

**U.S. Department of Labor**

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**Issue Date: 06 October 2010**

CASE NO.: 2009-STA-34

In the Matter of:

DAVID HALM,  
Complainant

v.

SCHWAN'S HOME SERVICE, INC.,  
Respondent

**APPEARANCES:**

John E. Kerley, Esq.,  
For the Complainant

Alan L. Rupe, Esq., and Richard A. Olmstead, Esq.,  
For the Respondent

BEFORE: RICHARD A. MORGAN  
Administrative Law Judge

**ORDER GRANTING RESPONDENT'S MOTION FOR JUDGMENT ON PARTIAL  
FINDINGS AND DISMISSING COMPLAINT**

**I. Procedural History**

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 [hereinafter "the Act" or "STAA"], 49 U.S.C. § 31105 (formerly 49 U.S.C. app. § 2305), and the applicable regulations at 29 C.F.R. Part 1978.<sup>1</sup> The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

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<sup>1</sup> On August 3, 2007, various amendments to the STAA were signed into law, which were included in the Implementing Regulations of the 9/11 Commission Act of 2007. See Pub. L. No. 110-53, § 1536, 121 Stat. 266, 464-467. The STAA amendments generally strengthen protections for employees who complain of potential dangers and "problems, deficiencies, or vulnerabilities" regarding motor carrier equipment. The new subsection 49 U.S.C. §31105(b)(3)(C), provides for punitive damages up to \$250,000 where previously only compensatory damages were allowed. I previously ruled that punitive damages were not available in this proceeding.

Complainant, Mr. David Halm (hereinafter “Halm”), filed a complaint of discrimination with the Department of Labor, under Section 405 of the Act, against Schwan’s Home Service, Inc. (hereinafter “Schwan’s”), on or about August 9, 2007, alleging he was discharged by the Respondents, Schwan’s Home Service, Inc., in retaliation for complaining that Schwan’s Home Service, Inc. Flex-route or Split-route program violated Department of Transportation (“DOT”) “hours-of-service” regulations and created other problems for employees in the program. On March 20, 2009, the Secretary issued her Findings dismissing the complaint. By letter, dated April 17, 2009, Mr. Halm timely objected to the Secretary’s Findings and requested a hearing. I was assigned the case on April 28, 2009. The hearing was repeatedly delayed due to the year long absence of an important witness for the Complainant. The matter was tried, June 22-24, 2010, in Springfield, Illinois. Complainant’s Exhibits (“CX”) 1-2, 4-5, 8-11, 13, 15-16, and 20-24 were admitted. Respondent Exhibits (“EX”) 1-7, 9-10, 12-18, 20-30 were admitted. After the presentation of the Complainant’s case in chief, the Respondent moved for Judgment on Partial Findings, pursuant to Federal Rule of Civil Procedure 52 (c). The Respondent formally submitted its Motion and Memorandum in Support on August 27, 2010. The Complainant submitted his response on September 24, 2010.

## II. The Law

### A. STAA

A complainant may recover under the Act under three circumstances:

First, by demonstrating that he was subject to an adverse employment action because he has filed a complaint alleging violations of safety regulations. 49 U.S.C. § 31105 (a)(1)(A). This provision of the Act provides specifically and in pertinent part:

(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 --

(A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . .

The U.S. Department of Labor (“DOL”) interprets this provision to include internal complaints from an employee to an employer. DOL’s interpretation that the statute includes internal complaints has been found “eminently reasonable.” *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998)(case below 95-STA-34). The Circuit Court of Appeals has stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee’s concerns and comments are too generalized and informal to constitute “complaints” that are “filed” with an employer within the meaning of the STAA. *Id.*

Second, by demonstrating that he was subject to an adverse employment action for refusing to operate a vehicle “because the operation violates a regulation, standard, or order of

the United States related to commercial motor vehicle safety or health.” 49 U.S.C. § 31105(a)(1)(B)(i).

In such a case, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 1994-STA-55 (Sec’y Aug. 4, 1995). However, protection is not dependent upon actually proving a violation. *Yellow Freight System v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).

Third, by showing that he was subject to an adverse employment action for refusing to operate a motor vehicle “because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle’s unsafe condition.” 49 U.S.C. § 31105(a)(1)(B)(ii). To qualify for protection under this provision, a complainant must also “have sought from the employer, and been unable to obtain, correction of the unsafe condition.” 49 U.S.C. § 31105(a)(2).

For the Administrative Law Judge to find a violation, the complainant must demonstrate, by a preponderance of the evidence, that the protected activity was a contributing factor in the alleged adverse action. If the complainant makes such a showing the respondent must demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity or the perception thereof. The ALJ may employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in STAA cases.<sup>2</sup> The Title VII burden shifting pretext framework is warranted where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence. The ALJ may then examine the legitimacy of the employer’s articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action.<sup>3</sup> Thereafter, and only if the complainant has proven discrimination by a preponderance of evidence and not merely established a prima facie case, does the employer face a burden of proof.

B. Federal Rule of Procedure 52 (c)

Rule 52 (c) provides:

If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52 (a).

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<sup>2</sup> *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 7-10 citing *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 and nn.12-19 (ARB Sept. 30, 2003).

<sup>3</sup> *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The trial judge rules on motions for judgment on partial findings as a final factfinder, reviewing all evidence presented thus far without presumptions in favor of either party.<sup>4</sup> The judge grants the motion if, upon the evidence already presented, the judge would find against the party that has already presented evidence and in favor of the moving party.

### III. Stipulations and the Parties' Contentions

#### A. Stipulations

The parties agreed to, and I accepted, the following stipulations of fact (ALJ I):

1. The Respondent is a motor carrier engaged in commercial motor vehicle operations which maintains a place of business in Springfield, Illinois.
2. Some of the Respondent's employees, specifically Customer Service Managers ("CSM") and Customer Service Manager Trainees ("CSMT"), operate commercial motor vehicles, in the regular course of business, over interstate highways and connecting routes, principally to transport frozen food.
3. The Respondent is and was a "person," as defined in the STAA, 49 U.S.C. § 31101(3).
4. The Complainant is an "employee" as defined in the STAA, 49 U.S.C. § 31101(2).
5. The Complainant was hired on or about May 15, 2006, as a CSMT.
6. CSMs operate U.S. Department of Transportation regulated commercial motor vehicles, as defined in 49 U.S.C. § 31101(1)(a).<sup>5</sup>
10. On August 9, 2007, the Complainant filed a complaint with the Department of Labor, OSHA, under the provisions of the STAA.
11. The complaint was timely filed, i.e., within 180 days of the alleged adverse employment action.
12. On or about March 20, 2009, the Area Director, OSHA, issued "Secretary's Findings" finding "there is no reasonable cause to believe that Respondent violated" the STAA.
13. The Complainant timely filed objections to the Secretary's Findings on April 17, 2009.
14. The Office of Administrative Law Judges, U.S. Department of Labor, properly exercises in personam and subject matter jurisdiction to hear this matter.

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<sup>4</sup> *First Virginia Banks, Inc. v. BP Exploration & Oil Inc.*, 206 F.3d 404, 407 (4<sup>th</sup> Cir. 2000).

<sup>5</sup> The gap in the numbers results from the parties not agreeing to certain proposed stipulations.

15. The parties waive the 30-day requirement for the issuance of a decision under 29 C.F.R. section 1978.109(a).

There being adequate support in the record for the parties stipulations in Paragraph IIIA herein, those stipulations are hereby incorporated by reference into Paragraph IV as Findings of Fact and Conclusions of Law, as if fully set forth.

B. The Parties' Contentions:

1. *Complainant:*

The Complainant argues that his complaints to Schwan's management about the flex-route program constituted protected activity. He further argues that his refusal to operate a flex-route also constituted protected activity. He argues that Schwan's suspended and terminated him because he engaged in these protected activities.

2. *Respondent:*

The Respondent does not agree that the Complainant engaged in protected activities or that he suffered adverse employment actions for impermissible reasons. Respondent argues that it suspended Complainant when he refused to operate personally owned vehicles as part of a flex-route and refused to accept a different sales position in Schwan's. Respondent argues it terminated Complainant when he voluntarily abandoned his position. It argues that it suspended and discharged Halm for legitimate, non-discriminatory, reasons.

**IV. Issues**

- I. Whether, under 49 U.S.C. § 31105(a)(1), the Respondent discharged, disciplined or otherwise discriminated against an employee, to wit the Complainant regarding pay, terms or privileges of employment, because:
- a. he made or filed complaints (with his supervisors or others) related to violation(s) of commercial motor vehicle safety regulation(s), standard(s), or order(s), namely for "hours of service" and "hours of service reporting."
    - i. were his complaints "related to" to violation(s) of commercial motor vehicle safety regulation(s), standard(s), or orders?
- or**
- b. he refused to operate a vehicle, in or about January and February 2007, because
    - i. its operation, would have violated a regulation, standard, or order of the United States related to commercial motor vehicle safety or health, that is pertaining to operating hours and recording duty status. (49 C.F.R. §§ 395.3, 395.8, and 395.15).

## V. Discussion: Findings of Fact and Conclusions of Law

### A. Findings of Fact and Law

Schwan's started in 1951 when Marvin Schwan started selling ice cream from a truck in Minnesota. It has engaged in the door-to-door sales business and is primarily a sales-driven company. Schwan's had about 12,000 employees at the time of the hearing. Its food is delivered by customer service manager ("CSMs") in the familiar refrigerated Inca gold trucks which are dispatched from its depots to individual subscriber customer homes. (TR 37-39). The CSMs are also required to spend part of their work days soliciting for new customers and often worked 12-hour days.

The Complainant was hired as an employee of the Respondent commercial motor carrier, on or about May 15, 2006, as a commission-based customer service manager trainee ("CSMT") route delivery driver/salesman, for flex-route work. The CSMT position was basically a "training" position, although some experienced employees may revert to this position to act as a "builder," whose job it is to "cold-door" (individuals who have had no previous contact with Schwan's) or "warm-door" (individuals who had had some prior contact with Schwan's, but were not yet customers). (See CX 16). That involves soliciting new customers who will be added to routes a CSM would take over. Most CSMs worked the sales routes by themselves, i.e., solo routes.

The Respondent had an optional "flex-route" or split-route program where a route would be divided and worked by two CSMs, one a morning or AM CSM and the other the afternoon or PM CSM. The Respondent averred that the flex-route was ostensibly created to give employees more flexibility and less taxing work hours. About 45 percent of the District's routes were flex-routes in 2007. The CSMs would split all the sales commissions. An employee choosing a flex-route was required to either use their personal vehicle ("POV") or provide their own transportation for part of the day. It worked with the AM CSM arriving early at Schwan's depot, logging in on the handheld computer, taking and driving a loaded refrigerated truck 30-40 miles away and starting the food delivery route. This AM CSM was provided a hand-held computer terminal device ("HHT"), which always stayed in the truck, to make required DOT entries. At the end of his split-shift, the AM CSM would "warm-door" for about two hours or turn over the Schwan's truck to the next shift, i.e., the PM CSM, along with the computer on which he had logged out. The PM CSM, who had arrived at the community with the delivery route in his POV, usually directly from his own home rather than the depot, would have warm-doored for about two hours prior to picking up the truck. Upon picking up the Schwan's truck at the delivery community, the PM CSM would log in on the HHT and resume the food deliveries. In the meantime, after completing his soliciting for customers, the AM CSM would take his partner's POV (the PM CSM's car) and drive it back to Schwan's depot. At the end of his route and soliciting work, the PM CSM would drive the truck back to the depot and sign out on the handheld computer. Some flex-route partners would make alternative arrangements for POV use, e.g., one pair of CSMs jointly purchased a POV to meet their obligation to provide their own transportation.

In this case, Mr. Halm was the AM CSM. His partner, the PM CSM, was Bob Luconic. They would alternate their shifts weekly. Mr. Halm would drive his POV to Schwan's Springfield depot, enter his unique employee identification ("ID") number in the handheld computer and log in, ensure the truck was loaded, and drive the Schwan's truck out of the depot about 6:30-7:00 AM. He drove about 30-50 miles to his food sales route area, in Taylorsville-Ina, Illinois. There, he would first deliver product on the route then warm-door for one and one half hours to two hours until Mr. Luconic met him with the latter's POV. Mr. Luconic would have warm-doored about two hours before meeting him. At the truck "turn-over", Mr. Halm would log out on the handheld. Mr. Luconic would take over the truck and handheld computer also logging in his required DOT information under his own ID. Mr. Halm would do about two hours more warm-dooring then drive Mr. Luconic's POV back to the depot, arriving about 6-6:15 PM, where he would complete his paperwork then drive his own POV home.<sup>6</sup> Later that evening, Mr. Luconic would return to the depot in Schwan's truck, log out in the handheld computer, then drive his POV home.

The Complainant was initially expected to utilize his own vehicle for sales and route purposes, under the flexible route program. The use of employee's personal vehicle for the CSMT job is no longer required, flex-routes having ended on or about October 2008.

Mr. Halm was on sick leave January 23, 2007 returning January 29, 2007. Between January 23, 2007 and February 2007, Mr. Halm and Mr. Luconic complained about their "flex-route" to their manager, Mr. Chad Bullock, specifically about compliance with DOT regulations, reporting of on-duty hours, use of personal vehicles, insurance and liability matters, drivers carrying guns in their vehicles, expired license stickers, unregistered cars, and safety issues related to driving POVs.<sup>7</sup> Mr. Halm asked how they were to report on-duty hours given the handheld computer remained with the truck and was largely inaccessible if one was not with the truck. At the time, these concerns were not passed on the District General Manager, Mr. Hindt. Mr. Bullock found out they could not be required to use their POVs.

Sometime, in late January 2007, the Complainant and Mr. Luconic ceased using their POVs for the flex-route. All their driving between the site of their route and the depot was done in a company truck. Their switch from the AM to the PM CSM would be made at the depot and both had access to the handheld computer to make all their required DOT entries. That resulted in the Schwan's truck being driven an extra 60-100 miles per day. Mr. Bullock did not criticize this new procedure.

On or about February 8, 2007, Mr. Halm initiated a telephone conversation with Human Relations eventually reaching Roger Cardoni, Director of Human Relations, where the former testified he complained about: POV use and on-duty hours; misuse of an employee ID number;

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<sup>6</sup> After his termination, he prepared a log of his POV use, which contains some errors. (CX 20).

<sup>7</sup> Mr. Luconic prepared a memorandum about the substance of meeting with Mr. Halm's input. (CX 21). He stated that Mr. Bullock did not have an answer but got back to them, after speaking with human resources, and said Schwan's could not require them to use POVs for flex-routes; it was voluntary. The two then stopped using their POVs on the route. Mr. Halm testified that several other flex-route CSMs similarly stopped POV use. Schwan's Business Ethics Code of Conduct lists supervisors, HR, and the hotline as resources to whom to report ethics matters. (CX 9; RX 4). It is noteworthy that the Code gives an example whereby employees are advised to "clock-in" for safety meetings; addressing one of Mr. Halm's concerns. (CX 9, p. 16).

food fights/wrestling at the depot; fireworks use in the depot; horseplay with toys; non-payment for time spent at safety meetings; warehouse employee working 14 hours without a break; guns and ammunition in POVs; pay and commission matters; packaging; absence of lunch breaks; and, his concerns about POV and handheld computer use on flex-routes.<sup>8</sup> As can be seen, many of the complaints, many of which involved violations of Schwan's policies, did not involve him personally or his own work. (CX 10). A witness, Halm friend, and terminated for a 3-day absence, former Schwan's CSM driver-salesman, Blake McConkey<sup>9</sup> corroborated many of Mr. Halm's complaints; at least evidencing lax procedures by former depot manager David Hall. Former employee Otis Caudle, who testified that Mr. Hall had "taken care" of an occasion he had (improperly) exceeded DOT hours, corroborated some of the same complainants, as did Sgt. Bach and former employee Rex Metcalf. Sgt. Bach, who "loves" Schwan's, testified, "[I]t was all about sales." If a top salesman, such as Mr. John Hagewood, incurred DOT violations during manager Hall's tenure, they would be "rolled-over" under a new employee's ID and not reported as a DOT violation, according to Sgt. Bach. Mr. Metcalf, who testified he liked Schwan's, also corroborated how employee ID numbers were misused to cover-up DOT violations, but that he never told Mr. Hindt.

Former Schwan's Route Manager, Sergeant Steve Bach, whose testimony I find very truthful, consistent, and corroborated in the record, testified that there were DOT hours of service and DOT reporting violations at the Springfield depot which the former management, i.e. Mr. Hall, knew of and remedied under "false pretenses." When CSMs were signed-out on the HHT, subsequent hours (non-driving) were not accounted for, according to Sergeant Bach. He admitted the trucks each contained blank DDLs. Mr. Metcalf, who had worked a flex-route, testified that CSM (salesmen-drivers) "end-of-day activities were logged in to the HHT." Additionally, Mr. Metcalf said their warm-dooring was recorded on "building" slips for sales purposes.

On February 15, 2007, Mr. Halm ran into Mr. Todd Hindt and Ryan Schave, Schwan's managers, who were visiting the Springfield depot on an unrelated matter.<sup>10</sup> Mr. Hindt had never met or heard of Mr. Halm. Mr. Halm advised them of the new manner in which he and Mr. Luconic were operating their flex-route and voiced his concerns concerning the old mode. Mr.

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<sup>8</sup> Mr. Halm later listed those concerns on CX 22. Mr. Cardoni's recollection of the complaints was quite different, i.e., more limited, and are encompassed in Mr. Evert's final letter to Mr. Halm. (RX 2). He believed most of the incidents occurred under Mr. Hall who had left months ago and were not on-going. Mr. Cardoni reported the complaints to Schwan's Global Compliance department and informed Mr. Halm of the company's Ethics Hotline which the latter did not wish to use. Neither Mr. Hindt nor LGM Bullock passed on Mr. Halm's complaints to them. Likewise, Mr. Evert only recollected the six complaints addressed in RX 2. The investigation into alleged DOT violations was limited to Mr. Hall's denials. However, Mr. Hall substantiated a number of the other matters, according to Mr. Cardoni. But, Mr. Evert testified that Mr. Hall either substantiated them all or represented they were over or stopped. Mr. Evert insisted no one had ever informed him of any issue related to recording on-duty hours.

<sup>9</sup> Mr. McConkey, who did not like Mr. Hindt, testified that after Halm's termination, Mr. Hindt said "he'd cut the cancer out" at a meeting, which the former believed related to Mr. Halm. He and Mr. Christianson (fired for misconduct) never saw blank DDLs in Schwan's Springfield depot trucks. Mr. Luconic never heard management use negative words about Mr. Halm. Sgt. Bach testified that the "cut the cancer out" language came from former managers Mr. Francis and Mr. Hall, not Mr. Hindt. I find, in accordance with Mr. Hindt's testimony, that he never said such a thing.

<sup>10</sup> Mr. Hindt testified this occurred on February 15, 2007.

Halm raised his concerns related to horseplay, guns, and hours of service. Mr. Hindt, who had not previously heard of any of this, explained their new mode was unacceptable because of the increased costs of operating the company truck. After checking with Mr. Evert, the next day Mr. Hindt explained that although Schwan's could not require POV use, the flex-route required the use of personally-provided transportation. He offered Mr. Halm the choice of a CSMT/builder position until a solo route became available or to continue the flex route providing his own transportation. Mr. Hindt advised him if he did not choose to do either job he would be suspended pending a ruling from HR. Mr. Halm informed him he would do neither. Mr. Schave memorialized the substance of the meeting in an email to Mr. Evert and Mr. Cardoni, on the same day. (RX 22). There was no discussion of potential termination.

The Complainant was subsequently suspended by Mr. Hindt without pay, on or about Friday, February 16, 2007, "pending investigation" and pending his decision to accept a change in his work assignment.<sup>11</sup> Mr. Hindt, and later Mr. Roger Evert (Human Resources Manager), offered him two options: return to the flex-route arrangement and use personal transportation as required by the plan or take a CSMT position, a "builder" position, which did not require POV use pending an opening for a CSM. (RX 3). Mr. Halm's partner, Mr. Luconic was offered the same choice, given the weekend to consider it, and accepted the CSMT position on February 19th.<sup>12</sup> In a certified mail letter, dated Monday, February 19, 2007, Mr. Evert informed Mr. Halm to respond to Mr. Hindt by 5:00 PM, Friday, February 23, 2007.<sup>13</sup> (RX 3; CX 2). He was warned that his failure to do so or if he declined both options, his employment "would be terminated for refusal to accept a route change or work assignment." (RX 3).

On late Friday, February 23, 2007, Mr. Halm received and signed for the two certified letters from Mr. Evert of Schwan's. (RX 1 and RX 2). One addressed his two work options and required a response; the other reported the results of Schwan's investigation of his complaints.<sup>14</sup> (CX 1; CX 2; and, RX 2). He responded within an hour or so via email to Mr. Evert, voice-mails to Mr. Cardoni and Mr. Hindt, and with a certified mail requesting more time. (RX 18). According to Mr. Halm, neither Mr. Evert nor Mr. Cardoni responded to the request. However, Mr. Hindt returned the call and told Mr. Halm to follow the terms of the letter. Mr. Halm testified that he believed as of 5:01 PM, February 23, 2007, he had been terminated and thus did not return to work. However, his email states that he needed more than an hour to make a decision that will affect (his) livelihood and that he would contact Mr. Evert "following the advice of legal counsel." (RX 18). Mr. Halm did not contact Mr. Evert or management within the following week and did not appear for work February 26 – February 28, 2007. Mr. Evert explained the options given Mr. Halm were the only ones available at the time and he had not anticipated the former would decline both.

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<sup>11</sup> Mr. Hindt was not involved with Mr. Cardoni's investigation. Upon advice by Mr. Evert he decided that Mr. Halm would be suspended for "refusing work" if he did not choose either job option. Mr. Cardoni testified this was not a "termination" letter.

<sup>12</sup> Mr. Luconic felt being a CSMT was a demotion, but he earned more as a CSMT. (RX 28). He was later terminated for unrelated misconduct.

<sup>13</sup> Mr. Evert sent two letters, dated February 19, 2007, to Mr. Halm. The envelope for one of those two was post-marked (Tuesday) February 20, 2007. (CX 1A). Mr. Halm claimed not to have received either until Friday, February 23, 2007, around 4:00 PM. (See CX 4 and 4B).

<sup>14</sup> Mr. Evert's response concerning Mr. Halm's complaints was based on Mr. Cardoni's cursory investigation and report. (RX 27). Mr. Evert testified that the intent of the letter was to "get Mr. Halm back to work."

The Complainant's employment with Respondent formally ended, on or about March 1, 2007.<sup>15</sup> (CX 5 and RX 17). The termination letter from Mr. Evert, dated March 1, 2007, gave the following bases for termination: ". . . refusal to accept route change or work assignment and failure to appear or call." (CX 5). It states that Mr. Halm had not provided any answer to his two options and had not worked from February 26-February 28, 2007. Mr. Cardoni established that Schwan's had a policy to terminate employees with unauthorized absence of three or more days. Mr. Halm repeatedly insisted he never declined or refused to drive a truck, but rather that had management explained how to record his POV time, he would use a POV. Several other driver-salesperson CSMs also declined taking flex routes. In 2007, the CSMT position was not a step down from the CSM position, according to Mr. Hindt and Evert, but would have involved a different pay structure.<sup>16</sup>

Schwan's employees, including the Complainant admittedly, were specifically and fully trained on the use of the handheld computers and DOT compliance.<sup>17</sup> (See RX 6; RX 9; RX 14 and CX 8, "Handheld DOT Compliance" Video Participant Guide; RX 12: RX 14; RX 20-21; RX 23-24; RX 30; CX 10 pp. 21-22). The Guide to DOT Compliance, which Mr. Halm received in training, contained a number of examples concerning the use of HHTs on flex or "dual" routes. (RX 6). RX 12 specifically states that work time records "are maintained in one of two ways: Time Record (maintained in the handheld computer). Paper Log (also referred to as the record of duty status). . . the driver-salesperson . . . required to maintain a Time Record and is exempt from keeping a paper log." (RX 12 at C-10). Moreover, while drivers were charged with the responsibility to maintain hours of service, consistent with DOT regulations, "[I]t is the duty of each manager (and front-line supervisors) to ensure and enforce compliance." (RX 12 at H-6 and I-11).

Mr. Cardoni testified that terminating an employee is bad for Schwan's given the thousands of dollars to train them and the impact on customers. Schwan's would prefer to work things out. Schwan's takes DOT violations seriously and has about twenty employees working in its DOT compliance section. The HHTs cost from \$5,000 to \$10,000. That section audits HHTs reports daily. Schwan's has a "progressive" discipline policy, but will terminate employees for falsifications, such as misusing another's ID. However, numerous employees had been terminated for absences, in the Schwan's district encompassing Springfield, between 2002 and March 2007. (RX 5). Mr. Evert pointed out that at least two other present employees had reported improprieties related to Mr. Christiansen inappropriately instructing employees to work "off-the-clock" resulting in his termination. Mr. Evert testified that he, not Mr. Hindt, makes the

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<sup>15</sup> RX 16 is the manager's form, dated March 1, 2007, to terminate Mr. Halm. Mr. Bullock's, the LGM, supervisor notes reflect the last day worked as February 23, 2007 and the termination date of March 1, 2007.

<sup>16</sup> But, the Schwan's University Student Workbook does not show the CSMT position as one in the career path of a sales employee. (RX 21 at p. 15).

<sup>17</sup> Schwan's Employee Handbook, which Mr. Halm had read, states: "Hourly employees and regulated drivers are responsible for their time and must remember to record time worked. If you forget to enter . . . you must notify your supervisor in order for a correction to be made. . . No one may record hours worked for another on the . . . HHT." (CX 10, p. 21; RX 7). Mr. Halm testified that no one at Schwan's ever said use a drivers' daily log ("DDL") similar to RX 23. Although Schwan's training materials specified DDL use "if you do not use a HHC/HHT," Mr. Halm testified it was not required as he "never exceeded" the 100 air-mile radius or 12 hours and was a driver-salesperson. (RX 13; TR 227).

decision to terminate employees.<sup>18</sup> He testified about the Complainant's earnings commissions. (RX 29). Mr. Evert testified there has never been an occasion where an employee violated DOT regulations and not been terminated.

Mr. Evert felt Schwan's had "legitimate, non-retaliatory reasons" to terminate Mr. Halm, that is: the fact he did not respond with a choice of jobs; he failed to report for work; and, he had been absent from work. Again, Mr. Luconic, who had also complained, made the choice, became a CSMT, and was not terminated.

The Complainant briefly collected unemployment while diligently seeking comparable work. (CX 23). At the time of the hearing he had been hired and was working for Delivery Logistics and has been since May 4, 2007, earning about \$600 per week; less than his average of about \$1000 per week at Schwan's. (CX 24).

#### B. Complaint Clause

Halm complained, either in writing or verbally, to company superiors, about potential "hours-of-service" issues some of which could relate to potential violations of federal trucking regulations. These complaints were made to Chad Bullock, the Local General Manager, on January 23, 2007. Halm testified that he also raised complaints about hours of service issues in a telephone conversation with the Human Resources Director, Roger Cardoni, on or about February 8, 2007. He also raised hours of service issues with managers Todd Hindt and Ryan Schave on February 15, 2007.

Under the complaint clause, 49 U.S.C.A. § 31105(a)(1)(A), the complainant must at least be acting on a reasonable belief regarding the existence of a violation. *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 02-STA-5, slip op. at 3 (ARB July 31, 2003). Thus, an "internal complaint to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA." *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 99-STA-37, slip op. at 5 (ARB Dec. 31, 2002). The complainant need not prove an actual violation or that the complaint has merit.

Halm's "hours of service" complaints relate to Federal Motor Carrier Safety Administration ("FMCSA") regulations, codified at 49 C.F.R. § 395 *et seq.* Although the testimony is disputed with regard to the content of the complaints made to Mr. Cardoni, it is undisputed that Halm raised concerns about the flex-route program and accurate recording of on-duty hours with Mr. Bullock, Mr. Hindt, and Mr. Schave. The concerns raised by Halm were motivated by a reasonable belief regarding the existence of the FMCSA regulations. Thus, I find that at least some of Halm's complaints constituted "protected activity" under the STAA. *See Dutkiewicz v. Clean Harbors Environmental Services*, 1995-STA-34 (Sec'y Aug. 8, 1997) (internal complaint to superiors is a protected activity under the STAA); *accord, Stiles v. J.B. Hunt Transportation*, 1992-STA-34 (Sec'y Sept. 24, 1993) and cases there cited; and, *Pillow v. Bechtel Construction*, 1987-ERA-35 (Sec'y July 19 1993) (under analogous employee protection

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<sup>18</sup> Schwan's manual states human resources were responsible for "supporting the supervisor" with discipline. (RX 12 at M-1).

provision of the Energy Reorganization Act, contacting a union representative about a safety violation is protected), *aff'd sub nom. Bechtel Construction Co. v. Secretary of Labor*, 98 F.3d 1351 (11th Cir. 1996).<sup>19</sup>

### C. Refusal to Drive Clause

Halm does not argue that Schwan's alleged violations of the FMCSA regulations posed a safety risk to the driver or to the public. Thus, he can only prove protected activity under the first "refusal to drive" provision, 49 U.S.C.A. § 31105(a)(1)(B)(i). This provision requires that a complainant "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive -- a mere good faith belief in a violation does not suffice." *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993).

The parties initially dispute whether Halm can claim protection under the "refusal to drive" clause at all. The Respondent argues that Halm's eventual refusal to run a flex-route was not a refusal to operate a commercial motor vehicle. Instead, it argues that Halm was refusing to operate his POV and the POV of his flex-route partner. Thus, he cannot claim protection under § 31105(a)(1)(B)(i). Halm counters that he does not need to prove that he was refusing to drive the Schwan's refrigerated truck. Rather, he simply needs to show that he refused to run the flex-route in general because doing so would result in a violation.

I find that Halm's refusal to continue running a flex-route because it would allegedly violate a federal regulation constituted "refusing to drive" under the STAA. Schwan's argues that, based on the facts and Halm's testimony, Halm never refused to drive a "commercial motor vehicle." This is a mischaracterization of the facts and law. Halm's refusal to run a flex-route necessarily involved refusing to operate a commercial motor vehicle. Flex-route employees evidently had flexibility in their other transportation arrangements, but driving the refrigerated Schwan's truck was a necessary part of the flex-route. Additionally, the refusal to drive provision applies to an "employee" who refuses to operate a "vehicle." The last clause of § 31105 (j) defines an employee as an individual not an employer who directly affects commercial motor vehicle safety or security in the course of employment. As Halm is an STAA-covered "employee" who refused to operate a "vehicle," he can claim protection under the refusal to drive prong.

Halm must still prove, however, that his refusal to drive was based on apprehension of a regulatory violation. Unlike under the complaint clause, this refusal to drive must be based on an *actual* violation. Halm claims that running a flex-route would have caused actual violations of 49 C.F.R. §§ 395.8. § 395.8, in pertinent part, states:

- (a) Except for a private motor carrier of passengers (nonbusiness), every motor carrier shall require every driver used by the motor carrier to record his/her duty

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<sup>19</sup> Under the STAA, a safety related complaint to any supervisor, no matter where that supervisor falls in the chain of command, can be protected activity. *See, e.g., Hufstetler v. Roadway Express*, 1985-STA-8 (Sec'y, Aug. 21, 1986), *aff'd Roadway Express v. Brock*, 830 F.2d 179 (11th Cir. 1987).

status for each 24 hour period using the methods prescribed in either paragraph (a)(1) or (2) of this section.

(1) Every driver who operates a commercial motor vehicle shall record his/her duty status, in duplicate, for each 24-hour period. The duty status time shall be recorded on a specified grid, as shown in paragraph (g) of this section. The grid and the requirements of paragraph (d) of this section may be combined with any company forms. The previously approved format of the Daily Log, Form MCS-59 or the Multi-day Log, MCS-139 and 139A, which meets the requirements of this section, may continue to be used.

(2) Every driver who operates a commercial motor vehicle shall record his/her duty status by using an automatic on-board recording device that meets the requirements of Sec. 395.15 of this part. The requirements of Sec. 395.8 shall not apply, except paragraphs (e) and (k) (1) and (2) of this section.

§ 395.1 (e)(1) states the following:

(e) Short-haul operations--

(1) 100 air-mile radius driver. A driver is exempt from the requirements of § 395.8 if:

- (i) The driver operates within a 100 air-mile radius of the normal work reporting location;
- (ii) The driver, except a driver-salesperson, returns to the work reporting location and is released from work within 12 consecutive hours;
- (iii)(A) A property-carrying commercial motor vehicle driver has at least 10 consecutive hours off duty separating each 12 hours on duty;
- (B) A passenger-carrying commercial motor vehicle driver has at least 8 consecutive hours off duty separating each 12 hours on duty;
- (iv)(A) A property-carrying commercial motor vehicle driver does not exceed 11 hours maximum driving time following 10 consecutive hours off-duty; or
- (B) A passenger-carrying commercial motor vehicle driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty; and
- (v) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:
  - (A) The time the driver reports for duty each day;
  - (B) The total number of hours the driver is on duty each day;
  - (C) The time the driver is released from duty each day; and
  - (D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

§ 395.2 contains the following relevant definitions

“Driver-salesperson” means any employee who is employed solely as such by a private carrier of property by commercial motor vehicle, who is engaged both in selling goods, services, or the use of goods, and in delivering by commercial motor vehicle the goods sold or provided or upon which the services are

performed, who does so entirely within a radius of 100 miles of the point at which he/she reports for duty, who devotes not more than 50 percent of his/her hours on duty to driving time. The term selling goods for purposes of this section shall include in all cases solicitation or obtaining of reorders or new accounts, and may also include other selling or merchandising activities designed to retain the customer or to increase the sale of goods or services, in addition to solicitation or obtaining of reorders or new accounts.

“Driving time” means all time spent at the driving controls of a commercial motor vehicle in operation.

“On duty time” means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. On duty time shall include:

(1) All time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;

(2) All time inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All driving time as defined in the term driving time;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth;

(5) All time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded;

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle;

(7) All time spent providing a breath sample or urine specimen, including travel time to and from the collection site, in order to comply with the random, reasonable suspicion, post-accident, or follow-up testing required by part 382 of this subchapter when directed by a motor carrier;

(8) Performing any other work in the capacity, employ, or service of a motor carrier; and

(9) Performing any compensated work for a person who is not a motor carrier.

Schwan’s argues that Halm was a short-haul driver-salesperson, as defined by §§ 395.1 (e)(1) and 395.2, and thus is exempt from the record-keeping requirements of § 395.8. Therefore, it argues that Halm cannot prove that an actual violation of § 395.8 would have occurred, because that section was inapplicable. Halm agrees that he was a short-haul driver-salesperson. He argues, however, that Schwan’s flex-route program violated § 395.1 (e)(1) and § 395.8 in practice. § 395.1 (e)(1) states that short-haul drivers are exempt from the § 395.8 recording requirements if the motor carrier maintains true and accurate time records showing the time the driver reported for duty each day, the total number of on-duty hours each day, and the time the driver is released from duty each day. Halm argues that Schwan’s did not keep these records for its flex-route drivers. Halm states that drivers were only instructed on how to make

entries into the HHC. Because the morning flex-route driver would log out of the HHC before commencing warm-dooring, no accurate records were being kept of his on-duty hours.

Schwan's counters this argument by pointing out that there were numerous ways for a driver to record on-duty time other than the HHC. The main alternative identified by Schwan's is paper logbooks that can be used by drivers to record their hours manually. Respondent's Exhibit 12, a safety and procedure manual for drivers, states that work-time records "are maintained in one of two ways: Time Record (maintained in the handheld computer). Paper Log (also referred to as the record of duty status). . . the driver-salesperson . . . required to maintain a Time Record and is exempt from keeping a paper log." (RX 12 at C-10). Moreover, while drivers were charged with the responsibility to maintain hours of service, consistent with DOT regulations, "[I]t is the duty of each manager (and front-line supervisors) to ensure and enforce compliance." (RX 12 at H-6 and I-11). The Respondent presented evidence that its drivers, including Mr. Halm, had been made fully aware of how to report DOT hours when the handheld computer was unavailable. (RX 1, 9, 12, 14, 20, 23, and 24; see also CX 10 pp. 21-22 and CX 15).

Mr. Luconic explained that both driver and non-driver entries could be made on the HHT in addition to entering commissions. He was not familiar with DOT rules and testified he was unfamiliar with DDLs. Mr. Luconic testified there was no method for accounting for warm-dooring times. Mr. Hindt testified that Schwan's drivers were responsible for recording their on-duty hours and that he has terminated employees for DOT violations. He testified, and I find, that Mr. Hindt played "by the rules." Mr. Halm had received and been trained on Schwan's Truck Safety, Compliance, and Operation. (CX 13). That guide instructs CSMs to: "immediately punch in on the HHC upon arrival at work;" "punch out on the HHC after being relieved of all work-related duties;" and if the HHC malfunctions, to "[I]mmediately start a daily log to track today's hours of service records." (CX 13, p. 190). It also provides specific instruction for DOT compliance for driver-sales persons. (CX 13, p. 208). Moreover, in his Employment Agreement, Mr. Halm had agreed to abide by the Company's policies and procedures "including the Standards of Conduct, as set forth in the Employee Handbook . . ." (RX 1, Employment . . . Agreement, para. 2). Sergeant Bach testified that when CSMs were signed-out on the HHT, subsequent hours (non-driving) were not accounted for. He admitted the trucks each contained blank DDLs. Mr. Metcalf, who had worked a flex-route, testified that CSM "end-of-day activities were logged in to the HHT. Additionally, Mr. Metcalf said their warm-dooring was recorded on "building" slips for sales purposes.

I find, based on the materials in the record and the testimony of the witnesses, that Schwan's employees should reasonably have been aware that an alternative means of recording on-duty time (other than the HHT) was available. In particular, the drivers were trained on how to record hours in the case of a malfunctioning HHT. Halm was aware of what to do if his HHT were to fail; he should also have been aware of how to record time without the HHT. The inconsistent testimony of some of the witnesses regarding how to record hours of service indicates Halm may not have been the only confused employee, but nevertheless the information was readily available. Because it was Halm's responsibility to both know the proper way to record his on-duty time and to record his times, an actual violation of the recordkeeping regulations would not have occurred had he continued participating in a flex-route.

Thus, I find that Halm did not establish protected activity under the refusal to drive clause.

#### D. Suspension and Discharge

The complainant has the burden of proof to show that retaliation for protected activity was a reason for his suspension and termination. As part of this burden, the complainant must show that the respondent had knowledge of complainant's protected activity at the time of employer's adverse action. See *Homen v. Nationwide Trucking, Inc.*, 1993-STA-45 (Sec'y Feb. 10, 1994); *Stiles v. J.B. Hunt Transportation, Inc.*, 1992-STA-34 (Sec'y Sept. 24, 1993). If the complainant meets such burden, the respondent has the burden to prove a legitimate, nondiscriminatory reason for termination. A complainant may show that the employer's reason for termination is pretext by evidence that the employer's proffered reasons have no basis in fact, that the proffered reasons did not actually motivate his discharge, or that the reasons were insufficient to motivate the discharge. *Manzer v. Diamond Shamrock Chemical Company*, 29 F.3d 1978 (6th Cir. 1994).

The proximity in time between protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of a prima facie case. See, e.g., *Stiles v. J.B. Hunt Transportation, Inc.*, 1992-STA-34 (Sec'y Sept. 24, 1993) (Complainant discharged within one week of raising safety concerns sufficient for inference of causation); *Toland v. Werner Enterprises*, 1993-STA-22 (Sec'y Nov. 16, 1993) (Where complainant was discharged the same day he raised safety complaints, the secretary found that complainant raised the inference that he was terminated because he engaged in protected activity); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989) (Temporal proximity is sufficient as a matter of law to establish the final element in a prima facie case of retaliatory discharge); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987) (Temporal proximity alone did not support an inference of causation where there was compelling evidence that the employer encouraged safety complaints).

Schwan's argues that Halm cannot establish the inference that his protected advice lead to his suspension and termination. Rather, it argues that they were the result of voluntary choices made by Halm. Prior to his suspension Schwan's offered Halm the choice of continuing as a flex-route driver or moving to a CSMT position until a solo route became available. Schwan's argues that the move to a CSMT, had Halm taken it, would have been a lateral move, not a demotion. Halm's decisions to reject both options, not retaliation, lead to his suspension. Similarly, Schwan's argues that Halm's termination was the result of his own voluntary choice. Schwan's points out that Halm was suspended while he contemplated the options presented to him. He was informed that if he did not choose either option he would be terminated. Halm stated in an e-mail that he would contact Schwan's following the advice of legal counsel. Halm did not contact anyone from Schwan's, so it treated Halm as if he had abandoned his position and terminated his employment on March 1, 2007.

Halm argues first that the CSMT position offered to him was less favorable than a CSM position. He further argues that it was not incumbent on him to contact anyone at Schwan's regarding his employment. In support of this argument, he points out that the certified letter he received on February 23, 2007 stated that if he did not choose between the flex-route and the

CSMT position by 5:00 p.m. on that day his employment would be terminated. He left several voicemails requesting additional time to make a decision and received no response, save for Mr. Hindt telling him to follow the instructions of the certified letter. Thus, he believed that his employment was terminated at 5:00 p.m. on February 23, 2007 and therefore did not have to contact Schwan's regarding the work week of February 26, 2007.

I find that Halm has not established the inference that his engaging in protected activity caused his suspension and termination. When Halm informed Hindt that he and his partner were no longer using their POVs to operate the flex-route, he was told that this was unacceptable because of the additional fuel costs and wear and tear on the trucks of having the flex-route drivers switch positions at the depot. Halm protested that, without an accurate way to record on-duty time, operating the flex-route using POVs was illegal. There is no evidence on the record that Hindt, Schave, or Evert took Halm's complaints regarding timekeeping into consideration when he was informed that he must choose between a flex-route and a CSMT position. Rather, their motivation was a desire that the flex-route program be operated in the manner in which it was designed. Although his suspension occurred shortly after he made the complaints in person to Hindt and Schave, this temporal proximity does not establish an inference of retaliation. This is especially so because Halm had lodged prior complaints regarding hours of duty with Schwan's management and human resources and no adverse action was taken. The suspension followed so quickly from the complaints to Hindt and Schave because that was when they became aware that Halm and Luconic were operating the flex-route in a manner inconsistent with its design. There is no causal link between Halm's protected activity and his suspension and termination.

The record does not support Halm's contention that the option of a CSMT would have represented a demotion. While monetary considerations are not the only factor in determining whether a job option would be a lateral move or a demotion, it is important to note that Luconic earned more money as a CSMT than as a CSM. Additionally, Halm was assured that he would be in the CSMT until a solo route CSM position became available.<sup>20</sup> In *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), the Court held that a Title VII plaintiff bringing a retaliation claim must show that a reasonable employee or job applicant would find the employer's action "materially adverse." That is to say, "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." 126 S. Ct. at 2409. Applying that standard in this case, I find that a reasonable employee would not have found the choices offered by Schwan's to be materially adverse. Offered the same choices, Luconic took the CSMT position.

Schwan's argument that Halm abandoned his position is also valid. Halm's e-mail to Evert clearly stated that he would contact Schwan's after obtaining legal advice. Whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer. *Pennypower Shopping News v. N.L.R.B.*,

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<sup>20</sup> Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996); *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 12 (ARB Feb. 29, 2000) (approving *Smart* and other cases that "make the unexceptionable point that personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions or privileges of employment").

726 F.2d 626, 629 (10<sup>th</sup> Cir. 1984). While Schwan's did not object when Halm informed Evert that he required more time to make a decision and would contact them after seeking counsel, it was not reasonable for Halm to conclude that he had been terminated and decide not to provide Schwan's with any further information.

Schwan's also argues that Evert was the sole decision maker with regard to Halm's employment, and that he was not aware of Halm's protected activity. An e-mail from Schave to Evert and Cardoni states that Halm believed using his POV on a flex-route was "illegal" but does not go into detail about Halm's complaints. (RX 22). Schwan's argues that Evert was the sole decision maker when it came to Halm's suspension and termination and that he had no knowledge of the protected activity. Therefore, his motives could not have been retaliatory. Halm made specific complaints to Hindt, Bullock, Schave, and Cardoni, but there is no evidence that any of these men articulated Halm's complaints to Evert. Even assuming *arguendo* that Evert was made aware of the specifics of Halm's protected activity, the evidence still supports the conclusion that his decisions were not motivated by retaliation.

Even if Halm could raise the inference of retaliation, the preponderance of the evidence does not support the argument that Schwan's articulated reasons for suspending and discharging Halm was pretext for retaliation. Under the dual motive analysis, the burden shifts to the respondent to show that it would have taken the same action against the complainant even in the absence of protected activities. *Asst. Sec. and Chapman v. T. O. Haas Tire Co.*, 1994-STA-2 (Sec'y Aug. 3, 1994), appeal dismissed, No. 94-3334 (8th Cir. Nov. 1, 1994). To establish pretext, it is not sufficient for a complainant to show that the action taken was not "just, or fair, or sensible . . . rather he must show that the explanation is a phony reason." *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 9 (ARB July 31, 2002). With regard to the suspension, Halm was treated in the same manner as Luconic, his flex-route partner. Luconic had complained with Halm to Bullock about the flex-routes, and he was offered the same choices as Halm by Hindt. Luconic accepted the CSMT position. As for his termination, Cardoni testified that employees are commonly terminated if they fail to report to work for three consecutive days. Halm stated to Evert that he would contact him and did not do so. It was completely legitimate for Schwan's to conclude that Halm had abandoned his position and there is no evidence that their decision to terminate his employment was motivated in any part by his protected activity.

## **VI. Conclusions**

Halm's complaints to Schwan's management and human resources regarding accurate recording of on-duty time for flex-route drivers was protected activity under the STAA. Halm's refusal to drive a flex-route was not based on an apprehension of an actual violation of safety regulations. Schwan's decisions to suspend and eventually terminate Halm were motivated by his refusal to choose between the employment options presented to him and his failure to communicate with Schwan's after his suspension. Schwan's suspended and terminated Halm for legitimate, nondiscriminatory reasons. Halm's suspension and termination were not causally related to his protected activity. Thus, the adverse actions against him were not illegal. Therefore, I find that, at the close of his case, the Complainant has not established a violation of the STAA and the Respondent's 52 (c) motion should be granted.

## ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the record at the close of Complainant's case, Complainant's relief requested is hereby DENIED. It is hereby ordered that the complaint filed by David Halm be dismissed.

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RICHARD A. MORGAN  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).