up the transactions over several months or among separate Visa cards (“parceling”).² *Id.* Mr. Godfrey alleged that the purpose of Mr. Bussard’s parceling was to avoid exceeding card limits and to avoid “bring[ing] attention to these purchases by the corporate office, thus to conceal those assets.” *Id.* Mr. Godfrey further alleged that he was innocent of any wrongdoing

¹ Although the document was apparently signed by Mr. Godfrey’s wife rather than Mr. Godfrey, OSHA construed the document as Mr. Godfrey’s formal complaint of discrimination under SOX. (Godfrey Memo, Ex. P).

² Union Pacific company policy required that written contracts be executed for services expected to exceed \$5,000 annually. (Godfrey Dep. at 121; Godfrey Dep., Ex. 8, 16). Mr. Godfrey had a Visa purchasing card with a single transaction limit of \$1,000 and a monthly transaction limit of \$2,000. (Godfrey Dep., Ex. 15). Company policy provides that “[p]urchases may not be split (parceled) in order to stay under the individual transaction limits.” (Godfrey Dep. Ex. 15).

and that he was discriminated against and terminated for reporting parceling and other issues to senior management. *Id.*

On October 1, 2007, the OSHA Regional Administrator, acting on behalf of the Secretary of Labor, issued a decision finding that Mr. Godfrey may have engaged in protected activity when he participated in two internal investigations, but that the evidence did not establish that his participation was a contributing factor in his discharge. (Godfrey Memo, Ex. P).

In a letter dated October 3, 2007, and addressed to the Chief Administrative Law Judge, Mr. Godfrey objected to the Secretary's findings. (Godfrey Memo, Ex. O). The letter was construed as a request for a formal hearing, and Mr. Godfrey's claim was forwarded to the undersigned for a hearing.³

On March 31, 2008, Respondent filed a Motion for Summary Decision. Complainant filed a responsive memorandum on April 16, 2008. Having carefully considered the arguments of the parties, I find that summary decision should be granted in favor of Respondent.⁴

II. Factual Background

Mr. Godfrey was employed by Union Pacific as a "locomotive manager" in Kansas City, Missouri, a position he was promoted to in 1998. Union Pacific maintains a "Values Line," which is a toll-free hotline for reporting violations of company policies or guidelines. (Godfrey Dep., Ex. 28). The Company maintains a separate hotline for reporting violations of the Company's Equal Employment Opportunity policies. *Id.* In the period from November 2005 through February 2006, Mr. Godfrey's wife, at his behest, placed calls and sent an email to the values line. (Godfrey Dep. at 242-245; Godfrey Dep., Ex. 33-34). Also in February 2006, Mr. or Mrs. Godfrey sent a letter to Dennis Duffy, a Union Pacific Executive Vice-President. (Godfrey Dep. Ex. 35). The letter described various grievances and was signed, "A Concerned Investigator." *Id.* In several of his filings, such as his objection to the Secretary's findings, Mr. Godfrey has suggested that these calls and emails constituted protected SOX activity. However, as described below, Mr. Godfrey is apparently now abandoning this argument.

The next event relevant to this proceeding occurred in early 2007, when Union Pacific management became concerned with various "ethics issues," including concerns about parceling at the Kansas City facility. (Godfrey Dep., Ex. 5). An internal company document states that in January 2007, management requested that "corporate audit staff" investigate "alleged misuse of Visa procurement cards by locomotive maintenance employees in Kansas City, Missouri." (Godfrey Dep. Ex. 8). Audit staff interviewed employees on April 24, 2007, and issued a brief report on July 13, 2007. (Godfrey Dep., Ex. 8). The report concluded that Charles J. Bussard "advised employees to parcel invoices among cardholders to keep within monthly purchases, approved purchases made without estimates, [and] requested price of purchased vehicles to be

³ As an alternative basis for summary decision, Respondent argues that Mr. Godfrey's objection is deficient in several respects. Because I find that Mr. Godfrey has not presented sufficient evidence on a substantive element of his claim, it is not necessary to address this procedural argument.

⁴ Respondent requested and was granted an extension of time to file a reply memorandum in support of its motion. However, after carefully reviewing the arguments submitted by the parties, I do not believe that additional briefing is necessary.

below single transaction limits.” (Godfrey Dep., Ex. 8). The report found that Mr. Godfrey was frequently asked by Mr. Bussard to “incur transactions on procurement card, [and] purchased a used vehicle using procurement card.”⁵ (Godfrey Dep., Ex. 8).

In his deposition, Mr. Godfrey stated that he unwittingly engaged in parceling, to the extent that he paid portions of bills with his Visa, as directed by Mr. Bussard, but denied that he ever set up the parceling transactions. (Godfrey Dep. at 124-125). For example, Mr. Godfrey stated that “from time to time,” Mr. Bussard would tell him to go to Brocato’s and “pay a bill.” (Godfrey Dep. at 128-129). Similarly, in his deposition, Mr. Godfrey stated that on one occasion in late December or early January, he was asked by Mr. Bussard to “go up to Brocato’s and pay a bill.” (Godfrey Dep. at 129). After speaking with a coworker, Foster McDaniel, the two discovered that Mr. McDaniel had already paid a similar amount for the same vehicle. (Godfrey Dep. at 129). This led Mr. Godfrey to believe that “there was some impropriety going on,” which he then reported to Mr. Slattery. (Godfrey Dep. at 129-130).

Following internal investigations, Mr. Bussard was terminated on May 22, 2007. (Godfrey Dep. Ex. 3). Mr. Godfrey was suspended without pay, also on May 22, 2007. (Godfrey Dep. Ex. 20). A letter informed Godfrey that the suspension was for “investigation into allegations concerning the use of invalid EDCS badges to sign off work tasks in the maintenance control system (MCS) in violation of FRA policy.”⁶ *Id.* Mr. Godfrey was terminated by letter on June 15, 2007. (Godfrey Dep., Ex. 19). The letter informed Mr. Godfrey that he was terminated, effective immediately, for “dishonest and unethical behavior relating to misuse of your company VISA purchasing card in violation of OI-9 policy as well as misuse of temporary EDCS badges to sign off on MCS tasks in violation of FRA regulations.”⁷ *Id.*

III. Law and Analysis

A. Summary Decision

The Rules of Practice and Procedure for administrative hearings are set forth at 29 C.F.R. Part 18. Summary decision may be granted “if the pleadings, affidavits, material obtained by discovery . . . or matters officially noticed show that there is no genuine issue as to any material fact.” 29 C.F.R. § 18.40(d). Respondent, as the moving party, has the burden to prove that

⁵ The report also determined that Mr. Godfrey “did not properly register the vehicle with the State of Missouri, did not obtain bids for work performed, did not understand how vendor charges were calculated, [and] purchased [a] global positioning device for use by truck drivers and kept at residence.” Mr. Godfrey denies all of these allegations.

⁶ This referred to an internal investigation of violations of Federal Railroad Administration (“FRA”) regulations. Mr. Godfrey has not alleged that Union Pacific’s investigation of FRA violations, or his participation in the internal investigation concerning FRA violations, are related to his claim that he engaged in SOX protected activity.

⁷ Internal company emails reveal that management initially only suspended Mr. Godfrey because of his minor role in the misconduct uncovered in the internal investigations. (Godfrey Memo, Ex. C5). Management considered terminating Mr. Godfrey in May but decided to review his personnel record before doing so. *Id.* The investigation found that Godfrey repeatedly followed Mr. Bussard’s instructions and engaged in other wrongdoing. *Id.* The ultimate decision to fire Mr. Godfrey was apparently based on his involvement in parceling, FRA violations, and other issues. *Id.* At least one member of management considered relocating Mr. Godfrey rather than terminating him, but stated that management had been directed not to relocate “marginal performers.” *Id.*

Complainant lacks evidence to support his claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to Complainant to bring forth evidence illustrating the existence of a genuine issue of material fact. *Id.* The Court must look at the record as a whole and determine whether a reasonable fact-finder could rule in Complainant's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If the non-moving party fails to sufficiently show an essential element of his case, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Reddy v. Medquist, Inc.*, ARB No. 04-123, Slip Op. at 5 (Sep. 30, 2005) (citing *Celotex*, 477 U.S. at 322-23).

B. Coverage Under Section 806 of Sarbanes-Oxley

Section 806 of SOX, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A(a) states, in relevant part:

No [publicly-traded company] . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee - (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C.] section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by - (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)

18 U.S.C. § 1514A(a)(1)(C).

The legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b), govern SOX whistleblower actions. 18 U.S.C. § 1514A(b)(2)(C). To prevail, an employee must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and, (4) the protected activity was a contributing factor in the unfavorable action. *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008) (citing 49 U.S.C. § 42121(b)(2)(B)(iii)); *Platone v. Flyi, Inc.*, ARB No. 04-154, Slip Op. at 16 (Sep. 29, 2006). If the employee establishes these four elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of that [protected] behavior." *Allen*, 514 F.3d at 476 (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

1. *Whether Mr. Godfrey made complaints that "definitively and specifically" related to one of the six enumerated categories found in Section 1514A*

The majority of Mr. Godfrey's memorandum opposing summary decision, as well as his objection to the Secretary's findings, are devoted to arguing that he is innocent of wrongdoing

and that Union Pacific did not have valid grounds for terminating him.⁸ Proof that his Employer's asserted reason for firing him is false and pretextual is a necessary element of Mr. Godfrey's whistleblower complaint. However, before reaching this issue, Godfrey must establish that he engaged in protected activity under SOX. If Godfrey did not engage in protected activity under SOX, his claim necessarily cannot survive, regardless of Union Pacific's reason for terminating him.

SOX "does not provide whistleblower protection for all employee complaints about how a public company spends it money and pays its bills." *Platone*, ARB No. 04-154, Slip Op. at 17. Rather, to constitute protected activity, an employee's complaints must "definitively and specifically" relate to one of the six enumerated categories found in § 1514A. *Platone*, ARB No. 04-154, Slip Op. at 17; *Allen*, 514 F.3d at 477.

Initially, it must be determined exactly which activity Mr. Godfrey is claiming constitutes his protected activity under SOX. Mr. Godfrey's filings have not been entirely consistent or clear in this regard. For example, in his hearing request, Mr. Godfrey asserts that he reported "Visa card violations" to his superiors. (Godfrey Memo, Ex. O). He also asserts that his wife reported "financial misdeeds" to the Company using Union Pacific's EEO/Values hotline on February 14, 2006. *Id.* His hearing request contains other unspecific references to "financial misdeeds" and wrongdoing by Union Pacific. *Id.*

Respondent contends that Godfrey's claim must fail because he cannot establish that he engaged in protected activity under SOX. Specifically, Respondent points to deposition testimony from Mr. Godfrey in which he was asked to identify the "real" reason that he was terminated. (Godfrey Dep. at 263). Mr. Godfrey answered, "[b]ecause I made waves, contacted the Values Line, the EEO hotline and Mr. Duffy, and they wanted to quiet me down, silence me for good" *Id.* Mr. Godfrey was then specifically asked what laws he believed were being violated when he placed calls to the Values Line, the EEO line, or wrote the letter to Mr. Duffy. (Godfrey Dep. at 268-69). Mr. Godfrey replied, "EEO . . . harassment, intimidation." (Godfrey Dep. at 269-70). When asked if he could think of any other laws that he felt were being violated,

⁸ For example, in his hearing request Godfrey argues that he was instructed to engage in parceling by his manager and was unaware of what he was doing. (Godfrey Memo, Ex. O). He also denies engaging in other misconduct, either expressly denying Union Pacific's allegations, or claiming that he only did what he was told by his superiors. *Id.* Godfrey also states,

It's appalling that a government agency decides an individual [Mr. Godfrey] is guilty of violations based on lies and candid conversations with a company when the individual wronged [Mr. Godfrey] provides written proof that [he] did not violate policies or regulations on [his] own accord, but [was] instructed to do so by a superior and even reported and/or attempted to report the misdeeds.

Id. Mr. Godfrey should be aware that the issue in this proceeding is not whether he is "guilty" of the misconduct alleged by Union Pacific. The sole issue in this proceeding is whether Union Pacific violated the whistleblower protection provisions of the Sarbanes-Oxley Act. More specifically, the issue raised in Respondent's Motion for Summary Decision and addressed in this Decision and Order is whether Mr. Godfrey has presented sufficient evidence to establish that a material issue of fact exists as to whether Mr. Godfrey engaged in protected activity under SOX. Whether Mr. Godfrey is "guilty" of the misconduct alleged by Union Pacific is irrelevant to this issue and this Decision.

Mr. Godfrey responded, “I really can’t off the top of my head say anything else.” (Godfrey Dep. at 270-71).

In its Motion for Summary Decision, Respondent identified this sworn testimony by Mr. Godfrey, which tends to demonstrate that Mr. Godfrey’s alleged protected activity related solely to perceived discrimination and/or sexual harassment. To avoid summary decision, Mr. Godfrey must come forward with specific evidence to demonstrate that he, in fact, engaged in protected activity by reporting conduct which he reasonably believed violated one of the enumerated statutes. Godfrey must point to specific evidence, in his sworn testimony or elsewhere, that he made a complaint that “definitively and specifically” related to a perceived violation of one of the six enumerated categories found in 18 U.S.C. § 1514A(a)(1)(C).

In his response to the Motion for Summary Decision, Mr. Godfrey states that the testimony cited by Respondent related to “questions regarding previous reports of misconduct or illegal acts by Mr. Godfrey . . . which are included as background information.” (Godfrey Memo at 22). Mr. Godfrey asserts that he “has not claimed he was terminated for these prior reports.” *Id.* Accordingly, Mr. Godfrey’s calls to the Values Line, the EEO line, or his letter to Mr. Duffy, all of which apparently occurred in late 2005 and early 2006, cannot form the basis of his SOX claim, as the complaints related to alleged violations of “EEO” (presumably Title VII of the Civil Rights Act of 1964),⁹ and Mr. Godfrey has admitted that he does not believe that he was fired for these “prior reports.” (Godfrey Memo at 22).

Thus, it appears that Mr. Godfrey’s claim that he engaged in protected activity relates solely to complaints of improper parceling by Mr. Bussard.¹⁰ For example, in his memorandum opposing summary decision, Godfrey references “inappropriate and fraudulent purchasing of assets by [Mr. Bussard].” (Godfrey Memo at 5). Specifically, Godfrey claims that Mr. Bussard,

... would sign the monthly purchasing logs without them being reviewed by management senior to him in order to conceal this information and defrauded Union Pacific while other managers and employees were disciplined or terminated

(Godfrey Memo at 6). Mr. Godfrey asserts that Mr. Bussard’s parceling was an attempt to prevent “these purchases from being brought to the attention of the corporate office, thus an intentional act to conceal these assets.” (Godfrey Memo at 24). Mr. Godfrey further asserts that the parceling “was fraud perpetrated on the company when these vehicles were excluded from being reported as assets on the financial statements” (Godfrey Memo at 21-22), and that

⁹ The Board has held that complaints about employment discrimination are not protected under SOX. *Harvey v. Home Depot U.S.A., Inc.*, ARB No. 04-114, Slip Op. at 14-15 (June 2, 2006) (“although a company that tolerates discriminatory practices may not be acting in the best interests of its shareholders, a SOX protected activity must involve an alleged violation of a federal law directly related to fraud against shareholders.”).

¹⁰ Another instance of financial impropriety was addressed in the July 13 internal audit; namely, Mr. Bussard’s improperly using certain vendors to perform vehicle maintenance rather than going through “GE Commercial Fleet Services.” (Godfrey Dep., Ex. 8; Godfrey Dep. at 114-117). However, Mr. Godfrey asserts that he never reported this conduct to anyone because he feared retaliation from Mr. Bussard. (Godfrey Dep. at 116-117). Accordingly, I find that Mr. Godfrey never reported such activity and cannot rely on this activity to establish that he engaged in protected activity.

Mr. Bussard's parceling "would constitute fraud against the shareholders regardless of the materiality level." (Godfrey Memo at 24).

In his memorandum opposing summary decision, Mr. Godfrey also generally attacks Union Pacific's policies, which he argues permitted Mr. Bussard to engage in improper parceling:

Had the appropriate level of internal controls been established, enforced, and maintained, the likelihood that . . . Mr. Bussard could have perpetrated this fraud on Union Pacific would have been a significantly decreased risk if any risk at all. However Union Pacific did not establish or enforce internal controls concerning Visa procurement card purchases or contract services. . . . Proper internal controls[,] with the appropriate hierarchy authorization limits[,] based on management level[,] could have prevented this violation of fraud against Union Pacific, its employees and shareholders.

(Godfrey Memo at 6). Mr. Godfrey also asserts that Union Pacific "is still in violation of SOX due to the inadequate[,] if existent[,] controls around their Visa purchasing cards and the many other assets that are concealed and not reported appropriately on the financial statements." (Godfrey Memo at 24).

While Mr. Godfrey's memorandum contains these specific allegations of "fraud" occurring at Union Pacific, Mr. Godfrey's memorandum is far less specific about what exactly *he reported* concerning this "fraud" that he now believes was and is occurring, and when. Mr. Godfrey asserts only that "he was discharged . . . after (1) reporting to and providing copies of receipts to Steven J. Slattery . . . between late November and early December 2006." (Godfrey Memo at 3). Mr. Godfrey does not describe the exact nature or content of his complaint to Mr. Slattery. In his deposition, Godfrey testified that he reported improper parceling to Mr. Slattery in late December or early January. (Godfrey Dep. at 129-130). However, he testified only that he brought bills and receipts to Mr. Slattery, and "told him what was going on." *Id.*

Mr. Godfrey has not demonstrated the existence of a material issue of fact as to whether he engaged in protected activity under SOX because he has produced no evidence that his complaints "definitively and specifically" related to a violation of one of the six enumerated categories found in § 1514A. In his memorandum opposing summary decision, Mr. Godfrey makes numerous arguments to the effect that Mr. Bussard's parceling constituted fraud on the company and its shareholders, and more broadly, that Union Pacific's policies violated SOX by allowing these practices to occur. However, Mr. Godfrey does not identify any evidence or even argue in his memorandum that his reports to Mr. Slattery contained the specific allegations he advances now, or otherwise "definitively and specifically" related to a violation of one of the six enumerated categories found in § 1514A.

It is not enough that Mr. Godfrey now believes that Mr. Bussard or Union Pacific was violating one of § 1514A's enumerated categories; he must demonstrate that prior to being terminated, he made communications which "definitively and specifically" implicated one of these categories. Mr. Godfrey has not provided any sworn testimony or identified any portion of his deposition testimony establishing that he did so. Mr. Godfrey did testify that he brought

receipts to Mr. Slattery and “told him what [he] thought was going on,” with respect to Mr. Bussard’s parceling. (Godfrey Dep. at 130). However, this evidence establishes only that Mr. Godfrey made vague complaints about parceling. It does not establish that Mr. Godfrey’s complaints “definitively and specifically” related to a violation of one of § 1514A’s enumerated six categories.

Although not specifically addressed by Mr. Godfrey, his participation in Union Pacific internal investigations could also constitute protected activity. As part of the internal audit of Visa purchases, Mr. Godfrey testified and provided information to Union Pacific investigators. (Godfrey Dep., Ex. 18). In the course of that testimony, Mr. Godfrey answered questions about his use of his Visa card, but nothing in his testimony can be construed as a communication which “definitively and specifically” related to a violation of one of the six enumerated categories.¹¹

Accordingly, Mr. Godfrey has not identified any evidence in the record which establishes that prior to being fired he made complaints to supervisors which “definitively and specifically” implicated a perceived violation of one of § 1514A’s six enumerated categories. Additionally, in reviewing Mr. Godfrey’s testimony and other evidence, the undersigned has not seen any evidence which could create a material issue of fact in this regard. Although his briefs make fairly specific arguments about why he now believes that Mr. Bussard’s parceling and Union Pacific’s Visa purchasing policy violated SOX or constituted “fraud” against the Company and its shareholders, Mr. Godfrey has not presented a scintilla of evidence that he made the same specific complaints to Mr. Slattery or anyone else prior to being terminated.

2. *Whether Mr. Godfrey “reasonably believed” that Union Pacific violated one of the six enumerated categories found in Section 1514A*

Even if Mr. Godfrey could establish that he made the specific complaints and arguments to his superiors that he advances now, he has still failed to establish that he engaged in protected activity under SOX. In addition to establishing that he made complaints which “definitively and specifically” related to a violation of one of § 1514A’s six enumerated categories, Mr. Godfrey must establish that he held “both a subjective belief and an objectively reasonable belief that the company’s conduct constitute[d] a violation of the relevant law.” *Livingston v. Wyeth*, ___ F.3d ___, Slip Op. at 13 (4th Cir. 2008) (citing 18 U.S.C. § 1514A(a)(1)); *Allen*, 514 F.3d at 477-78. Moreover, the belief must relate to an “existing” violation of law. *Livingston*, ___ F.3d ___, Slip Op. at 13.

Mr. Godfrey’s memorandum references § 302 of Sarbanes Oxley, which requires certain corporate officers to execute certifications along with their financial reports. 15 U.S.C. § 7241. The certifications must “discuss the company’s internal controls systems and must explain the effectiveness of those internal controls.” *In re Scottish Re Group Securities Litigation*, 524 F.Supp 370, 390-91 (S.D.N.Y 2007) (citing 15 U.S.C. § 7241(a)(4)). Assuming that § 302 is a “provision of federal law relating to fraud against shareholders,” *see* 18 U.S.C. § 1514A(a)(1), Mr. Godfrey cannot establish that he reasonably believed that this provision was being violated.

¹¹ Godfrey also testified in a later investigation unrelated to the Visa purchasing issue. (Godfrey Dep., Ex. 14). However, this occurred after he was terminated, and any information he provided at that time could not form the basis of a SOX whistleblower claim.

Section 302 addresses the internal controls that a company must maintain with respect to reporting obligations. It does not require a company to maintain internal controls over the use of company credit cards by its employees. Notably, Mr. Godfrey does not allege that the parceling of credit card purchases by employees caused Union Pacific's SOX certifications to be false or inaccurate, and any such allegation could only be based on pure speculation. Thus, Mr. Godfrey has not established the existence of a material fact as to whether he "reasonably believed" that violations of § 302 were occurring.

Section 302 is the only law that Mr. Godfrey specifically identifies in his memorandum. His other arguments contain vague arguments that parceling constituted "fraud" against Union Pacific and its shareholders. For example, Mr. Godfrey argues that parceling "was fraud perpetrated on the company when these vehicles were excluded from being reported as assets on the financial statements," (Godfrey Memo at 21-22). This allegation of "Fraud . . . on the company" rather than fraud against shareholders, is not protected activity under SOX. *See Harvey*, ARB No. 04-114, Slip Op. at 15 ("SOX protected activity must involve an alleged violation of a federal law *directly related to fraud against shareholders.*") (emphasis added).

To the extent that Mr. Godfrey attempts to link this "fraud . . . on the company" to fraud against the shareholders and violations of federal law relating to shareholder fraud, such is pure speculation. Mr. Godfrey provides no evidence that parceling resulted in inaccurate financial statements, nor does he identify any evidence that could support a reasonable belief that parceling was resulting in inaccurate financial statements. Rather, Mr. Godfrey presents nothing more than bare assertions and conclusory statements that parceling concealed assets from Union Pacific's corporate office and resulted in inaccurate financial records. (Godfrey Memo at 18). He presents no evidence that he had any knowledge of Union Pacific's accounting practices or any other basis for his belief that parceling would cause Union Pacific's financial reports to be inaccurate.

However, even if Mr. Godfrey did reasonably believe that parceling was resulting in inaccurate financial statements, he would still have to demonstrate that he "reasonably believed" that these inaccurate statements violated federal securities laws. This would require that he demonstrate that he reasonably believed that Union Pacific: "(1) made a material misrepresentation (or omission) (2) with scienter (3) in connection with the purchase or sale of a security (4) on which the seller or purchaser reasonably relied, (5) causing economic loss." *Livingston*, __ F.3d __, Slip Op. at 16 (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005)). Mr. Godfrey's conclusory allegations of "fraud" do not establish that he "reasonably believed" that Union Pacific was committing securities fraud or otherwise violating one of § 1514A's six enumerated categories.

Accordingly, Mr. Godfrey has also failed to identify any evidence which establishes that he "reasonably believed" that Union Pacific was violating one of § 1514A's six enumerated categories. His reference to § 302 and "fraud" do not establish the existence of a material issue of fact as to whether he "reasonably believed" that Union Pacific was violating one of § 1514A's six enumerated categories.

C. Conclusion

As Mr. Godfrey has not established the existence of a genuine issue of material fact as to whether he engaged in protected activity under SOX, he has failed to establish an essential element of his case. Thus, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Reddy v. Medquist, Inc.*, ARB No. 04-123, Slip Op. at 5 (Sep. 30, 2005). Thus, summary decision for Respondent is appropriate. Accordingly,

It is HEREBY ORDERED that Respondent's Motion for Summary Decision is GRANTED and the Complaint of Patrick J. Godfrey is DISMISSED.

It is FURTHER ORDERED that the hearing scheduled for June 17, 2008, is CANCELLED.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the Administrative Law Judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC, 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC, 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC, 20210.

If no Petition is timely filed, the Administrative Law Judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the Administrative Law Judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).