

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 June 2007

CASE NO. 2005-STA-00029

In the Matter of:

STEVEN C. BATES,
Complainant,

vs.

USF REDDAWAY, INC.,
Respondent.

Appearances:

For the Complainant:
Steven C. Bates, *pro se*

For the Respondent:
Joel R. Hlavaty, Esq.

BEFORE: Anne Beytin Torkington
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This claim arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (“STAA”), as amended and recodified, 49 U.S.C.A. § 31105 (2004), and its implementing regulations, 29 C.F.R. Part 1978 (2004). The STAA provides for employee protection from discrimination when the employee has engaged in protected activity while employed by an entity which is engaged in interstate commerce. Steven C. Bates (“Complainant”) filed a complaint alleging that USF Reddaway, Inc. (“Respondent” or “Reddaway”) violated the STAA by suspending and then terminating him in violation of 49 U.S.C.A. § 31105(a)(1)(B)(i). That section prohibits discipline or discrimination against an employee for refusing to operate a vehicle because the operation would violate a regulation related to commercial motor vehicle safety or health.

Complainant filed a complaint with the Secretary of Labor on December 5, 2004. The Occupational Safety and Health Administration conducted an investigation on behalf of the Secretary of Labor, and on March 15, 2005, concluded that the complaint lacked merit. On April 11, 2005, Complainant requested a hearing before an administrative law judge. The first pre-trial

notice was sent to the parties on April 20, 2005 for a trial date of May 11, 2005 in San Francisco, California. On April 27, 2005, Complainant requested a change of venue to Fresno, California. An order of continuance was granted on May 5, 2005, and the case was assigned to me on September 15, 2006. The parties waived the statutory and regulatory time limits on these proceedings. (TR 22).

A formal hearing was held in Fresno, California on November 22, 2006. Both parties were present. Complainant appeared in *pro se*, and Respondent was represented by counsel. Complainant's exhibits ("CX") 1 through 28 and Respondent's exhibits ("RX") 1 through 29 were admitted into evidence. (TR 3). The parties' pre-hearing statements were also admitted as ALJX 1 (Complainant's) and ALJX 2 (Respondent's). (TR 46). At the hearing, the parties called seven witnesses. (TR 3). At the conclusion of the hearing, the parties were ordered to submit their post-trial briefs by February 1, 2007. The parties' post-trial briefs are admitted as ALJX 3 (Complainant's) and ALJX 4 (Respondent's).

SUMMARY OF DECISION

After reviewing and considering all of the evidence, I find that Complainant did not meet his burden of establishing a prima facie case of unlawful discrimination. Complainant failed to establish by the preponderant evidence that (1) he engaged in protected activity under the STAA by refusing to drive his vehicle while he was ill; (2) Respondent was aware that Complainant was ill and that his refusal to drive was due to his illness; and (3) there was a causal connection between the alleged protected activity and Respondent's adverse employment actions against Complainant. Furthermore, even if Complainant had established a prima facie case, Respondent's articulated legitimate, non-discriminatory reasons for Complainant's suspension, termination, and lay-off were supported by the preponderant evidence. In sum, Complainant cannot prevail in this case.

ISSUES FOR DETERMINATION

The issues presented in this case are: (TR 5-6)

- (1) Whether Complainant informed Respondent that he was too sick to drive;
- (2) If Complainant informed Respondent that he was too sick to drive, when did he communicate this information to Respondent, and what information did he give;
- (3) Whether Complainant's conduct constitutes protected activity as defined under the STAA;
- (4) If Complainant engaged in protected activity, whether a causal connection exists between that protected activity and Respondent's adverse employment actions against him;

- (5) If a causal connection exists, whether Complainant can prove that Respondent's articulated reasons for the adverse employment actions are mere pretext for unlawful retaliation;
- (6) If Respondent did unlawfully retaliate against Complainant, what damages are owed to Complainant.

STIPULATIONS

The parties stipulate (TR 7-12), and I accept that:

- (1) Respondent was engaged in interstate trucking operations and maintained Clackamas, Oregon as its principal place of business in 2004. In the regular course of business, and at all times relevant herein, Respondent's employees operated commercial motor vehicles affecting interstate commerce.
- (2) Respondent is now, and at all times relevant herein was, a person as defined by 49 U.S.C.A. § 31101(3)(a).
- (3) On or about May 29, 2003, Respondent hired Complainant as a driver of a trailer with a gross vehicle weight in excess of 10,000 pounds.
- (4) At all times relevant herein, Complainant was an employee of Respondent in that he was a driver of a commercial motor vehicle having a gross vehicle rating of at least 10,000 pounds used on the highways and interstate commerce.
- (5) Complainant was employed by a commercial carrier, and in the course of his employment, he indirectly affected commercial motor vehicle safety pursuant to 49 U.S.C.A. § 31105.
- (6) Respondent was Complainant's sole employer, in that Respondent provided the equipment that Complainant selected to drive, paid his wages, directed his work hours, and instructed him as to how to use the equipment it provided.
- (7) During all times relevant to this matter, Respondent employed Mr. Thomas Karl Hawker as manager of its Fresno, California terminal.
- (8) During all times relevant to this matter, Mr. Hawker was Complainant's supervisor.
- (9) On July 30, 2004, Mr. Hawker issued Complainant a Letter of Information, which Complainant never signed.

- (10) On August 6, 2004, Complainant had a dispatch from Medford, Oregon to Sacramento, California. Complainant left Medford at approximately 10:45 AM and was scheduled to arrive in Sacramento at approximately 4:30 AM. Complainant actually arrived in Sacramento at approximately 7:00 AM.

SUMMARY OF THE EVIDENCE

Mrs. Kathleen Bates

Mrs. Bates is Complainant's wife, and they have been married for over fifteen years. (TR 25). At the hearing, she testified that when Complainant arrived home on August 6, 2004¹, he was "dragging," "physically green," "bouncing off the walls," and "could hardly walk." (TR 26). She stated that Complainant took a shower and some Nyquil and then went to bed. (TR 26). Mrs. Bates also stated that Complainant did not see a doctor for his illness until three days later. (TR 34-35).

Mrs. Bates testified that a couple of hours after Complainant went to bed, she answered a phone call from Mr. Thomas Karl Hawker asking to speak with Complainant. (TR 26). Mrs. Bates stated that she explained that Complainant was in bed, that he had taken some Nyquil because he was sick, and that she was not sure if she would be able to awake him. (TR 26-27). She stated that she did not tell Mr. Hawker exactly what Complainant's sickness was because they did not know what it was at the time, although they assumed it was the flu. (TR 35). Mrs. Bates also asserted that when Complainant returned Mr. Hawker's call at approximately 4:30 or 5:00 PM, she heard him tell Mr. Hawker that he was sick by placing her ear next to the phone as they were talking. (TR 27, 35-36). She testified that after Complainant hung up the phone, he told her that he was suspended until he turned in his driving logbook. (TR 28).

Mrs. Bates further testified that a couple of months later, she participated in a phone call between Complainant and Ms. Lana Aguilar. (TR 29, 37-38). According to Mrs. Bates' testimony, Complainant asked Ms. Aguilar whether she remembered him telling her he had been sick on August 6, and she replied affirmatively and said she would fax him a letter confirming that fact. (TR 32). However, Ms. Aguilar never faxed any letter to Complainant. (TR 38).

Mr. Tony Scales

Mr. Scales was employed at Reddaway from 1998 to February 2006. (TR 55). At the time of the events of this case, he was the lead dock supervisor. (TR 47-48). This was not a management position. (TR 53). As lead dock supervisor, his duties included filling out line sheets for outbound trucks, discussing truck lines with the head dispatch, and informing the head dispatch when drivers called in sick. (TR 48-49).

¹ Unless otherwise indicated, all dates in this opinion refer to the year 2004.

Mr. Scales testified that he also drove city routes and line haul routes² while employed at Reddaway. (TR 56). When he drove line haul routes, he was required to keep a logbook and to make entries upon leaving or stopping at a certain location, pursuant to DOT regulations. (TR 56). Mr. Scales stated that when he pulled into a weigh scale while driving line hauls, he would typically receive documentation if an inspection of the truck was conducted at the scale. (TR 56-57). He stated that even if the driver did not receive paperwork when he left the scale, the computerized system would still have a record of the stop at the scale. (TR 57-58).

Mr. Scales also asserted that he was not aware of any incident where a driver was not allowed to take time off because of illness. (TR 54). He stated that he personally was never refused time off for illness or “given any grief” for requesting a sick day. (TR 54-55).

Mr. Scales further testified that during the course of his six years working at Reddaway, there were slow periods, usually from November until February or March. (TR 55). He stated that during these slow periods, employee hours would be reduced. (TR 55-56). He also stated that he had been laid off once during a slow period. (TR 56).

Ms. Lana Aguilar

Ms. Aguilar was employed by Reddaway at the time of the events of this case. (TR 60). Her duties included customer service, dispatch, and payroll services, and she also served as the office supervisor when Mr. Hawker or the operations manager was not in the office. (TR 60). Ms. Aguilar was never in a management position at Reddaway. (TR 76).

Ms. Aguilar testified that when Complainant came into the Fresno terminal on August 6, she asked him for a copy of his logbook for payroll purposes. (TR 70). She testified that Complainant turned in all of his logbooks with the exception of his last Medford to Fresno run on August 6, which Mr. Hawker had specifically requested. (TR 70, 83-84; RX 10). She stated that she asked Complainant several times for either the original or a photocopy of that specific log. (TR 84; RX 10). Although she could not recall other details of her conversation with Complainant, she recalled that it was a “pleasant” conversation, that Complainant was in a “fair mood,” that he did not appear to be in a rush to go home, and that he did not appear to be ill or impaired in any way. (TR 61-62, 77).

Ms. Aguilar also testified that Mr. Hawker notified her to pay Complainant for a sick day for August 6. (TR 63; CX 3). She stated that the sick day could have been put into the payroll records at any time after August 6. (TR 74, 78). Although she testified on direct examination that Mr. Hawker told her on August 6 before 3:30 PM that Complainant was sick (TR 65), she later testified on cross-examination that any discussion with Mr. Hawker regarding the matter would have occurred after August 6. (TR 78-79). She also asserted that Complainant never told her directly on August 6 that he was sick. (TR 76). Furthermore, Ms. Aguilar wrote an e-mail stating that on August 6, she did not have a discussion with Complainant, Mr. Hawker, or Mr. Jeremy De Borde about Complainant feeling ill in any way. (CX 21; TR 73, 76). According to

² Mr. Hawker explained that a city driver makes local deliveries within a specific community in a manner similar to a FedEx or UPS driver, while a line haul driver delivers freight over long distances from one location to another, usually through the middle of the night. (TR 159).

Ms. Aguilar's testimony, Complainant asked her more than five times to write a letter for him stating that he had been sick on August 6, but she never did because Mr. Hawker advised her against it. (TR 75, 80-82).

Ms. Aguilar further testified that to her knowledge, no driver at Reddaway had ever been suspended for refusing to drive while sick or forced to drive while sick. (TR 66-67, 80).

Jeremy De Borde

Mr. De Borde is an operations supervisor at Reddaway. (TR 90). At the time of the events of this case, he had just started this position and was still in training. (TR 96). He stated that when drivers are too ill to drive, they can notify him on the phone or in person. (TR 90). Mr. De Borde testified that Complainant never told him directly that he was sick on August 6. (TR 96-97, 111). He testified that Mr. Hawker did not tell him on that date that Complainant was sick. (TR 92). He also stated that Complainant did not appear sick to him at the Fresno terminal on that date. (TR 113).

Mr. De Borde recalled a conversation on August 6 during which Mr. Hawker demanded that Complainant take a driving "run" to Bakersfield. (TR 97-98, 112). He testified that Mr. Hawker offered Complainant this run two or three times, but Complainant refused because it was not his scheduled bid run. (TR 99). He testified that Complainant later said that he was too sick to do the Bakersfield run, but that he was not too sick to do the Medford run. (TR 101-102). Mr. De Borde also stated that Mr. Hawker indicated to Complainant that if Complainant did not take the Bakersfield run, he would be suspended. (TR 112).

Mr. De Borde explained that the DOT regulations require a driver to rest for ten uninterrupted hours from the completion of his last run before driving again. (TR 107). He acknowledged that driving straight from Fresno to Bakersfield to Stockton to Willows, without a ten-hour rest period before driving to Willows, would be an illegal run. (TR 102). However, he also stated that if the driver goes from Fresno to Bakersfield to Stockton and then rests for ten hours, he could legally continue driving to Willows. (TR 102-103). Mr. De Borde did not know when Complainant was scheduled to arrive in the Fresno terminal on August 6 or when he could drive his next run that day. (TR 105-107).

Mr. De Borde testified that when drivers indicated they were sick, he would tell them to go home and never forced them to drive. (TR 110). He also asserted that no driver had ever been disciplined, suspended, or terminated for failing to drive because he was sick. (TR 90-91).

Mr. Steven Bates (Complainant)

Complainant testified that when he arrived at the Sacramento terminal on the morning of August 6, he told the terminal manager, Mr. Dan McKeehan, that he had stopped several times to use the restroom and that he had to delay at the truck stop to clean himself. (TR 117-118). Complainant also asserted that he told Mr. McKeehan that he was sick. (TR 118). However, his logbooks and timesheets for August 5 and 6 do not indicate that he was sick on those days. (TR

118; RX 13). Complainant also admitted that he never called anyone at the Fresno terminal to indicate that he was sick. (TR 118).

Complainant testified that on August 6, Ms. Aguilar asked him for the original copy of his logbook (not just a photocopy), but that he could not give it to her because it was an incomplete log. (TR 121-122). Complainant stated that Mr. Hawker later indicated to him on the phone, with a threat of termination, that he would not be allowed to drive until he turned in his original logbook. (TR 126). Complainant asserted that he did not know why Mr. Hawker wanted to see his original logbook. (TR 127).

Complainant further testified that when he arrived at the Fresno terminal on the evening of August 6, he had no intention of working that night because he had already called in sick. (TR 123). While he was at the Fresno terminal, he gave Mr. Hawker his original logbook, and Mr. Hawker made a photocopy of the log. (TR 123). Complainant also asserted that although he had already called in sick, he could not have simply indicated that he was sick in his logbook and turned it in on August 6, because that would have constituted a violation of DOT regulations. (TR 123-124).

Complainant testified that he did not know “in what capacity” he would have been able to drive on the evening of August 6, and that he declined Mr. Hawker’s demands to take the Bakersfield and Stockton runs. (TR 124, 127-128). He asserted that the length of the Bakersfield run would have been almost the same as the Medford run, but admitted that he would have been able to return to his own home that night if he had driven the Bakersfield run, while the Medford run would have required him to stay overnight. (TR 128).

In his logbook, Complainant indicated that he stopped at the Dunsmuir Scales for a “regulatory inspection.” (TR 130; RX 13). Complainant testified that although his truck had to be reweighed twice when he stopped at the scales, he did not receive any documentation indicating the truck’s weight. (TR 128-129). He stated that the California Highway Patrol officer on duty has discretion of whether to issue such documentation. (TR 129-130). He also asserted that no record was made of his truck when he stopped at the scales for weight inspection because his truck did not have a bypass device, which would have electronically noted his stop. (TR 129).

Complainant testified that he did not seek any medical attention for his alleged illness on August 6, but that he went to see his family physician, Dr. Flynn, on August 9. (TR 120, 132). He testified that Dr. Flynn found that he had bowel distress. (TR 135). On August 17, Complainant went to the doctor’s office and picked up two notes indicating that he had been unable to work from August 6 through August 11 due to illness. (TR 134; RX 23). He testified that another residing physician on duty signed the August 17 note, using information in a report from Dr. Flynn, who was on vacation at the time. (TR 133-135). Complainant did not see any physician on August 17 when he picked up the notes. (TR 133-134).

Complainant also testified that he did not know of any other driver at Reddaway who had been disciplined, suspended, or terminated for calling in sick. (TR 119).

Complainant testified that he was reinstated at Reddaway on or about October 20 after his period of suspension. (TR 136). He asserted that he did not have a discussion with Mr. James Draper regarding the terms and conditions of his reinstatement. (TR 137). He stated that when he asked Mr. Draper about his “sick time on the books,” Mr. Draper only replied, “Be thankful you have a job.” (TR 137). However, Complainant signed a Letter of Information that Mr. Hawker presented to him on or about November 1. (TR 138; RX 28). This Letter of Information indicates that Complainant would return to work on October 20 without any monetary compensation for his period of suspension. (RX 28).

Complainant testified that he retained the same position (the last line driver) in terms of seniority when he returned to work at Reddaway. (TR 146). However, Complainant asserted that his position “completely changed” because he lost his bid run after being reinstated. (TR 140). Complainant also asserted that there were no slow times during the entire time he was employed at Reddaway. (TR 140-141). Complainant admitted receiving a letter on November 1 from Mr. Hawker informing him that he would be on part-time status due to slow business. (TR 143; CX 17). Complainant asserted that Mr. Hawker was “playing games” and wanted to lower his operating expenses by laying off employees or changing them to part-time status so that the company would not have to pay them benefits. (TR 143).

Thomas Karl Hawker

Mr. Hawker has been employed at Reddaway since 2003. (TR 150). His current position is division sales director for the state of Oregon. (TR 150). At the time of the events of this case, he was the manager at Reddaway’s Fresno terminal. (TR 151).

Mr. Hawker asserted that Reddaway valued safety “above all else,” and that this motto was posted at every terminal. (TR 156-157). He stated that as the Fresno terminal manager, he had never instructed a sick driver to come to work. (TR 158). Mr. Hawker further testified that the DOT regulations require line haul drivers to maintain accurate logbooks. (TR 160-161). Drivers are required to record when they go on or off duty and when they start and stop driving at each particular location. (TR 160, 219). Mr. Hawker was also aware of the DOT regulation mandating that drivers rest for ten uninterrupted hours after driving for eleven hours. (TR 161).

Mr. Hawker testified that on August 6, he received an email at approximately 7:30 AM from Mr. McKeehan, the Sacramento terminal manager, notifying him that Complainant had arrived at the terminal at 7:00 AM, which was two and a half hours later than his scheduled arrival time. (TR 165, 208-209; RX 8, 11). Mr. Hawker stated that there was no reason given for Complainant’s late arrival, and that Mr. McKeehan asked him to check Complainant’s logbook to verify where Complainant had been and why the freight had been delayed. (TR 165; RX 8). Mr. Hawker testified that he then instructed Ms. Aguilar to ask Complainant for a copy of his logbook, specifically for the pages documenting the time he left Medford until the time he arrived in Fresno. (TR 166; RX 11). They did not receive a copy of the requested Medford to Fresno pages. (TR 166; RX 10). Mr. Hawker acknowledged that Complainant was correct in arguing that he could not turn in his original logbook for August 6 because it was incomplete. (TR 166-167). However, Mr. Hawker asserted that they only asked Complainant for a photocopy of his logbook pages, not his original logbook. (TR 167; RX 11).

Mr. Hawker further testified that when he did not receive a copy of Complainant's log, he notified Mr. Doug Schuster, his immediate supervisor. (TR 167). He stated that Mr. Schuster directed him to contact Complainant and suspend him until he provided a copy of the requested log pages. (TR 167; RX 11). Mr. Hawker testified that when he called Complainant's home at approximately 2:00 PM, Mrs. Bates answered the phone and said that Complainant was asleep. (TR 168, 195). He asserted that Mrs. Bates did not say that Complainant was sick in any way. (TR 168, 194-195). He told Mrs. Bates that Complainant should call into work when he woke up. (TR 168).

Mr. Hawker testified that when Complainant returned his call at approximately 6:00 PM, he told Complainant that he was suspended until he turned in a complete copy of his logbook. (TR 170; RX 11). Mr. Hawker asserted that he did not threaten to terminate Complainant. (TR 170-171). He also asserted that during the course of this phone conversation, Complainant never indicated that he was sick. (TR 170, 195-196). Mr. Hawker testified that Complainant was very upset about the suspension and hung up the phone abruptly. (TR 170; RX 11). When Complainant hung up, Mr. Hawker assumed that Complainant would not be coming in for work that evening, and scheduled another driver to cover Complainant's Medford bid run. (TR 170; RX 11). Mr. Hawker further testified that up until this point in time, he did not have any knowledge from any source that Complainant was sick on August 5 or 6. (TR 171).

Mr. Hawker testified that Complainant unexpectedly showed up at the Fresno terminal at approximately 8:15 PM and gave him his logbook, which was then photocopied. (TR 173-174; 196; RX 13). Mr. Hawker then explained that he had scheduled another driver for Complainant's Medford run because he had thought that Complainant would not be reporting to work that night after their phone conversation. (TR 173).

According to Mr. Hawker's testimony, he then asked Complainant twice to drive to Stockton and Bakersfield instead, but Complainant refused because it was not his scheduled Medford bid run. (TR 173). Mr. Hawker testified that he then asked Complainant to drive to Stockton and Bakersfield, then back to Fresno, and then rest for ten hours before driving to Willows. (TR 174-175). Mr. Hawker acknowledged that driving from Stockton to Bakersfield to Willows, without resting, would be an illegal run, but stated that he made it clear that Complainant could rest for ten hours before driving to Willows. (TR 174-175, 205). Complainant again refused to drive for the third time because it was not his scheduled run. (TR 176). According to Mr. Hawker's testimony, at this point Complainant indicated for the first time that he was sick. (TR 176; RX 11). Mr. Hawker asserted that Complainant said he could "suck it up and be sick and go to Medford," but not to Stockton or Bakersfield because he would be able to stop more often on the Medford run. (TR 176). Mr. Hawker did not see the logic in this, and suspended Complainant for refusing to take the run. (TR 176). Mr. Hawker asserted that he had already made the decision to suspend Complainant before he said he was sick. (TR 177). He also asserted that Complainant did not appear sick to him that evening. (TR 177).

Mr. Hawker testified that he did not authorize Ms. Aguilar on August 6 to mark Complainant down for a sick day or tell her that Complainant was ill. (TR 197, 212). According to the weekly paycheck system, Complainant's sick day was entered on August 9 at 2:14 PM.

(TR 198; CX 3). Mr. Hawker stated that each employee had five sick days per year, and the company would pay the employee for a sick day whenever he wanted one. (TR 178, 199; RX 4). Thus, according to Mr. Hawker, he decided to pay Complainant sick leave for August 6 because Complainant had said he was sick on that date. (TR 178-179).

Mr. Hawker further testified that after Complainant's suspension, the company conducted an extensive investigation of his logbook records. (TR 179). Although Complainant's log indicated that he had been detained at the Dunsmuir Scales for a regulatory inspection, there was no record or other documentation at the scales indicating that Complainant had ever gone through. (TR 179-181; RX 14, 15). One of the sergeants at Dunsmuir Scales also told Mr. Hawker that if Complainant's truck had been inspected at the scales, there would have been paperwork documenting the inspection. (RX 14). After the investigation, Mr. Hawker and other Reddaway management determined that Complainant had falsified his logbooks and thereafter terminated his employment on August 25. (TR 181; RX 16). Mr. Hawker asserted that Complainant's termination was due to the falsification of his logbooks and for misleading the company, and was not in any way related to Complainant's alleged illness on August 5 or August 6. (TR 181; RX 16).

In October, Mr. Hawker learned from Mr. Draper that Complainant would be reinstated without back wages for his period of suspension. (TR 184-185). Mr. Hawker testified that he presented Complainant with a Letter of Information on or about November 1, which indicated that as a condition for his reinstatement, Complainant would not receive any back pay for his period of suspension. (TR 185; RX 28).

Mr. Hawker further asserted that when Complainant returned to work in October, he was in the same position in terms of seniority as if he had never been terminated. (TR 185-186). Mr. Hawker stated that the company removed Complainant's bid run and reduced his hours because business was slow during October and November. (TR 186-189; RX 29; CX 17). Mr. Hawker testified that business typically slowed during this time of the year. (TR 190-191). He asserted that Complainant would have lost his bid run and had his hours reduced even if he had not been terminated before. (TR 188). He also stated that he was not manipulating the runs or financial numbers to keep Complainant from working. (TR 189).

Mr. Hawker testified that he laid off Complainant in March 2005 because business continued to decline, and there was no work for Complainant at that point. (TR 191-194). Mr. Hawker also asserted that even if Complainant had not been terminated in August 2004, he would still have been laid off in March because he was ranked lowest in terms of seniority. (TR 193).

Mr. James Draper

Mr. Draper has been employed at Reddaway for approximately eight years and is currently the vice president of human resources. (TR 221). He was serving in this position at the time of the events of this case. (TR 221).

Mr. Draper explained that drivers are legally required to maintain accurate records of their duty status in their logbooks. (TR 222-223). He stated that the company had terminated other employees in the past for falsifying logbook records. (TR 230). Mr. Draper also testified that Reddaway has “zero tolerance” for safety violations. (TR 223). He asserted that he was not aware of any practice at the company of requiring a sick driver to work or of any incidents in which drivers were terminated because they refused to work while sick. (TR 224, 231).

Mr. Draper testified that per Complainant’s request, he investigated the circumstances surrounding Complainant’s termination. (TR 225-226). After the investigation, Mr. Draper upheld the termination because he agreed that Complainant had not been terminated for his alleged illness, but rather for his logbook falsification and insubordination. (TR 226; RX 19). When Complainant requested that Mr. Draper reconsider the determination, Mr. Draper reopened the investigation to see if he had missed any facts. (TR 227). According to Mr. Draper’s testimony, he found that it was still difficult to substantiate many of the facts, so he decided to suspend rather than terminate Complainant. (TR 227-228). Mr. Draper testified that he informed Complainant on the phone that he would be reinstated without back pay for his period of suspension, and that Complainant agreed to this condition. (TR 228). Mr. Draper also stated that he explained the terms and conditions of Complainant’s reinstatement to Mr. Hawker so that they could be recorded in writing. (TR 229; RX 28).

Complainant later asked for arbitration on the issue of his suspension. (TR 229; RX 20). Mr. Draper felt that by raising the issue of back pay again, Complainant was renegeing on the terms of his reinstatement agreement. (TR 230; RX 20).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 protected activities. 49 U.S.C.A. § 31105(a). These protected activities include “refus[ing] to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health.” 49 U.S.C.A. § 31105(a)(1)(B)(i).

To prevail on a complaint of unlawful discrimination under the STAA, the complainant must establish by a preponderance of the evidence that the respondent employer took adverse action against the complainant because he engaged in protected activity. *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); *Densieski v. La Corte Farm Equipment*, ARB No. 03-145, AU No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. Nat’l Welders Supply*, ARB No. 03-117, AU No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, AU No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

As the Administrative Review Board (“ARB”) explained in *Densieski*, ARB No. 03-145, slip op. at 4, STAA cases may be analyzed within “the framework of burdens of proof and

production developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws, such as the Age Discrimination in Employment Act.” See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Regan*, slip op. at 5-6; *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, AU No. 96-STA-35, slip op. at 5-6 (ARB June 28, 2002).

Under this burden-shifting framework, the complainant must first establish a prima facie case, thus raising an inference of unlawful discrimination. *Densieski*, slip op. at 4. The complainant meets this burden by showing that: (1) the employer is subject to the STAA; (2) the complainant engaged in activity protected under the statute; (3) the employer was aware of such activity; (4) the complainant suffered adverse employment action; and (5) there was a causal connection between the protected activity and the adverse action. *Id.*; *Regan*, slip op. at 6.

Once the complainant has established a prima facie case of unlawful discrimination, the burden shifts to the employer to produce evidence that it took the adverse action for a legitimate, non-discriminatory reason. *Densieski*, slip op. at 4. At that stage, the burden is one of production, not persuasion. *Id.* If the employer carries this burden, the complainant must then prove by a preponderance of the evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination. *Id.*; *Calhoun v. United Parcel Serv.*, ARB No. 00-026, AU No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The fact-finder may consider the evidence establishing the complainant’s prima facie case and inferences properly drawn from it in deciding whether the respondent’s explanation is pretextual. *Reeves*, 530 U.S. at 146; *Densieski*, slip op. at 4. The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant’s protected activity remains at all times with the complainant. *St. Mary’s Honor Ctr.*, 509 U.S. at 502, *Densieski*, slip op. at 4-5; *Regan*, slip op. at 6; *Gale v. Ocean Imaging and Ocean Res., Inc.*, ARB No. 98-143, AU No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002); *Poll*, slip op. at 5.

The ARB has said that a case tried on the merits should be analyzed by focusing on the complainant’s ultimate burden of proof, rather than using the shifting burdens of going forward with the evidence. See *Densieski*, slip op. at 5; *Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01-021, ALJ No. 99-CAA-15 (ARB May 20, 2003).

A. Complainant Did Not Meet His Burden of Establishing a Prima Facie Case of Unlawful Discrimination.

Complainant must first establish a prima facie case that would establish an inference of unlawful discrimination. *Densieski*, slip op. at 4. In order to meet this burden, Complainant must show that: (1) he engaged in activity protected under the STAA; (2) Respondent was aware of such activity; (3) Complainant suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse action. *Id.*; *Regan*, slip op. at 6. While a *pro se* complainant may be held to a lesser standard than legal counsel in procedural matters, the burden of proving the elements necessary to sustain a claim of discrimination is no less. See *Flener v. H.K. Cupp, Inc.*, 90 STA-42 (Sec’y Oct. 10, 1991).

1. Complainant's Protected Activity

Complainant contends he engaged in protected activity when he refused to drive because he was sick. A refusal to drive because of illness may constitute a protected activity under the STAA. The regulations provide: "No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle." 49 C.F.R. § 392.

There is some evidence in the record indicating that Complainant may have been sick on August 5 and 6. Complainant repeatedly asserted that on his drive to the Sacramento terminal on the morning of August 6, he had to make several stops to use the restroom and to clean himself. (TR 117-118). Mrs. Bates testified that Complainant did not look well when he arrived home on August 6, and that he took some Nyquil and went to bed. (TR 26). There is also evidence in the record indicating that Complainant went to see Dr. Flynn for his illness on August 9, and that Dr. Flynn found that he had some bowel distress. (TR 132, 135). Complainant also had signed medical notes from Dr. Flynn's office indicating that he had been unable to work from August 6 to August 11. (RX 23). Thus, there is some evidence indicating that Complainant may have been sick on August 5 and 6. His refusal to drive due to illness, then, would be considered "protected activity" under the STAA if he could show that Respondent was aware that he was ill and was refusing to drive for that reason.

However, assuming *arguendo* that Complainant was in fact sick on those days, I find that Complainant did not meet his burden of establishing that he refused to drive because he was ill. Thus, he did not establish that he engaged in protected activity under the STAA.

When Complainant told Mr. Hawker that he was sick and thus could not drive the Stockton and Bakersfield runs, his statements after this assertion of illness indicate that he was not very concerned about safety. According to Mr. Hawker and Mr. De Borde, Complainant stated that he was too sick to drive to Stockton and Bakersfield, but not too sick to drive to Medford. (TR 101-102, 176). Complainant also testified that the length of the Bakersfield run would have been almost the same as the Medford run, but that he would have been able to make more stops if he drove to Medford. (TR 124, 127-28, 176). If Complainant was really too sick to drive safely, it would not make sense for him to agree to drive to one destination but not to another, when the distance to both destinations was approximately the same. Furthermore, Complainant had driven for about one hour and fifteen minutes from his home in Visalia to the Fresno terminal. (TR 125). Thus, I find that Complainant was not truly concerned about creating an unsafe driving condition. When underlying safety concerns are not genuine, they are not considered protected activity under the STAA. *Felter v. Century Trucking, Ltd.*, ARB No. 03-118, slip op at 6 (ARB Oct. 27, 2004).

Additionally, the fact that Respondent paid Complainant sick leave for August 6 does not raise an inference that Complainant was in fact sick and refused to drive because he was sick. Mr. Hawker testified that he did not authorize Ms. Aguilar on August 6 to pay Complainant for a

sick day. (TR 197, 212). His testimony is corroborated by the testimony of Ms. Aguilar, as well as the fact that Complainant's sick day was entered on August 9 at 2:14 PM. (TR 78-79, 198; CX 3, 21). Mr. Hawker also stated that each employee had five sick days per year, and the company would pay the employee for a sick day whenever he wanted one. (TR 199; RX 4). Thus, I find that Respondent's payment of sick leave to Complainant for August 6 was not a concession that Complainant was in fact sick or engaged in protected activity, but rather was simply the result of administrative convenience.

Complainant further attempted to show that he refused to drive to Stockton, Bakersfield, and Willows because he believed that it would constitute an illegal run in violation of the DOT regulations. A refusal to drive illegal dispatches would constitute protected activity. Both Mr. Hawker and Mr. De Borde acknowledged that driving from Fresno to Bakersfield to Stockton and finally to Willows, without a ten-hour rest period before driving to Willows, would constitute an illegal run. (TR 102, 174-175). However, there is nothing in the record indicating that Complainant objected on August 6 to a dispatch because he believed it was illegal. Furthermore, Mr. Hawker testified that he made it clear that Complainant could rest for ten hours before driving to Willows, which would make the trip legal. (TR 102-103, 174-174, 205). I find Mr. Hawker's testimony credible. The fact that Complainant's Letter of Suspension does not indicate whether Mr. Hawker specifically instructed Complainant to rest for ten hours before continuing to drive to Willows is more likely an oversight on the part of Reddaway management. (TR 204-206; RX 12). Thus, I find that Complainant did not refuse to drive to Stockton, Bakersfield, and Willows on August 6 because he believed that it would constitute an illegal run.

In sum, I find that Complainant did not establish by the preponderant evidence that he engaged in protected activity under the STAA.

2. Respondent's Awareness of Complainant's Alleged Protected Activity

Assuming *arguendo* that Complainant did establish that he engaged in protected activity by refusing to drive while he was ill, he must still show that Respondent was aware of this protected activity in order to show that Respondent engaged in unlawful reprisal. Absent unusual circumstances, the employee has the burden of showing that he communicated or attempted to communicate his safety concerns to the employer. *Boone v. TFE, Inc.*, 90-STA-7 (Sec'y July 17, 1991). I find that Complainant has not carried this burden.

Complainant testified that when he arrived at the Sacramento terminal on the morning of August 6, he told Mr. McKeehan, the Sacramento terminal manager, that he had to stop several times to use the bathroom and to clean himself. (TR 117-118). These comments did not explicitly convey to Mr. McKeehan that Complainant was feeling sick or that his late arrival had anything to do with an illness. While Complainant asserted that he told Mr. McKeehan that he was sick (TR 117-118), his assertion is directly contradicted by Mr. McKeehan's e-mail to Mr. Hawker shortly after Complainant's arrival in the Sacramento terminal. In his e-mail, Mr. McKeehan did not indicate in any way that Complainant had said he was sick. Complainant also admitted that he never called anyone at the Fresno terminal to report that he was sick. (TR 118).

Furthermore, Complainant's case is severely weakened by the testimony of several Reddaway employees. Both Ms. Aguilar and Mr. De Borde testified that Complainant never told them directly on August 6 that he was sick and that Complainant did not appear ill to them when he arrived at the Fresno terminal. (TR 73, 76, 77, 96-97, 113). Ms. Aguilar also wrote an email stating that on August 6 she did not have a discussion with Complainant, Mr. Hawker, or Mr. De Borde about Complainant feeling ill in any way. (TR 73; CX 21).

Mr. Hawker testified that when he called Complainant's home at 2:00 PM on August 6 regarding the missing logbook pages, Mrs. Bates answered the phone and said Complainant was asleep, but did not say that Complainant was sick. (TR 168, 194-195). Mr. Hawker stated that when Complainant returned his call at approximately 6:00 PM, Complainant never indicated that he was sick. (TR 170, 195-196).

While Mrs. Bates testified that she told Mr. Hawker over the phone that Complainant was sick, she admitted that she did not tell him exactly what Complainant's sickness was. (TR 35). She also asserted that when Complainant returned Mr. Hawker's call, she heard him tell Mr. Hawker that he was sick by placing her ear next to the phone as they were talking. (TR 27, 36). I do not find Mrs. Bates' testimony credible. Placing one's ear next to a phone to hear a conversation is not a typical thing to do, nor would Mrs. Bates need to do so to hear her husband's side of the conversation, as she was present at the time.

Complainant refused Mr. Hawker's order three times to take the Stockton and Bakersfield runs, and only on the third time did he assert that he was ill. (TR 176; RX 11). Moreover, Complainant merely told Mr. Hawker that he was sick, without any explanation of his illness or its possible impairment of his motor abilities. Complainant's statements thus were not "explicit enough to convey to Respondent that the refusal ... to drive was because the complainant's ability to do so was impaired." *Stout v. Yellow Freight Sys., Inc.*, ARB No. 00-017, ALJ No. 1999-STA-42 (ARB Jan. 31, 2003); *Smith v. Specialized Transp. Serv.*, 91-STA-22 (Sec'y Apr. 30 1992). See also *Wrobel v. Roadway Express*, ARB No. 01-091, ALJ No. 2000-STA-48, slip op. at 5 (ARB July 31, 2003) ("even assuming, arguendo, that the Complainant's condition actually precluded him from driving without violating DOT's fatigue regulation, the Complainant's notification to the dispatcher that he was 'sick,' without any further elaboration ... did not communicate this information" to the employer).

Furthermore, the doctor's notes that Complainant presented the week after his suspension are similarly too vague to communicate to Respondent that Complainant had been too sick to operate a motor vehicle on August 6. In *Wrobel v. Roadway Express*, the Administration Law Judge (ALJ) found that the complainant had not engaged in protected activity based upon, among other things, the fact that the complainant's note from his chiropractor upon his return to work merely stated "'excuse [complainant] from work from 5-28-99 to 5-30-99' and did not indicate the nature of [complainant's] illness or treatment." *Wrobel*, slip op. at 3. The Administrative Review Board upheld the ALJ's determination, finding that the "chiropractor's vague note which made no mention of any condition which made it unsafe for [the complainant] to drive" did not communicate to the employer that the complainant was unfit to drive. *Id.*, slip op. at 5. Similarly, the doctor's notes that Complainant presented in this case merely state "Excuse from work due to illness from 8/6 [and] until able to return" and "[P]atient is excused

from work due to illness from 8/6/04 through 8/11/04. Patient is able to return to work on 8/12/04.” (RX 23). These notes do not indicate the nature of Complainant’s illness or explain how the illness impaired Complainant’s ability to drive safely on the relevant dates. Thus, I find that these doctor’s notes do not help satisfy Complainant’s burden of proving that he communicated to Respondent that he was too sick to drive on August 6.

In sum, I find that Complainant did not meet his burden of showing by the preponderant evidence that he communicated his alleged illness to Respondent or that Respondent was aware of his alleged illness and his refusal to drive based on that illness.

3. Respondent’s Adverse Actions Against Complainant

It is clear that Respondent took adverse actions against Complainant. Complainant was suspended on August 6, 2004. Complainant was then terminated from employment on August 25, 2004. After his reinstatement on or about October 20, 2004, he lost his scheduled bid run and was reduced to part-time status. Finally, Complainant was laid off in March 2005. Thus, I find that Respondent did take adverse employment actions against Complainant.

4. Causal Connection Between Alleged Protected Activity and Adverse Actions

Even though I have found that Respondent took adverse actions against Complainant, I find that these actions were not causally related to Complainant’s alleged protected activity because Respondent was not aware of such activity. Where an employer does not have knowledge of the employee’s protected conduct, it cannot be causally established that the employer’s decision to take adverse action was motivated by the employee’s protected activity. *Stout*, ARB No. 00-017, slip op. 10. *See also Perez v. Guthmiller Trucking Co.*, 87-STA-13 (Sec’y Dec. 7, 1988).

In this case, I am persuaded that if Respondent had prior knowledge of Complainant’s alleged sickness, it would have simply excused him from work that day. Mr. Hawker asserted that Reddaway’s motto is “Safety Above All Else.” (TR 156). Respondent’s employee handbook states that conduct which creates safety or health hazards is prohibited. (RX 4). None of the witnesses who worked for Reddaway knew of any instance where a driver had been disciplined, suspended, or terminated for failing to drive because he was sick. (TR 54, 66-67, 90-91, 224). Even Complainant testified that he did not know of any other driver at Reddaway who had suffered an adverse employment action for calling in sick. (TR 119). Mr. Hawker and Mr. De Borde both testified that they had never forced a sick driver to work. (TR 110, 158). Thus, I am persuaded that if Mr. Hawker had known about Complainant’s alleged illness on August 6, he would not have ordered Complainant to drive the Stockton and Bakersfield runs that night.

However, since I have found that Respondent was not aware that Complainant’s refusal to drive on August 6 was due to his alleged sickness, I find that there is no causal connection between Complainant’s alleged protected activity and Respondent’s adverse actions against him.

In sum, I find that Complainant did not meet his burden of establishing a prima facie case of unlawful discrimination.

B. Respondent's Legitimate, Non-Retaliatory Reasons for Employment Actions Are Supported by the Preponderant Evidence.

Even assuming that Complainant had established a prima facie case of unlawful discrimination, Respondent's legitimate, non-retaliatory reasons for suspending Complainant on August 6, terminating him on August 25, and laying him off in March 2005 are supported by the preponderant evidence. Complainant also did not meet his burden of proving by the preponderant evidence that Respondent's legitimate, non-discriminatory reasons were mere pretexts for retaliation.

1. Complainant's Suspension on August 6, 2004

Respondent contends that it suspended Complainant on August 6 for his insubordination when he refused three times to drive the Stockton and Bakersfield runs. I find that this explanation fulfills Respondent's burden to articulate a legitimate and non-discriminatory reason for Complainant's suspension, and that the preponderant evidence supports this articulated reason.

Mr. Hawker testified that Complainant refused to drive the Stockton and Bakersfield runs three times because they were not his scheduled Medford run, and only after refusing the third time did Complainant say that he was sick. (TR 173-176). Mr. Hawker asserted that Complainant said he could "suck it up and be sick and go to Medford," but not to Stockton or Bakersfield because he would be able to stop more often on the Medford run. (TR 176). Mr. Hawker did not see the logic in this, and suspended Complainant for refusing to take the run. (TR 176). Mr. Hawker further asserted that he had already made the decision to suspend Complainant before he said he was sick. (TR 177). I find Mr. Hawker's testimony credible. Complainant said that he was too sick to drive to Stockton and Bakersfield but not too sick to drive to Medford, even though he admitted that the distance to both destinations would be approximately equal. From this, Mr. Hawker was justified in believing that Complainant was not truly too sick to drive, but was simply refusing to drive anywhere but Medford. Thus, I find that Respondent legitimately and reasonably suspended Complainant for insubordination.

In light of this testimony, I find, by the preponderance of the evidence, that Respondent suspended Complainant on August 6 for his insubordination, and not for his refusal to drive while allegedly sick.

2. Complainant's Termination on August 25, 2004

Respondent contends that it terminated Complainant on August 25 for the falsification of his driving logbook. I find that this explanation fulfills Respondent's burden to articulate a legitimate and non-discriminatory reason for Complainant's termination, and that the preponderant evidence supports this articulated reason.

Although Complainant's log indicated that he had stopped at the Dunsmuir Scales for a regulatory inspection, there was no record or other documentation at the scales indicating that Complainant had ever gone through. (TR 170-181; RX 14, 15). Complainant asserted that the highway patrol officer on duty has discretion to issue such documentation, and that he did not receive any documentation at the scales. (TR 128-129). He also asserted that no record was made of his truck when he stopped at the scales because his truck did not have a bypass device, which would have electronically noted his stop. (TR 129). However, Complainant's testimony is directly contradicted by a statement from one of the Dunsmuir Scales sergeants, who said that if Complainant's truck had been inspected at the scales, there would have been paperwork documenting the inspection. (RX 14). The sergeant also stated that none of the officers on duty at the time recalled Complainant ever stopping at the scales. (RX 14, 15). After an investigation, Mr. Hawker and other Reddaway management determined that Complainant had falsified his logbooks and terminated his employment. (TR 181; RX 16).

The DOT regulations require that drivers maintain accurate logbooks and record correct times and locations. (TR160-161, 219, 222-223). Mr. Draper also testified that Reddaway had terminated other employees in the past for falsifying their logbooks. (TR 230). In light of the DOT regulations, Reddaway's asserted emphasis on safety, and the company's prior terminations of other employees for logbook falsification, I find that Complainant's logbook falsification was a legitimate and non-retaliatory reason for his termination on August 25.

I further find that the fact that Mr. Draper ultimately decided to reinstate Complainant does not indicate that Respondent did not have a legitimate, non-discriminatory reason for terminating Complainant in the first place. Per Complainant's request, Mr. Draper also investigated the circumstances surrounding Complainant's termination. (TR 225-226). After the investigation, Mr. Draper upheld the termination because he agreed that Complainant had not been terminated for refusing to drive due to an alleged illness, but rather for his logbook falsification and insubordination. (TR 226; RX 19). Mr. Draper reopened the investigation when Complainant asked him to reconsider his determination and ultimately reinstated him. (TR 227-228). Since Mr. Draper still felt there was some confusion about the facts, he satisfied himself with suspending Complainant rather than terminating him. (TR 227). It seems more likely that Mr. Draper was trying to give Complainant the benefit of the doubt, rather than conceding that Mr. Hawker did not have a legitimate cause to terminate Complainant.

In light of all this testimony, I find that Respondent terminated Complainant on August 25 for falsifying his logbook and misleading the company, and not for his refusal to drive his vehicle while allegedly sick.

3. Complainant's Layoff in March 2005

Respondent contends that it laid off Complainant in March of 2005 because there was no work for Complainant due to the company's declining business. I find that this explanation fulfills Respondent's burden to articulate a legitimate and non-discriminatory reason for Complainant's layoff, and that the preponderant evidence supports this articulated reason.

Complainant and Reddaway management agree that when Complainant returned to work in October 2004, he was in the same position in terms of seniority as the last line driver. (TR 146, 185, 186). However, Complainant asserted that his position “completely changed” because he lost his bid run after reinstatement. (TR 140). Yet according to Mr. Hawker, the company removed Complainant’s bid run and reduced his hours because business was slow during October and November. (TR 186-189; RX 29; CX 17). Mr. Hawker testified that business typically went down during that time of the year. (TR 190-191; RX 29; CX 17). Complainant admitted receiving a letter on November 1 from Mr. Hawker informing him that he would be on part-time status due to slow business. (TR 143, 145; CX 17). Mr. Hawker’s testimony is further corroborated by that of Mr. Scales, who testified that during the course of his six years working at Reddaway, there were slow periods, usually from November until February or March. (TR 55). Mr. Scales further stated that during these slow periods, employee hours would be reduced. (TR 55-56).

Moreover, even Complainant himself testified that Mr. Hawker wanted to lower his operating expenses by laying off employees or changing them to part-time status (TR 143), which supports Respondent’s argument that there were legitimate business reasons to reduce Complainant’s hours and lay him off. Therefore, I find that Respondent does have periods of slow business from approximately October to March.

In light of all this testimony, I find that Complainant would have lost his bid run and had his hours reduced even if he had not been previously suspended or engaged in any alleged protected activity. Complainant was ranked lowest in terms of seniority, so it would be reasonable during slow business periods for Respondent to cut his bid run and his hours before doing the same with higher-ranked drivers. Additionally, Mr. Hawker asserted that he did not manipulate the driving schedules or financial numbers to keep Complainant from working (TR 189), and I find this testimony credible. Thus, I find that Respondent removed Complainant’s bid run and changed his status to part time due to declining business, and not due to Complainant’s previous suspension or any alleged protected activity.

Mr. Hawker further testified that he laid off Complainant in March 2005 because Reddaway’s business continued to decline, and there was no work for Complainant at that point. (TR 191-194). His testimony is again corroborated by that of Mr. Scales, who stated that he himself had once been laid off by the company due to slow business. (TR 56). Mr. Hawker asserted that even if Complainant had not been terminated in August 2004, he would still have been laid off in March because he was ranked lowest in terms of seniority. (TR 193). I find this assertion credible in light of my finding that Respondent does have periods of slow business. Since Complainant was the lowest-ranked driver, it would be reasonable for Respondent to lay him off first when the company’s business declined, just as it was reasonable for Respondent to cut Complainant’s bid run and hours. Thus, I conclude that Complainant was laid off due to declining company business and not due to his previous suspension or any alleged protected activity.

In sum, I find that Respondent’s legitimate, non-discriminatory reasons for suspending, terminating, and laying off Complainant are supported by the preponderant evidence. Complainant did not meet his burden of proving by the preponderant evidence that Respondent’s

legitimate, non-discriminatory reasons were mere pretexts for retaliation. Complainant is unable to carry his burden of showing that Respondent took adverse action against him because he engaged in protected activity under the STAA.³

CONCLUSION

After reviewing and considering all of the evidence, I find that Complainant did not meet his burden of establishing a prima facie case of unlawful discrimination. Complainant failed to establish by the preponderant evidence that (1) he engaged in protected activity under the STAA by refusing to drive his vehicle while he was ill; (2) Respondent was aware that Complainant was ill and that his refusal to drive was due to his illness; and (3) there was a causal connection between the alleged protected activity and Respondent's adverse employment actions against Complainant. Furthermore, even if Complainant had established a prima facie case, Respondent's articulated legitimate, non-discriminatory reasons for Complainant's suspension, termination, and layoff were supported by the preponderant evidence. In sum, Complainant cannot prevail in this case.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, and upon the entire record, I recommend the following Order:

Complainant shall be awarded nothing.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, United States Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. See 29 C.F.R. Part 1978.109(a); 61 Fed. Re. 19978 (1996).

³ Another issue raised by the testimony and evidence is whether Complainant agreed to his reinstatement without back pay for his period of suspension and whether that alleged agreement constituted a waiver to arbitrate the matter. However, since I have found that Complainant did not meet his burden of showing that Respondent took adverse action against him because he engaged in protected activity, I do not reach the issue of damages.