

**U.S. Department of Labor**

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**Issue Date: 17 January 2006**

Case No.: 2005-STA-00051

In the Matter of

JOSHUA J. ISRAEL,  
Complainant,

v.

SCHNEIDER NATIONAL CARRIERS, INC.,  
Respondent

Appearances: Complainant Pro Se

James C. Hardman, Esquire  
For Respondent

Before: Administrative Law Judge Janice K. Bullard

**RECOMMENDED DECISION AND ORDER**

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“the Act” hereinafter), and implementing regulations set forth at 29 C.F.R. part 1978. The pertinent provisions of the Act prohibit the discharge, discipline, or discrimination of employees who report violations of commercial motor vehicle safety rules or refuse to operate a commercial motor vehicle when such operation constitutes a violation of federal motor vehicle safety regulations or because of reasonable apprehension of serious injury due to unsafe conditions or health matters.

This decision and order is also governed by the provisions of 29 C.F.R. Part 18.

I. **PROCEDURAL BACKGROUND**

Joshua J. Israel (“Complainant” hereinafter) was employed by Schneider National Carriers, Inc. (“Respondent” hereinafter) from approximately December 24, 2004, until he was terminated on or about August 16, 2005. On June 4, 2005, Complainant filed a complaint with the Department of Labor’s Office of Occupational Safety and Health Administration (“OSHA” hereinafter) alleging that he had been harassed and discriminated against by Respondent and had been removed from active employment with Respondent for engaging in whistleblowing activities. After conducting an investigation, on July 20, 2005, OSHA issued the findings of the Secretary, concluding that Complainant was neither harassed nor discriminated against because

of his protected activity. The findings also concluded that Complainant's removal from active service was unrelated to his protected activity.

On July 28, 2005, Complainant filed an appeal of that determination with the Office of Administrative Law Judges ("OALJ" hereinafter). The case was assigned to me for adjudication, and by Notice issued on August 4, 2005, I scheduled a hearing in the matter on Tuesday, August 30, 2005, in St. Paul, Minnesota. At that time the parties appeared and were given an opportunity to present evidence and arguments. Exhibits, as described herein, were admitted into the record. After the hearing, Complainant submitted evidence regarding damages on September 7, 2005. Complainant filed a brief on October 17, 2005. Respondent filed a brief on October 14, 2005. This decision is based upon all of the evidence, laws, and regulations pertinent to the issues under adjudication.

## II. ISSUES

Respondent stipulated that it is jurisdictionally bound under the Act. Respondent further conceded that Complainant is a person covered under the Act and that Complainant engaged in protected activity as defined by the Act. The record supports these stipulations.

The issues to be decided are:

1. Whether Complainant was subjected to harassment, discrimination, reprisals, and eventually was discharged due to his protected activity.<sup>1</sup>
2. If so, what is the appropriate remedy.

## III. CONTENTIONS OF THE PARTIES

Complainant contends that Respondent retaliated against him by denying him loads, assigning him faulty trailers, failing to give him his requested days off, removing him from active service, and finally terminating his employment for engaging in protected activity under the Act. Complainant alleges that he raised safety-related issues with Deborah Knaus, the Regional Loss Prevention Manager at Respondent's Green Bay, Wisconsin operating center. Respondent denies that Complainant suffered any retaliation for his protected activity and further denies that Complainant's discharge was related to his protected activity.

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<sup>1</sup> Complainant was subsequently terminated from his employment with Respondent after the filing of his complaint with OSHA and the issuance of the Secretary's findings regarding his complaint. Since Complainant alleges that his subsequent termination was a continuing violation due to his protected activity, I expanded the scope of the administrative hearing to include his termination. Tr. at 108-111. Notwithstanding the possible lack of notice prior to the hearing, each party was given the opportunity to fully litigate the issue at the hearing and the opportunity to respond. Therefore, the requirements of administrative due process were satisfied. *See Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6<sup>th</sup> Cir. 1992).

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### A. Documentary Evidence

Filings and pleadings of the parties shall be referred to by description herein.

At the hearing, Complainant submitted exhibits marked CX 1, 2, 4 – 13, which were admitted into the record. Tr. at 90.

Respondent submitted exhibits marked EX 1 through EX 4, EX 6 through EX 12, EX 16, EX 17, and EX 19, which were admitted into the record.<sup>2</sup> Tr. 90, 146-148, 150-165, 189-259, 261-318.

Post-hearing, on September 7, 2005, Complainant submitted a statement of damages, which I have marked as ALJX 1. This exhibit contains exhibits marked CX 14 through CX 25. I hereby admit into the record ALJX 1 and CX 14 through CX 25.

Complainant was also granted additional time to submit a document that he described as an off-duty responsibilities letter authored by Workers Compensation Adjuster, Rachel Janda. Tr. 125. Complainant submitted the letter on September 7, 2005. I have marked this exhibit as CX 26, and hereby admit it into the record.

##### B. Testimony

###### **Joshua J. Israel**

Complainant was hired by Respondent as a truck driver on December 24, 2004. Tr. at 33. He had experience driving an 18-wheeler, and had been laid off by his previous employer in November of 2004. Tr. 32-33. Complainant's employment began with a mandatory four-week training course which consisted of two weeks of classroom work and two weeks of on-the-road driving instruction. Tr. 34-35. The on-the-road portion of the training required Complainant to drive with training engineer John Steigerwald and perform the duties required of a truck driver. Tr. 37.

Complainant's first contact with Mr. Steigerwald occurred on a Saturday in January, immediately before he was scheduled to begin his on-the-road training. Complainant testified that Mr. Steigerwald asked Complainant to meet him the following day, Sunday, at his truck, which was parked in Eagen, Minnesota. Complainant arrived at the site of the truck, but Mr. Steigerwald did not. Complainant called Mr. Steigerwald, who reportedly stated that he did not work on Sundays and directed Complainant to go home. Tr. 38-39.

On the following Monday, Complainant returned to the designated location and met with Mr. Steigerwald to begin the on-the-road portion of his training. Complainant's first task was to

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<sup>2</sup> Complainant objected to Respondent's exhibits as untimely. (Tr. 7-12) However, I found that Complainant was not prejudiced by any of Respondent's exhibits as they supplemented the testimony of Respondent's witnesses. Tr. 7-13, 90, 148, 165, 259, 318.

pick up a trailer and deliver it, and he did most of the highway driving. Complainant stated that nothing unusual happened on his first day on the road except that he noticed discrepancies between the way Mr. Steigerwald completed his logbook and the manner in which Complainant had been instructed during his classroom training. Tr. 42-43. Complainant explained that Mr. Steigerwald altered the entries of his logbook to permit him to stay in-service longer than if he had properly logged all of his time and activities. Complainant testified that Mr. Steigerwald instructed him to follow the same procedure in completing his own logbook. Tr. 43-44.

On January 12, 2005, after eight days of driving with Mr. Steigerwald, Complainant was issued a citation for inoperable taillights. Tr. 45; CX 4. Complainant was driving Mr. Steigerwald's trailer when he pulled into a weigh station and a police officer observed that the trailer's brake lights were not operating. The brake lights were dimmer than they would have been had they been working correctly but Complainant was not familiar with the trailer, and trusted Mr. Steigerwald's assurances that the equipment was compliant with safety regulations. Tr. 45-48. Complainant felt deceived by Mr. Steigerwald and confronted him about allowing him to drive noncompliant equipment. Complainant was upset, because the citation affected his driving record. Tr. 46-47, 51-52. Mr. Steigerwald then called Employer's Green Bay operating center and reported the citation and suggested that he be relieved of training Complainant, as they were arguing with each other. Tr. 52-53. Complainant did not want to drive Mr. Steigerwald's truck anymore because of his doubts about its safety.

Mr. Steigerwald drove the rest of the day, for approximately four hours, while Complainant rode in the passenger seat. Tr. 54-55. Complainant testified that Mr. Steigerwald sped on the highway ramps, took corners very sharply, and did not slow down or try to avoid potholes. Tr. 55. Mr. Steigerwald's driving caused Complainant to be jostled around in the truck's passenger seat, which had no suspension to cushion the ride. Tr. 55-57. Complainant also testified that Mr. Steigerwald had told him that some of his previous students had been injured while sitting in the passenger seat of his truck. Tr. 55-56. As a passenger, Complainant became sick to his stomach, and, after returning home, he vomited, experienced hot flashes, cold chills, and overall queasiness. Tr. 57.

Complainant testified that his back "felt like it was dislodged" after riding as a passenger in Mr. Steigerwald's truck. Complainant also testified that he had previously felt discomfort in his back from riding in Mr. Steigerwald's truck, but after riding as a passenger on the last day of his on-the-road training, his back "felt really, really, really dislodged." Complainant stated that he did not seek medical treatment for his back condition because his health insurance coverage was not scheduled to begin until March of 2005. Tr. 57.

On January 14, 2005, Complainant hand-delivered the citation to Deborah Knaus, the Regional Loss Prevention Manager. Tr. 66-67. Complainant recorded on the back of the citation his complaints regarding his training with Mr. Steigerwald. Tr. 66, CX 4, CX 5. At the end of the day, Complainant was called into a meeting with four management representatives to discuss his complaints regarding the training engineer. Tr. 67. Complainant was asked to provide specific incidents that concerned him, including his allegations that Mr. Steigerwald's driving was reckless and rough. He was also asked whether Mr. Steigerwald fell asleep while driving and Complainant answered that he did. Complainant testified that he felt that the management

personnel were trying to justify Mr. Steigerwald's actions and convince him that Respondent's policies had not been violated. Tr. 68.

Complainant was relieved of any further on-the-road training, and instead was directed to report to the Green Bay operating center where he took and passed both his skills qualification tests and a written test. Tr. 58-59. By the end of January 2005, he had been assigned a truck. Tr. 59-60. Complainant's first load assignment was completed without incident. Tr. 60-61. On his second load assignment, he encountered several problems. He was charged a loading fee of \$168 by the warehouse, which was deducted from his paycheck. Respondent refunded the fee to Complainant, but several pay periods passed before he was reimbursed, because of lost paperwork. Tr. 61-63. In addition, after delivering a trailer to the assigned warehouse, Complainant was told that his delivery was late because his appointment time had been changed from 11:00 a.m. to 8:00 a.m. He had not been informed of the change. Tr. 64. Complainant advised his service team leader that the delivery time for his load had been changed without notice to him. Complainant acknowledged that the service team leader did not tell him that the late delivery was his fault, and no action was taken against Complainant for the late delivery. Tr. 64-66.

On February 19, 2005, Complainant gave Ms. Knaus another written complaint involving his difficulty completing an assignment. Tr. 71, CX 6. Complainant had been directed to pick up an empty trailer at one location, and to proceed to another location to have the trailer loaded. However, he was unable to locate an empty trailer at the designated location, where he learned that other drivers had arrived and inquired about an empty trailer at that location. Tr. 72- 73. Complainant then used a satellite communication device provided by Employer to advise that no empty trailer was available at the designated location. Complainant was given another location to find an empty trailer, and when he did, he tried to confirm that he still had an appointment for loading of the trailer. Tr. 73-74. However, Complainant was informed that he needed to take a required break, as he had worked the maximum hours allowed without a rest. After his break, Complainant discovered the next morning that his assignment had been given to another driver. Complainant was given another assignment, but could not complete it because another driver had already taken the load. Tr. at 74. Complainant learned that two other loads were available and he contacted Respondent's customer service through the satellite communication system to request assignment of one of the two available loads. Customer service advised him he could not have one of the loads, and eventually, he was given another assignment. Because of his inability to take a load, Complainant wasted several days and lost the money he would have made completing the deliveries. Tr. 74-75.

Complainant also experienced problems when off-duty, such as being assigned loads on his designated days at home. Tr. 77-78. He testified that when he told his service team leader that he would not take a load on his day off, he was advised that it would "reflect on him." Regardless, Complainant did not pick up the assigned load and took his day off. Complainant admitted that upon returning to work after his time at home, he was assigned loads and not penalized for his previous refusal. Tr. 76-77.

Complainant also asserted that in February, 2005, he was kept on the road for more than four weeks, even though he was scheduled for three weeks. Tr. 76, 78. Complainant explained

that this occurred because he was given an assignment that took him far from his residence, which was contrary to the general practice of assigning a driver a load near his home when his scheduled time off approached. Tr. 79-80. Upon delivering the load at issue to Dallas, he was told by his service team leader, Eric Shack that he wanted to talk to Complainant about his complaints regarding his time off. Tr. 79-80. Complainant sent Mr. Shack a communication over the satellite system in which he requested a load rather than have a telephone conversation with him. Tr. 80-82, 85-86. He also stated in his communication that he felt Mr. Shack had abused his managerial discretion and had discriminated against him by assigning him loads contrary to his request for days at home. Tr. 80-82. When Complainant declined to have a telephone conversation with him, Mr. Shack decommissioned Complainant's truck. Tr. 78, 85-86.

Complainant was directed to report to the drivers' services desk at the Dallas operating center where he was told that Mr. Shack wanted to speak to him over the telephone. At that time, Complainant did call Mr. Shack by telephone, and was placed on a telephone conference call that included Employer's Regional Capacity Manager Bruce Wilkinson, Ms. Knaus, and Mr. Shack. During the conference call, Complainant relayed his complaints about how his requests for time at home had been handled. Tr. 86-87. During the conversation, Ms. Knaus stated that Complainant was too distressed and upset to be driving and told him to get on a bus and return to the Green Bay operating center. Tr. 87-88. However, Complainant disagreed with her assessment and refused to take a bus. Mr. Wilkinson returned his truck to him and gave him an assignment to Blaine, Minnesota, which was near his home. Complainant accepted the load, drove to Blaine, Minnesota, and took his required days at home. Tr. 87-89. Upon returning after his days at home, Complainant was regularly given load assignments. Tr. 89.

On March 7, 2005, Complainant faxed a complaint to Respondent's Human Resources department, in which he cited his previously lodged complaints about cigarette smoke during training, Steigerwald's non-compliance with safety practices, and complaints of discrimination. Tr. 91; CX 1, CX 2. On March 11, 2005, Complainant met with Mr. Wilkinson about the complaint. In the meeting, Complainant stated that he had complained to Ms. Knaus about being subjected to cigarette smoke during training, the incidents with the training engineer, the disparity in the treatment he was receiving, and his back problems. Tr. 92-93. Mr. Wilkinson asked Complainant what he expected and Complainant answered that he "wasn't going to quit, the problem was they were trying to force a person to quit." Tr. 93. As a result of the meeting Mr. Wilkinson told Mr. Shack to give Complainant longer assignments than the short hauls he had been receiving, which are generally less lucrative. Tr. 93-94.

Immediately after the meeting with Mr. Wilkinson, Complainant received another load assignment, but when he went to pick up the trailer, Complainant discovered that it was missing brake parts. He called for a road repair over the satellite communication system, and was told that a road repair service person would arrive at the site shortly. Tr. 94-95. Complainant had no previous experience requesting road repair but stated that he had been taught in training to make contact again with the road repair service if no help had arrived after waiting two or three hours. Tr. 95-96. Complainant tried to contact the road repair service again but received no response. He waited another two hours and tried to make contact again, but again received no response. Complainant waited another three hours and finally received a response from the road repair service and learned that there was no record of his first call for service. Complainant gave the

required information again and received a road repair service about an hour later. Tr. 96. Complainant left a voicemail message for Mr. Wilkinson about his problems with the faulty trailer and his attempts to obtain a road service repair. Tr. 97. Complainant estimated that the repair cost him twelve hours of down time. Tr. 96.

Complainant testified that on April 21, 2005, Respondent again interfered with his days at home. He received a load-relay assignment in which he would be responsible for only one segment of the load's delivery. However, Complainant was told to take the load all the way to its final destination and then take his days at home, which he did. Tr. 100. Complainant called Mr. Wilkinson to convey his concerns that he was not getting his time at home, and Mr. Wilkinson informed him that coming off his days at home to deliver a load was strictly voluntary. Tr. 100-101.

On May 19, 2005, Complainant was assigned to transport an empty trailer to a shipper and then hand-load the truck himself. He refused the load and informed customer service that physical labor hurt his back and that he feared that if he loaded the truck he would not be able to drive. Tr. 101-104. Customer service asked him to call his service team leader the following morning to discuss his job assignment capabilities and to receive another load assignment. Tr. 117. On May 20, 2005, Complainant called Becky Collar, his service team leader, and explained the problems with his back and his inability to load or unload a trailer. Ms. Collar insisted that Respondent's employment policies required that Complainant be able to hand-load or unload a trailer on occasion. As he felt he would be unable to perform this function, Ms. Collar informed Complainant that he could not receive any more load assignments at this time. Ms. Collar also advised Complainant to seek medical attention for his back and allowed him to file a workers' compensation claim. Complainant was assigned one final load assignment that returned him to Blaine, Minnesota, near his home. Tr. 117.

Complainant returned to Blaine, Minnesota on May 23, 2005 and contacted a representative in the workers' compensation department who instructed him to get a physical examination and inform her of the results. Tr. 117-118. Complainant saw Dr. Daniel Florrey, who gave him a full physical examination, issued a work ability report dated May 25, 2005, and referred him to pain management rehabilitative specialist Dr. Charlotte Roehr. Tr. 118-119, 121; CX 11; EX 18. After receiving Dr. Florrey's work ability report, Complainant faxed a copy to his workers' compensation adjustor and contacted either Becky Collar or someone else on her team. Tr. 122-123, CX 10, CX 11.

Complainant received a letter dated May 31, 2005 from Vickie A. Osmun-Volpe, Claims Case Manager III for Helmsman Management Services, Inc.<sup>3</sup>, denying him worker's compensation benefits because of the untimeliness of his claim. Tr. 123; CX 12. Complainant asked his service team leader what to do next and was told to wait for further communication. Tr. 123. Complainant also received a letter from Rachel Janda, Respondent's Workers' Compensation Adjuster, which contained her contact information, Complainant's claim number, and a notice regarding his duties as a driver while injured and unable to work. The notice advised Complainant that he was required to keep a daily log and send it weekly to payroll, or monthly, if he expected to be out of work for an extended period. Tr. 123-125; CX 26.

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<sup>3</sup> Helmsman Management Services Inc. is Respondent's workers' compensation insurance company.

Complainant complied with Respondent's policy, sending his last set of weekly logs in July of 2005. Tr. 126.

On June 22, 2005, Ms. Collar telephoned Complainant and asked him to remove his personal items from the truck because Respondent wanted to place the truck back in service. Complainant was "suspicious" because the request occurred right after he received correspondence from OSHA concerning the instant claim. Complainant asked Ms. Collar if her request was related to his complaint with OSHA. Ms. Collar stated that it was not related and the reason they were requesting the removal of his personal things was because the truck was currently sitting idle and Respondent wanted it back in service. Complainant then asked if the truck was being decommissioned. Ms. Collar stated that it was not and told Complainant that the truck would be returned to him if he was able to return to service. Complainant accused Respondent of constructive discharge. He also complained that he had been taken out of rotation for assignments when the reason for his injury and inability to take assignments was the result of actions by one of Respondent's employees. Tr. 126-128. During the June 22, 2005 conversation with Ms. Collar, Complainant also spoke with Kimani Jefferson, his team operations manager, and told Mr. Jefferson that he could currently take an assignment if it did not involve loading or unloading a trailer. Complainant also told Mr. Jefferson and Ms. Collar that he would inform them of the results of his forthcoming doctor's appointment. Tr. 128-129

Complainant saw Dr. Roehr on June 24, 2005, and was told to return for a second appointment. He left a message that he had another doctor's appointment in two weeks and faxed a copy of the doctor's order to Respondent. Tr. 128-130, 133. Complainant also received a voicemail message from Mr. Jefferson asking him to call if he wanted to talk about any of his concerns and gave a phone number where he could be reached. Complainant testified that he did call the number but he was unable to reach Mr. Jefferson and did not leave a message. Tr. 130-131. Approximately a week later, in July of 2005, Complainant received another message from Ms. Collar advising him that Respondent was going to place the truck back in service and directing him to clean out his personal belongings. Tr. 131. Complainant stated that by that time he had already removed his personal items, but had not informed any one that he had because he had complied with the timeframe Respondent had set for him to remove his things. Tr. 128, 131-132. Complainant did not return the keys to the truck because he anticipated being reassigned the trailer once he received clearance from his doctor. Tr. 133. During the period from Ms. Collar's telephone message in July until his discharge letter dated August 16, 2005, Complainant had no further communications with representatives for Respondent. Tr. 134; EX 19.

Complainant testified that he has been unable to look for other work because of his back problems. Tr. 136. Complainant believes that he was unfairly treated in assignments and attributes that treatment and his discharge to his complaints regarding safety issues. Complainant seeks pay back and front wages from Respondent, as well as reimbursement for his medical bills.<sup>4</sup> Tr. 135-141.

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<sup>4</sup> In Complainant's Statement of Damages, he also asks for damages pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101 et al. However, Complainant's complaint with OSHA and the basis for my jurisdiction over the instant matter arises out of allegations of retaliation and discrimination under the Surface Transportation Assistance Act. Any dispute regarding Complainant's treatment by Respondent that relates to the Americans with Disabilities Act must be raised in another forum which has jurisdiction to hear such claims.

## **Debbie Knaus**

Ms. Knaus is the Regional Loss Prevention Manager for Respondent. Tr. 146. She is responsible for supporting the drivers in the operations group, implementing programs to prevent accidents and injuries, assuring compliance with all of the Department of Transportation safety regulations, and helping to work with the drivers in managing fatigue. Tr. 147. Ms. Knaus is neither Mr. Steigerwald's supervisor nor the supervisor of any of the other training engineers, but training managers consult her on safety and training issues, as well as problems involving working with a particular person. Tr. 149.

Ms Knauss described a portion of the new driver's training that she conducts, called "Jump Start", during which she discusses safety, including Respondent's safety expectations; how to prevent accidents and injuries; and tools available to drivers to help them stay safe. Tr. 148. After her Jump Start presentation in December of 2004, Ms. Knaus found a memorandum on her desk from Complainant. In the memorandum, Complainant objected to being placed in a smoking room for training. Tr. 149. Ms. Knaus observed that Complainant's registration forms did not indicate a smoking preference, and administrative staff confirmed that Complainant had not raised this concern during training. Tr. 150. Ms. Knaus attempted to locate Complainant to discuss the memorandum, but he had left for the day. Tr. 150.

On January 14, 2005, Complainant hand-delivered to Ms. Knaus the citation he received while driving with Mr. Steigerwald. Ms. Knaus frequently receives drivers' citations and forwards them to the proper department for resolution. Tr. 178-179. Complainant was cited for a faulty light and the citation needed to be signed by a representative from Respondent's maintenance shop. Tr. 178. Ms. Knaus assured Complainant that she would complete the paperwork to dispose of the citation, and she did so. Tr. 168. Ms. Knaus was not aware that Complainant had written complaints about Mr. Steigerwald on the back of the citation until he referred to those complaints in another letter that he sent to her. Tr. 160-161; 168-170. Ms. Knaus explained that complaints about training engineers usually would be brought to the attention of the regional training advisor that supports the training engineers. Tr. 153. When Ms. Knaus finally received a copy of Complainant's January 14, 2005 complaint regarding John Steigerwald, she forwarded it to Rick Blazer, who was John Steigerwald's regional training advisor, and to Tom Dhein, the training service team leader. Ms. Knaus suggested that they meet to discuss Complainant's concerns. Tr. 179-180, 319-320. She was not informed of the results of any inquires that had been made regarding the issuance of the citation or the complaints against Mr. Steigerwald. Tr. 180, 320.

Ms. Knaus testified that Mr. Steigerwald was still a training engineer with Respondent, and to her knowledge, no other complaints had been received from other driver trainees. Tr. 152. Generally, the training engineer would provide a recommendation and feedback about the trainee that would be considered in Respondent's hiring decision. Tr. 153. Mr. Steigerwald's recommendation and feedback regarding Complainant was that he was a good driver. Tr. 153. Ms. Knaus did not know whether any disciplinary action was taken against Mr. Steigerwald in response to Complainant's complaints. Tr. 153-154.

On March 1, 2005, Ms. Knaus participated in the telephone conference held with Complainant, Mr. Shack, and Mr. Wilkinson. Tr. 154. She had been made aware of Complainant's concerns regarding his time at home, and his inquiries about when he would be considered off-duty after completing his Dallas trip. Id. Ms. Knaus explained that the satellite communication system was not the most effective way to communicate, and she was aware that there was confusion over Complainant's and Mr. Shack's expectations. Therefore, Mr. Shack sent Complainant a message to telephone him to discuss the problem. Tr. 154-155, 182-183. When Mr. Shack did not receive a telephone call from Complainant he deactivated Complainant's truck so he would call to discuss his concerns. Tr. 156. Ms. Knaus testified that it was not uncommon for a service team leader to deactivate equipment in order to force a driver to call him. When a truck is deactivated, the security gates will not let the driver out of the operating center and he is forced to call in to get the equipment reactivated. Tr. 155.

Ms. Knaus characterized Complainant's conduct during the conference call as "very irrational, very belligerent, very rude. . .". Tr. at 156. She stated that Complainant called Mr. Shack a liar, referred to Mr. Shack as if he were not present during the conference call, and, at one point, called Mr. Shack mentally deficient. Tr. 156, 167. Complainant seemed very agitated and Ms. Knaus became concerned about whether he could drive and operate his equipment safely. Tr. 156-157. At that point, Ms. Knaus offered Complainant two options: 1) he could commit to operating his equipment safely, delivering his next load, taking his days off, and then reporting to the Green Bay operating center to discuss his concerns face to face, or 2) leave his truck behind and ride a bus back to Minnesota to take his days at home. Tr. 157. Complainant committed to operating his equipment safely. Tr. 157-158. He was then given a load assignment near his home and his equipment was reactivated. Tr. 155-157.

After the March 11, 2005 meeting between Mr. Wilkinson and Complainant, Ms. Knaus did not receive any further complaints from Complainant. Tr. 176.

### **Bruce Wilkinson**

Mr. Wilkinson worked as a team operations manager for Respondent at its Green Bay operating center from August 2, 2004 until June 15, 2005, when he became Respondent's regional capacity manager, which involves driver recruiting. Tr. 188. While he was a team operations manager, Mr. Wilkinson was Mr. Shack's supervisor, who was in turn Complainant's immediate supervisor. Tr. 189-191.

Mr. Wilkinson addressed the incident where Complainant was sent for an empty trailer that was not at the designated location, and explained that the service team manager and operations managers are not involved with the initial assignment of trailers. Tr. 212. However, Mr. Wilkinson stated that when service team managers get calls from drivers in this situation, the manager would guide the driver through the process of informing the necessary department that no trailer was available at the designated location and request another assignment. Tr. 212-213.

Mr. Wilkinson's first involvement with Complainant was in the telephone conference on March 1, 2005, regarding a disagreement regarding time at home. Tr. 191-192. Complainant had received a load that would not return him home at the time that he expected. Mr. Shack wanted

to meet Complainant's expectations regarding his time at home but Complainant did not communicate his concerns until he had picked up the load and was enroute to Dallas. Tr. 193. Mr. Wilkinson explained that the satellite communication system allowed drivers to send and receive formatted information, and was not an adequate method to engage in a dialogue about a problem. Therefore, a telephone conversation was necessary. Tr. 192-193. During the telephone conference Complainant requested that he be assigned to a different service team leader, which Mr. Wilkinson denied. He found no compelling evidence that Mr. Shack purposely retaliated or discriminated against Complainant. Mr. Wilkerson also denied Complainant's request because he believed that successful drivers learn to work with different people and becoming effective problem-solvers. Tr. 202.

Mr. Wilkinson explained that as a national fleet driver, Complainant would receive one day off for every week he was on the road. Tr. 193-194. Respondent maintains a computer system that contains a driver calendar on which the service team leader records each driver's scheduled off time. The calendar, along with the freight schedules and load assignments, is used by the scheduler or transportation planner to assign particular loads to drivers. Tr. 194-195. Although Respondent tries to honor its drivers' expectations regarding days at home, exact dates cannot be guaranteed and off time depends upon the location of the driver's home, the needs of the other drivers, and the freight that needs to be hauled. Tr. 193-197. Communication between the driver and service manager helps maximize the chance of drivers receiving the days off that they hope for. Id. Mr. Wilkinson found no evidence that Mr. Shack bypassed the customary process when handling Complainant's requests for time at home. Tr. 197.

Mr. Wilkinson emphasized the importance of communication to address changes in hauls caused by weather, mechanical breakdowns, customer needs, and the driver's needs. Tr. 198-199. Most of Complainant's communications were sent through Respondent's satellite communication system, which allows the driver to send "canned messages" or to send free-form messages. Tr. 199. However, Mr. Wilkinson stated that the satellite communication system is designed to be used only for the exchange of "dry, business information," and is not the appropriate medium for addressing complaints or concerns. Tr. 200. Hoping to facilitate productive communications between Complainant and Mr. Shack, Mr. Wilkinson met with them on March 11, 2005. Tr. 197-198. They discussed establishing regular, proactive communication between Complainant and his service team leader. Tr. 201. Mr. Wilkinson recalled telling Complainant that it was in Respondent's interest to try to work with him, as he was a rarity in the industry – a driver with a good safety record that delivered his loads on time. Mr. Wilkinson observed that retention of drivers is one of the biggest challenges in the truckload industry. Tr. 216.

Mr. Wilkinson admitted that on occasion drivers will receive faulty trailers, and explained that Respondent's drivers are not the only people who have contact with the trailers. Often customers use yard drivers to move the trailers from one part of the yard to another; in addition, customers use more than one delivery company. For that reason, drivers are required to perform a pre-trip maintenance before driving a load. Tr. 209-210, 213. Mr. Wilkinson testified that drivers are familiarized with Respondent's procedures for reporting a faulty trailer. The driver is expected to send a message over the satellite communication system to the emergency maintenance department, and a determination is made about whether the trailer should be

serviced at its location, or brought to Respondent's shop for repairs. Tr. 211. Mr. Wilkinson testified that the time it took to respond to a call from a driver in need of repairs depends upon the location of the break-down and the availability of alternate trailers in the area. Tr. 213-214.

Respondent's office structure underwent a re-organization during Complainant's tenure with the company. Drivers and team leaders were aligned according to their geographic regions and Rebecca Collar became Complainant's service team leader. Tr. 202-203. As Ms. Collar was supervised by Mr. Kimani Jefferson, Complainant's team operations manager also changed at that time. Tr. 246-247. However, Mr. Wilkinson still acted in an advisory capacity to Ms. Collar. Tr. 257. Mr. Wilkinson introduced Complainant to Ms. Collar and sat in on their first meeting together. Tr. 203. As Ms. Collar had never met Complainant, she started the meeting with the baseline expectations that she had for her drivers. Mr. Wilkinson left the meeting before it had concluded. Tr. 203-204. Mr. Wilkinson denied giving Ms. Collar any special instructions regarding Complainant except that she should stress the importance of communication. Tr. 204.

Mr. Wilkinson also testified that team leaders do not have the ability to assign or unassign loads to the drivers. Tr. 204. Load assignments are made by a transportation planner, who is located in each regional market. Using global scheduling system software, and a process called optimization, the planner attempts to match up the loads with drivers based on driver availability and location. The transportation planners are in charge of the movement of the loads and the drivers once an assignment is made. The service team leaders only have the ability to influence the process in an advisory capacity by inputting a driver's desired at-home time into the driver calendar or making the transportation planner aware of any emergency situations the driver is experiencing. Tr. 204-205. Additionally, the load assignment system does not contain the name of the driver but categorizes drivers by work category. Tr. 206.

Ms. Collar informed Mr. Wilkinson of another incident where Complainant expressed concerns about his time at home. Complainant expected to be home on a particular set of days but his load assignments did not provide him with the days off he expected. Complainant had delivered a load to Eau Claire, Wisconsin, which is close to his home, but did not want to take his time at home until the following weekend. He was concerned that he would have to be back out on the road before he would be able to take care of his personal affairs. A number of calls were placed to the transportation planner and the transportation planner's supervisor to see if Complainant could be assigned freight that had semi-local destinations so he could remain on the road until he wanted to have his time at home. Unfortunately, no local load assignments were available. In an attempt to accommodate Complainant's time at home expectation, he was sent home early and allowed to stay home for the duration of time that he originally desired. Tr. 207.

The last time that Mr. Wilkinson had any contact with Complainant was on the day after Complainant refused an assignment because of his inability to load the trailer. Although Mr. Wilkinson was not present at the time Complainant refused the assignment, he received a voicemail message from Complainant the following morning asking to talk to him about it. Before contacting Complainant, Mr. Wilkinson asked Ms. Collar if Complainant had spoken to her about his concerns and his reason for refusing the load assignment. After discovering that Complainant had not spoken to Ms. Collar first, Mr. Wilkinson sent Complainant a satellite

message telling him that he would not become involved before Complainant attempted to work out his concerns with Ms. Collar, who was his immediate supervisor. Tr. 207-208.

Ms. Collar spoke with Complainant by telephone regarding his refusal of the assignment that needed to be hand-loaded, and Mr. Wilkinson listened to the conversation. Mr. Wilkinson wanted to provide Ms. Collar guidance with the process of advising a driver of his options if an injury occurred. Complainant was not informed that Mr. Wilkinson was listening to the conversation. Mr. Wilkinson first became aware of Complainant's back problem through this telephone conversation. Tr. 214-215. Mr. Wilkinson considered the ability of drivers to be able to hand-load or unload their trucks a "vital" requirement of the job. Mr. Wilkinson knew of no driver of Respondent's 15,000 drivers who is exempt from the hand-loading and unloading requirement. Tr. 208-209. Mr. Wilkinson also testified that previous drivers who had injuries resulting in a physical limitation were placed in a work hardening program until cleared by their doctors to perform the requirements listed in the driver job description. Tr. 221-222. Mr. Wilkinson stated that in the five years he had worked as a team operations manager he did not know of any driver that was allowed to continue to drive if he could not perform all the requirements listed in the driver's job description. Tr. 223.

After learning of Complainant's injury, Ms. Collar contacted the occupational health department. However, after Complainant explained that his back problem was a work-related injury, Ms. Collar placed him in contact with the workers' compensation department so he could file an official claim. Tr. 215. Mr. Wilkinson was not involved in the decision to terminate Complainant's employment or deny him workers' compensation benefits. Tr. 249. He also testified that he was not aware of any retaliation or discrimination against Complainant. Tr. 218, 253-254.

### **Rebecca Collar**

Ms. Collar is a service team leader at Respondent's Green Bay operating center. Tr. 260. In April, 2005, she was assigned as Complainant's service team leader. Tr. 260. Although Mr. Wilkinson had told her that Mr. Shack and Complainant had had some communication problems and advised her to stress the importance of communication, Ms. Collar was not given any instructions on how to treat Complainant or told that she should treat him differently than her other drivers. Tr. 265-266. During her initial meeting with Complainant, she referred to the standard form she uses in every meeting with a new driver and gave him a phone number to use when making his daily service call. Tr. 260-262; EX 12. Complainant and Ms. Collar also discussed his requests for time at home. At that time, Complainant informed Ms. Collar that he preferred to be home at the beginning of the month. Tr. 263.

Although Ms. Collar had stressed to Complainant the importance of talking directly to her on a daily basis, she did not hear from him on a regular basis. Tr. 216-262, 277-278.

On April 26, 2005, Ms. Collar refused to extend Complainant's driving time because of his fatigue. She explained that if a driver is close to exceeding his operating hours or seems fatigued, a service team leader has the authority to decide whether to allow the driver to continue driving or to pull him off the road. Tr. 269-270. Ms. Collar believed that Complainant was

fatigued and her refusal to extend his hours was not in any way predicated on the complaints he had made. Tr. 270. Ms. Collar also testified that she would do the same with any driver if there was a concern regarding fatigue level or safety and has done so to other drivers on many occasions. Tr. 207-271.

On May 6, 2005, Ms. Collar had a conversation with Complainant in which he demanded to speak with Mr. Wilkinson. Tr. 291. Complainant was concerned that he had received a 1000-mile assignment and would have to take his days at-home during the weekend instead of during the week. Ms. Collar requested that the two of them try to work through the issue together but when Complainant became adamant she transferred him to Mr. Wilkinson. Tr. 291-293. The issue was resolved by allowing him to stay at home for an extended period of time that would give him some of his days at home during the business week. Tr. 207, 293-294.

On May 19, 2005, Ms. Collar was made aware that Complainant had refused to perform an assignment that required hand-loading because of a back problem. Before she could contact Complainant to discuss the problem, he had already left a message for Mr. Wilkinson. Tr. 266. With Mr. Wilkinson sitting in on the call to guide her through the process, Ms. Collar contacted Complainant, who explained that he was unable to perform the loading portion of the assignment because he was experiencing back pain. At that point, Ms. Collar initiated a conference call with the occupational health department so Complainant could explain the pain he was feeling and a determination could be made about his ability to drive. Complainant told the representative from the occupational department that his back problems originated from an injury he had received during his January training with Mr. Steigerwald. Ms. Collar then placed Complainant in contact with Rachel Janda from the workers' compensation department. Tr. 266-267. During the telephone conversation, Ms. Collar reassured Complainant that his injury was not a reason for termination but was a safety concern that demanded a decision regarding whether he could drive. Tr. 267-268. On May 20, 2005, Ms. Collar informed Complainant that he could not receive any more load assignments until he received clearance from a doctor that he could load trailers by hand. Tr. 294. Ms. Collar testified that she had no knowledge of Complainant's complaints about his training engineer until he refused his load assignment due to his back injury. Tr. 297-298.

On June 22, 2005, Ms. Collar contacted Complainant and informed him Respondent had decided to return his truck to service. Tr. 272, 294. She asked him to turn in his keys and clean out his personal items from the truck. Ms. Collar reassured Complainant that his employment was not being terminated and that he was still employed with Respondent. Tr. 273. However, Complainant would not agree to return his keys or remove his personal items. Ms. Collar transferred the call to Mr. Jefferson, her team operations manager, so he could reassure Complainant that he was not being terminated. Tr. 273. As Complainant had a forthcoming doctor's appointment, Mr. Jefferson deferred the decision to transfer the truck assignment until Complainant informed him of the results of his doctor's appointment. However, Complainant did not call any of Respondent's managers after his doctor's appointment. Tr. 275.

Ms. Collar also contacted Complainant two different times in July of 2005. Both times she left him messages informing him that he needed to turn in his keys to the truck and to clean out his personal belongings. In both instances, Ms. Collar asked Complainant to return her call,

but she never heard from him. Tr. 275. Ms. Collar informed Mr. Jefferson of her conversations and attempts to reach Complainant. She testified that the decision to terminate Complainant's employment was made by Mr. Jefferson Tr. 274.

### **Kimani Jefferson**

Mr. Jefferson is a team operations manager at Respondent's Green Bay operating center and is Ms. Collar's direct supervisor. Tr. 302. He first met Complainant in March or April, 2005 after the reorganization of the drivers into geographical pods. Tr. 303.

Mr. Jefferson testified that he listened in on the June 22, 2005 conversation where Ms. Collar advised Complainant that Respondent had decided to put his truck back into service, consistent with its policy of reassigning a truck to another driver if the assigned driver expects to be off work for a long duration. Mr. Jefferson reassured Complainant that this was the normal procedure. Tr. 303-305. As Complainant had a physician's appointment scheduled, Mr. Jefferson agreed to delay returning Complainant's truck to service until he heard what Complainant's doctor had to say about his condition. Tr. 304. After his appointment with the doctor, Complainant sent in his work ability report. Mr. Jefferson forwarded the report directly to the occupational health department who determined that Complainant was not able to return to work at that time. Tr. 306.

Mr. Jefferson again delayed putting the truck back in service pending the results of another doctor's appointment two weeks later. After Complainant's scheduled appointment Mr. Jefferson received a fax cover sheet from Complainant but did not receive the work ability report. He called Complainant and requested that he re-fax the report. Mr. Jefferson also told Complainant that if there was anything else he wanted to discuss to please give him a call. Complainant neither re-faxed the report nor called Mr. Jefferson. Tr. 307.

In mid-July of 2005, Mr. Jefferson asked Ms. Collar to contact Complainant and ask him to return the keys to the truck and clean out his personal belongings. Ms. Collar left Complainant a message and asked him to call her. When Complainant did not respond by the next day, Ms. Collar left another message telling him to have his personal items removed by noon the next day. Tr. 307-308, 324-325. Complainant did not call to make arrangements to return the keys, nor to confirm that he had removed his belongings, which Respondent learned he had accomplished. Tr. 308-309.

After six weeks elapsed with no contact from Complainant, Mr. Jefferson considered discharging him. Tr. 308-309. Mr. Jefferson conferred with Respondent's legal counsel, and on August 16, 2005, issued a letter to Complainant, terminating his employment. Tr. 309, EX 19. Mr. Jefferson based his decision to discharge Complainant on Complainant's failure to communicate with any of Respondent's representatives for an extended period of time and his failure to return the keys to the truck when requested. Tr. 309-310, 317. Although he was aware of Complainant's complaints regarding his training engineer, Mr. Jefferson denied that his decision to terminate Complainant's employment was in any way related to any complaints that Complainant had filed. Tr. 310, 314-316. Mr. Jefferson further stated that he would discharge

any driver who failed to communicate for five or six weeks after being requested to do so. Tr. 310.

### C. Statement of the Law

The Act 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 activity. 49 U.S.C.A. § 31105(a)(1). Protected activity includes making a complaint “related to a violation of a commercial motor vehicle safety regulations, standard, or order.” § 31105(a)(1)(A). Internal complaints to management are protected under the Act. *Reed v. National Minerals Corp.*, Case No. 91-STA-34, Sec., Dec. and Order, slip op. at 4, July 24, 1992. A “commercial motor vehicle” includes “any self-propelled. . . vehicle used on the highways in commerce principally to transport passengers or cargo” with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. app. § 2301(1).

The Act further provides protection for employees who have “a reasonable apprehension of serious injury to [themselves] or the public due to [an] unsafe condition.” § 31105(a)(1)(B)(ii). Whether an employee’s apprehension of serious injury is reasonable is subject to an inquiry of whether a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. *Id.* To prevail under the Act, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sac’s v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003). By establishing a prima facie case, a complainant creates an inference that the protected activity was the likely reason for the adverse action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Once the inference is established, the employer has the opportunity to present evidence of a nondiscriminatory justification for the adverse employment action. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec’y June 23, 1992). The respondent need only articulate a legitimate reason for its action. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993). If such evidence is presented, then the complainant must prove by a preponderance of the evidence that the employer’s articulated legitimate reason is pretext for discrimination. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6<sup>th</sup> Cir. 1987); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248,253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action and that employer’s explanation is not credible. *Hicks*, supra at 515-524. In addition to discounting the employer’s explanation, the fact finder must believe the [complainant’s] explanation of intentional discrimination.” *Id.* at 519.

When an employer offers a nondiscriminatory justification for the adverse employment action, then it is necessary to decide whether that reason is pretextual. Instead of focusing on whether a prima facie case has been made out in this circumstance, “the proper inquiry is

whether the complainant has shown that the reason for the adverse action was his protected safety complaints.” *Pike v. Public Storage Companies, Inc.*, ARB No. 99-071, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999). However, “[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a ‘dual motive’ analysis.” *Mitchell v. Link Trucking, Inc.*, ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

#### D. Discussion

1. Whether Complainant was subjected to harassment, discrimination, reprisals, and eventually termination due to his protected activity.

Although Respondent concedes that Complainant engaged in protected activity as defined under the Act, Respondent argues that Complainant has failed to prove that he suffered an adverse employment action. Resp. Br. at 2. Although a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the complainant must still carry the burden of proving the necessary elements of discrimination. *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec’y Oct. 10, 1991). When a case is fully tried on its merits, the proper inquiry is not whether Complainant presented a *prima facie* case, but rather whether Complainant met his burden of proof of establishing liability. *U.S.P.S. Bd. Of Governors v. Aikens*, 460 U.S. 711, 713-714 (1983); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5<sup>th</sup> Cir. 1991). This does not relieve Complainant of his burden of establishing a *prima facie* case, but practically applied, once the respondent has produced evidence of a legitimate reason for why complainant was subjected to adverse action, it serves little analytical purpose to inquire whether the complainant presented a *prima facie* case. *Ciotti v. Sysco Foods of Philadelphia*, 97-STA-30 at 5 (ARB July 8, 2003).

I accept Respondent’s concession that Complainant engaged in protected activity when he reported concerns about his training instructor and the condition of equipment. I further find that Complainant’s termination constitutes an adverse action. Accordingly, Complainant has established a *prima facie* case of discrimination. However, I find that Respondent has demonstrated that Complainant was terminated for legitimate reasons unrelated to his protected activity. I further find that Complainant failed to provide evidence that Respondent’s actions during his employment and its rationale for his termination were mere pretext.

It is clear from the testimony that many of the acts that Complainant perceived as retaliation and discrimination were problems common to all drivers. During the hearing Complainant pointed out numerous times when he felt that he had been treated unfairly by Respondent including the change of his arrival time without being notified, being directed to pick up an empty trailer that was not at the designated location, being assigned a trailer that was not in good operating condition, and interference with his time at home. However, Complainant failed to provide testimony or any other evidence that demonstrates that these incidents occurred in retaliation for his complaints, and were not common occurrences for Respondent’s other drivers. Moreover, Respondent provided credible testimony that when Complainant brought these instances to his supervisors’ attention, either action was taken to correct the problem or

Complainant was absolved of responsibility. The uncontradicted evidence reflects that Complainant continued to receive load assignments despite making complaints, and that Respondent attempted to enhance his compensation by assigning him longer hauls.

I find little support for Complainant's assertions that Respondent discriminated against him by failing to accommodate his requests for at-home time. Respondent adequately explained how a driver's at-home time is but one factor considered when load assignments were made. The testimony regarding at home assignments is supported by Respondent's written at-home policy. See, EX 16. Moreover, the evidence discloses that Respondent attempted to assign him loads that corresponded with his needs, once they were articulated to the company's management.

Complainant concurred with Respondent's testimony that it accommodated his requirements for at-home time. Accordingly, I find that the record does not establish that Respondent's assignments to Complainant were discriminatory and retaliation for his protected activity.

Furthermore, Complainant's actions and failure to take action contributed to his continuing problems. The evidence reflects that beginning with his training and continuing throughout his employment, Complainant was told of the importance of communication. As demonstrated by descriptions of meetings with Mr. Shack, Mr. Wilkinson, and Ms. Collar, not only was Complainant directed to communicate with his service team leader and other representatives through Respondent's satellite communication system, but he was also instructed to make contact by telephone, especially when he had a concern or experienced a problem. By his own admission, Complainant continually refused to comply with requests to use the telephone for communication. Complainant explained that he did not believe he needed to speak personally to anyone because he thought the satellite communication system was an adequate means of communication. This explanation for refusing to initiate telephone contact is implausible, considering the difficulties he encountered with loads, his requests for specific time at home, and direct orders from supervisors to contact them by telephone.

I find no evidence that Complainant's bar from active duty was related to his claims of health and safety violations by Respondent. Even accepting Complainant's contention that he was injured on the job, Complainant admitted that he did not report the injury because he did not expect to have health insurance coverage until March, 2005. Complainant presented no evidence that reflects that he sought treatment for his back injury once he was covered by insurance. Moreover, Complainant appeared able to perform the duties of his job for a substantial amount of time after he sustained the injury. Once Complainant asserted he could not perform that duty because of his back injury, the record reflects that Respondent attempted to facilitate Complainant's rehabilitation. Ms. Collar and Mr. Wilkinson directed Complainant first to the occupational health department and then to the workers' compensation department in an attempt to help Complainant resolve his physical ailment so he could return to active driving.

I find no evidence of pretext in Respondent's refusal to assign Complainant loads once his medical condition was manifest. Although Respondent assigned Complainant a load after he refused to hand load cargo, I do not find it inconsistent with its assertion that Complainant could

not drive once an injury was reported. To have required Complainant to return to his home on his own would have penalized him. In addition, the record establishes that prior to his refusal to hand load an assignment, Claimant drove without incident despite having a back injury. The record reflects that thereafter, Complainant was taken off the active assignment roster. Complainant offered no credible evidence to rebut Respondent's position that it had followed company policy when he was removed from active driving. The evidence documents that loading a truck is among the duties of a driver. EX 3. In consideration of how assignments are made, I find it reasonable that a driver with a back injury would be prohibited from performing work that could exacerbate his injury, or present a potential safety risk.

I fully credit Respondent's explanation that he was removed from actively driving only until he produced evidence of medical fitness. The record establishes that Respondent gave Complainant sufficient time to provide a physician's report that would have allowed him to return to active duty. Both Mr. Jefferson and Ms. Collar credibly testified that they left messages asking Complainant to contact them, but he failed to do so. The documentary evidence establishes that Complainant was not discharged until some time had lapsed after Respondent asked him to contact them and return his truck keys. EX 19. Mr. Jefferson testified that Complainant's failure to contact him played a direct role in his decision to discharge him from his employment. Complainant engaged in self-defeating behavior by failing to provide Respondent with medical fitness reports, and failing to return telephone calls, or communicate with Respondent's representatives.

There is no evidence to support Complainant's allegation that his removal from active driving was in retaliation for his safety complaints. There is little temporal connection between Complainant's reports of safety concerns and his removal from driving. Complainant was not removed from active driving service until he informed Respondent that he was unable to hand-load the cargo of a trailer. Neither Ms. Collar nor Mr. Jefferson was aware of Complainant's earlier reports involving his training. Complainant was assigned loads until he refused to accept an assignment that involved loading and driving. Accordingly, I find that Complainant's removal from service was related to his reported injury.

Considering the record as a whole, I find that Respondent's reasons for terminating Complainant's employment were legitimate. Complainant originally filed a safety complaint with Respondent in January of 2005. It was not until August 16, 2005, after six weeks of receiving no communication from Complainant, that Respondent finally terminated his employment. As I have stated, I fully credit Mr. Jefferson's testimony that the primary reason for his decision to discharge Complainant was because of Complainant's failure to timely communicate with him and Ms. Collar regarding his treatment for his back injury and whether or not he would be able to return to driving. Moreover, Mr. Jefferson credibly testified that he would terminate the employment of any driver that failed to communicate his status for an extended period of time. Although Complainant was no longer actively receiving load assignments, Respondent still expected him to communicate his status to them and his failure to do so, especially when specifically requested, constituted a legitimate reason to terminate his employment.

Because I have found that there is no nexus between Complainant's protected activity and the adverse employment actions he suffered, I need not discuss the evidence he submitted regarding compensatory damages.<sup>5</sup>

V. CONCLUSION

As Complainant failed to demonstrate a link between his protected activity and an adverse employment action, I find that Complainant is not entitled to the relief he seeks under the Act.

RECOMMENDED ORDER

It is hereby recommended that the complaint filed by JOSHUA J. ISRAEL, and identified as Case No. 2005-STA-00051, be DISMISSED.

A

Janice K. Bullard  
Administrative Law Judge

Cherry Hill, New Jersey

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

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

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<sup>5</sup> In his brief Complainant asked for the imposition of Rule 11 sanctions under the Federal Rules of Civil Procedure. I am without authority to impose such sanctions. *See*, 29 C.F.R. part 18.