

U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)



Issue Date: 07 October 2005

CASE NO.: 2005-STA-00019

In the Matter of:

MICHAEL A. GLOVER,
Complainant,

vs.

ARMADILLO EXPRESS,
Respondent.

Appearances: Michael A. Glover,
Pro se

Bradford E. Kistler, Esquire
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

INTRODUCTION

This matter is before me on a request by Michael A. Glover, the Complainant, for a hearing before the Office of Administrative Law Judges ("OALJ") under the employee protection provision of the Surface Transportation Assistance Act ("Act" or "STAA"), 49 U.S.C. § 31105. The Respondent is a commercial motor vehicle carrier as defined at 49 U.S.C. § 31101. (HT,¹ p. 13.) The OALJ has jurisdiction over this matter pursuant to 49 U.S.C. § 31105 and 29 C.F.R. § 1978.105.

I conducted a hearing in this matter in Salt Lake City, Utah, on July 11, 12 and 19, 2005. The Complainant and the Respondent's counsel appeared and participated in the hearing on all three days. At the hearing, ALJ Exhibits ("ALJ") 1 and 2 were admitted, as were the Complainant's Exhibits ("CX") 1-7, 10-18, 20-32,² 34-36, and the Respondent's Exhibits ("EX") A-EE and GG-NN. The Complainant's Exhibits 9, 19 and 33 were excluded, as was the

¹ References "HT" are to the hearing transcript.

² Pages 26 and 28 of CX 16 should be excluded because they are identical to pages found in CX 9, which was excluded.

Respondent's Exhibit OO. The Complainant's Exhibit 8 and the Respondent's Exhibit FF were withdrawn.

For the reasons set forth below, the Complainant's complaints are DISMISSED.

ANALYSIS AND FINDINGS

Procedural Background

This proceeding was initiated on January 25, 2005, when the Claimant filed a notice objecting to findings issued by the Acting Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA"), which dismissed a complaint he filed on September 27, 2004, alleging that the Respondent, Armadillo Express, suspended him in retaliation for placing himself in duty status when he was instructed to bring his van in to be exchanged for a new van. (ALJ 1.) This complaint was noticed for hearing in Salt Lake City on March 17, 2005.

On January 18, 2005, the Complainant filed a new complaint with OSHA alleging that he had been terminated in retaliation for engaging in protected activity, and he subsequently submitted three amendments to his January 18, 2005, complaint. On March 10, 2005, Rita Lucero, the OSHA Regional Supervisory Investigator in Denver, Colorado, informed me of the new complaint and its amendments and asked, in the interest of judicial and departmental economy, that I consolidate the new complaint with the hearing that had been scheduled. OSHA had not investigated the new complaint. On March 15, 2005, I issued an order consolidating the new complaint with the one scheduled for hearing and continued the hearing to April 27, 2005. The April 27, 2005, hearing was continued for a variety of discovery issues and was finally held July 11, 12, and 19, 2005.

Issues

The following issues are pending in this case:

1. Whether the Complainant was a commercial motor vehicle operator as defined by Section 31101(1)(B) of the Surface Transportation Assistance Act.
2. Whether the Complainant engaged in activity protected by the employee protection provisions of the STAA and, if so, whether the Respondent was aware of the Complainant's protected activity.
3. Whether the Respondent retaliated against the Complainant for engaging in protected activity by reprimanding, suspending, and ultimately terminating the Complainant or whether the Respondent had a non-retaliatory reason for its actions.
4. The Complainant's damages, if the Respondent indeed retaliated against him.

Factual Background

Railroad crews are limited by statute or regulation to a maximum number of hours that they can work on a train. When a train crew approaches the maximum number of hours allowed, the crew has to be replaced with a fresh crew. The Respondent is in the business of transporting railroad crews to and from their trains so the railroad can comply with these requirements.

Respondent's drivers pick up railroad crews who have reached the maximum number of duty hours from their train and transport them to a site designated by the railroad, and they pick up the fresh train crew from a meeting point and transport them to meet their assigned train. The railroad contacts Respondent's dispatchers with their transport needs, and Respondent's drivers transport the railroad personnel wherever they need to go. (HT, p. 170.) Respondent's services are provided on an on-call basis any time of the day or night. (HT, p. 688.)

To accomplish this task, the Respondent has dispatch areas in Salt Lake City, Ogden and Provo, Utah, and each of those areas has its own group of drivers available for dispatch. (HT, pp. 79-80.) Drivers are dispatched for runs as the requests come in on a "call and demand" basis. (HT, pp. 355-56.) The Respondent's drivers are sent in vans of varying sizes by its dispatchers to transport the crews. (HT, pp. 172, 444, 461.)

Unless Respondent's drivers are ill, on vacation, or resting, they are expected to be available to respond and take a run when contacted by the dispatcher. Drivers are given an 8 hour rest period to rest. The driver is expected to get his rest and sleep during his 8-hour rest period because the driver can be given a run as soon as his rest period ends. (HT, pp. 540, 582.)

After the rest period is over, the drivers are considered rested and available for dispatch. Though considered available for dispatch, the drivers are not actually sent on a run until the railroad contacts the dispatcher with a request for a driver. Respondent has no control over when it will receive requests for drivers from the railroad. (HT, pp. 581-82; 593-94.) There can be a period of as much as three days before the railroad calls to request a driver. (HT, p. 582.) Drivers are told when they are hired about the erratic nature of the driving assignments and the expectation that they will get adequate rest during their rest period. (HT, pp. 582, 686.) Drivers are notified of available runs through their home phone, cell phone, and a pager. (HT, pp. 61-62, 74-75.) The driver is usually given 30 minutes to respond to the call for work. (HT, p. 75.)

Drivers use logbooks to keep track of their driving assignments and hours. (HT, pp. 33-35.)³ When taking a run, a driver is required to fill out a form indicating the month, the date, the year, the total amount of mileage driven, the vehicle number, the total miles driven to date, the driver's signature, the name of the carrier, and the address of the Respondent's office. (HT, p. 47.) Drivers are furnished a Department of Transportation ("DOT") booklet, and are required to follow the rules in the booklet. (HT, p. 55.) Drivers are also expected to do a vehicle inspection of their van before they take a run. The inspection is often done at the driver's residence, if that is where the vehicle has been parked. (HT, p. 486.) Drivers then can proceed with operating the vehicle after checking the box on their DOT log that says "The condition of the above vehicle is satisfactory." (HT, pp. 57-58.)

On August 25, 2000, Ronald Hankins, a manager driver for the Respondent, hired the Complainant to be a "long haul road driver." (HT, pp. 22-23, 26, 29, 106, 654, 684.) The Complainant worked for the Respondent as a driver in this capacity through December 28, 2004. (HT, pp. 7-8, 19.) On his date of hire, the Complainant signed a Memorandum entitled, "Hours of Service/Adequate Rest," which provided: "No Armadillo Express driver is to be on duty for

³ In 1998 or 1999, the Respondent voluntarily began requiring use of Department of Transportation ("DOT") logbooks by its drivers, but it was not required to have its drivers use DOT logbooks until 2003. (HT, pp. 33-35, 104, 161.)

more than twelve (12) hours during any period of twenty-four (24) consecutive hours...Drivers are further reminded of their responsibility to make sure they obtain adequate rest during their off-duty hours.” (HT, p. 691; EX KK.) The job description for the Complainant’s driver position states that drivers are required to be on call 24 hours a day and 7 days a week unless they are on rest, a scheduled day off, authorized leave, other leave of absence, or disciplinary suspension. It also states that drivers must be rested and in a state of readiness at all times but with some exceptions. (HT, pp. 102, 226, 621; CX 1.) The Complainant was not given a copy of his job description when he was hired, but he was aware that his job was an “on demand” job.⁴ (HT, p. 686.)

At the time the Complainant was hired, the Respondent’s policy required a 12-hour rest period after 12 hours on duty, with a maximum of 10 hours of driving. The 12-hour rest period was reduced to 8 hours for drivers based in Ogden, Utah, after the Complainant objected to being required to take 12 hours to rest. (HT, p. 163.)

On October 14, 2002, the Complainant signed a form entitled “Addendum Two: Hours of Service Adequate Rest,” which provided that “No Armadillo driver is to be on duty for more than [sic] fifteen (15) hours not to exceed ten (10) hours of driving time in any period of twenty four (24) consecutive hours...Drivers are further reminded of their responsibility to make sure they obtain no less than eight (8) hours of adequate rest during their off-duty hours.” (HT, pp. 691-92; CX 10; CX 13, p. 27; EX JJ.)

On June 8, 2004, the Chandra Barber, a dispatcher, called the Complainant at 3:10 p.m. to take a run. The Complainant turned down the run, telling her that he hated that they did not call him earlier in the day. (HT, pp. 421-23, 696-97; EX H; EX I.) Ms. Barber contacted the Complainant’s supervisor who instructed her to put the Complainant down for rest from the time she talked to him. (HT, p. 423.)

On September 20, 2004, the Complainant was considered rested at 6:00 a.m. (HT, pp. 622-23.) He was sent on his first run at 2:15 p.m. (HT, p. 623.) At about 9:00 p.m. that night, the Complainant notified the Respondent’s Cheyenne dispatch center that he was too tired to drive, and that he would not be available until he had an opportunity to rest. (HT, p. 12.) The Complainant’s actions left the Respondent with no driver available from 9:00 p.m. until 3:40 a.m. because he had been the only driver available, and the next driver to become available was scheduled to become available at 3:40 a.m. (HT, p. 497; EX L.) Under Respondent’s 12-hour availability policy, if the Complainant had not called in, the gap with no driver would have been only from 2:15 a.m. to 3:40 a.m. (HT, p. 497.)

On the night of September 21, 2004, Jennifer Leander, the dispatch manager, was working dispatch from 6 p.m. to 10 p.m. (HT, p. 498.) She spoke with Gary Harms, the Complainant’s manager, early in the evening when he called to check on what was going on. She gave him a status report and mentioned that the Complainant was the first driver available for a run. He informed her that she would be lucky if the Complainant went out on a run because it was getting late in the evening. (HT, pp. 506-07.)

⁴ The first time the Complainant saw this position description was at his unemployment hearing in 2005. (HT, p. 682.) Mr. Hankins, as a manager, never presented a written job description or a written rest policy to the drivers he hired. (HT, p. 43.)

Later that evening, she was contacted by Union Pacific Railroad and asked if there was a driver available for a long run transporting a crew from Ogden, Utah, to Montello⁵ where the crew would be switched out with the crew on the train. The driver would be required to transport the crew that was getting off the train from Montello to Elko, Nevada. (HT, pp. 499-500.) Because the Complainant was listed on the first-out sheet as rested, she notified Union Pacific Railroad that she had a driver available. Union Pacific notified its train crew to prepare for the crew switch and asked that a driver be dispatched. (HT, p. 500; EX N.) Ms. Leander contacted the Complainant at 9:30 p.m. and offered him the run. He told her he would call her back. He called her back a half hour later and said he was not taking the run, laughed at her, and said he was too tired. (HT, p. 501, 658-59, 699; EX N.) Ms. Leander offered to make the run a “meet” run in which she would dispatch a driver from Elko to meet the Complainant part of the way to Montello so that he would not have to drive all the way. He rejected the offer. (HT, p. 505.)

Ms. Leander was left in a bind and ultimately got the run covered, but the driver she sent was 45 minutes late. (HT, pp. 502-03, 508-09; EX O.) She called Mr. Harms, who explained that the Complainant turns down runs when he has been up all day and does not get called until the evening. She responded that the Complainant should understand that his position was an on-call position and he should know how to deal with the uncertain scheduling. Mr. Harms acknowledged that was true but pointed out that the Complainant could always fall back on the company policy that drivers cannot drive when they’re tired. (HT, pp. 507, 574, 617-19.) From September 18 through September 21, 2004, the Complainant had logged only 10 ½ hours total of driving time, but he still responded that he was too tired to take the September 21, 2004, run. (HT, pp. 701-02; EX K.)

On September 23, 2004, the Complainant received a written reprimand from Mr. Harms, who was instructed by Mr. Hankins to reprimand the Complainant for turning down the run on September 21, 2004. (HT, pp. 12, 546, EX Q.) The reprimand stated: “On 9-21-04 you refused a run, the night before you took yourself off the board 6 hours early. This is an ongoing problem. It’s the driver’s responsibility to get adequate rest and be available when on call. The position of a full time road driver requires you to be available 5 or more days per week.” (HT, pp. 236, 292-93, 546-47; CX 13, p. 7; EX Q.) The Complainant responded to the reprimand, asking the Respondent to withdraw the reprimand and work with the Complainant to determine reasonable on-duty and off-duty times. (HT, p. 312; CX 13, pp. 8-9; EX R.)

That same day, at the request of Mr. Harms, the Complainant drove his company van to a designated location and left it there to be repaired. Mr. Harms met him at the repair shop with a new company vehicle so the Complainant could swap vehicles. (HT, pp. 550, 586.) To swap into the new vehicle, the Complainant transferred his radio to the new van and mounted the first aid kit and fire extinguisher into the new vehicle. The Complainant contacted the dispatcher and instructed the dispatcher to put him down as being on duty when he made the swap.⁶ (HT, p.

⁵ The record did not indicate whether Montello was in Nevada or Wisconsin. I assume it was Nevada since the crew being picked up was to be taken to Elko, Nevada.

⁶ Mr. Harms testified that he had already instructed the dispatcher to put the Claimant in duty status. (HT, pp. 551, 587.) However, this was not corroborated by the dispatchers. Jeri Cranmore, the dispatcher the Complainant spoke to, testified that the Complainant called and asked to be put on duty and that that was a very unusual event. (HT, p. 393.)

703.) The van swap took two and a half hours. Drivers are normally only put in duty status by the dispatcher when they are dispatched on a run.

During the afternoon of September 23, 2004, Mr. Harms was instructed in a conference call with Joe Brown, Russ Brown, the Vice President of Operations, and Gene Wartman, the general manager, to suspend the Complainant because he had started his time before being sent on a run and no one else did that. (HT, pp. 588-89.) Later that day, the Complainant was given a two-day suspension for putting himself on the clock before actually starting a run. (HT, pp. 587-88; CX 13, p. 25; EX S.)

On September 27, 2004, the Complainant filed a complaint with OSHA, alleging that the Respondent had retaliated against him for engaging in a protected activity. (HT, pp. 6, 185-86; CX 13, p. 4.) The Complainant indicated in his complaint that he was given a suspension for directly contacting the Respondent's dispatcher on September 23, 2004, (HT, p. 672) and asking to be placed on-duty for the time he spent taking his vehicle to be serviced and switching into a new company vehicle at the repair shop. (CX 13, p. 4.)

On October 12, 2004, the Complainant called Chandra Barber, a dispatcher, at 2:15 p.m. and said that Mr. Harms had authorized him to call in sick and be taken off the board for 12 hours. (EX T.) Mr. Harms had never authorized the Complainant's sick leave or instructed him to make the call. (HT, pp. 428-30, 640-41.) While drivers can call in sick, the normal procedure is for the driver to call his manager, who then calls the dispatchers to inform them. (HT, p. 428.) On October 12, 2004, Ms. Barber noted on the pass on sheet that because the Complainant was the only rested driver, as a result of the Complainant's call, they had no drivers available if any were needed. She wrote on the pass on sheet, "This relays sucks, but I guess what Mike wants, Mike gets." She took him off for 12 hours, which made him eligible to drive at 2:15 a.m. (HT, pp. 428-30; EX T.) When she informed Mr. Harms that the Complainant had called in, Mr. Harms instructed her to take the Complainant off the board for 24 hours instead. (HT, p. 429, EX T.)

On October 25, 2004, Ms. Barber called the Complainant for a run but was unable to reach him after four attempts. Mr. Harms ended up taking the run for the Complainant. (HT, pp. 430-31; 642-43; EX U; EX V.) Ms. Barber wrote on the pass on sheet, "Here we go again with Mike." (HT, p. 432.) From September through December 2004, the Complainant turned down most of the runs Ms. Barber called him for, saying he was tired. (HT, p. 410.) Once he did that, her hands were tied because company policy required dispatchers to immediately put the driver on rest when the driver says he's tired. (HT, p. 411.) Though dispatchers were supposed to document on the pass-on sheets each time a driver turned down a run, Ms. Barber stopped doing so with the Complainant because nothing happened as a result of her entries. (HT, p. 233.)

Another dispatcher, Jeri Cranmore, considered the Complainant to be an unreliable employee, rating him a 2 on a scale of 1 to 5 where 1 was "terrible." (HT, p. 395.) She would worry about whether he would accept a run whenever she called him. He would reject runs because he had been waiting too long for a run, he wasn't ready for the run, or he wasn't rested. (HT, p. 395-96.)

On November 22, 2004, OSHA sent a letter to Ms. Leander, giving her notice that the Complainant had filed a complaint against the Respondent for discrimination against the Complainant “for his participation in job safety/health activities.” (HT, p. 329; CX 15.) Ms. Leander was the first person notified of the Complainant’s complaint. (HT, p. 515.)

On November 29, 2004, the Complainant filed a complaint with the Federal Motor Carrier Safety Administration, alleging that the Respondent was failing to recognize the definition of “on duty” time as defined by § 49 C.F.R. 395.2 by requiring its drivers to remain in a readiness to work status for indefinite amounts of time. (HT, p. 187; CX 16, pp. 1-2.)

On December 14, 2004, shortly after she received a request for a driver at 9:05 p.m., Lucy Spillman, a dispatcher, contacted the Complainant and asked him to take a run to Promontory that would begin at 10:00 p.m. The call came during the Claimant’s rest period, which was scheduled to end at 10:00 p.m. (HT, pp. 445-47, 710; EX X; EX Y.) The Complainant refused the run. (HT, pp. 448-49, 643-44, 706-08; EX X.) He felt that the run was a “301 run” to be done by the drivers who normally do shorter runs. He also believed that another driver, Carl, was ahead of him on the board and should have been called for the run. He called Carl and told him to call dispatch and take the run. (HT, pp. 710-13.)

On December 15, 2004, the Complainant was offered a run at 6:30 a.m. by a dispatcher named Eric. (HT, p. 714.) The Complainant turned down the run and by the time Eric found someone to cover it, the run was 30 minutes late. (HT, pp. 471-73; EX Y.) This same day, the Complainant called and asked the lead dispatcher, Letha L. Gaudern, what the DOT policy was regarding 8 hours of undisturbed rest. (HT, pp. 476, 512-13.) He was concerned about having been contacted the day before by Ms. Spillman before his rest period ended. Ms. Gaudern advised the Complainant that he could be contacted during his rest time but could not be sent out to drive until he was rested. (HT, p. 476.) The Complainant asked to see that policy in writing, and Ms. Gaudern advised him that he could go to any Port of Entry to see the DOT policy regulations book, but that she would try to get him a copy in writing. (HT, pp. 477, 512.) Ms. Gaudern relayed the Complainant’s request to see the written policy to Ms. Leander, who was responsible for safety, as well as complaint resolution. (HT, pp. 367, 477-78, 490, 617.)

Russ Brown overheard this conversation between Ms. Gaudern and Ms. Leander and became aware that the Complainant had asked to see something in writing regarding the policy on interruption of rest. (HT, pp. 367-68, 373-74, 729.) He decided to arrange a meeting with the Complainant the next day, since he had a trip planned to Ogden to deliver Christmas presents to the railroad officials. (HT, pp. 302, 374.) At the suggestion of Joe Brown, he contacted Respondent’s counsel for information on whether the Respondent could contact the Complainant by phone during his 8 hours of rest time. The Respondent’s counsel advised him that calling a driver during his 8 hours of rest did not constitute interrupting his rest and sent him supporting documentation. (HT, pp. 320, 323-24, 340, 740; EX AA.) Meanwhile, the Complainant told Mr. Harms that he had contacted Ms. Gaudern after being interrupted during his rest. (HT, pp. 601-02.) He also asked Mr. Harms to get the written policy on whether he could be contacted during his rest period. (HT, p. 649.) Mr. Harms also contacted Ms. Leander and told her that the Complainant had requested something in writing that would explain that the Complainant could receive dispatch calls before his rest time ended. (HT, pp. 513-15.)

On December 16, 2004, the Complainant was paged by dispatch and told to call Mr. Harms. When the Complainant responded to the page, Mr. Harms told him that Russ Brown was in town and wanted to meet with him immediately. (HT, pp. 402-03, 598, 718; CX 25.)

The Complainant wanted a witness with him for the December 16, 2004, meeting and asked Patrick Winslow, a Pacific Union Railroad employee, to accompany him.⁷ Mr. Winslow offered to bring a tape recorder to record the meeting. (HT, pp. 667-68, 719-20, 724.) Mr. Winslow was interested in attending the meeting to discuss the Respondent's rest policy, which was a concern of his. (HT, p. 194.) Mr. Winslow understood that the topic of the meeting was the hours of service of the Respondent's drivers. (HT, p. 198.)

Russ Brown was in a normal mood at the start of the meeting with the Complainant and planned to address the Complainant's questions about the rest policy. Upon arriving for the meeting, the Complainant asked that Mr. Winslow be allowed to sit in on the meeting with Russ Brown, Mr. Harms, and himself. The Complainant did not know that he was supposed to have come alone to the meeting. However, Russ Brown told the Complainant that Mr. Winslow was not welcome at the meeting and that he would not meet with the Complainant in the presence of Mr. Winslow. (HT, pp. 194, 606-08, 720-21; CX 25.) The Complainant continued to insist that Mr. Winslow be allowed to attend the meeting with him. (HT, pp. 722-23.) Russ Brown did not allow Mr. Winslow to accompany the Complainant at the meeting, so the meeting never took place. Mr. Winslow secretly recorded the verbal exchange between the Complainant and Russ Brown over whether Mr. Winslow would be allowed at the meeting. (HT, pp. 182-83; 306, 326, 558, 720, 724; CX 18; CX 23; EX BB; EX CC.) Towards the end of the attempted meeting, the Complainant told Russ Brown that they could meet at his attorney's office and Russ Brown indicated his verbal agreement. (HT, p. 645.) Russ Brown interpreted the Complainant's suggestion to meet at his attorney's office as a threat of a lawsuit rather than a true agreement to meet at another time. (HT, p. 401, 735.) In fact, Mr. Russ Brown, after the attempted meeting, told the other upper management officials that he thought the Complainant was building a case against the Respondent. (HT, p. 401; CX 20, p. 8.)

By the end of the attempted meeting, Russ Brown felt that he had just witnessed blatant insubordination. (HT, p. 325.) He was very mad. His face was bright red. He threw his papers into his briefcase and told Mr. Harms to immediately suspend the Complainant and to take him off the dispatch board. He told Mr. Harms that "people sued him all the time" and that the worse case scenario was that he would have to pay the Complainant some unemployment. (HT, p. 560.) Mr. Brown then called Joe Brown,⁸ the company president, and told him what had happened and that he had suspended the Complainant. Joe Brown told Russ Brown that he did not think the Complainant should be suspended because he thought the Complainant had turned them in to OSHA and the action could be construed as retaliation. (HT, pp. 384, 736-37.)

Russ Brown then instructed Mr. Harms not to suspend the Complainant and to put him back on the board. (HT, p. 610.) The Complainant was immediately put back on the board. (HT, pp. 317-18.) Russ Brown then had a conference call with Mr. Harms and Mr. Hankins,

⁷ Mr. Winslow is an employee of the Respondent's biggest client, Union Pacific Railroad, and is the legislative representative for the trainmen in Ogden. (HT, p. 171.)

⁸ Joe Brown is also Russ Brown's father.

which was secretly recorded by Mr. Harms.⁹ (HT, pp. 325-27, 380-81, 560, 610-11, 743; CX 20.) In the conference call, Russ Brown said: “I mean he’s reported me to OSHA, he plays these games during the summertime...and the guy refuses to even meet with me...questioning when we call him. I don’t think the guy likes his job. I think he’s only hanging around to make an excuse to sue me.” (HT, p. 331; CX 20, p. 4.)

Meanwhile, the Complainant, who was put back on the board, was sent on several runs beginning at 9:00 p.m. that same day, the last of which he completed at 1:00 p.m. the next day. (HT, pp. 318, 666, 670; CX 21.) When the Complainant completed four runs, he was called to return to the yard with his van, and at that point, Mr. Harms told him that he was suspended indefinitely. (HT, p. 670.) An indefinite suspension letter was issued to the Complainant on December 17, 2004. (HT, pp. 344-45; CX 27, p. 25.)¹⁰

Two days later, on Monday, the Complainant called Mr. Brown and offered to meet with him one-on-one. Mr. Brown replied that he would think about it. (HT, pp. 670-71.)

On December 22, 2004, the Federal Motor Carrier Safety Administration sent a letter to the Complainant with regard to his complaint to the agency, indicating the following:

The time that a driver is free from obligations to the employer and is able to use that time to secure appropriate rest may be recorded as off-duty time. The fact that a driver must also be available to receive a call in the event the driver is needed at work, even under the threat of discipline for non-availability, does not by itself impair the ability of the driver to use this time for rest. If the employer generally requires its drivers to be available for call after a mandatory rest period which complies with the regulatory requirement, the time spent standing by for a work-related call, following the required off-duty period, may be properly recorded as off-duty time.

(CX 24.)

On December 23, 2004, the Acting Regional Administrator of OSHA dismissed the Complainant’s September 27, 2004, complaint, finding that the Complainant did not operate a commercial motor vehicle as defined in 49 U.S.C. § 31101. (HT, pp. 6, 663-64; ALJ 1.) At the same time, the OSHA Regional Supervisory Investigator notified the OALJ of the filing of the complaint and OSHA’s findings and provided OALJ with a copy of the complaint and determination letter. (HT, p. 15; ALJ 1.)

Respondent conferred with its counsel and decided to terminate the Complainant. The decision to terminate the Complainant was made by Russ Brown, Joe Brown, and Ron Hankins. (HT, pp. 318, 320; CX 29, p. 12.) On December 28, 2004, Mr. Harms called the Complainant and told him he was being terminated and asked him to bring in his “payroll and stuff.” (HT, p.

⁹ At trial, Mr. Harms stated that he recorded the conference call, as well as every other work conference call he ever made, because it was company policy to do so. (HT, p. 560.) On cross-examination, however, Mr. Harms admitted that no one at the Respondent had ever instructed him to tape record work conference calls. (HT, p. 611.)

¹⁰ The suspension document is erroneously dated November 17, 2004, but it was really issued on December 17, 2004. (HT, pp. 344-45.)

671.) The termination report did not provide a reason for the termination, but Russ Brown testified that he was terminated for his “blatant insubordination” at the time of the December 16, 2004, meeting with Mr. Brown. (EX HH, CX 27, p. 27; HT, p. 325.) Mr. Harms did not agree with the decision to terminate the Complainant and wrote on the termination report that he signed it “under protest.” (HT, pp. 345-46; 383, 614; CX 27, p. 27; EX HH.)

On January 18, 2005, the Complainant filed another complaint with OSHA, alleging that he had been terminated for engaging in a protected activity.

On January 24, 2005, the Complainant received a letter from John R. Mulcare of the Federal Motor Carrier Safety Administration, notifying him that while an investigation into his November 29, 2004, complaint had yielded some instances of non-compliance, the nature of the actions did not warrant enforcement action. (HT, pp. 188-89; CX 28.)

Also on January 24, 2005, the Complainant filed an objection to the OSHA Regional Administrator’s December 23, 2004, determination, dismissing his September 27, 2004, complaint. The Complainant then filed a timely request for a formal hearing on his complaint before the OALJ. (HT, p. 7; ALJ 2.)

After being terminated by the Respondent, the Complainant filed for unemployment benefits, which the Respondent challenged, stating that the Complainant had been insubordinate. His unemployment claim was denied, but on February 11, 2005, the Complainant was awarded benefits after he successfully appealed the rejection of his application for benefits. (HT, pp. 346, 403, 671; CX 29; CX 30.) The Administrative Law Judge found that the Complainant had not been overtly insubordinate on December 16, 2004, because Russ Brown had not made it clear that the Complainant would be terminated if he did not agree to meet with him alone right then. The Administrative Law Judge interpreted the recorded conversation during the attempted December 16, 2004, meeting, to indicate that Russ Brown had agreed to meet with the Complainant at his attorney’s office. (CX 30.)

On February 1, and 14, 2005, the Complainant amended his January 18, 2005, OSHA complaint, adding a statement that he had operated 11 passenger vans for the Respondent, adding the recording of the December 16, 2004, attempted meeting, and adding copies of his complaints with the Federal Motor Carrier Safety Administration.

On March 10, 2005, the Regional Supervisory Investigator for OSHA requested that the Complainant’s January 18, 2005, complaint be consolidated with his September 27, 2004, complaint, and on March 15, 2005, I issued an order consolidating the two complaints.¹¹

On March 14, 2005, the Respondent appealed the Utah Administrative Law Judge’s finding that it had to pay the Complainant unemployment benefits, arguing that it was not unreasonable for the Respondent to insist on meeting with the Complainant outside of the presence of Mr. Winslow. (CX 31.) On April 28, 2005, the Workforce Appeals Board found

¹¹ The Complainant also requested that a complaint he filed with the Wage and Hour Division of the Department of Labor be consolidated with these complaints. However, I denied his request, explaining that the OALJ has no jurisdiction over the complaint.

that the Complainant was indeed entitled to unemployment benefits from the Respondent. (CX 32.)

Applicable Law

Section 31105 of the STAA was enacted to encourage employees in the transportation industry to report noncompliance with applicable safety regulations governing commercial motor vehicles and to protect these "whistle-blowers" by forbidding the employer to discharge, or to take other adverse employment action, in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance. *Brock v. Roadway Express, Inc.*, 481 U.S. 250, 255; 107 S.Ct. 1740, 1744 (1987); 49 U.S.C. app. § 2305(a), (b). The STAA protects three distinct types of protected activities: (1) safety-related complaints (either internal or external), (2) refusals to operate a vehicle when the operation of the vehicle would in fact violate Federal safety standards, and (3) refusals to operate a vehicle if (a) an employee has a "reasonable apprehension of serious injury to himself or the public" because of the unsafe condition of the vehicle and (b) the employee has unsuccessfully attempted to have his employer correct the unsafe condition. 49 U.S.C. § 31105(a)(1).

Under the STAA employee protection provision, to establish a *prima facie* case, a complainant must show by a preponderance of the evidence that he engaged in protected activity, that he was subjected to an adverse action, and that the respondent was aware of the protected activity when it took the adverse action. *Auman v. Inter Coastal Trucking*, 91-STA-32 (Sec'y July 24, 1992), slip op. at 2; *Dartey v. Zack Co. of Chicago*, 82-ERA-2 (Sec'y Apr. 25, 1983), slip op. at 7-9 (case under analogous provision of ERA). The complainant must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Dec. 15, 1992), slip op. at 2.

However, where, as in this case, there has been a full trial of the matter and the Respondent has presented evidence of lawful reasons for terminating the Complainant, the question of whether the Complainant has established a *prima facie* case is moot, and the analysis of the facts can be limited to the issue of whether the Complainant has proven a violation of the STAA by a preponderance of the evidence. See *USPS Board of Governors v. Aikens*, 460 U.S. 711, 713-16 (1983). See also *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Anderson v. Jonick & Co., Inc.*, 93-STA-6 (September 29, 1993). The Administrative Review Board ("ARB") specifically stated in *Assistant Secretary & Ciotti v. Sysco Foods Co. of Philadelphia*, 97-STA-30 (ARB July 8, 1998), that where the case has been fully tried on the merits, it is not necessary to determine whether the complainant presented a *prima facie* case and whether the respondent rebutted that showing. The relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability.

In this case, I find the Complainant has failed to show that his reprimand, suspension and his termination were in reprisal for his September 27, 2004, and January 18, 2005, STAA complaints to OSHA or any other protected activity.

1. Whether the Complainant was a commercial motor vehicle operator as defined by Section 31101(1)(B) of the Surface Transportation Assistance Act

A “commercial motor vehicle” is defined under the Act as “a self-propelled or towed vehicle used on highways in commerce principally to transport passengers or cargo, if the vehicle is designed to transport more than 10 passengers including the driver.” 49 U.S.C. § 31101(1)(B). To be classified as a commercial motor vehicle operator, the Complainant had to drive vehicles that were able to transport at least 11 passengers, including the driver.

Before the hearing, the Respondent contested the Complainant’s status as a commercial motor vehicle operator. However, at the hearing, Russ Brown acknowledged that the drivers in Ogden were commercial motor vehicle operators. (HT, pp. 263-64.) The parties then stipulated that the Complainant was a commercial motor vehicle operator for the Respondent. (HT, p. 267.) There is evidence to support the stipulation. During the course of his employment with the Respondent, the Complainant drove several vehicles, including unit numbers 23 and 328. (HT, pp. 8, 110, 118.) Armadillo unit number 23 is a 2000 Dodge 3500 van with a factory rated seating capacity of 11 passengers, including the driver, and unit number 328 is a 2003 Chevrolet 3500 van with a factory rated seating capacity of 15 passengers, but it is configured for 11 passengers, including the driver. (HT, pp. 10-12.)

Thus, I find the Complainant was a commercial vehicle operator under the Surface Transportation Assistance Act.

2. Whether the Complainant engaged in activity protected by the employee protection provisions of the STAA and if so, whether the Respondent was aware of the Complainant’s protected activity.

The three separate personnel actions involved in this case are: a reprimand the Complainant received after stating he was too tired to accept a run, a two-day suspension when the Complainant called dispatch to be placed on duty while swapping into a new vehicle, and his termination of employment after refusing to meet with Russ Brown without Mr. Winslow.

As stated above, a protected activity can be a safety-related complaint (either internal or external), a refusal to operate a vehicle when the operation of the vehicle would in fact violate Federal safety standards, or a refusal to operate a vehicle if (a) an employee has a "reasonable apprehension of serious injury to himself or the public" because of the unsafe condition of the vehicle and (b) the employee has unsuccessfully attempted to have his employer correct the unsafe condition. 49 U.S.C. § 31105(a)(1).

Refusal To Take the Run on September 21, 2004

On September 21, 2004, the Complainant turned down a run offered to him, saying he was “fatigued.” (HT, p. 697.) Turning down the run in this instance constitutes a protected activity if accepting the run would have violated Federal safety standards. Since driving while fatigued is unsafe, and Respondent’s own safety policy stresses the dangers of driving while fatigued, this was a protected activity. The Respondent was obviously aware that the Complainant turned down the run and his stated reason for doing so.

Having Dispatch Start His Time on September 23, 2004

On September 23, 2004, the Complainant called the dispatcher and instructed her to place him on duty for time he spent swapping vehicles. This was not a protected activity. This was not a safety complaint, nor was it a refusal to operate a vehicle.

Refusing to Meet with Russ Brown without Mr. Winslow on December 16, 2004

The Complainant refused to meet with Russ Brown and Mr. Harms if he was not allowed to have Mr. Winslow accompany him. His refusal to attend the meeting without Mr. Winslow was also not a protected activity. Again, it was not a safety-related complaint or a refusal to operate a vehicle.

Filing Complaints with OSHA on September 27, 2004, and January 18, 2005

The Complainant's filing of OSHA complaints on September 27, 2004, and January 18, 2005, constitutes protected activity, as his complaints were safety-related. Moreover, Respondent was aware of the first complaint at the time of the decision to terminate the Complainant.

Filing Complaint with FMCSA on November 29, 2004

The Complainant's filing of the complaint with the Federal Motor Carrier Safety Administration involved driver duty hours, and thus, was safety related. Thus, it was a protected activity. It is unclear, however, as to when or if the Respondent was aware of this complaint because the Complainant offered no evidence or testimony on this issue.

3. Whether the Respondent retaliated against the Complainant for engaging in protected activity by reprimanding, suspending and ultimately terminating the Complainant or whether the Respondent had a non-retaliatory reason for its actions

The Complainant alleges that the Respondent failed to follow safety rules and retaliated against him for refusing to take runs when he was too tired. In particular, the Complainant believed he was disciplined because he started following the safety rules and turned down runs when he felt too tired to safely operate a commercial motor vehicle.

Respondent denies retaliating against the Complainant, asserting that he was disciplined because of his failure to comply with the company requirement to get adequate rest during his rest period, putting himself in on-duty status before he started a run, and his insubordination.

Since I find there was no protected activity that led to the suspension, I will not discuss that disciplinary action, but I will discuss the reprimand and termination.

The Reprimand

The Claimant asserts that his written reprimand for turning down a run on September 21, 2004, was retaliatory since he had turned down the run because he was too tired. The reprimand, itself, states: "Infraction: On 9-21-04 you refused a run, the night before you took yourself off

the board 6 hours early. This is an ongoing problem. It is the driver's responsibility to get adequate rest and be available when on call. The position of a full time road driver requires you to be available 5 or more days per week." EX Q.

Mr. Harms testified that he gave the reprimand to the Complainant pursuant to instructions from Mr. Hankins. (HT, p. 546.) Respondent denies that the Complainant was reprimanded for refusing to accept a run because he was tired. Mr. Hankins testified that the company policy is that drivers have an obligation to get their rest, and if a driver says he is too tired to take a run, the driver is taken off the list of available drivers and put at the bottom of the rotation list. (HT, p. 84.) He further testified that a driver is never disciplined for turning down a run simply because he is too tired or has an emergency. (HT, pp. 84-85.) However, a pattern of not getting rest within a short period of time is taken up with the driver and can result in a reprimand. (HT, p. 85.)

Ms. Leander explained that the Complainant was given the reprimand "because of the chronic problems that we've had with his unavailability and unreliability, not just in one instance, but repeatedly this is happening over and over again." (HT, pp. 510-11.) As Russ Brown stated, Respondent is in the transportation business, and they expected the drivers to get their rest and be ready to go to work after they achieved their rest period. (HT, p. 233.) The Complainant had a pattern of refusing runs, providing fatigue as his excuse, if there was too long a break between the end his rest period and when the dispatcher called him. Ms. Gaudern, Ms. Cranmore, and Ms. Leander all testified about his tendency to turn down runs. (HT, pp. 395-96, 463-65, 491-92.)

Gene Wartman stated in a written declaration sent to OSHA that the Respondent recognizes that circumstances occasionally arise beyond the control of the driver, which preclude the driver from getting adequate rest to be ready for duty. However, he said, "in Mr. Glover's case, he has a history of many instances where he has turned down runs due to being tired. This ongoing pattern indicates a failure by Mr. Glover to fulfill his responsibility to Armadillo to get adequate rest while off duty, and for this reason he was given a written reprimand on September 23, 2004. (CX 26.)

I am not persuaded that the Complainant was reprimanded because he turned down the run because of fatigue. The Complainant clearly had a pattern of picking and choosing the runs he wanted to take, exploiting the company policy of not requiring a driver to take a run if the driver said he was tired, and using that policy to manipulate the runs he wanted to take. The dispatchers felt that he was manipulating the schedule to suit his preferences. It was not unreasonable for Respondent to reprimand him for repeatedly failing to get adequate rest during his rest period when he knew the nature and demands of the job he had and acknowledged that it was his responsibility to get adequate rest during his rest period. Though he was not involved in the Complaint's reprimand, Russ Brown testified that the Complainant was an ongoing problem because time and time again, he had failed to achieve adequate rest. (HT, p. 238.) As stated in the reprimand, it was his responsibility to get adequate rest. He was reprimanded because of his failure to do so.

In *Schwartz v. Young's Commercial Transfer, Inc.*, the ARB held that the termination of a driver for refusing a run due to fatigue was not retaliatory where the evidence showed the driver

was either unable to unwilling to perform the shifts required by the employer on a regular basis. *Schwartz v. Young's Commercial Transfer, Inc.*, slip op., ARB No. 02-122, ALJ No. 01-STA-33 (ARB Oct. 31, 2003). Thus, I find the Complainant's reprimand was not issued in reprisal for protected activity.

I also note that if the Complainant had, in fact, been too tired to take the run on September 21, 2004, he would have told the dispatcher that he was tired immediately, instead of saying he would call back and then calling back half an hour later to say he was too tired. He was certainly well aware of the fact that he could decline a run if he was legitimately tired. There was no reason for him to wait half an hour to offer that excuse. Additionally, drivers who were on the board for a possible run but were too tired to take a run were expected to call in and ask to be taken off the board. (HT, p. 503.) The Complainant knew that since he had done exactly that the day before when he called at 9:00 p.m. and asked to be taken off the board. Respondent clearly had a valid reason for reprimanding the Complainant for his failure to get adequate rest during his rest period.

The Termination

The Complainant alleges that he was terminated in retaliation for all his safety-related activities. Respondent asserts that the Complainant was terminated for insubordination because of his refusal to meet with Russ Brown without the presence of Mr. Winslow. Joe Brown testified that the decision to terminate the Complainant for insubordination was made unanimously in a conference call he had with Russ Brown, Mr. Wartman, and Mr. Hankins. (HT, p. 743.) Joe Brown explained at the hearing that Respondent had other reasons for terminating the Complainant, including the indications in the pass-on sheets that the Complainant had been given preferential treatment, which he said was unacceptable. (HT, p. 745.)

Russ Brown had decided to meet with the Complainant to discuss his request for documentation showing that he could be called about a run that before his rest period was over. He was already planning to go to Ogden to deliver Christmas presents to the railroad officials and decided to modify his trip so he could meet with the Complainant. Because his office adjoins the area the dispatchers worked in, he overheard all their comments and complaints about the Complainant's lack of dependability, but he was also aware that Mr. Harms considered the Complainant to be an excellent driver. However, even Mr. Harms had communicated to Mr. Brown that there was a problem with the Complainant's dependability. (HT, p. 291.) Mr. Brown also wanted to meet with the Complainant to resolve the differences between Mr. Harm's assessment of the Complainant and the problems with the Complainant's lack of dependability. (HT, pp. 303, 365.)

It is very apparent from the evidence that Russ Brown was very angered by the Complainant's refusal to meet with him without Mr. Winslow. Mr. Harms testified there was no doubt in his mind that Russ Brown was genuinely mad. He stated that Russ Brown's face was bright red, he was "slamming his papers into the briefcase," and that he "threw all his stuff in his briefcase and told me to suspend [the Complainant] indefinitely." (HT, p. 607.) Russ Brown only rescinded the suspension after being instructed to do so by Joe Brown, but even Joe Brown testified that he considered the Complainant's conduct to be insubordinate because the

Complainant had refused to meet with a vice president of the company, and that he only hesitated because of the possible retaliation claim. (HT, p. 745.)

The transcript of Mr. Brown's conference call shows Mr. Brown's anger towards the Complainant, but his tone of voice in the audio-recording was even more revealing as to the depth of his anger and frustration at the Complainant's refusal to meet with him. The anger was apparent even though time had passed since the unsuccessful meeting. (CX 20.) Though during the call, Mr. Brown referred to the Complainant filing an OSHA complaint, it is very apparent that Russ Brown's anger was directed at the Complainant because he truly felt the Complainant had been insubordinate for refusing to meet with him and that he felt the Complainant was just setting Mr. Brown up to sue him. This is also consistent with his comment to Mr. Harms immediately after the meeting that people sued him all the time and the worse case scenario was that he would have to pay the Complainant some unemployment. (HT, p. 560.)

Joe Brown testified the Complainant could also have been terminated because of the preferential treatment he had been given. (HT, pp. 744-45.) The evidence shows that the Complainant had, in fact, been given preferential treatment by Mr. Harms. First out sheets are used by dispatchers to see what time drivers become available and what time they are put down for rest. (HT, p. 493.) The first out sheets for the Ogden dispatch center, dated July 26, August 17, August 21, September 22, October 18, December 15, and December 17, 2004, had handwritten special instructions from Mr. Harms for dispatchers on how to handle the Complainant if he turned down a run. (HT, pp. 364-66; 493-95, 648; EX MM; EX Z.) For example, the first out sheet for August 17, 2004, provided that if the Complainant turned down a run because he was tired, he was to be put down for rest for 12 hours with no exceptions. (HT, pp. 363-64; EX MM.) Another first out sheet dated September 22, 2004, had a notation that read, "If Mike says he's 'tired' put him down for rest from the time he turns down the run. NO EXCEPTIONS!" (EX MM.) At some point, Mr. Harms' special instructions for handling the Complainant were made permanent and were simply typed onto the blank first out sheets. (EX MM, pp. 3-5.)

Ms. Leander stated that these instructions pertaining to the Complainant were given because the Complainant often turned down runs. (HT, p. 495.) Mr. Harms implicitly denies the Complainant was given any special treatment, stating that Joe Brown told him that any driver who turned down a run because he was tired was to be taken off the board for 24 hours. (HT, pp. 575-77, 579.) However, this was obviously untrue. If Joe Brown had given such an instruction, there would have been no need to have these specific instructions written on the first out sheets, and there certainly would have been no need to specifically identify the Complainant by name. In fact, these same first out sheets had instructions to call Mr. Harms if a driver took themselves off the board or turned down a run. (EX MM.) Yet no call to Mr. Harms was required if the Complainant refused a run. Thus, there was obviously a separate standard for the Complainant, which Joe Brown said was unacceptable.

Russ Brown testified that no other drivers in Respondent's employ were given this type of specialized treatment. (HT, p. 365.) Joe Brown, as company president, said that with 400 employees, they could not single out a person and give him that type of special treatment. (HT, p. 745.)

It is apparent to me from the testimony and evidence that Respondent terminated the Complainant not because of his protected activities but because its management officials truly felt that the Complainant had been insubordinate in his refusal to meet with Russ Brown on December 16, 2004. Regardless of whether the Complainant's refusal to meet with Russ Brown without Mr. Winslow was considered by the Utah unemployment benefits officials to be insubordinate, it was very clear to me that both Russ and Joe Brown, both felt very strongly that the Complainant had been insubordinate to Russ Brown. It was apparent to me from their tone of voice and demeanor at the hearing that they still felt that way, even at the time of the hearing.

Russ Brown's feelings towards the Complainant were undoubtedly influenced by his knowledge of all the difficulties and complaints he had heard from the dispatchers about the Complainant's attitude and unreliability. He felt the Complainant had a history manipulating his hours of service to work whatever shift he wanted and not being available when he was needed and should be technically rested. (HT, p. 289.) Mr. Brown repeatedly overheard the dispatchers complaining when the Complainant turned down runs claiming to be tired and describing him as a driver who was turning down runs and could not be relied on. (HT, pp. 242, 371-72.) Almost every dispatcher said he was the hardest driver to work with. (HT, p. 511.)

The dispatchers reiterated their problems with the Complainant at the hearing. At trial Ms. Gaudern, the lead dispatcher, recounted her dealings with the Complainant (HT, pp. 460-62) and when asked if she enjoyed working with him, responded: "Mr. Glover was most of the time a hassle to work with...because he didn't want to go out on certain runs. You would have to go around him... He would argue about having of his hours of service interrupted." (HT, pp. 463-64.) She further stated that the Complainant had "a sort of arrogance about him." (HT, p. 466.) She explained that the Complainant did not like to take night runs and found ways of getting around accepting them by starting his hours of service early while servicing his van or by simply stating that he was too tired to take the night runs as a result of being awake all day. (HT, pp. 464-66.)

Ms. Leander testified that she overheard the Complainant's name mentioned by dispatchers more than any other driver's name. (HT, p. 514.) She personally had the unpleasant experience described earlier when the Complainant turned down the September 21, 2004, run she needed covered. She described the Complainant as the most difficult driver she ever had to work with. (HT, p. 491.)

Jeri Cranmore described the Complainant's reliability as a driver as a two on a scale of one to five. (HT, p. 395.) The Complainant often told Ms. Cranmore that he had to refuse a run because he had been waiting too long. (HT, pp. 396, 398.)

Chanda Barber described the Complainant as "hard to deal with" in the last two to three months before he was terminated. (HT, p. 410.) She testified that the Complainant had a bad attitude, explaining, "[i]f you would call him for a run and he didn't want to take it, he wasn't exactly the nicest person to talk to." (HT, p. 413.)

Lucy Spillman testified that when she called the Complainant before the end of his rest period on December 14, 2004, to alert him that there was a run for him when the run ended, the Complainant was rude and "pissy" when he turned down the run. (HT, p. 449.)

The Complainant knew when he was hired that his job was an “on demand” job that required to him to be available on very short notice to transport the railroad crews and that he was expected to be fully rested and available for a run after his rest period ended. Initially, there was a lot of work, and he was sent out on runs immediately after completing his rest period. He testified that he liked those kinds of days. (HT, pp. 654-55.) He apparently enjoyed the work and was anxious to maximize the work available to him. It was in response to his complaint that the rest period was reduced from 12 hours to 8 hours. However, as the runs started coming in less frequently for the Respondent, the gaps between runs became longer and longer.

The Complainant knew that Respondent counted on him to be on call and ready to take a run if called upon. (HT, p. 690.) He admitted that he could not always meet the Respondent’s expectations for him to be rested and available for a run. (HT, p. 690.) He made it very clear to the dispatchers that he did not like to wait too long after his rest period ended to get a run. He was especially unhappy if he completed his rest period in the morning and did not get a run until the evening. Even Mr. Harms was aware of his feelings on this. Mr. Harms warned Ms. Leander on September 21, 2004, that he would be surprised if the Complainant accepted a run that night. The dispatchers were unhappy with the Complainant because in their opinion, the Complainant was manipulating the company’s policies to take only the runs he wanted, he was rude and arrogant towards them, and his refusal to take runs had put them in very difficult positions.

Russ Brown was aware of their problems and complaints about the Complainant because of his proximity to the dispatchers. He wanted to meet with the Complainant to resolve his complainant about being called before the end of his rest period, and he wanted to resolve the problems the dispatchers had with the Complainant’s lack of dependability. Instead, the Complainant insisted on attending the meeting with Mr. Winslow, who was an employee of Respondent’s biggest client. The Complainant refused to meet without Mr. Winslow and then suggested that they meet at his attorney’s office, which Mr. Brown interpreted as a threat to sue him. The refusal to meet with Mr. Brown angered him immensely, especially when coupled with what he interpreted as a threat to sue him. His anger was exhibited in his actions immediately after the meeting and in his tone of voice during the conference call with Mr. Harms, Mr. Wartman and Mr. Hankins. It was very obvious at the hearing from his demeanor and voice that even at the time of the hearing, he was still angered by the confrontation and considered the Complainant to be insubordinate on December 16, 2004. Joe Brown exhibited a similar response to the Complainant’s conduct, noting that the Complainant had “refused to meet with a company vice-president.”

Clearly, both Joe and Russ Brown considered his refusal to meet with Russ Brown on December 16, 2004, to be insubordination. The Complainant was already treading on thin ice because of all the problems the dispatchers had had with him and his repeated failure to get adequate rest during his rest period. The refusal to meet with Mr. Brown was the straw that broke the camel’s back with respect to continuation of the Complainant’s employment.

After considering all the evidence and testimony, listening to the two recordings and observing Russ and Joe Brown’s demeanor and hearing their tone of voice at the hearing, I find the Complainant has failed to show that he was terminated for engaging in protected activity.

4. The Complainant's damages, if the Respondent indeed retaliated against him

Because I find that the Respondent did not retaliate against the Complainant, the Complainant is not entitled to any damages.

CONCLUSION

The Complainant is a commercial motor vehicle operator as defined by Section 31101(1)(B) of the Surface Transportation Assistance Act. His refusal to take a run on September 21, 2004, because he was fatigued and his filing of complaints with OSHA and FMCSA were protected activity, while his request to be put on duty status was not. However, the Complainant has failed to prove that Respondent's decisions to reprimand, suspend, and terminate him were in retaliation for any of his protected activities.

ORDER

It is ORDERED that the Complainant's September 27, 2004, and January 18, 2005, complaints alleging that the Respondent violated § 31105 of the Surface Transportation Assistance Act of 1982 be DISMISSED.

A

JENNIFER GEE
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, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. *See* 29 C.F.R. § 1978.109(a);