

U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, Louisiana 70433

(985) 809-5173
(985) 893-7351 (FAX)



Issue Date: 02 February 2006

CASE NO.: 2005-STA-2

IN THE MATTER OF

RONALD JOE MELTON,
Complainant

vs.

YELLOW TRANSPORTATION, INC.,
Respondent

APPEARANCES:

PAUL TAYLOR, ESQ.,
On Behalf of the Complainant

ANDERSON B. SCOTT, ESQ.,
On Behalf of the Respondent

RECOMMENDED DECISION AND ORDER

Procedural Background

This matter originated with an administrative complaint under the Surface Transportation Assistance Act¹ (the Act) brought on 28 Jun 04 by Ronald Joe Melton (Complainant) against Yellow Transportation (Respondent). The Occupational Safety & Health Administration (OSHA) issued a report of investigation on or about 23 Sep 04 and Complainant requested a formal hearing. Following continuances and motion practice, the hearing was conducted on 29-30 Aug 05. Both parties were represented by counsel and were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

¹ 49 U.S.C. § 31105 *et seq.*

My decision is based upon the entire record, which consists of the following:²

Witness Testimony of

Complainant
Gerald Seaborn
Ronald Martin
Jeffrey Lee Bacon
Billy Darrell Cullen
Robert J. Wade

Exhibits

Joint Exhibits (JX) 1 - 7
Complainant's Exhibit (CX) 1
Respondent's Exhibits (RX) 1- 7

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

Stipulations³

The parties have stipulated and I find as fact that:

- 1) Complainant became a fulltime employee of Respondent on 21 Apr 99.
- 2) At all relevant times, Complainant was Respondent's employee under the Act.
- 3) Respondent is an employer under the Act and is a person subject to the Act.
- 4) Complainant's job duties include operating commercial motor vehicles with a gross vehicle rating of 10,001 pounds or more on highways in interstate commerce.
- 5) In May 2004, Complainant's usual bid for Respondent was a trip from Nashville, TN to Jackson, MS with a scheduled starting time of 0600 on Wednesday, Friday and Sunday and a scheduled running time of 9 hours, including vehicle inspections and a one hour meal break.

² I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

³ JX-7.

- 6) At approximately 1130 on 20 May 04, Complainant went on vacation and was scheduled to return to work at 0600 on 30 May 04.
- 7) At approximately 0330 on 30 May 04, an employee of Respondent called Complainant at home and told him his dispatch was delayed.
- 8) Complainant called Respondent's dispatcher shortly after noon on 30 May 04. Respondent did not dispatch Complainant during that conversation.
- 9) Respondent issued Complainant a warning letter dated 10 Jun 04.⁴
- 10) Complainant filed a timely complaint with OSHA, OSHA issued a preliminary decision, and Complainant filed timely objections and a demand for formal hearing.
- 11) Complainant is a member of Local 480 of the International Brotherhood of Teamsters.
- 12) JX-1 is the Collective Bargaining Agreement applicable to Complainant's employment and was in effect in May and June of 2004.
- 13) JX-3 is an authentic copy of the 16 Jun 04 letter filed by Complainant to protest his warning letter.
- 14) JX-4 is an authentic copy of the "T-card" filled out in Complainant's case.

General Legal Background

The Act protects drivers who refuse to operate vehicles in violation of safety rules or because they reasonably fear for their or the public's safety.

(a) Prohibitions.--(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

* * *

(B) The employee refuses to operate a vehicle because--

(i) The operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

⁴ JX-2 is an authentic copy of that letter.

(ii) The employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.⁵

A federal regulation related to commercial motor vehicle safety provides:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.⁶

As a remedy, the Act authorizes an order to take affirmative action to abate the violation; reinstate the employee with the same pay, terms, and privileges of employment; and pay compensatory damages, including back pay. It also provides that the employee may recover reasonable costs in bringing the complaint, including attorney's fees.⁷

An employee establishes a prima facie case by proving he engaged in protected activity under the Act and because of that activity was subjected to adverse employment action. The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. If the employer is successful in rebutting the inference of retaliation, the employee bears the ultimate burden of demonstrating, by a preponderance of the evidence, that the legitimate reasons were a pretext for discrimination.⁸

⁵ 49 U.S.C. § 31105(a).

⁶ 49 CFR § 392.3.

⁷ 49 U.S.C. § 31105(b)(3)(A).

⁸ *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir.1987).

However, in a case fully tried on the merits, a shifting burden analysis of the prima facie case is not appropriate. The question becomes whether the complainant established, by a preponderance of the evidence, that he engaged in protected activity and that that the activity was the reason for his discharge or discipline.⁹

Factual Background

The basic facts of this case are not subject to significant disagreement. Complainant is a truck driver for Respondent. On 30 May 04, he was scheduled to drive a load from Nashville, TN to Jackson, MS. On that day, while waiting for a call that his load was ready, he called Respondent and took himself out of service. On 10 Jun 04, Respondent issued Complainant a warning letter for avoiding work.

Issues

Protected Activity

Complainant argues that he took himself out of service because of the delay. A departure at that point would have made him too fatigued to safely complete the trip. He maintains his actions were protected both because of his reasonable apprehension that driving would have been unsafe and because it would have been a violation of federal safety regulations.

Conversely, Respondent argues that Complainant was not fatigued, could have safely taken the load, and was simply avoiding work. Even if Complainant did in fact honestly and reasonably believe he could not drive safely, Respondent issued the warning letter in the good faith belief that Complainant was simply avoiding work. In addition, if Complainant was so fatigued that he could not safely take the load he was unqualified for his job.

Adverse Action

The parties have a fundamental legal dispute over whether the warning letter is an adverse action. Respondent argues that it does not qualify as “discipline or discrimination against an employee regarding pay, terms, or privileges of employment.” Complainant maintains that it does.

⁹ *Pike v. Public Storage Companies, Inc.*, 1998-STA-35 (Aug 10 1999).

Remedies

Respondent submits that since the warning letter has been removed, abatement is not a meaningful remedy. It argues that since Complainant never suffered any action that affected his position or terms of employment, reinstatement and compensatory damages are not applicable. Conversely, Complainant seeks damages for his emotional distress, costs, and non-monetary relief in the form of an order that Respondent must expunge all records of the protected activity from its files and post any favorable decision for 90 days in its terminals.

Protected Activity

Evidence

Complainant testified in relevant part as follows:

He has been a truck driver for about 35 years. He can not recall ever being fired from a job or having any chargeable accidents in a commercial vehicle. With the exception of the one bid to Jackson, he has spent all six years with Respondent on the extra-board.

An extra-board driver takes extra runs and covers for drivers who have a bid, but are on vacation, sick, or fatigued. Drivers have to stand by the phone to see if they have a load to take. There are one-hour call blocks from 1200 to 1300, 1500 to 1600, 1800 to 1900, and 2100 to 2200. Drivers on the extra-board can be called to take a run at any time, 24 hours a day, seven days a week; as long as they have the federally mandated rest periods.

The April 2004 bid from Nashville to Jackson was the only time he was not on the extra-board. He was bumped off that bid by a senior driver after four or five months. When he got the bid, he was given a schedule. He had a starting time of 0600 on Sunday, Wednesday and Friday. No one from Respondent mentioned that the run would be delayed frequently.

In the beginning of April, he tried to establish rest patterns. He went to bed between 1800 and 1900 to get at least eight hours of rest, but he did not always fall asleep right away. He lives about 33 miles of mostly four-lane road from the terminal. He normally arrived at the terminal between 0530 or 0545. He arrived early to get his paperwork and to see if there were any problems or hazardous material. He then filled out trip and sign-out sheets. He safety inspected the vehicle for 15 to 30 minutes. As a result, he typically departed the terminal around 0615 or 0620.

The terminal to terminal distance from Nashville to Jackson is about 415 miles and the driving time is eight hours; nine hours with an hour lunch break. The Nashville to Jackson run was often delayed. It would vary. According to the master freight agreement negotiated between the union and Respondent, Respondent was obligated to call him two hours before the run was set to leave. Once the run was delayed, Respondent had to send him out before midnight. The latest departure he recalls was at 1630.

On days he drove the bid, he typically set his alarm for about 0400. If the bid was on time, he normally arrived in Jackson at 1500. There was no given time when the load would be ready for his return to Nashville.

He took a ten day vacation in May of 2004. He spent much of his vacation in Alabama, where he went to bed at 2100 or 2200. He returned home the Thursday evening prior to 30 May 04.

Upon returning to Nashville, Complainant tried to get back to his sleeping pattern. He went to bed between 1830 and 1900 on Thursday, Friday, and Saturday, to try to get back into a cycle. He slept well those three evenings. On 29 May 05, he set his alarm clock for 0400 the next morning. At 0330, he was awakened by a call from Mike Millican. Mr. Millican said there was a delay and to stand by the phone. After he was done talking to Mr. Millican, he could not go back to sleep. He had no idea how long the delay would be. He got up, made coffee, and turned on the TV.

He was not sleepy and did not try to go back to sleep. He sat around, watched TV, and played with his grandson for most of the day. At noon he called the dispatcher to take himself out of service. He felt that if the bid went, he would be too fatigued to perform safely down the road. He talked to Danny Bennett and told him that he was going to become too fatigued to take this run. Mr. Bennett said he did not see anything on the dock or coming inbound. Complainant asked Mr. Bennett to drop him to his next bid. Mr. Bennett said it was no problem. Complainant's next bid was on Wednesday.

Had there been a dispatch available when he called Mr. Bennett, he would have had two hours to report. Assuming there were no delays and everything went smoothly, he would have left Nashville at about 1415 and arrived in Jackson nine hours later.

He was not surprised when he called at noon and heard there was no load yet. It was not the first time it happened and he just decided he could not do a run. It was not safe. He has driven before when he was sleepy. He was not alert, ran back and forth off the shoulder of the road, and slowed up. He was not safe to be driving and decided during the last trip he did tired, that he would not do it again.

He did his part by waiting for a run. He was not trying to get time off because he needs to work to pay his bills. He is paid by mileage and earns nothing when he sits at home.

JX-4 is a T-card that is filled out after each trip to track how many driving hours are available. Drivers can not exceed 70 hours per week by Department of Transportation regulation. The T-card says there was a delay at 0353.

He did not think the warning letter was personal and felt that Jeff Bacon was generally fair. Complainant claimed fatigue on a few other occasions, both before and after his 2004 warning letter. He did not receive a warning letter on those occasions.

Daniel E. Bennett testified via deposition in relevant part as follows:¹⁰

In May of 2004, he was a line haul dispatcher for Respondent. Drivers were paid based on their arrival at the terminal. Consequently, if a driver was scheduled to arrive at 0600, but there was no load ready, the driver would be called at home and told to stand by until a load was ready.

Complainant was a reliable and safe driver. On 30 May 04, Complainant called and said he would become too fatigued to safely complete his bid. He asked to be dropped to his next bid. Mr. Bennett marked Complainant's T-card, but did not discuss Complainant's call with his supervisor, Mr. Bacon.

Gerald Seaborn testified in relevant part as follows:

He drove the Nashville to Jackson run for 18 months in 2003 and 2004. The runs were delayed more than they were on time. He did not take the 0600 run and does not know how often that run was delayed.

¹⁰ JX-5.

Jeffrey Bacon testified in relevant part as follows:

He works for Respondent and in May 2004 was a shift operations manager, responsible for the daily operation of the line haul department. He was the line haul shift operations manager for approximately five years. As line haul shift operations manager he issued warning letters.

The purpose of a warning letter is to encourage the employee not to repeat an act in the future. JX-2 is the warning letter he issued Complainant. He issued it because Complainant used "fatigue" as a subterfuge for absenteeism. He still has a copy of the warning letter.

He was suspicious of the claimed fatigue because Complainant was making his first run after a 10 day vacation. Moreover, Complainant was on a Sunday morning bid that historically was delayed more times than it had run on time. In 2004, the Sunday bid to Jackson was on time about 25 percent of the time. Sometimes, it did not leave until as late as 1400. Finally, Complainant had pretty much spent his entire career with Respondent as an extra board driver, with a very irregular schedule.

When he issued the warning letter, the only information Mr. Bacon had about Complainant's calling in fatigued was a copy of his T-card.¹¹ The T-card shows Complainant was called at approximately 0330 and put on delay. Complainant then called at 1212, claiming fatigue and dropping to his next bid. Mr. Bacon did not call Mr. Millican or Mr. Bennett about Complainant's refusal to take the bid.

Occasionally drivers contact him with explanations of why they turned down a bid for fatigue, but he could not recall a specific example or name. In the ten days between Complainant's refusal of the bid and the warning letter, Complainant did not contact Mr. Bacon and he did not seek out Complainant for an explanation. It is the driver's obligation to either make the bid or provide a detailed excuse on why he could not.

Complainant filed a protest about the warning letter.¹² However, the protest did not help Complainant because it said he was ill, even though his T-card said he called in fatigued.

¹¹ JX-4.

¹² JX-3.

Mr. Bacon's understanding of the federal regulations is that any 24-hour cycle may include a maximum of 14 hours on duty with 11 hours of driving time, beginning when the driver punches in at the terminal. Waiting at home for a call to come in does not count as on-duty time toward the 14 hours.

If there had been a run available for Complainant after noon on 30 May 04, he would have had two hours to report to work and would have been expected to do a pre-trip vehicle inspection. He would have had a nine hour scheduled run time to Jackson and the earliest he would have arrived would have been shortly after 2300. Respondent has no control over what Complainant does before getting the call ending a delay and taking his bid. Whatever Complainant decided to do while on delay, he needed to be ready to leave on his run anywhere from 0600 to 2200.

He does not know how many times Complainant "booked off" fatigued while he was in the operations job, but thinks Complainant is qualified for his job.

Law

Under section A(1)(b)(i) of the Act, it is not enough for a complainant to have a reasonable belief that there would be an actual violation of a commercial motor vehicle safety regulation. The complainant must show a violation would have occurred.¹³ Complainants refusing to drive may cite the first prong of the Act and the "fatigue rule,"¹⁴ even if they are not fatigued at the time, but anticipate that they will become fatigued. However, a mere assertion or even proven good faith belief is insufficient and the complainant must offer evidence in support of the anticipated fatigue.¹⁵

Under section A(1)(b)(ii) of the Act, the complainant must show that a reasonable person under the same circumstances would believe there is a bona fide danger of an accident, injury, or serious impairment of health.¹⁶ In the event the employee believes that even though the requested act conforms to established Employer policies, it still creates a danger, the focus is not on the reasonableness of the Employer's policy, but the reasonableness of the employee's apprehension under the circumstances. An employer may have a policy which appears reasonable on its face, but with which an employee may refuse to comply under the Act, based on the specific circumstances.¹⁷

¹³ *Cook v. Kidimula International, Inc.*, 95-STA- 44 (Sec'y Mar. 12, 1996).

¹⁴ 49 C.F.R. §392.3.

¹⁵ *Stauffer v. Wal-Mart Stores, Inc.*, 1999-STA-21, (ARB Nov. 30, 1999).

¹⁶ *Smith v. Specialized Transportation Services*, 91- STA-22 (Sec'y Apr. 20, 1992).

¹⁷ *Stauffer*, 1999-STA-21, at 11.

Even if an employee establishes protected activity, he must also show that the protected activity was the reason for the adverse action taken by the employer.¹⁸ In determining motivation, the facts are taken as the employer believes them to be. The employer's subjective perception of the circumstances is determinative. If the employer does not believe the employee's action to be protected, then there is no violation.¹⁹

Discussion

Complainant engaged in protected activity if (1) by taking the bid he would have violated the "fatigue rule" or (2) he reasonably believed that taking the run would have been dangerous to him or the public. The "fatigue rule" simply prohibits the operation of a vehicle if the driver is so fatigued that to do so would be dangerous. As a result, in this case the two prongs tend to collapse into one, at least for substantive purposes.

There are no real factual disputes in this case. As an extra-board driver, Complainant took driving assignments with essentially no notice. He was aware of the general parameters of the bid. Although the nominal departure for the nine hour trip was 0600, Respondent could call him to come in any time up to 2200. Complainant was coming off of vacation and even returned home early to establish his sleep patterns. On the day in question he was called by Respondent at about 0330 and put on delay. He was not sleepy and did not try to go back to sleep. By about 1200 he determined that even if he got the call to go right away (and he had no indication from Respondent that a load would soon be ready), he could not safely complete a trip that would have lasted nine hours.

Although Respondent contends in the first instance that Complainant was not actually fatigued and simply using it as an excuse to avoid work, the weight of the evidence indicates otherwise. Complainant was a reliable driver who came home early from vacation to be ready to work. I found his live testimony to be credible on this issue. Complainant subjectively believed that he could not safely complete the trip.

Moreover, I find the weight of the evidence establishes his belief was reasonable. It is true that there is no allegation that Respondent's scheduling system violated any federal regulations and that other drivers, including Complainant, had operated under that system. While Complainant himself had accepted a departure as late as 1630, he also testified that he was unsafe and decided not to do it again. I find that it was not unreasonable for Complainant - who was expecting a 0600 departure, received a call at 0330 putting him on hold, did not return to sleep, and was on an indeterminate hold at 1200 - to refuse to remain on hold for a nine hour trip based on anticipatory fatigue.

¹⁸ *Calhoun v. United Parcel Serv.*, 99-STA-7, (ARB Nov. 27, 2002) (assuming evidence of a non-discriminatory reason).

¹⁹ *Allen v. Revco D.S., Inc.*, 91-STA-9 (Sec'y Sep. 24, 1991).

Respondent suggests that if Complainant truly was unable to take the bid because of anticipatory fatigue he was unqualified for the job. I again find the weight of the evidence to be to the contrary. There was no suggestion that this was a chronic problem. According to the testimony of Respondent's managers, Complainant was a reliable driver who was qualified for the job.

This Court's finding that Complainant engaged in protected activity presents the question of whether Respondent gave him a warning letter because of that activity. Respondent, in the person of Mr. Bacon, knew that (1) Complainant was an extra-board driver for most of his career and was used to taking trips on short notice; (2) Complainant was on the Jackson bid for at least a couple of months and the bid was delayed 75% of the time, sometimes to 1400; (3) Complainant was returning on his first day back from an extended break; (4) Complainant got a call at 0330 delaying the run; and (5) Complainant called at 1212 to refuse to drive.

While it may well have helped if Complainant had contacted Mr. Bacon right away instead of waiting to fill out a union form letter after he received a warning, Mr. Bennett gave him no impression that there was a problem. Similarly, Mr. Bacon felt no obligation to seek out Complainant for his side of the story before issuing a warning. On other occasions where Complainant turned back bids due to fatigue, he was not issued warnings.

In any event, the weight of the evidence is that Mr. Bacon, (whose testimony on this issue I found to be credible and who Complainant conceded was generally fair) honestly believed that Complainant was not refusing to drive for safety reasons and was trying to add another day off. Given the circumstances and information available to Mr. Bacon, I also find that belief to be reasonable, even if factually incorrect.

In sum, I find the weight of the evidence establishes that Complainant engaged in a protected activity and that Respondent issued a warning letter, but that Respondent issued the letter based on a reasonable belief that Complainant had not engaged in protected activity.

Adverse Action

Evidence

Complainant testified in relevant part as follows:

JX-2 is the warning letter he received by certified mail. JX-3 is a protest letter. There were copies provided by the union in the drivers' room. Complainant did not type the letter, but the handwriting is his. He sent the form to the union. He

marked off the “ill” because he was just following the procedure from the union. He was not ill when he turned back the bid.

Shortly after receiving the warning letter, he talked to “Mr. Baker.”²⁰ He told “Mr. Baker” that he did not appreciate receiving the warning letter, did not deserve it, and was not going to accept it. Respondent imposes discipline somewhat progressively. It is probably not unusual for drivers to get warning letters. The warning letter did not cause him to lose any pay or opportunities for promotion. It did not affect his schedule, benefits, or any other terms of his employment with Respondent.

He was informed that the letter was removed from his file, but does not think warning letters ever age off.

Jeffrey Bacon testified in relevant part as follows:

For six months, warning letters can be used to support discipline for a second non-cardinal offense. Even after the six month period, warning letters normally stay in the personnel file. They are just like any other document pertaining to the employment history, such as change of address forms and W-4 changes. The company might need the letters for a court case like this. Nonetheless, he removed the 10 Jun 04 warning letter from Complainant’s personnel file in late December of 2004.

Gerald Seaborn testified in relevant part as follows:

He has been employed by Respondent as a road driver for almost 28 years. He was a trustee on the Executive Board of the Teamsters Union for six years and a business representative for over three years. He has been a union steward for over ten years. As a business representative, he represented road drivers at various companies when there was a grievance or complaint. As a business agent he was a full time employee of the union and took a leave of absence from Respondent.

He has received more than 100 warning letters in his 28 years with Employer. He deserved a few of them, but was mad about the ones he did not deserve because he was trying to do a good job and then would get some nitpicky warning. It is not unusual for an employee to get two or three warning letters per year or to only have two in five years. It varies. Some drivers get very upset over warning letters and others do not care.

²⁰ I note the transcript refers to “Mr. Baker,” but “Mr. Bacon” makes more sense in context. The discrepancy, if it is one, is not significant.

A warning letter is discipline because it is the first step in the disciplinary process. It can eventually affect pay, benefits, and terms and conditions of employment. There must be a prior warning notice or warning letter before disciplinary action can be taken, unless there is a cardinal infraction, such as stealing, drugs, alcohol, or unprovoked violence in the workplace. Absenteeism is not a cardinal infraction and it takes a previous warning letter to be fired for absenteeism.

An employee files a grievance by filling out a form with the specifics of what happened and what remedy is sought. The form goes to the steward or business representative and the union processes it. The employer gets a copy and it goes through the committee process.

When a union member has a grievance or complaint, he can try to resolve it with a local level hearing. The company, the union, and the complainant sit down and try to come up with a decision. There is no panel acting as an arbitrator or mediator, just company and labor people. It is a negotiation.

If the grievance cannot be resolved at the local level, it is sent to the multi-state committee. The committee forms panels to hear the grievance. The panel has two union representatives from another local union and two employer representatives from another company that is signed onto the same collective bargaining agreement. They deliberate in secret and render a summary decision. It is in the nature of a trial.

Mr. Seaborn has been a panelist several times. None of those panels involved his local union. He has presented hundreds of cases to panels. He saw an employer raise an employee's work record even though it was more than six months old. The employee testified that he had been a good employee for five or ten years and the employer started reading off infractions from his entire work history. The employer was Respondent. At practically every hearing employers have gone back more than six months to bring up an employee's work record. He saw a case where a panelist brought up the old work record, even though the employee had not brought up his work record. The employer in that case was not Respondent.

He saw local hearings where Respondent raised issues relating to the employee's record more than six months old.

Discipline is controlled by the contract. The grievance procedure is for an employee who believes the employer breached the contract.

The contract does not allow grievances of first warning letters to a multi-state panel. Those letters can be protested and taken to the local level.

The rule of procedure under the contract is that warning letters older than six months can not be raised by the employer unless the employee opens the door by raising his good work record. Even though warning letters can only be used for six months as a first step, they stay in the employee's file and can be used if the employee opens the door at a multi-state hearing or in the case of accidents or personal injury.

If a case goes to the panel based on two warning letters, the employee can dispute the first letter if he protested it. If the panel finds for him on the first letter, it is removed. Even if the panel finds against him on the other offense letter, the second letter becomes his first and he can not be disciplined.

Ronald Martin testified in relevant part as follows:

He has been employed by Respondent since 1987 and has been a truck driver for almost 38 years. He currently holds a bid from Nashville to Atlanta. He became a Teamster in 1967. He was President of Local 480 from 1996 through 1998. The president is the principle officer of the local. He is familiar with the National Master Freight Agreement, since part of his job was to enforce the contract. He has also been job steward. Article 45 of the Southern Regional Over-The-Road Supplemental Agreement governs discharges and suspensions.

He has received warning letters from Respondent and considers them to be discipline within the meaning of the Collective Bargaining Agreement because a warning letter is a prerequisite to discharge. The contract is specific that an employee cannot be suspended or discharged without receiving at least one warning letter, unless it is a cardinal infraction.

A warning letter does not immediately affect an employee's pay. It can have an effect within a six month period, if the employee is charged with the same infraction or a general infraction of the same nature. Then the employee can be suspended, discharged or given another warning letter. The warning letters stay in the employee's file indefinitely, even though there is a limit on how the company can use them.

He has been a panelist on the multi-state grievances hearings a few dozen times over a three year period. He has presented 30 or 40 cases to panel hearings. He

recalls one hearing where Respondent raised a warning letter in excess of six months old. In that case the employee himself opened the door by saying he had never had a warning letter. Employees at hearings should know to avoid opening the door.

Billy Cullen testified in relevant part as follows:

He was a truck driver and teamster for almost 30 years. He is retired, but his last employment was as President and business manager of Teamsters Local 480. He entered that position on 1 Jan 99 and left it on 31 Dec 04. During that time, Local 480 and Respondent were parties to the National Master Freight Agreement. He was part of the negotiating committees that bargained for the union.

He had the responsibility to make sure the members of Local 480 were properly represented and enforce the provisions of the National Master Freight Agreement. He had the occasion to deal with Respondent's Labor Relations Manager, Robert Wade.

He served on multi-state grievance panels. At one panel he and Mr. Wade discussed the existence of some confusion about how long a warning letter stays in effect and whether it is discipline or not. They subsequently exchanged letters, clarifying their understanding of the issue.²¹

Warning letters are not discipline. They are more in the realm of counseling because before a company disciplines an employee — except for certain cardinal infractions — the company should counsel the employee and give him a chance to fix the problem. A non-cardinal infraction, without a warning letter, presents no danger of discharge, suspension, loss of pay, or loss of benefits.

If the employee does not believe the warning letter is warranted, he can come to the union, which can discuss it with the company. Some employees do not bother doing that and others do. If the employee protests, the union will discuss it with the company. Sometimes the company will rescind the warning letter, but if they do not, the union just files the letter because a warning letter cannot be heard by the grievance committee.

A warning letter does not affect pay, hours or any terms and conditions of employment. If an employee protests a warning letter and within six months receives discipline for a second offense, he can challenge the basis for that first

²¹ RX-1; RX-2.

warning letter when he takes his case to the union local. If the challenge to the first warning letter is upheld, the discipline would be taken back because there was no proper warning letter in effect. If he did not protest the first warning letter, he can not dispute it at the hearing.

Once six months has elapsed, the company can not raise the warning letter, unless somebody on the union side opens the door. If that happens and the company raises the warning letter, the employee can dispute it.

The only exception would be in severe vehicular accidents or lost time accidents where both the union and the company agreed to go back and look at the driving history of the grievant. Then his driving record over six months old could be admitted.

Robert Wade testified in relevant part as follows:

He was an over-the-road driver from 1978 until about 1989, when he went to the Union Hall. He was a member of the Teamsters Union from 1978 until 1996. He was a business agent for, and then President of, Teamsters Local 961. Since 1999, he has served as Respondent's manager of Labor Relations.

He represents Respondent in issues concerning the Collective Bargaining Agreement and comes in contact with representatives of the Local 480 of the Teamsters Union, which is the bargaining representative of Respondent's over-the-road drivers. Before coming to Respondent in 1999, he held the same position at Consolidated Freightways.

Both Consolidated Freightways and Respondent were under the National Freight Agreement and Southern Region supplemental agreements. He helped negotiate those agreements. He also has negotiated contracts on both sides of the table.

He is familiar with Article 45 of the over-the-road supplement to the National Master Freight agreement. He has attended multi-state grievance panels on both the union and company side as both panelist and presenter.

In deliberations, the panel would discuss whether the punishment fit the crime, if the employee was aware that his actions were either a violation of the contract or rules, and how the contract applies to the facts. No one ever argued that a company could not issue a warning letter unless they previously gave the employee a warning.

Sometimes Mr. Wade brings an employee's entire work record to the panel hearings, in case the employee opens the door and raises his entire work record.

Respondent keeps Nashville road drivers' personnel files in the office of the line haul department in Nashville. The management and supervision of the line haul department has access to those file. He does not keep duplicate copies of the personnel files. He keeps files of grievances that are being or have been processed.

He does not know why a Respondent employee who was no longer employed in management for line haul operations would have a copy of a driver's warning letter.

He advises, but does not decide whether to discharge or discipline employees.

He has been involved in rescinding warning letters, but that does not mean that the physical piece of paper is removed from the file. It means that the merits of the warning letter are rescinded and the letter is no longer a letter of warning. Individuals who received copies of the warning letter would normally get copies of the rescinding letter also, but no one retrieves all the copies of the previous letter.

Verbal warnings are not normally noted in the personnel file.

The applicable contractual terms provide that:

“The employer shall not discharge, suspend or take any other disciplinary action ... [unless it] shall give at lease one warning notice of the complaint against such employee to the employee in writing by certified mail and/or in person and a copy of same to the Union affected, by certified mail except that no warning notice need be given to an employee before he/she is discharged if the cause of such discharge is [a cardinal offense].

The warning notice as herein provided shall not remain in effect for a period of more than six (6) months from the date of said warning notice.”²²

“Appeal of warning notice will not be heard before the multi-state committee.”²³

²²JX-1, 223-4.

²³RX-3, 1.

The multi state committee will consider only evidence pertaining to the current complaint, except for evidence of past offenses for which warning letters were given within six months.²⁴

Law

While at one time a warning letter may have qualified as an adverse action under the Act, the current case law looks to the factual details of each case to see if they lead to tangible job consequences under the Act.²⁵

To constitute adverse action and establish prohibited discrimination under the Act, a complainant must have suffered “tangible job consequences.” Written reprimands which are part of a progressive disciplinary system do not constitute tangible job consequences, even if they may bring an employee closer to termination.²⁶

A “second Formal Written Warning” which states “future violations of this nature will result in more severe disciplinary action up to and including discharge” does not qualify as a tangible job consequence.²⁷

Finally, an initial warning letter issued under a collective bargaining agreement that allowed for discipline in the event of a second offense within nine months of the letter is not a tangible job consequence.²⁸

Discussion

Whether or not the warning letter fell within the definition of discipline under the Collective Bargaining Agreement is not particularly relevant. What is relevant is how the letter effected the terms and conditions of Complainant’s employment with Respondent. The significant facts which are relevant to a determination of whether the warning letter is a tangible job consequence and qualifies as a discipline or discrimination as contemplated by the Act are not subject to significant dispute.

²⁴RX-3, 1.

²⁵ *Oest v. Illinois Dep’t of Corrections*, 240 F.3d 605 (7th Cir. 2001).

²⁶ *Oest*, 240 F.3d at 612-613.

²⁷ *West v. Kasbar, Inc.*, 2004-STA-34 (ARB Nov. 30, 2005) (neither of the opinions at the ALJ nor the ARB level indicate whether a second warning letter was required under the contract before suspension or discharge could be imposed).

²⁸ *Agee v. ABF Freight Systems, Inc.*, 2004-STA-40 (ARB Dec. 29, 2005) (the nine month “age-off” period would, if anything make, these facts more favorable to Complainant’s position. Nonetheless, the ARB rejected it. The record is silent as to whether the letter remains in the file and may be used by the employer in rebuttal if the employee “opens the door” at a grievance hearing. Even so, that would be a slender reed upon which to distinguish the case at hand and find adverse action).

The warning letter issued to Complainant on 10 Jun 04 did not change anything related to his hours, work assignments, pay, opportunities for advancement, or retirement benefits. The letter had no immediate impact on any term or condition of his employment. The letter was relevant to Complainant's future employment in only two aspects. First, it meant that for the six months following issuance, if Respondent decided Complainant committed a second non-cardinal offense, it could impose discipline such as a suspension or discharge. Second, it meant that if at any time in the future, Complainant appeared at a multi-state hearing over a grievance and claimed he was never warned or committed any infractions, his statement could be impeached by the warning letter.²⁹

The warning letter did not qualify as discharge, discipline or discrimination under the Act.

Damages

Evidence

Complainant testified in relevant part as follows:

He received the warning letter at home. He was very upset because he thought he tried to be safe and did Respondent a favor, but Respondent said he was lying. It is not his normal practice to mark off fatigued. He only recalled one or two other occasions that he claimed fatigue.

He was stressed by the issuance of the letter. The stress lasted six months because another letter could have resulted in his termination. The stress went away once he knew Respondent could not use it for more discipline.

He never saw a counselor or doctor because of the alleged stress from the 2004 warning letter. The only physical symptom caused by the warning letter was a rash of red bumps on his legs, under his arm, and on his chest. He does not recall when the rash started but he saw the doctor for it in February of 2005. By the time he went to the doctor he had been told that the warning letter was removed from his file, although he did not know that for sure. He did not tell the doctor he thought the rash was caused by stress. The doctor did not know what caused the rash.

²⁹ There was some testimony adduced that warning letters may have been raised outside the provisions of the collective bargain agreement. I found that evidence to be unclear and not particularly relevant to this case, where the letter has been removed even for those purposes. In any event, it would seem that a remedy for those individuals lies within the fact that the collective bargaining agreement was violated.

He wants to be compensated for his emotional distress, but will let the Court decide what amount is appropriate. He also wants the Court to order Respondent to remove his warning letter from all of its files and to post this decision at every terminal. Finally, he also wants his attorney's fees and expenses to be paid.

RX-5 is a warning letter he received in February of 2003 for absenteeism. That letter moved him closer to discharge for the six months that it was in effect, just as the 2004 warning letter did. The two letters upset him equally.

He currently has a pending workman's compensation case against Respondent for carpal tunnel syndrome. He felt like there were needles sticking in his fingers and the pain was terrible. It was a potentially career ending problem. He had surgery for that in December of 2003 and was out of work for three months. His hands were bandaged and he couldn't use them. His wife had to help him bathe, eat, and go to the bathroom. He believed Respondent should pay for his treatment, but it refused. The therapy company that treated him after surgery threatened to sue.

When he returned to work in March of 2004, he was on extra-board for a month and then took the bid to Jackson.

About two years or so before the hand surgery, he had thyroid surgery and was off work for six to eight weeks. He has filed other grievances against Respondent seeking pay. He won some of those grievances. He also filed a number of discrepancy notifications, in which he claimed that Respondent violated the master contract and made monetary claims against Respondent.

He was in combat in Vietnam and had friends who were killed. He still feels some of those effects.

At his deposition for his workman's compensation case he said the money he sought in this case was just to compensate him for the time he spent working on this case. The \$10,000.00 he requested was a random number because Respondent's counsel kept pressuring him. He did not know he could not recover for the time he spent on this case.

Law

Compensatory damages under the Act include damages for pain and suffering, mental anguish, embarrassment, and humiliation.³⁰ They can be based solely on an unrefuted complainant's credible and persuasive testimony,³¹ even if it is not supported by evidence of professional counseling or other medical evidence.³²

If there is a finding of no violation of the employee protection provision of the Act, there can be no award of attorney's fees or costs.³³ A complainant appearing *pro se* is not entitled to an attorney fee award,³⁴ but is entitled to costs.³⁵

Authorized non-monetary relief includes orders to expunge offending documents from files³⁶ and post notices³⁷ and decisions.³⁸

Discussion

Damages are not relevant because there was no violation of the Act. Respondent did not issue the warning letter because of what it believed to be Complainant's protected activity. Moreover, the warning letter did not constitute actionable adverse action. However, even if there was a violation, the evidence is insufficient to support Complainant's request for compensatory damages. His live testimony was not as credible in the area of damages as it was in the area of his protected activity.

Complainant was highly offended when he received the warning letter. He considers himself to be a good employee and a safe driver. He was hurt that Respondent did not trust him when he said in good faith that it would be unsafe to take the delayed run that day. While he may have had some concerns that the warning letter meant he was only one more offense away from possible discharge, he had received a warning letter before.

There is no clear nexus between the rash and the warning letter. When he went to the doctor for the rash he had already been told that the letter was out of his file. He did not even mention the letter as source of stress to his doctor. When he testified in his workman's compensation deposition he minimized the stress from this case. He

³⁰ *Michaud v. BSP Transport, Inc.*, 95-STA-29 (ARB Oct. 9, 1997).

³¹ *Roberts v. Marshall Durbin Co.*, 2002-STA-35 (ARB Aug. 6, 2004).

³² *Jackson v. Butler & Co.*, 2003-STA-26 (ARB Aug. 31, 2004).

³³ *Abrams v. Roadway Express, Inc.*, 84-STA-2 (Sec'y May 23, 1985).

³⁴ *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, 95-STA-34 (ARB Aug. 8, 1997).

³⁵ *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995).

³⁶ *Self v. Carolina Freight Carriers Corp.*, 91-STA-25 (Sec'y Aug. 6, 1992).

³⁷ *Scott v. Roadway Express, Inc.*, 1998-STA-8 (ARB Jul. 28, 1999).

³⁸ *Michaud v. BSP Transport, Inc.*, 95-STA-29 (ARB Oct. 9, 1997).

indicated that he was seeking only to recover damages in this case for the time he spent on it. In this case he originally suggested \$10,000.00 as appropriate, but now leaves it up to the Court.

Any significant emotional distress Complainant suffered in this case is not from pain and anguish over the possible consequences of the warning letter, but rather anger at Respondent for giving it to him in the first place. Consequently, its removal did little to ameliorate that distress. He appears to have brought the action in hopes of vindicating his position that Respondent should have trusted him and not issued the letter; and perhaps also to encourage Respondent to change its policies concerning scheduling or issuing warning letters.

Complainant may have obtained partial vindication in the Court's finding that he was not trying to use fatigue as a subterfuge to avoid work. However, he cannot obtain any relief under the Act, in light of the further findings that Respondent issued the letter based on a good faith mistake of fact and that the letter is not discipline or discrimination.

Ruling and Order

Complainant's claim is **DIMISSED**.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 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