

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 24 March 2010**

**Case Number: 2009-STA-00028**

**In the Matter of:**

**VICTOR W. HURSH,  
Complainant,**

**v.**

**FRONTIER EXPRESS,  
Respondent.**

Terry A. Hall, Esq.,  
Armstrong & Lowe, P.C., Tulsa, Oklahoma  
For Claimant

Ann E. Allison, Esq., Austin P. Bond, Esq.,  
Rhodes, Hieronymus, Jones, Tucker & Gable, P.L.L.C., Tulsa, Oklahoma  
For Respondent

Before: PAMELA LAKES WOOD  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This case arises from a claim brought under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105 (“STAA”), with implementing regulations at Title 29, Part 1978 of the Code of Federal Regulations. The STAA prohibits an employer from disciplining, discharging, or otherwise retaliating against any employee because the employee has undertaken certain protected activities, including (1) participating in proceedings related to the violation of commercial motor vehicle safety regulations or (2) refusing to operate a motor vehicle due to concerns about such violations or reasonable apprehension of serious injury because of the vehicle’s unsafe condition.<sup>1</sup> The STAA regulatory framework includes regulations promulgated by the Department of Transportation, Federal

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<sup>1</sup> Under Public Law No. 110-053 on August 3, 2007, the STAA was amended to include three other categories of protected activity: (1) accurately reporting hours on duty; (2) cooperating with a safety or security investigation by certain federal entities; and (3) furnishing information to federal entities relating to an accident or incident resulting in injury, death, or property damage. Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007).

Motor Carrier Safety Administration relating to the driving of commercial motor vehicles appearing at 49 C.F.R. Part 392.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments made by the parties. Where pertinent, I have made credibility determinations concerning the evidence. Because the scope of Complainant's employment was in the state of Oklahoma, Tenth Circuit law applies.

### **PROCEDURAL BACKGROUND**

Complainant Victor Hursh ("Complainant"), represented by counsel, filed a timely complaint with the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) on November 10, 2008. Complainant alleged that he was terminated on November 5, 2008 for refusing to deliver a load for which Respondent Frontier Express ("Respondent") gave him insufficient time to deliver safely. The Office of Investigative Assistance of OSHA, based in Austin, Texas, on behalf of the Secretary, determined that there was no reasonable cause to believe Respondent violated the STAA and dismissed the case on March 3, 2009. Specifically, the Secretary found that even though Complainant may have refused to carry a load because to do so would have required him to violate posted speed limits, he never made an effort to deliver the load, nor did he give the dispatcher an opportunity to correct the alleged violation (Secretary's Findings, p. 2). Accepting Respondent's defense that Complainant's employment was terminated for economic reasons, the Secretary found that Complainant's alleged protected activity was not a motivating factor in his termination. On March 25, 2009, Complainant objected to all of the Secretary's findings and requested a hearing before the Office of Administrative Law Judges. The evidence before this tribunal is reviewed *de novo*.

A hearing was scheduled before the undersigned administrative law judge on April 23, 2009 in Tulsa, Oklahoma. Complainant, with Respondent's agreement, moved for a continuance of ninety days upon a showing of good cause, which was granted. Accordingly, the hearing was rescheduled for August 19, 2009 in Tulsa, Oklahoma.

At the August 19, 2009 hearing, eight Complainant's Exhibits, fourteen Respondent's Exhibits, and two Administrative Law Judge Exhibits were admitted into evidence.<sup>2</sup> Complainant testified and called as witnesses Pablo Munoz ("Munoz"), the dispatcher who supervised Complainant; William Caldwell ("Caldwell"), the Senior Vice President of Transportation at Frontier Express; and Deborah Haggin ("Haggin"), Complainant's fiancée. Respondent called as a witness Amber Bradshaw ("Bradshaw"), the Director of Safety and Administration at Frontier Express.

Complainant's Exhibits included Munoz's handwritten dispatch log (CX 1); an electronic log system record showing approximate times of load deliveries (CX 3); wage claim information (CX 5); a status change form showing Complainant's termination (CX 6); a notification from human resources about the termination (CX 7); Complainant's cell phone records (CX 8);

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<sup>2</sup> Complainant's Exhibits are numbered CX 1, CX 3, and CX 5 through CX 10. Respondents Exhibits are numbered RX 3-5, RX 9, RX 11-13, RX 15, RX 25, RX 27-28, RX 28A, and RX 30-31. Administrative Law Judge Exhibits are numbered ALJ 1 and ALJ 2.

Complainant's pay stubs (CX 9); and Complainant's application for unemployment (CX 10). Respondent's Exhibits included the electronic log system record (RX 3, see also, CX 1); a copy of the bill of lading for a load Complainant took from Dallas to Oklahoma City the day before, and a tender freight form for this load (RX 4); Complainant's driving log (RX 5); a rate confirmation sheet prepared by a third party (RX 9); an annotated copy of the bill of lading (RX 11); an annotated copy of the tender freight form (RX 12); a driver detention form for Complainant's delay at the Dallas terminal the day before (RX 13); Complainant's employment application for a previous employer (RX 25); the July 17, 2001 judgment in Complainant's criminal case (RX 27); Complainant's cell phone records (RX 28, 28A); Munoz's handwritten dispatch log (RX 30); and Complainant's employment application with Respondent (RX 31). The record also contains a list of stipulations between the parties (ALJ 1) and Complainant's discovery requests to Respondent for the limited purpose of showing whether Complainant asked for Respondent's financial data in the form of financial documents (ALJ 2, Tr. 252-54). At the hearing, the exhibits were admitted and the record was closed. The parties were permitted to submit closing briefs within thirty days following the hearing, subject to extension by stipulation. By stipulation, the deadline was extended to October 5, 2009, and both briefs were timely filed.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Factual Background**

Complainant, a resident of Tulsa, Oklahoma, began work for Respondent as a truck driver on or about October 21, 2008 (CX 7; Tr. 22, 24).<sup>3</sup> Prior to working for Respondent, Complainant worked at several other trucking companies, and his longest duration of employment was about one year (Tr. 59-60). He held a commercial driver's license and drove a Penske Straightliner rental truck for Respondent (Tr. 22, 28). He worked out of the Tulsa terminal, where about twenty of Respondent's other drivers were based (Tr. 24). He drove regional routes from Oklahoma to nearby states such as Texas and Colorado (Tr. 23-24, 29-31). Following a series of events disputed by the parties, Complainant was terminated on November 5, 2008 (ALJ 1).

### ***Witness Testimony***

Because of inconsistencies in the witnesses' testimonies and wide discrepancies in the record as a whole, the testimony of each witness as to the disputed issues in this case will be summarized individually below. Where possible inconsistencies cannot be reconciled, text from the transcript is quoted.

**Complainant Victor Hursh:** Complainant testified that he ordinarily received a phone call from his dispatcher, Pablo Munoz, in the morning when Munoz arrived at work (Tr. 25). Munoz would assign him a load or give him a choice of loads, and Complainant would accept. *Id.* He would drive his personal vehicle to the terminal, located about 20 minutes from his house (Tr.

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<sup>3</sup> Complainant initially testified that he started working for Respondent, beginning with orientation, around October 20, 2008 [after correcting a reference to November]. (Tr. 22, 23-24). However, Respondent's electronic employment record at CX 7 reflects a start date of October 21, 2008. Complainant confirmed later in his testimony that these dates were correct when CX 7 was admitted (Tr. 50).

25-26). Prior to making a run, he would go to the assigned loaded trailer, hook the trailer to the tractor, do a mandatory pre-trip inspection of the truck's operational and safety equipment, receive his dispatch paperwork, and fuel the truck (Tr. 26-28). He testified that it would typically take about 15 minutes for the hook-up, 15 minutes for the mandatory pre-trip inspection, and 15 minutes for fueling (Tr. 26-28). A delivery from Tulsa, Oklahoma to Oklahoma City would take an hour and a half to an hour and forty-five minutes (Tr. 30). It would take 30 minutes to unload a trailer and hook up a new one. *Id.* A drive from Oklahoma City to Irving, Texas, a suburb of Dallas, takes a minimum of four hours, depending on traffic (Tr. 30-31). Later in his testimony, Complainant clarified that it was about ten miles from Irving to downtown Dallas (Tr. 63).

At 8:09 a.m. on November 5, 2008, Complainant made a phone call to the cell phone of his dispatcher, Munoz, who told Complainant that he had just arrived at work and would check to see if he had a load (Tr. 36). At 8:12 a.m., Munoz called back and said he had a load going from Oklahoma City to Dallas, but it needed to arrive no later than 2:00 p.m. (Tr. 38). Complainant responded, "You mean it absolutely, that's the deadline[;] it's got to be there at two o'clock? If it is I can't do that[;] I can't make it." *Id.* As Complainant explained at the hearing, "it would take too long to do a load from Tulsa to Oklahoma City and from Oklahoma City to Dallas.... For the timeline I was dealing with. It was impossible." *Id.* Complainant recalled Munoz "affirming and agreeing with me. He goes, 'Yeah, you're probably right, there's probably not enough time to do that'" (Tr. 39). Complainant asked if Munoz could speak to the person requesting the delivery so that it could be moved later in the afternoon. *Id.* Munoz responded, "I'm going to call—I'll find out, I'll check, and I'll get back with you as soon as I find out anything" (Tr. 39).

The next time Complainant and Munoz talked was at 11:24 a.m. Complainant called Munoz and asked if Munoz had found a load to deliver for him yet; Munoz told him to wait and he would go check (Tr. 40). Munoz put Complainant on hold. *Id.* After a long pause, Munoz came back and says, "man, I really don't have anything right now." *Id.* At 2:39 p.m., Munoz called back and informed Complainant that he needed to come to the terminal in Tulsa with his truck to be cleaned out because he had been terminated (Tr. 41). The next communication was at 3:55 p.m., and Complainant, having arrived at the terminal, asked Munoz where he should park the truck (Tr. 42-43). Munoz then personally terminated Complainant, without explaining why (Tr. 43).

Complainant also testified to the quality of his work for Respondent. He admitted that he used his cell phone while driving, but stated this was common practice and he would receive phone calls from his dispatcher while he was on the road (Tr. 44). He testified that he was "absolutely not" disciplined for it. *Id.* He testified that he complied with the regulations for maintaining his driver's log (Tr. 45). He also testified that the driver's log was not falsified, and that it reflected his accurate time (Tr. 89). He testified that he has, in the past, occasionally used text messaging while driving (Tr. 91-92). Complainant admitted that he had answered "no" when asked on his employment application whether he had ever been convicted of a felony, even though he had been convicted of a felony in 1998 (Tr. 46). However, he testified that he had been told by a U.S. attorney that his conviction was sealed and thus not found in public record, and so he felt he was not required to disclose the conviction on his application (Tr. 46-47, 74).

On cross-examination, Complainant admitted that he had answered “yes” to having been convicted of a felony on an earlier employment application for another employer (Tr. 83-84).

In detailing his search for work following termination, Complainant stated that he had applied to every trucking company in Tulsa and the region and had used the services of an employment agency (Tr. 52-53). He added that in the weeks and months following the termination, he had anxiety and sleeplessness, as well as a great deal of stress over financial issues, including child support (Tr. 56). His unemployment payments were being garnished for unpaid child support at the time of the hearing (Tr. 56-57). However, Complainant testified that he was up-to-date on child support while he was working (Tr. 78). Complainant testified that there had been a slowdown in trucking in general, which limited his job opportunities. (Tr. 51-52, 76-77). His felony conviction prevented him from receiving a hazardous material hauling license, which further limited employment opportunities (Tr. 76).

Finally, in rebuttal to testimony by the dispatcher (Munoz), Complainant provided an explanation as to why he left a delivery from Dallas at the terminal in Oklahoma City the night of November 4, 2008, the day before he was terminated. At 9:32 a.m. on the morning of November 4, Complainant received a call from Munoz in which Munoz asked him if he had any problems with his route to Irving and Dallas, and Complainant responded that he did not, and he was on his way (Tr. 257-58). At 1:32 p.m., Complainant testified that he received a phone call from Munoz telling him that he had to pick up the load in Dallas, bring it back to the terminal in Oklahoma City, and then return to Tulsa (Tr. 258-59). When Complainant arrived in Dallas, he received a third and final phone call that day from Munoz (Tr. 258). According to Complainant, Munoz was aggravated about a load that had been mixed up and had to be recalled (Tr. 259). Complainant, having arrived at the Dallas terminal at 3:00 p.m., informed Munoz that he was told he would be in detention for up to three hours (Tr. 259). He testified that he was only actually detained about an hour. *Id.* He further testified that he made a mistake on his log book when he recorded only a half-hour delay in Dallas, but he did not believe he was required to report detention on his driver’s log. *Id.* As far as the load he picked up in Dallas, Complainant testified that he was instructed to take it to the Oklahoma City terminal and leave it to be delivered the next day, and to continue on to Tulsa (Tr. 266). When pressed, Complainant testified that he “assume[d]” that Munoz wanted him to leave the load at the terminal on the evening of November 4 (Tr. 266-67).

**Pablo Munoz:** Munoz had worked in Tulsa for Respondent for five years at the time of the hearing (Tr. 98-99). He dispatched trucks for Respondent in the Tulsa area; he was responsible for about ten truckers at a time as well as about six additional contracting truckers (Tr. 99-100). The testimony is unclear as to whether Munoz routinely dispatched loads out of Oklahoma City as well as Tulsa (Tr. 106).<sup>4</sup> He testified that his normal work hours are from 7:30 a.m. to 4:30 p.m. (Tr. 101). Upon arrival at the office, he would learn which assignments were available for dispatch by communicating with the larger terminal of Respondent’s truckers in Oklahoma City (Tr. 102). He typically called drivers on their personal cell phones, or their company cell phone if one were assigned (Tr. 102). Some drivers, however, regularly called him to ask about

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<sup>4</sup> To the question “do you on occasion dispatch loads that go from your yard in Oklahoma City down to Irving, Texas?” Munoz answered, “Yes.” However, following the next question, he said “I don’t dispatch loads out of Oklahoma City,” but he may not have completed his answer (Tr. 106).

assignments (Tr. 103). He confirmed that it takes about 15 to 20 minutes to do a hook up of a tractor to a trailer and another 15 minutes for a pre-trip inspection (Tr. 103). He also explained that trucks must go to a vendor to fuel, and fuelling takes about 15 minutes (Tr. 104-05). He testified that it takes two hours to drive from the terminal in Tulsa to the terminal in Oklahoma City (Tr. 106).

For November 4, 2008, the day before Complainant was terminated, Respondent submitted Munoz's handwritten driver log (RX 30; CX 1). According to Munoz, the log showed that Complainant pulled a trailer to Irving, Texas, and then had some detention in Dallas while waiting for a return delivery (Tr. 121). Munoz explained that detention is what Respondent's customers pay Respondent for any delays in preparing a load for delivery (Tr. 121-122). He also authored the detention form (RX 13). A dispatcher would fill out a detention form when informed by the driver or the customer that the driver would be delayed at the customer's expense (Tr. 121-122). Munoz testified that he made an erasure and a correction the same day he filled out the form, and at no point did he alter the form since (Tr. 124). Munoz wrote on the form that Complainant was in detention for three hours in Dallas (Tr. 125). Munoz relied on information provided by "Joe at AWG" via phone for the contents that he wrote on the form, which was prepared at the terminal back in Tulsa. *Id.* Because of the detention, Munoz testified that he released Complainant in Oklahoma City because he was almost "out of hours" (i.e., beyond the number of hours he was allowed to be on duty) (Tr. 127). According to Munoz, the last time he and Complainant spoke was in the middle of the afternoon on November 4, when they talked about the detention and he told Complainant to take the load to Oklahoma City (Tr. 127). Munoz said that Complainant was required to stay in Oklahoma City with the load because of the 14-hour rule and Complainant did not ask to return to Tulsa (Tr. 128). Munoz kept track of a driver's location and status on the dispatch system computer program and updated the program as drivers checked in with him as to their status (Tr. 129-130; RX 3). He updated the form before he left work with the time Complainant would have arrived in Oklahoma City after his three hour detention, 9:00 p.m., which he called a "guesstimate" (Tr. 132; compare entry 5, RX 3).<sup>5</sup>

In rebuttal testimony, Munoz responded to points about which Complainant had testified. He indicated that Respondent's drivers were required to report detention time on their driver's logs (Tr. 271). Munoz recalled that Complainant was irate that he had to sit in Dallas for three hours (Tr. 273). Munoz emphatically denied having given Complainant the option of continuing on to Tulsa after leaving Oklahoma City because he would be over his allotted hours. *Id.* The following exchange took place over Complainant's driver's log for November 4, 2008:

Respondent's Attorney (Mr. Bond): Do you believe he started that day around six in the morning?

Munoz: It should be, yes.

Mr. Bond: Okay. That's not what he showed in his logbook.

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<sup>5</sup> According to the right-hand column of the CSC log and Munoz's explanation as to how to read the log, this entry was updated not on November 4, as Munoz testified, but at 8:05 a.m. on November 5 (see entry 5, right-hand column, RX 3; Tr. 143-144).

Munoz: Correct.

Mr. Bond: If [Complainant] testified that you gave him the option of going back to Tulsa, is that a lie?

Munoz: Yes.

Mr. Bond: Did you have a specific conversation with [Complainant] about him being in detention for three actual hours?

Munoz: Yes.

Mr. Bond: Do you have any doubt in your mind whether or not [Complainant] was in detention for at least three hours that day?

Munoz: No (Tr. 274).

According to Munoz's testimony, when he arrived at work on the morning of November 5, he learned that Complainant had left the load he brought back from Dallas at the yard (terminal) in Oklahoma City (Tr. 132). Munoz then called Complainant to ask him where he was; Complainant said Tulsa. (Tr. 133). Upon hearing that, Munoz told him that he needed to come to the terminal (Tr. 107, 133). He testified that he did *not* tell Complainant at this point that he was terminated (Tr. 133-34, 136). In the following exchange, Munoz appears to state that he told Complainant to come to the terminal *before* he spoke to Caldwell, his supervisor:

Munoz: I contact[ed] [Complainant] to check on him to see where he was.

Respondent's Attorney (Mr. Bond): Uh-huh. And what did he tell you?

Munoz: He was in Tulsa.

Mr. Bond: Okay. Did you tell him anything after that?

Munoz: That I needed to see him.

Mr. Bond: Okay. And, in between the time you said you needed to see him, did you talk to anyone in Oklahoma City about [Complainant's] status?

Munoz: Yes.

Mr. Bond: Who did you talk to?

Munoz: Bill Caldwell.

Mr. Bond: And what did Bill Caldwell tell you?

Munoz: That I needed to have [Complainant] come in and clean out the truck.

Mr. Bond: Did he tell you anything else?

Munoz: That we were—it was my understanding that we were turning in the Penske trailer tractors (Tr. 133-134).

Munoz's testimony later continued with the following exchange:

Respondent's Attorney (Mr. Bond): Did you ever intend on giving [Complainant] a load after you found out that he dropped and abandoned a trailer in Oklahoma City?

Munoz: No.

[...]

Mr. Bond: Why did you want [Complainant] to come into the Tulsa office?

Munoz: Because I needed to terminate him (Tr. 135-136).

However, at an earlier point in his testimony, Munoz testified that he had spoken to Caldwell *before* telling Complainant to come to the Tulsa terminal (Tr. 111-12). This phone call with Caldwell happened sometime between when he arrived at work at 7:30 a.m. and “a little before lunch” (Tr. 112):

Mr. Hall: Who told you that you needed to terminate [Complainant]?

Munoz: Bill Caldwell.

Mr. Hall: And when were you told by Mr. Caldwell that you needed to terminate [Complainant]?

Munoz: November 5.

Mr. Hall: That would have been earlier in the morning, prior to the time that you spoke to [Complainant]?

Munoz: Yes.

Mr. Hall: And you were told specifically to terminate [Complainant] on that day, correct?

Munoz: Yes.

Judge Wood: What time was the telephone conversation?

Munoz: It was in the morning sometime. I don't know what time it was. I work from 7:30 so it had to be 7:30 to before lunch, a little before lunch (Tr. 112).

He further testified that he did not tell Complainant that he would be terminated until he arrived at the office (Tr. 136). He stated that he never told Complainant *why* he was being terminated; Complainant would have to check with the terminal in Oklahoma City for that information (Tr. 140).

Later in the testimony, Munoz confirmed that he had spoken to Caldwell before calling Complainant and telling him to come to the terminal in Tulsa:

Judge Wood: ...When was your conversation that you talked about when you found out that the load was still in Oklahoma City...?

Munoz: In the morning of November 5, when I came in.

Judge Wood: And do you know what time that was?

Munoz: It had to be after 7:30. Every morning when I come to work we—the dispatchers in Oklahoma City and myself will communicate, via fax or telephone, what we have on our yard that has to [be delivered]....

Judge Wood: Okay. So what was the next call; was it to Bill Caldwell or was it to [Complainant]?

Munoz: Bill Caldwell first.

Judge Wood: Okay. Well, what was said during that conversation?

Munoz: I was told to terminate [Complainant].

Judge Wood: Who called whom?

Munoz: Bill Caldwell called me.

Judge Wood: And did you tell him about what happened with the Oklahoma City load or—

Munoz: No (Tr. 146-47).

Munoz's testimony as to whether Bill Caldwell gave him any reason for terminating Complainant is somewhat unclear. The pertinent testimony is as follows:

Judge Wood: What did Mr. Caldwell tell you during the conversation; did he tell you why he was firing [Complainant]?

Munoz: It was my understanding that the tractors needed to be turned [in]. He was driving a rental truck, a Penske truck, and that was my understanding that he was going to turn the trucks in.

Judge Wood: Well, did Mr. Caldwell tell you that?

Munoz: Yes (Tr. 154-55).

On redirect, Mr. Hall used Munoz's prior deposition to challenge this statement. In his deposition, Munoz stated that Caldwell did not state why Complainant was being terminated (Tr. 156). After reading the relevant portion of the deposition, the following exchange took place:

Mr. Hall: Did you tell me the truth when you told me [in your deposition] that you did not remember any reason why Mr. Caldwell told you he wanted [Complainant] to be fired, when you told me that on Thursday, August 6, 2009?

Munoz: Yes, that was the truth (Tr. 157).

On recross:

Mr. Bond: Now, Mr. Munoz, you testified a moment ago that you didn't know why Mr. Caldwell told you to terminate [Complainant], correct?

Munoz: Correct.

Mr. Bond: You also said Mr. Caldwell told you to turn in his rental truck, correct?

Munoz: Correct.

Mr. Bond: Did you also say you assumed from that that that's why he was fired?

Munoz: Yes.

Mr. Bond: And that's your assumption, correct?

Munoz: Yes.

Mr. Bond: It's not what Mr. Caldwell told you?

Munoz: Correct (Tr. 157-158).

According to Munoz, Complainant called him several times after being told he needed to come to the terminal, for a total of three or four phone calls, because he had questions about payroll (Tr. 107-08). The following exchange took place at the hearing:

Complainant's Attorney (Mr. Hall): How many times did you call [Complainant] on that day?

Munoz: I remember calling him the first, the first time in the morning.

Mr. Hall: You don't recall calling him any other time that day?

Munoz: No (Tr. 111).

Munoz testified that Complainant had a reputation as a complainer (Tr. 134). Complainant often made accusations that he was not being paid correctly and that his mileage was being calculated wrong. *Id.* "Every time that he would come into the office he would complain," Munoz stated. *Id.* His complaints were made in a loud voice (Tr. 135). Munoz repeated these sentiments later in the testimony (Tr. 138). According to Munoz, "at the time we shared an office with other people there and he got to the point where there were people that were afraid, afraid that he might react. That, you know, that they were pretty much scared of him." *Id.* Complainant would just "barge in" Munoz's office (Tr. 139). Munoz said that some of Complainant's complaints were related to a three hundred mile discrepancy in Complainant's mileage, which would affect how much he was paid (Tr. 149-50). Munoz stated that the tone and manner of Complainant's complaints were more objectionable than the content: "he would come in and, and be loud, he would just be outspoken about it. And there were other people in the office that didn't appreciate the attitude that he had" (Tr. 150, 151). Munoz testified that one woman in the office in particular was fearful of Complainant (Tr. 153-54). However, Munoz verified that when Caldwell told him to terminate Complainant, nothing was said of the assertive behavior or the complaints about his wages (Tr. 152).

Munoz stated that Complainant was not the only driver with a Penske rental truck who was terminated (Tr. 140). Munoz was told to terminate another driver of a Penske rental truck at the end of 2008 (Tr. 141). Munoz also testified that since Complainant's termination and the later terminations of nine other drivers, the company has hired approximately five drivers, including some of those terminated earlier (Tr. 117). He said that the company began having slow-downs in the amount of deliveries the company made (Tr. 119-120). Munoz further testified that he had no control over hiring or firing (Tr. 154).

**William Caldwell:** Caldwell, a resident of the Oklahoma City area, is the Senior Vice President of Transportation for Respondent, for whom he has worked for twenty-one years (Tr. 160). According to Caldwell, Respondent had a significant downturn in business in late 2008 (Tr. 165). Costs escalated nineteen percent between September and October 2008. *Id.* In poor economic times, the trucking company needs to cut costs; Respondent did so by cutting rental units, which had very narrow profit margins (Tr. 166). These included nine Penske rental trucks that were on annual leases, which proved to be more expensive than daily rentals, and so those trucks were phased out (Tr. 167). Except for the rental trucks that were on long-term leases

(which would not be cost effective to turn in), all of the rental trucks were eliminated and their drivers terminated. (Tr. 168). Complainant operated one of the nine trucks to be eliminated (Tr. 169). However, the Penske rental trucks and drivers were not terminated at once; they were terminated as they came in. *Id.* Caldwell testified, however, that all of the drivers were terminated within days of each other, depending on whether they were away from the terminal driving for several days (Tr. 181). At the time of the hearing, rental trucks were used only as backups to the company's trucks (Tr. 170).

Caldwell remembered the first time he met Complainant. At his orientation, Complainant threatened to call the Department of Transportation on the company for a trucking violation because he was asked to perform a "blind" backup as part of his road test (Tr. 171). Caldwell indicated that comments such as "too many complaints" were not uncommon on forms such as Complainant's post-termination change of status form and were for the purpose of alerting them in case the driver reapplied for a job (Tr. 174). Respondent routinely had terminated drivers reapply for jobs, so it was important to document perceived shortcomings among former employees. *Id.* Caldwell had Complainant's first rental truck replaced with another one shortly before his termination because the first one continually had problems (Tr. 177). Caldwell admitted that Complainant's two-and-a-half week term with the company was brief, but he explained that it overlapped with a serious economic downturn in the region's trucking industry, and the decision to terminate his position took place after Complainant started working (Tr. 180). Caldwell provided the following sequence of events on the morning of November 5, 2008:

Mr. Hall: On the morning of November 5, 2008, you had a conversation with Mr. Munoz, is that correct?

Caldwell: That is correct.

Mr. Hall: And you told him at that time; what did you tell him?

Caldwell: "Anyone that was in a Penske truck, or a rental truck, to turn in those Penske trucks and terminate the driver."

Mr. Hall: And you specifically told him with regard to Penske trucks, correct?

Caldwell: Rental trucks.

Mr. Hall: You did not name [Complainant] by name?

Caldwell: No I did not (Tr. 161-62).

**Deborah Ann Haggin:** Haggin was Complainant's fiancée, with whom he resided (Tr. 185). She testified that about 8:00 a.m. on November 5, 2008, Complainant received a phone call from Pablo Munoz; she overheard the conversation on speakerphone (Tr. 186-87). She overheard Complainant dispute with Munoz whether he could get a load to Dallas on time, which would indicate that Munoz did in fact offer Complainant a load (Tr. 187). Her description of the phone call was as follows:

Haggin: He had asked, uh, Victor asked him if he was ready to go to work that day and what his case load was, his appointments that [ ] were lined up for him. And he said he would have to get back with him.

Mr. Hall: All right. Do you recall another conversation that day that you overheard?

Haggin: Yes. He never did call back so Victor called approximately eleven o'clock.

[...]

And I don't—I think that what, what was going on is they were going to have him take a load to Oklahoma City and then they were, wanted him to go to Dallas

(Tr. 186-87). Haggin was uncertain whether the exchange concerning the load occurred during the eight o'clock or eleven o'clock phone call. *Id.* However, she recalled Complainant telling Munoz that he “didn't believe that he would be able to legally get the load there by two o'clock, and asking if there was any way that he could arrange it [to be delivered later].” (Tr. 187). About 3:00 p.m., Complainant received a phone call informing him that his services were terminated and he needed to turn in the truck (Tr. 188). Haggin also testified that Complainant spent a great deal of time looking for alternative employment and that he became depressed and anxious about being unemployed (Tr. 189). She also testified that she had no knowledge of whether he falsified his employment records or failed to pay child support, although she knew of his felony convictions and garnishment of his wages (Tr. 191, 193). She also had no knowledge of when Complainant arrived home the night before he was terminated (Tr. 194).

**Amber Michelle Bradshaw:** Bradshaw was the Director of Safety and Administration at Respondent, a company for which she has worked for eighteen years (Tr. 198-99). As part of her duties, she regularly compiled Respondent's business records and was the administrator for the filing system (Tr. 201-02). She provided a business records foundation for the rate confirmation sheet, bills of lading, driver's log, tender freight, Dallas terminal sign-in form, and detention form (see generally Tr. 202-31). These documents were required to be retained by a trucking company in the event of a U.S. Department of Transportation audit (Tr. 247). She admitted that she did not fill out the documents and that several of them were made by third-parties (see generally Tr. 231-236). She testified that she would rely upon the rate confirmation sheet, prepared by third-party contractor CRST Logistics, over Complainant's conflicting driver's log (Tr. 234). She noted that an almost four-hour discrepancy existed between Complainant's driving log and the time that was recorded on the third-party produced rate confirmation sheet for a delivery that he made the day before he was terminated (Tr. 213). She testified that she has seen errors in driver's logs before, but Complainant's log seemed to contain wide discrepancies with the Respondent's other business records (Tr. 240-41). If the rate confirmation sheet were correct, she indicated, Complainant would be over his fourteen hour on-duty limit for November 4 (Tr. 245). Bradshaw confirmed that falsifying a driver's log to understate hours is a terminable offense (Tr. 230).

Bradshaw also testified as to company policy on cell phone use while driving. Since the company did not give cell phones to all drivers, they had their drivers use personal cell phones while on the road (Tr. 239-40). She affirmed that texting while driving “is not allowed, absolutely not allowed” under company policy (Tr. 229). However, she conceded that the term “data services transmission” as used on the cell phone records was ambiguous, did not distinguish between messages sent and received, and could have referred to more than just text messaging (Tr. 249).

### ***Business Records of Respondent***

**Driver’s Log:** Complainant testified that he filled out the Driver’s Log and did so correctly, apart from a half-hour discrepancy with respect to detention time (Tr. 87, 263). Complainant’s Driver’s Log shows that he left Tulsa, Oklahoma at 9:30 a.m., arrived in Irving, Texas at 2:00 p.m., departed Irving at 2:30 p.m., arrived in Dallas, Texas at 3:00 p.m., left Dallas at 3:30 p.m., arrived in Oklahoma City at 8:00 p.m., left at 8:30, and arrived in Tulsa at 10:00 p.m. (RX 5). Complainant testified that he remained in Dallas one hour and that his logbook is in error to this extent (Tr. 263). Bradshaw testified that it is not uncommon for drivers to round their times off in their log books (Tr. 246). The Log Book showed that Complainant had been on duty for 13.5 hours, including 11 hours of driving time (RX 5). When adjusted for the additional half hour in Dallas to which Complainant admitted at trial, the log would show he was on duty for a total of 14 hours (Tr. 263).

**Rate Confirmation Sheet:** The Rate Confirmation Sheet shows that Complainant arrived in Irving, Texas at 10:05 a.m. on November 4, 2008 (RX 9). It shows he left at 12:14 p.m. with an empty trailer. According to Bradshaw, the Rate Confirmation Sheet was prepared by CRST Logistics, a third-party contractor (Tr. 205). The form shows the time of pickup (the preceding day) and delivery, location of pickup and delivery, and special instructions for the load. *Id.* Bradshaw explained that her understanding of CRST procedure is that drivers’ arrival and departure times are logged for the purposes of calculating the amount of payment due by the company having the load shipped (Tr. 213). On cross-examination, Bradshaw admitted that she did not know who prepared the form or the basis on which they input time, but that she “was told by CRST that this information was entered by their representative” (Tr. 233). She testified that she trusted the CRST-produced Rate Confirmation Sheet over Complainant’s log book (Tr. 234).

**Driver Detention Form:** Respondent submitted the Driver Detention Form for Complainant for the period he had to wait while he was at the Dallas terminal waiting to depart (RX 13). Bradshaw authenticated the document as an ordinary business record (Tr. 218). According to Bradshaw, the form is ordinarily only filled out when a driver is detained at a terminal for more than one hour (Tr. 219). The document was prepared by Munoz at the Tulsa terminal based on information from a phone call with “Joe” at Associated Wholesale Grocers (AWG) (Tr. 124; RX 13). Munoz authenticated the form, as he had filled it out, and he testified that he had made no changes to it since (Tr. 122-23). According to Munoz, he filled out the form prior to leaving work on November 4, soon after talking on the phone with Complainant in Dallas (Tr. 127). In other words, the form was filled out before Complainant actually sat through detention. The document contains two significant alterations, which Munoz testified he had made himself, and

that he made contemporaneously with the phone calls (Tr. 124). The first is the “Arrival Time,” which appears to be a 15:00 written over a 14:00, but this may be subject to some interpretation (Tr. 125; RX 13). The second, lower on the page, is “Total Detention Time,” where a partially completed number (possibly a 1 or, more likely, a 4) is overwritten with a “3.” *Id.* Bradshaw testified that since she did not fill out the form, she could not know whether a number had been erased or when (Tr. 239).

**Tender Freight:** The Tender Freight form shows that Complainant was scheduled to pick up a load in Dallas at 1:00 p.m. on November 4, 2008 (RX 12). Bradshaw explained that this form was produced by a third-party, AWG, and it related to the same load (Tr. 215, 235-37). She explained that the times listed were scheduled times, and not actual times, and the form was preprinted five days before delivery (Tr. 236). RX 4, pages 3-5, is a second (annotated) copy of RX 12.

**Dallas Terminal Sign-In Log:** Respondent submitted the Sign-In Log of the Dallas truck terminal where Complainant picked up a load to deliver to Oklahoma City (RX 15). Bradshaw authenticated the Sign-In Log as a business record (Tr. 217). The Log shows that Complainant arrived at the Dallas terminal at 3:00 p.m. It does not show a departure time for any of the drivers listed (RX 15).

**Dispatch System Driver Log:** The Dispatch System Log was an internal database kept by Respondent detailing when drivers left and arrived at various points in their routes (CX 3; RX 3). Munoz testified that, as a dispatcher, he routinely updated the records manually through a piece of software known as CSC (Tr. 129-130). At 8:44 a.m. on November 4, 2008, the system reflected that Complainant was leaving Tulsa at 8:00 a.m. and arriving in Irving, Texas at 10:00 a.m. (Eleventh Entry, RX 3). The time the update was made in the system is reflected in the right hand column. At 10:25 a.m., the system was manually updated (code UP or UR in left hand column, see Tr. 143-144) to show that Complainant left Tulsa at 10:25 a.m. and arrived in Irving, Texas at 2:00 p.m. (Ninth and Tenth Entries, RX 3). At 1:52 p.m. on November 4, 2008, the system reflected that Complainant was arriving in Irving, Texas at 2:00 p.m. (Eighth Entry, RX 3). At 7:59 a.m. the next morning, the Dispatch System was updated to reflect that Complainant departed Dallas at 6:00 p.m., and arrived in Oklahoma City at 1:00 a.m. (Sixth Entry). Munoz testified that he manually updated the system on the morning of November 5, 2008 after he realized that Complainant had gone back to Tulsa after leaving his load at the terminal in Oklahoma City (Tr. 131-132). At 8:05 a.m., the system was updated to show that Complainant had arrived in Oklahoma City at 9:00 p.m. the night before (Fourth and Fifth Entries). At 8:27 a.m., the system was updated again to show that Complainant arrived in Tulsa at 12:01 a.m. (Third Entry). Munoz testified that the time of Complainant’s arrival in Oklahoma City was a “guesstimate” based on the number of hours it would have taken Complainant to arrive in Oklahoma City (assuming Complainant was in Dallas for three hours) (Tr. 132).

**Bill of Lading:** Respondent introduced two copies of the same bill of lading, one of which contains annotations (RX 4, pages 1 and 2, RX 11). Bradshaw testified that the document was routinely prepared in the ordinary course of business (Tr. 225). The document contains Complainant’s handwritten information in the lower right corner. However, according to Bradshaw, the handwritten name and number near the middle of the page on the annotated

version says “FRXP Drew” followed by a number, which refers to another driver and his tractor and trailer numbers (Tr. 227). According to Bradshaw, this indicates that the load was delivered by another driver and not by Complainant. *Id.*

**Status Change Form:** Complainant submitted a Status Change Form, which shows that Complainant’s status with Respondent was changed to “terminated” (CX 6). In the field entitled “reason for change,” the author of the document wrote “Too many complaints per B.C.” *Id.* The form is signed by Tyler Foss, the terminal manager at the time (Tr. 116). According to Caldwell, statements of this nature are not uncommon on Status Change Forms, to be reviewed in case the terminated employee ever reapplies for the job (Tr. 174). As Caldwell explained, “we don’t want any traps coming back to haunt the company as it is.” *Id.*

The following table identifies the discrepancies in the timeline of November 4, 2008, the day before Complainant was terminated. The cities shown are Complainant’s route.

<b>Document</b>	<b>Author</b>	<b>Tulsa, OK</b>	<b>Irving, TX</b>	<b>Dallas, TX</b>	<b>Oklahoma City, OK</b>	<b>Tulsa, OK</b>
<b>Driver’s Log</b> (RX 5)	Complainant	9:00 a.m. (pretrip)- 9:30 a.m.	2:00 p.m. (unload)- 2:30 pm	3:00 p.m. (load)- 3:30 p.m. (departed)	8:00 p.m. (drop, fueled)- 8:30 p.m.	10:00 p.m. (post trip)- 10:30 p.m.
<b>Rate Confirmation Sheet</b> (RX 9)	Third-Party (CRST Logistics)	Unrecorded	10:05 a.m. (arrived) 12:14 p.m. (departed)	Unrecorded	Unrecorded	Unrecorded
<b>Driver Detention Form</b> (RX 13)	Respondent (Munoz)	Unrecorded	Unrecorded	3:00 p.m. (arrived) 6:00 p.m. (departed)	Unrecorded	Unrecorded
<b>Tender Freight</b> (RX 12; RX 4 at 3)	Third-Party (AWG)	Unrecorded	Unrecorded	1:00 (scheduled pickup, not actual)	Unrecorded	Unrecorded
<b>Sign-In Dallas Terminal</b> (RX 15)	Complainant	Unrecorded	Unrecorded	3:00 p.m. (arrived)	Unrecorded	Unrecorded
<b>Dispatch System Driver Log</b> (RX 3)	Respondent (including Munoz)	8:00 a.m. (original) 10:25 a.m. (updated)	10:00 a.m. (original) 2:00 p.m. (updated)	6:00 p.m. (departed)	1:00 a.m. (original) 9:00 p.m. (updated)	12:01 a.m.

### ***Other Documentary Evidence***

**Cell Phone Records:** Both Complainant and Respondent submitted Complainant's cell phone records, which detail the phone calls between Complainant and his dispatcher Munoz on November 4 and 5, 2008 (CX 8, RX 28, 28A). Complainant testified that the cell phone records were indeed for his phone (Tr. 32). The cell phone records, provided by the carrier Cricket, reveal a series of phone calls between Complainant and Munoz (CX 8, p. 7 (numbered as page 6); RX 28, p. 8). The numbers also show text messages sent and received by the designation 777, described in the record's key as "data services transmissions" (CX 8, p. 1; RX 28, p. 3). The cell phone records were apparently missing pages at trial, which detail the phone calls of November 1 through 4; one of those missing pages appears in CX 8 but not RX 28 and was designated as RX 28A at the hearing.<sup>6</sup> No cell phone records for November 2 are in evidence. On November 4, 2008, the day before Complainant's termination, the cell phone records show that Complainant and Munoz spoke four times. The first was at 7:47 a.m. (Complainant to Munoz); the second was at 9:32 a.m. (Munoz to Complainant); the third was at 1:48 p.m. (Munoz to Complainant); and the fourth was at 3:17 p.m. (Munoz to Complainant)(RX 28A; CX 8, p. 5). Complainant testified that he would receive assignments in the morning and stay in touch with the dispatcher all day, as reflected by the phone records (Tr. 25).

The conversations of the next morning, November 5, are disputed by the parties. Based on the cell phone records, the following disputed calls on the morning of November 5, 2008 are at issue:

<b>Parties</b>	<b>Time</b>	<b>Duration</b>
Complainant to Munoz (cell)	8:09 a.m.	1:18
Munoz (office) to Complainant	8:12 a.m.	1:10
Complainant to Munoz (cell)	11:24 a.m.	4:29
Munoz (office) to Complainant	2:39 p.m.	1:17
Complainant to Munoz (cell)	3:55 p.m.	0:31
Munoz (cell) to Complainant	3:57 p.m.	2:10

According to Complainant, he called Munoz in the first conversation and asked for a load to deliver (Tr. 36). Munoz called back and said that he had a delivery to go from Oklahoma City to Dallas, but it had to arrive by 2:00 p.m. (Tr. 38). This was the second call on the table. Complainant refused the load because it was impossible; Munoz agreed and promised to call back after attempting to make new arrangements. *Id.* Since Munoz did not call back, Complainant called Munoz again at 11:24 (Tr. 39). Munoz informed him that he did not have a second load yet, and began unsuccessfully searching for one while he was on the phone (Tr. 40). At 2:39 p.m., Munoz called Complainant to inform him he needed to come turn his truck in, as he was being terminated (Tr. 41). A phone call at 3:55 and a return phone call at 3:57 related to Complainant's arrival at the terminal; he asked where he needed to park and informed Munoz that he had arrived and was cleaning out his truck (Tr. 42).

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<sup>6</sup> The missing page (marked as RX 28A) was not included in the bound set of Respondent's exhibits compiled by the court reporter. However, as the page was included in its counterpart Complainant's exhibit (CX 8), I have marked that page as RX 28A and references to RX 28A will be to the marked page in CX 8.

Haggin was also a witness to the phone call. She testified to being present when the first call came in, and she overheard the conversation through Complainant's speakerphone (Tr. 187). According to her, Complainant asked Munoz whether he had any deliveries lined up for him, and Munoz responded that he would have to get back to him (Tr. 186). Complainant called again around 11:00 a.m. (Tr. 187). In one of the conversations, she heard Complainant say that he was unable to get the load to Dallas by 2:00 p.m. *Id.* She also recalled overhearing a conversation at about 3:00 in which Complainant was told to bring his truck down to the terminal and clean it out (Tr. 188).

Munoz presented a different explanation for this sequence of phone calls. Putting aside the ambiguities discussed above, Munoz testified that he called Complainant initially and told him that he needed to come to the office (Tr. 107). After that phone call, Complainant called him several times to ask him questions about payroll (Tr. 109). Munoz also testified to only calling Complainant once on November 5 (Tr. 111).

**Munoz's Handwritten Dispatch Journal:** Complainant and Respondent submitted two pages from Munoz's handwritten dispatch journal (CX 1, RX 30). The first page lists the different drivers (including Complainant) and their routes for November 4, 2008. For Complainant, the document gives a location and number. Excluding numbers and codes, the line reads "Irving, Dallas, Detention, and OKC [Oklahoma City]." *Id.* The exhibits also contain the page for the following day, in which Complainant is listed as terminated (CX 1, p. 2; RX 30, p. 2).

**Complainant's Criminal Case Judgment:** Respondent submitted a copy of the July 17, 2001 criminal case judgment, which shows that Complainant pleaded guilty to drug possession with intent to distribute in 1998 and illegal possession of ammunition after former conviction of a felony in 1999 (EX 27). The records show that Complainant was sentenced to a term of imprisonment for the two counts (p. 2, 5). The document originated in the U.S. District Court for the Northern District of Oklahoma and the parties do not challenge its authenticity.

**Complainant's Employment Records with Oklahoma Forge, Inc.:** Respondent submitted a copy of Complainant's prior employment records with Oklahoma Forge, Inc. (RX 25). The records contain verification of employment for child support (p. 3); W-4 forms for 2004-05 (p. 4-6); employment eligibility verification (p. 7); copies of his social security card and driver's license (p. 8); his employment application (dated 10-21-04) and employee handbook form (p. 9-18); his unemployment application (p. 19); and his discharge form (p. 20). On his employment application, Complainant answered "yes" to the question of whether he had ever been convicted of a felony (p. 12). He answered "non-violent drug offense (federal)." *Id.* He also answered "yes" to the questions of whether he had ever been arrested and convicted for illegal drug use or possession (p. 15).

**Complainant's Employment Application with Frontier Express:** Respondent submitted a copy of Complainant's employment application with Frontier Express (dated 10-14-08) (RX 31). To the question, "Have you ever been convicted of a felony?" Complainant answered "No" (p. 5). Later in the application, he answered "No" again for the same question (p. 6). The application also asked for a list of traffic convictions, accident history, drunk driving violations, and reckless driving charges. *Id.* At the end of the application, Complainant signed his name

under the following line: “This certifies that this application was completed by me, and that all entries on it and information in it are true and complete to the best of my knowledge” (p. 9).

**Post-Termination Documents:** Complainant also submitted a copy of an email from Respondent showing he was terminated (CX 7), his pay stubs for the period he worked (CX 9), a notification that he filed a wage claim (CX 5), and his application for unemployment (CX 10).

**Administrative Law Judge Exhibits:** The record also contains a list of stipulations (ALJ 1) and a set of interrogatories and other discovery requests (ALJ 2). The interrogatories and discovery requests were submitted for the limited purpose of showing whether Complainant properly sought financial documents from Respondent (Tr. 252-53). The parties disputed whether Complainant specifically sought production of financial documents or only sought the information contained in such documents by interrogatory (Tr. 253).

### **Legal Background**

The employee protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105, prohibit discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety. To invoke the whistleblower provisions of the STAA, Complainant has the burden of proof to establish that he engaged in protected activity and that he was subjected to adverse action. He must also present evidence that Respondent was aware of the protected activity and took adverse action because of this awareness. *Byrd v. Consolidated Motor Freight*, ARB No. 98-064, ALJ No. 1997-STA-9 at 4-5 (ARB May 5, 1998).

Under 49 U.S.C. §31105 (a)(1)(A), an employee is engaged in protected activity if, inter alia, he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. Internal complaints from an employee to an employer qualify as protected activity. *See, e.g., Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 20 (1st Cir. 1998). If the internal communications are oral, however, they must be sufficient to give notice that protected activity has occurred. An employee’s concerns and comments may be too generalized and informal to constitute “complaints” that are “filed” with an employer within the meaning of the STAA. *Id.* at 22. A safety complaint made to any supervisor in the chain of command is deemed to be protected activity. *Zurenda v. J & K Plumbing and Heating Co., Inc.*, ARB No. 98-088, ALJ No. 1997-STA-16 at 5 (ARB, June 12, 1998).

An employee is also protected under the STAA when the employee refuses to operate a vehicle in violation of any federal rules, regulations, standard, or orders applicable to commercial vehicle safety or health. 49 U.S.C. §31105 (a)(1)(B)(i). Protection under this clause requires that a complainant demonstrate that operating a commercial motor vehicle would result in an actual violation of a pertinent motor vehicle standard. *Schulman v. Clean Harbors Environmental Services, Inc.*, ARB No. 99-015, ALJ No. 1998-STA-24 at 7 (ARB Oct. 18, 1999). Similarly, the STAA protects an employee who refuses to operate a commercial motor vehicle, which he or she reasonably believes would cause serious injury to the employee or the public due to its unsafe condition. 49 U.S.C. §31105(a)(1)(B)(ii); *Schulman*, 1998-STA-24 at 8.

If an employee objects to an unsafe condition but nevertheless drives the truck, the protection afforded the employee should be analyzed as a “complaint” under 49 U.S.C. §31105 (a)(1)(A), not as a refusal to drive. *Zurenda*, 1997-STA-16 at 5.

A complainant may establish unlawful discrimination in either of two ways. *Wright v. Southland Corp.*, 187 F.3d 1287, 1293 (11th Cir. 1999). The first method is using direct evidence to show that a respondent engaged in unlawful retaliation.<sup>7</sup> *Id.* Upon this showing, the burden of production shifts to the respondent to offer evidence showing that it would have taken the same action for non-retaliatory reasons. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). In some cases, the respondent’s allegedly retaliatory act may be driven by mixed motives, involving both permissible and impermissible factors. In a “mixed motives” case, the respondent must establish that it would have reached the same decision even in the absence of the protected conduct.<sup>8</sup>

The second method for establishing unlawful discrimination under the STAA is to create the inference of unlawful retaliation even in the absence of direct evidence. The U.S. Supreme Court developed a burden-shifting approach, which enables a complainant to present a rebuttable presumption of illegal discrimination or retaliation through circumstantial evidence. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Wright*, 187 F.3d at 1290. The Board has applied this approach in STAA cases. *Byrd*, 1997-STA-9 at 4-5. According to the Board, a complainant covered under the STAA can meet his burden of creating the inference of retaliation by proving (1) that he engaged in protected activity; (2) that respondent was aware of the activity; (3) that complainant suffered an adverse employment action; and (4) that there was a causal link between the protected activity and the adverse employment action. *Id.* Temporal proximity alone may be sufficient to raise the inference of a causal link between protected activity and an adverse employment action. *See, e.g., Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 386 (10th Cir. 1984). Upon this showing, the burden shifts to respondent to produce evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant may, in turn, rebut that showing with proof that the proffered reason was not the true reason for the adverse action, and was only a proxy, or “pretext,” for illicit motives. *See McDonnell Douglas Corp.*, 411 U.S. at 802, 803. However, while the burden of production shifts, the burden of proof always remains with the employee. *See generally Berry v. Stevinson Chevrolet*, 74 F.3d 980, 985-86 (10th Cir. 1996).

If an employee has satisfied the initial burden of creating an inference of retaliation and the employer has articulated a nondiscriminatory reason for taking the adverse action, the employee may prevail by establishing that the employer’s legitimate and nondiscriminatory reason for taking the adverse employment action was false. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). If the justification is determined to be false, a trier of fact

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<sup>7</sup> The Court defines direct evidence for purposes of employment discrimination as “evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected [activity].” *Wright*, 187 F.3d at 1293.

<sup>8</sup> Where the evidence of record clearly does not support a finding of any unlawful motive on the part of the respondent, the “dual motive” analysis is inappropriate. *Schulman*, 1998-STA-24 at 10. *Cf. Desert Palace dba Caesar’s Palace Hotel & Casino v. Costa*, 123 S.Ct. 2148 (June 9, 2003).

may conclude the employer engaged in unlawful discrimination. *Id.* at 140. Thus, there may be a valid inference that the employer's falsehood is an attempt to cover up the unlawful discrimination.

### **Discussion**

A complainant seeking to prevail in a whistleblower case under the STAA must demonstrate: (1) he was an employee working for an employer covered by the STAA; (2) he engaged in protected activity during the course of that employment; (3) the employer was aware of his involvement in the protected activity; (4) he was subject to an adverse action; and (5) a nexus exists between the protected activity and the adverse employment action. *Byrd v. Consolidated Motor Freight*, ARB No. 98-064, ALJ No. 1997-STA-9 at 4-5 (ARB May 5, 1998). By stipulation, Complainant and Respondent have agreed to the existence of an employer-employee relationship within the boundaries of the STAA and have agreed Complainant was terminated on November 5, 2008 (ALJ 1). Stipulations are accepted if based on substantial evidence, and I find the stipulations here to be supported by substantial evidence. The record in this case supports a finding that Complainant was an employee prior to his termination (CX 9, RX 31) and that Respondent terminated Complainant (CX 6, 7). 49 U.S.C. §31101(2)(A)-(3)(A); 29 C.F.R. §1978.101(d)(establishing the legal standard for an employer-employee relationship under the STAA). Complainant's termination constitutes an adverse employment action since it clearly constitutes a "significant change in employment status"; moreover, "discharge" is specifically included in the statute. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); 49 U.S.C. §31105. The parties contest elements (2), (3), and (5), which are the focus of the following discussion.

#### ***Protected Activity and Notice of Protected Activity***

Complainant argues he engaged in protected activity by refusing to drive a tractor trailer for Respondent with such a restrictive time limit that he would have needed to violate the speed limit (Complainant's Closing Argument at 1). According to Complainant's testimony, he communicated to his dispatcher a refusal to drive when he was assigned a load from Tulsa to Oklahoma City continuing to Dallas, to be completed in five hours (Tr. 38). As noted above, an employee is engaged in protected activity if the employee has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. 49 U.S.C. §31105 (a)(1)(A). Complainant's actions arguably fall within the purview of that section. In the alternative, an employee is engaged in protected activity if the employee refuses to operate a vehicle in violation of any federal rules, regulations, standard, or orders applicable to commercial vehicle safety or health. 49 U.S.C. §31105 (a)(1)(B). That provision is the one cited in the complaint. The additional three forms of protected activity, added in 2007, as discussed above, are inapplicable here and will not be further discussed.<sup>9</sup>

According to Complainant, he made a phone call to Munoz, his dispatcher, at 8:09 a.m. on November 5, 2008 (Tr. 35). Munoz told Complainant that he was looking for a load, and that he needed to call the terminal in Oklahoma City to find out (Tr. 36). Munoz called back at 8:12 a.m. and told Complainant that he had a load to be taken from Tulsa to Oklahoma City and

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<sup>9</sup> See footnote 1, above.

another to be taken from Oklahoma City to Dallas (Tr. 38). The Dallas load would have to arrive by 2 p.m. *Id.* Complainant informed Munoz that he would not be able to deliver the load by that time and Munoz agreed and promised to call back after attempting to work out an alternative arrangement (Tr. 38-39). Complainant never received a call after that, so he called Munoz at 11:24 a.m. on his cell phone (Tr. 39). This was a lengthy conversation, lasting four and a half minutes, during which time Munoz attempted to find another load for Complainant (Tr. 40). Munoz called back at 2:39 p.m., but when he did it was to terminate Complainant (Tr. 41). These phone calls and times correlated with the cell phone records detailed in CX 8 and RX 28 and 28A. Complainant's testimony was consistent between direct examination and cross-examination despite some confusion during questioning about the cell phone records (to see the consistency of his testimony, compare Tr. 34-43 with Tr. 66-69).

If Complainant's story is accurate, he has established both protected activity and notice of protected activity. The STAA's "refusal to drive" clause provides two alternative circumstances under which an employee can permissibly refuse to drive: (1) the employee's driving of the commercial vehicle would constitute an "actual violation" of a motor vehicle standard; and (2) the employee's driving would create "reasonable apprehension of serious injury" to the driver or the public. 49 U.S.C. §31105(a)(1)(B)(i)-(ii). Complainant has shown the first circumstance, an "actual violation." Scheduling a run in a manner that requires a driver to exceed applicable speed limit laws is a violation of federal motor carrier safety regulations. 49 C.F.R. §392.6.<sup>10</sup> Offering such a delivery assignment to Complainant would constitute an "actual violation" of trucking safety laws under 49 U.S.C. §31105(a)(1)(B)(i). *Nolan v. AC Express*, 1992-STA-37 (Sec'y Jan 17, 1995); *McGavock v. Elbar, Inc.*, 1986-STA-5 (Sec'y July 9, 1986). It is therefore unnecessary to determine whether Complainant established reasonable apprehension of serious injury, which he communicated to Respondent.<sup>11</sup> Consequently, if I credit Complainant's testimony, his refusal to drive would be protected under the circumstances.

In addition, Complainant's account would arguably establish protected activity on an alternative basis not listed in the complaint: that he made an internal complaint to a superior regarding an actual violation of a motor carrier safety standard. Section 31105(a)(1)'s "Complaint Clause" protects an employee from retaliation if the employee "has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order." Purely internal complaints, even informal ones, qualify under this standard, so long as they were made to a superior. *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993)(oral complaints to supervisor "are protected activity under the STAA"); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987)(finding that driver had

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<sup>10</sup> This section reads, "No motor carrier shall schedule a run nor permit nor require the operation of any commercial motor vehicle between points in such period of time as would necessitate the commercial motor vehicle being operated at speeds greater than those prescribed by the jurisdictions in or through which the commercial motor vehicle is being operated." 49 C.F.R. §392.6. Despite OSHA's finding to the contrary, it is of no moment that the motor carrier, and not the driver, would be in violation of the subject section. Likewise, contrary to OSHA's finding, Complainant indicated he would take the load if the schedule were adjusted when he asked Munoz to check to see whether the delivery could be moved to a later time in the afternoon. (Tr. 39). That testimony was corroborated by Haggin. (Tr. 186-87).

<sup>11</sup> Respondent correctly notes that under the "reasonable apprehension of serious injury" clause, a complainant must seek and have been unable to obtain, correction of the hazardous safety or security condition before refusing (Respondent's Proposed Findings of Fact and Conclusions of Law at 6, citing 49 U.S.C. §31105(a)(2)).

engaged in protected activity under the STAA where driver had made only oral complaints to supervisors). The Tenth Circuit has agreed in similar situations. *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985)(finding internal complaints sufficient under environmental whistleblower law's complaint clause). Since Complainant testified that he communicated his refusal to drive directly to his supervisor, he has established that Respondent had notice of the protected activity at the time he was terminated if his version of events is accepted (Tr. 38-39).

Complainant argued, and Respondent does not contest, that an assignment requiring Complainant to deliver a tractor trailer load from Tulsa to Oklahoma City and another load from Oklahoma City to the Dallas area by 2 p.m. would be impossible to accomplish at safe speeds or within existing speed limits (Tr. 38). I agree. The period of time from 8:12 a.m., when he was offered the load, until 2 p.m., when the load was required to be delivered in Dallas, was less than six hours. Complainant testified that it took twenty minutes to drive to the Tulsa terminal; it took an hour and a half to drive from Tulsa to Oklahoma City; and it took a minimum of four hours to drive from Oklahoma City to Irving, Texas, a suburb of Dallas (Tr. 26, 30-31). This would equal precisely five hours and fifty minutes. Delivering the load, even if theoretically possible, would not include the mandatory pre-trip safety checks, fueling, the hook-up process for attaching and unattaching the tractor to the trailer, and any road hazards, including traffic around the Dallas area (Tr. 26-28). Munoz, Complainant's dispatcher, testified that it takes about fifteen minutes to hook a trailer onto a tractor, another fifteen minutes on mandatory safety inspections, and fifteen minutes more to fuel (Tr. 103-104). He testified that a drive from Tulsa to Oklahoma City takes two hours, longer than the Complainant estimated (Tr. 106). In any case, the trip would have been impossible without exceeding applicable speed limits on the route.

Complainant's testimony is corroborated by the sworn testimony of his fiancée, Haggin, who was a credible witness. She testified that Complainant received a phone call from Munoz at about 8:00 a.m. on November 5, 2008, that Complainant called Munoz around 11:00 a.m. to follow up, and that she overheard both conversations on the speaker phone (Tr. 186-87). While uncertain during which conversation Complainant was offered a load, she confirmed overhearing Complainant decline the load because delivery would be impossible on time and ask whether it could be rescheduled. (Tr. 186). She also overheard a phone call around 3:00 p.m. in which Complainant was terminated (Tr. 188). Like Complainant's testimony, Haggin's testimony roughly tracks the cell phone records (CX 8, RX 28, 28A).

Respondent presents a very different account of these conversations. If I choose to credit Respondent's version, Complainant will be unable to show either protected activity or notice of protected activity. Munoz claimed that he called Complainant initially and told him that he needed to come to the office (Tr. 107). After that, Complainant called several times asking questions about payroll (Tr. 109). According to Munoz, he learned of Complainant's misdelivered load from the night before after speaking with dispatchers at the Oklahoma City terminal (Tr. 132). He then called Complainant to see where Complainant was; upon learning Complainant was in Tulsa, he told Complainant to come to the Tulsa terminal to be fired (Tr. 132-33). However, Munoz also testified that he received a phone call from Caldwell telling him to terminate Complainant (Tr. 157-58). He also testified that he received a phone call from Caldwell telling him to terminate Complainant before he called Complainant to come to the

Tulsa terminal (Tr. 146-47). Munoz did not tell Caldwell about Complainant's misdelivery the night before. *Id.* Munoz testified that Caldwell did not tell him why Complainant was being fired, but he assumed it was because of the downsizing (Tr. 157-58). Caldwell testified precisely the opposite and stated that he told Munoz to terminate the Penske drivers (Tr. 161-62). Munoz testified that Caldwell had said to fire Complainant specifically (Tr. 111, 157-58); Caldwell testified that he never mentioned Complainant by name (Tr. 161-62). Regardless of the precise order of the phone calls, Respondent is clear that it had no intention of offering Complainant an assignment on the morning of November 5, and that it did not in fact offer Complainant one.

Respondent has pointed to alleged falsifications by Complainant that may impact his credibility, first by alleging that Complainant falsified his driver's log and underreported his hours, and second by alleging that Complainant lied on his signed employment application.

First, Respondent claims that Complainant falsified his driver's log to put him under hours, a terminable offense (Respondent's Proposed Findings of Fact and Conclusions of Law at 4). That allegation rests on linking together a series of business records that could show that Complainant exceeded his permissible hours on duty the day before he was terminated and failed to follow orders that he remain in Oklahoma City for the night. His driver's log shows that he arrived at the Tulsa terminal at 9:00 a.m. and left Tulsa at 9:30 a.m.; he arrived in Irving at 2:00 p.m. and departed at 2:30; he arrived in Dallas at 3:00 and departed at 3:30; he arrived in Oklahoma City at 8:00 p.m. and left at 8:30; and he arrived in Tulsa at 10:00 p.m. (RX 5). He left duty at 10:30 p.m., which is 13.5 hours after he entered duty. *Id.* At trial, Complainant testified that he spent an extra half hour in Dallas, placing him exactly at 14 hours, the limit under Department of Transportation regulations (Tr. 263). Respondent argues more than this. The Rate Confirmation Sheet shows that Complainant actually arrived in Irving, TX at 10:05 a.m., which would have required Complainant to have left Tulsa between 5:30 and 6:00 a.m. (RX 9). However, Munoz testified that he ordinarily arrived at work around 7:30 a.m. and dispatched Complainant's deliveries after this time (Tr. 101). The cell phone records confirm that the first phone call between Munoz and Complainant on November 4 was at 7:47 a.m., which is consistent with Complainant's driver's log (RX 28A; CX 8, p. 5). Respondent has not explained how Complainant could have left at 6:00 a.m., before talking to his dispatcher. Also, the Dispatch System Driver Log (as updated by Munoz at 8:44 a.m., after he spoke with Complainant) initially states that the load was picked up from Tulsa at 8 a.m. (RX 3).

The documents relied upon by Respondent to establish the falsification are equivocal, incomplete, and/or prospective in nature. In this regard, the rate confirmation sheet shows Complainant left Irving, Texas at 12:14 p.m. (RX 9); Respondent has not explained why it would take Complainant nearly three hours to arrive in Dallas, ten miles away (RX 15). Bradshaw admits that the information on the document is hearsay; she did not know when the entries were made, who filled in the document, or what criteria were used to create the entries (Tr. 233-35). The driver detention form, based on information Munoz received from someone at the Dallas terminal, has a similar flaw (RX 13; Tr. 124). The form appears to have been filled in at 3:00 p.m., before Munoz's workday ended, but showed Complainant would be in Dallas until 6:00 p.m., which conflicted with his driver's log (see RX 13). In addition to the two significant erasures, the credibility of the document is also impacted based on the fact that it was filled out prospectively, based on information not in the actual knowledge of the author. Without these

two documents, Respondent cannot show that Complainant falsified his driver's log, as the Dallas terminal sign-in log corroborates Complainant's driver's log (RX 15); the tender freight lists only scheduled and not actual times (RX 12; Tr. 236); and the dispatch system log was based on the same information as the driver detention form (CX 3; RX 3). Thus, I find that Respondent has not succeeded in impeaching the credibility of Complainant's driver's log or establishing that he exceeded his permissible hours.

Second, Respondent points to Complainant's deliberate falsification of his signed employment application. *Id.* at 3-4. Complainant admitted that the information he listed was wrong, but he argued it was excused because the criminal records were sealed (Tr. 46-47; 74). That explanation did not, however, withstand scrutiny as Respondent showed that Complainant had disclosed this information on a prior application (Tr. 83-84; RX 25). Moreover, the rationale for sealing the records that he articulated was to protect what was then an ongoing investigation, and a careful reading of Complainant's testimony reveals that he believed that he was not *required* to disclose the information, not that he was precluded from doing so. Thus, I find that Complainant's falsification of his signed employment application does impinge on his credibility.

Despite the general issue concerning his credibility, I favor Complainant's testimony establishing protected activity over Respondent's version of events for several reasons. First, Complainant's testimony has accounted for all six phone calls between Complainant and his dispatcher, Munoz, on November 5, 2008. Munoz testified that he only called Complainant once that day, when he in fact the cell phone records show that he called Complainant three times and had a total of six conversations (compare Tr. 111 with CX 8, RX 28, 28A). Munoz did not give specific testimony on the content of at least one of the phone calls, the 11:29 a.m. phone call lasting four and a half minutes. Second, it is unclear from Munoz's testimony in which conversation he told Complainant to come to the terminal, although he did so before noon. Munoz has not explained why Complainant did not come in to the terminal until late afternoon if Munoz told him in the morning to come to the office. Complainant has explained this delay, as in his version he waited at home for several hours while Munoz attempted to adjust the delivery time on the load he was offered that morning. Third, Complainant's version of events was corroborated by his fiancée in sworn testimony, and her credibility is unchallenged, while Munoz's version is inconsistent with Caldwell's.

A more significant problem exists in Munoz's trial testimony, however, beyond a simple sequence of events that appears to conflict with the other evidence. His testimony never overcomes an inherent contradiction concerning his request to Complainant on the morning of November 5, 2008 that he come in to the office to be fired. In that regard, Munoz maintained that he had no intention of offering Complainant an assignment because, when he called him that morning, he had learned that Complainant misdelivered a load the night before and violated his orders to remain in Oklahoma City that night. (Tr. 135-36). On the other hand, however, he asserts that he called Complainant to the office in order to terminate him for an entirely unrelated reason: he had received word from Caldwell to terminate him because the drivers with a Penske rental truck were to be terminated (Tr. 133-34). He testified that he was not surprised that Complainant was being terminated because he complained too much about matters such as the way he was being paid. *Id.* These conflicting motives fit awkwardly with the call sequence.

Munoz could not have found out about the misdelivered load from the night before until he arrived at work at 7:30 a.m. He updated the electronic dispatch system to show that Complainant was in Oklahoma City at 7:59 a.m. and 8:05 a.m. (RX 3, right hand column, fourth and fifth entries). He did not update the system again to show Complainant was in Tulsa until 8:27 a.m. (third entry). The first set of conversations between Complainant and Respondent took place at 8:09 and 8:12 a.m. (CX 8, RX 28, 28A). Munoz testified that upon finding out of this misdelivered load he called Complainant and told him to come to the office (Tr. 106-07, 132-33). This correlates with the cell phone records. But Munoz was not qualified to hire or fire his drivers (Tr. 154), and that conversation apparently took place before he received word from Caldwell that he was to terminate Complainant because the division was downsizing (see Tr. 133-34). Munoz's testimony is unclear at the most critical point: whether he called Complainant and told him to come in the office *before* speaking to Caldwell and being told to terminate Complainant. Caldwell's testimony does not bolster or clarify Munoz' testimony but adds further discrepancies (as discussed below on the pretext issue).

Neither of the sequences of events provided by Complainant and Respondent is entirely convincing. Neither presented a clear, internally consistent, objectively verifiable explanation for the series of phone calls on November 5, 2008 and the events of the preceding day. Complainant himself was not a credible witness, and Respondent's witnesses, while credible by demeanor, contradicted each other, relied on documents of questionable origin, and failed to explain important inconsistencies. In the final analysis, the shortcomings of Complainant's testimony, especially his unconvincing explanation of the series of events the previous night, are not critical to showing protected activity and notice to Respondent of that protected activity. However, the deficiencies in Respondent's version of events are fatal. Munoz only clearly recalled one conversation the morning of November 5, when the record shows there were two; he did not clearly explain the point at which he was asked to terminate Complainant. Respondent has failed to rebut Complainant's account of the phone conversations. Based on the cell phone records, the most objective evidence in this case, I find Complainant has established protected activity and notice thereof.

### **Causal Link between Protected Activity and Adverse Employment Action**

Respondent disputes that Complainant can establish a causal relationship between the alleged protected activity and the adverse employment action (i.e., termination). In particular, Respondent argues that Complainant's termination was caused solely by poor economic conditions and the phasing out of Penske Straightliner rental trucks (Respondent's Proposed Findings of Fact and Conclusions of Law at 3). In order to succeed in an STAA claim, Complainant must establish a causal relationship between Respondent's adverse action against him and his protected activity. *See Prior v. Hughes Transport, Inc.*, ARB No. 04-044, ALJ No. 2004-STA-1 (ARB Apr. 29, 2005); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-33 (ARB Oct. 31, 2003). As a general rule, temporal proximity is sufficient to raise the inference that a respondent's adverse actions were taken in retaliation for a complainant's protected activities. *O'Neal v. Ferguson Const. Corp.*, 237 F.3d 1248, 1253, 1255 (10<sup>th</sup> Cir. 2001) (three months is sufficiently close to time to raise inference). *Compare Candelaria v. EG&G Energy Measurements, Inc.*, 33 F.3d 1259, 1262 (10<sup>th</sup> Cir. 1994) (finding three years not in sufficiently close temporal proximity).

In this case, Complainant argues that his refusal to drive and his termination followed sufficiently closely in time to create the inference of causal connection. I agree. A matter of mere hours separated his protected refusal to drive and his termination, as his testimony on the 8:12 phone call (where he made his protected refusal to drive) and the 2:39 phone call (where he was told to come to the terminal to be terminated) place them in close temporal proximity (CX 8, RX 28; Tr. 38, 41). In addition, the sequence of phone calls and, in particular, the lack of clarity in the testimony between Munoz and Caldwell as to when they spoke to each other and decided to terminate Complainant, supports Complainant's version of events and contributes to the inference. There was clearly an opening at which Complainant's refusal to drive could have been communicated to Caldwell, the person ultimately responsible for hiring and firing (see Tr. 146-47, 157-58, 161-62).

The establishment of a causal connection completes Complainant's prima facie case. The burden shifts to Respondent to produce evidence showing that Complainant's termination was unrelated to Complainant's protected activity by articulating a nondiscriminatory motive for the adverse action. *E.E.O.C. v. Flasher Co., Inc.*, 986 F.2d 1312, 1316 (10<sup>th</sup> Cir. 1992), quoting *McDonnell Douglas*, 411 U.S. at 802. In proving that an Respondent's asserted reason for adverse action is a pretext, Complainant must prove not only that the Respondent's asserted reason is false, but also that discrimination was the true reason for the adverse action. *Noeth v. Indiana Western Express, Inc.*, ARB No. 07-042, ALJ No. 2006-STA-34 (ARB March 19, 2009). Complainant bears the ultimate burden of persuasion on the issue of whether Respondent discriminated against him. *Id.*<sup>12</sup>

Respondent has offered a legitimate, non-retaliatory motive for terminating Complainant's employment: the termination of all Penske Straightliner rental truck drivers, including Complainant, because of narrow profit margins. According to Caldwell, early November 2008 was a financial low point for Respondent (Tr. 165). Costs escalated nineteen percent in September and October 2008. *Id.* Several major customers of the trucking company moved or closed. *Id.* Annual leases for Penske rental trucks had significantly reduced their profitability over 2008 (Tr. 167). According to Respondent, nine other Penske trucks were returned and their drivers terminated at about the same time (Tr. 181). Complainant admitted that the state of the economy was not good, and that the trucking industry in particular had

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<sup>12</sup> Despite some initial indication to the contrary, this has not developed into a mixed-motive case. Respondent presented significant evidence that Complainant abandoned a load in Oklahoma City without authorization the night before he was terminated and continued on to Tulsa against orders from Munoz (Tr. 127-28; 132-33; 226-27; see also, CX 3; RX 3; RX 11). Complainant's explanation for this is neither consistent nor convincing (Tr. 266). He testified that he had been instructed to leave the trailer in the terminal in Oklahoma City and have the load delivered the next day (Tr. 266). When pressed, however, Complainant admitted he had only "assume[d]" that Munoz wanted him to leave the load at the terminal (Tr. 266-67). Respondent does not claim that this apparent act of insubordination played any role in Complainant's termination. (Respondent's Proposed Findings of Fact and Conclusions of Law at 4, 8-9). Munoz firmly testified that he did not tell Caldwell, the decision maker responsible for terminating Complainant, about the apparent misdelivery and insubordination of Complainant in continuing to Tulsa (Tr. 146-47). Had this series of events played a role in Complainant's termination, this might have been a different case altogether. The facts presented by the parties do not give rise to a mixed motive analysis because, upon close scrutiny, Respondent's downsizing rationale, based upon elimination of the Penske rental trucks and their drivers, is simply not convincing, yet it is the only rationale offered. Accordingly, only a pretext analysis follows, based upon Respondent's only proffered non-discriminatory reason for terminating Complainant.

encountered hard economic times (Tr. 52, 76-77).<sup>13</sup> This explanation, if true, would break the causal connection between Complainant's protected activity and his termination.

As Respondent has proffered a legitimate, non-retaliatory reason for terminating Complainant's employment, Complainant must show that the protected activity and the termination are nonetheless still causally linked, because the legitimate, non-discriminatory reason was only a proxy, or a "pretext," for illegal retaliation. Complainant points to a number of reasons as to why Respondent's neutral, non-retaliatory reason for terminating Complainant is simply a pretext for retaliation (Complainant's Closing Argument at 4). First, the Status Change Form showing why Complainant was terminated states "too many complaints per B.C.," which is apparently a reference to Bill Caldwell (CX 6). Second, Complainant had a reputation for being a "complainer" around the office, and indeed he had made other safety complaints in the past (Tr. 134-35, 171). Third, the evidence suggests that the Penske rental truck drivers were not terminated at the same time, that Complainant was terminated first and others were terminated only later (Tr. 141, 169). In addition, some of those drivers, not including Complainant, have been hired back on other forms of employment contracts (Tr. 117, 168, 170). Finally, a significant discrepancy between Munoz's and Caldwell's testimonies, namely as to whether Complainant was singled out for termination in a phone call on November 5, 2008, dilutes the strength of Respondent's non-retaliatory reason for termination (compare Tr. 146-47 with Tr. 161-62). If Munoz is correct that Caldwell singled out Complainant by name for termination, that would undermine the allegation that Complainant's termination was due to a neutral implementation of the rental-truck-program elimination. On the strength of these factors together, I find that Complainant has successfully established that Respondent's non-retaliatory reason for his termination is only a pretext for illegal retaliation.

The Status Change Form listed "too many complaints" as the only reason for why Complainant was terminated (CX 6). The form did not say that economic considerations played a role, or even that Complainant was a poor employee who did not follow orders or get along with colleagues. In the abstract, "too many complaints per B[ill] C[aldwell]" might be ambiguous and might have referred to complaints about Complainant rather than complaints by him. But in context, and given the other testimony showing that Complainant had quite an extensive reputation at work for being a "complainer" (Tr. 134, 171), this statement probably refers to complaints that Complainant himself has made. Caldwell may be correct that the purpose of the comments on the form was for use purely as an internal reminder in case the terminated driver ever reapplied for employment (Tr. 174). That testimony, however, acknowledges that the form reveals the internal thought processes of the decision makers responsible for the status change (here, termination). Consequently, the form supports the inference that the complaints, and not a downturn in the economy, were the actual motivation for Complainant's termination, and the economic downturn was a mere pretext.

Complainant was the first Penske rental truck driver to be terminated by Respondent, although he was not the only one (Tr. 140, 169). Disparate treatment among similarly-situated employees may show that a legitimate, non-retaliatory motive is only a pretext for illegal retaliation. *Speegle v. Stone & Webster Const.*, ARB No. 06-041, ALJ No. 2006-ERA-006 (ARB Sept. 24, 2009). Caldwell asserts that nine rental truck drivers were terminated "within

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<sup>13</sup> Also, upon request I took official notice of the economic downturn. (Tr. 17-18). See 29 C.F.R. §18.45.

days of each other” (Tr. 181). Some drivers were on longer-term trips and they were not terminated until they returned to Oklahoma. *Id.* The decision to downsize the rental truck division was apparently implemented quickly; Complainant had only worked for Respondent for a little over two weeks by the time he was terminated (see Tr. 177-78; CX 7). On November 5, Complainant was terminated no more than several hours after his dispatcher received word to terminate Penske rental truck drivers (Tr. 136, 140, 146-47). Munoz testified that he was told to terminate another Penske rental truck driver “about the end of the year,” thereby contradicting Caldwell’s statement that the drivers were all fired within days of each other. (Tr. 141). That the terminations of the other Penske rental truck drivers were not simultaneous further contributes to the inference that Respondent’s economic reasons for terminating Complainant were only a pretext for illegal retaliation. In addition, Respondent indicated that it has hired back at least some of the rental truck drivers that it had earlier terminated on different contracts, and it has hired several new drivers (Tr. 117-18). Complainant was never reoffered a job (Tr. 118). Such disparate treatment contributes to the inference of pretext.

Respondent’s arguments concerning a change in economic conditions, which are credible in the abstract, do not account for the fact that Complainant was hired a mere 15 days prior to his termination. While Respondent has argued that economic factors changed during that short period, it has submitted no corroborative evidence suggesting such a complete turnaround in Respondent’s financial situation in a slightly-over-two-week period. Respondent relies entirely on Caldwell’s uncorroborated testimony, which is inconsistent with that of Munoz in some respects, to support the sudden turnaround. Thus, while I accept the premise that the Penske trucks were ultimately eliminated due to a downturn in the economy, Respondent has not adequately explained the short time frame involved here.

Inconsistent testimony by a respondent as to the reason a complainant was terminated may suggest retaliation. The Board has held that an “employer’s shifting explanations for its adverse action may be considered evidence of pretext...” *Douglas v. Skywest Airlines, Inc.*, ARB No. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009). While Respondent’s motives here were not necessarily “shifting,” the testimony shows that those motives were only incompletely formed at best. Munoz and Caldwell disagree as to whether Complainant was singled out for termination (compare Tr. 112, 146-47 with 161-62). Munoz’s testimony was unclear, even contradictory, as to whether Caldwell gave him a reason for Complainant’s termination (Tr. 146-47, 157-58). Munoz testified that he was unsurprised Complainant had been terminated because of the various problems Complainant had had on the job (Tr. 154). According to Respondent, it eliminated a division the morning after Complainant was clearly insubordinate and abandoned a delivery. Respondent chose a weaker, more poorly documented explanation for terminating Complainant over a stronger, well-documented one. Respondent’s presentation on the record never overcomes this fundamental discrepancy, and it remains unexplained. Had Respondent maintained it terminated Complainant for insubordination, its explanation would have been more persuasive. Respondent’s weak business-related justification for terminating Complainant simply does not overcome the inference that Complainant’s refusal to drive an illegal load led to his termination.

On balance, the presentations of both parties fail to indisputably show what actually happened on November 5, 2008. Neither story is completely convincing. It is unclear how the

events of the preceding day may have factored into Complainant's termination. But the case rests on the evidence actually submitted and not on speculation, and Complainant must only prove his case by a preponderance of the evidence. On the question of whether a causal relationship existed between the protected activity and the termination, Respondent offered a pretextual explanation for Complainant's termination even though it may have had legitimate reasons to terminate him. At the heart of the case, Respondent has not adequately explained the Status Change Form listing "too many complaints" (CX 6) and its witnesses have contradicted each other. Complainant's case is not a strong one, but it is a sufficient one. I find that Complainant has established by a preponderance of the evidence that Respondent terminated him because of Complainant's participation in protected activity, in violation of the Surface Transportation Assistance Act, 49 U.S.C. §31105.

### Remedies

#### ***Back Pay***

Back pay is the ordinary remedy for a successful complainant under the STAA. 49 U.S.C. §31105(b)(3). An award of back pay is not a matter of discretion, but is mandated once it is determined an employer violated the STAA. *Asst. Sec'y & Moravec v. HC & M Transport, Inc.*, 1990-STA 44, slip op. at 10 (Sec'y Jan. 6, 1992). A back pay award is intended to restore a complainant to the economic position he would have occupied but for his employer's retaliatory act. *Jackson v. Butler & Co.*, ARB No. 03-116, 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004). Consequently, a back pay award is based on earnings an employee would have received from the time of his discharge until the time of his reinstatement or equivalent. *Dutile v. Tighe Trucking, Inc.*, 1993-STA-31, slip op. at 5 (Sec'y Oct. 31, 1994). A back pay award includes interest. *Drew v. Alpine, Inc.*, ARB No. 02-044, 02-079, ALJ No. 2001-STA-47 (ARB June 30, 2003).

Where an employer subsequently discovers evidence that would have led to an employee's permissible termination had the employer known of it at the time of the retaliatory act, it would be unrealistic to require the employer to ignore the newly-discovered information and reinstate the employee and pay back wages. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995). This is true even where the employer would not have discovered the employee's wrongdoing absent discovery in litigation. *Id.* According to the Board, *McKennon* applies in whistleblowing cases where an employer subsequently discovers evidence of employee wrongdoing, after the employee was impermissibly terminated. *McCafferty v. Centerior Energy*, ARB No. 96-144, ALJ No. 1996-ERA-6, slip op. at 15 (ARB Sept. 24, 1997); compare *Tipton v. Indiana Michigan Power Co.*, ARB 04-147, ALJ No. 2002-ERA-24, slip op. at 8-9 (ARB Sept. 29, 2006)(not finding adequate after-acquired evidence of grounds for termination). Consequently, if Respondent here can show it discovered legitimate grounds for terminating Complainant after his termination, such a showing would cut off the back pay award as of the date of the discovery, or, if the date of discovery was not given, the date of the hearing. *McCafferty, supra*.

Respondents allege three violations that would have resulted in Complainant's termination had they been known at the time: first, his text messaging while driving; second, his

alleged falsification of driving records; and third, false statements on his employment application. (Respondent's Closing Brief at 8-9).

With respect to the first alleged violation, Respondent's Director of Safety and Administration (Bradshaw) testified that text messaging while driving was an offense unequivocally resulting in termination (Tr. 229). Complainant admitted at trial that he had occasionally engaged in text messaging while driving, but he did not actually admit to sending text messages while driving for Respondent (Tr. 91). Despite Respondent's attempt to rely on the phone records contained in CX 8 and RX 28, the phone records do not establish that Complainant ever sent a text message while he was driving a truck for Frontier Express. The phone records list all data transmissions as one notation, and do not distinguish among forms of data transmissions or text messages received from text messages sent (see CX 8, p. 1). Based on the cell phone records alone, it is unclear whether Complainant actually sent text messages while driving. He may have been stopped or off duty, or he may only have received texts, and not sent or read them. The brief testimony at trial in which Complainant admitted that he would occasionally "text" while driving is also unclear, as it does not indicate whether he sent or received such messages, or whether he engaged in texting while driving during his two weeks of employment with Frontier Express. Consequently, the text messaging testimony and cell phone records do not establish a basis for terminating Complainant and cutting off back pay.

The alleged falsification of Complainant's driving record the day before his termination is also unconvincing as a ground for cutting off a back pay award. In that regard, Complainant never admitted to falsifying his driving record; rather, it is an inference Respondent made based on apparent discrepancies between Complainant's Driver's Log (RX 5) and the Rate Confirmation Sheet (RX 9) and Driver Detention Form (RX 13). The Rate Confirmation Sheet was produced by a third party, no testimony from the author of the document was produced, and Respondent's witnesses were uncertain as to how information was recorded or whether it was accurate (Tr. 232-233). It also fails to account for the nearly three-hour gap between Complainant's alleged departure from Irving, Texas at 12:14 p.m. and his documented arrival in Dallas, Texas at 3:00 p.m. Specifically, the Detention Form shows Complainant arrived in Dallas at 3:00 p.m., nearly three hours after the Rate Confirmation Sheet shows he left Irving, Texas, ten miles away (RX 13). That handwritten Detention Form, however, was prepared by Munoz based on prospective information received from a third-party source. If Complainant was correct that he did not spend three hours in detention, Munoz would not have known this until the next day; Munoz left the office at 4:30 p.m. In addition, the form clearly contains two significant erasures. Respondent admitted some drivers round to the nearest hour on their logs (Tr. 246). It is unlikely Respondent would have ever discovered this alleged alteration of the driver log, given that they only "do spot checks" of their records, according to Bradshaw (Tr. 224-225). More importantly, however, Respondent's records are simply too unreliable to support the inference that Complainant falsified his Driver's Log, or the related inference that he actually worked more than the allowed 14 hours. Accordingly, I find that Respondent has not shown that it would have had legitimate grounds for terminating Complainant for falsifying his records or for driving over his scheduled hours for the day.

The false answers provided on Complainant's employment application, however, are a different case altogether. Complainant applied for a job with Respondent on October 14, 2008,

according to his employment application (RX 31). On the application, he indicated that he had never been convicted of a felony (RX 31, p. 5-6). However, records show that Complainant had been convicted of drug possession with intent to distribute and unlawful possession of ammunition as a convicted felon (RX 27, p. 1). He served a period of imprisonment. *Id.* at p. 5. In signing the employment application, Complainant certified that all information on it was true (RX 31, p. 9). Respondent's assertion that deliberately misstating felony conviction records would be a terminable offense is unrefuted (Tr. 172-73). Complainant testified that his criminal records were "sealed," and, consequently he believed he was not required to divulge them to any employer other than the federal government or law enforcement (Tr. 46-47). Complainant's own actions, however, undermine his testimony. He applied for a job in October 2004, in which he answered that he did, in fact, have a felony conviction (RX 25, p. 12-13, 15). He applied for this job from a halfway house in Oklahoma (RX 25, p. 17). He was hired at that position, notwithstanding the felony conviction, and was terminated seven months later (RX 25, p. 20). That Complainant revealed a felony conviction on an earlier employment application casts considerable doubt on Complainant's testimony that he believed his conviction records to be sealed. Furthermore, on cross examination, he essentially admitted that the records were sealed for the purpose of protecting an ongoing investigation and he was not precluded from admitting to a felony conviction. (Tr. 74-75). Accordingly, because Respondent had a permissible reason to terminate Complainant, even if it was unaware of the reason at the time, Complainant's back pay award ends as of the date Respondent learned of the terminable offenses, or at the time of the hearing, whichever is first.

Respondent argues that any back pay award (which Respondent characterizes as "front pay") should be limited until December 30, 2008, "the date Frontier [sic] responded to [Complainant's] Complaint, supplying multiple documents to the OSHA investigator in which information about additional dischargeable offenses was obtained." (Respondent's Proposed Findings of Fact and Conclusions of Law at 8-9). However, if the information was obtained from Frontier (i.e., Respondent), Respondent was already aware of it. Moreover, there is no evidence of record concerning what exactly was turned over to OSHA or whether it included any information concerning Complainant's criminal record. Indeed, the criminal record was not mentioned in OSHA's determination letter. Respondent has not provided any evidence concerning when it first learned of Complainant's felony conviction prior to the hearing date, although it was referenced in Respondent's August 10, 2009 prehearing filings. The only documentation establishing an earlier date is RX 25, employment records establishing that Complainant admitted to a felony conviction when applying for a job with another employer; the cover letter to that exhibit indicates by a date stamp that it was received by Respondent's counsel on July 20, 2009. (RX 25 at 1, 15). Thus, I find that back pay should terminate on that date. Accordingly, I find that Complainant is entitled to back pay from November 5, 2008 through July 20, 2009, for a period of 36 weeks and five days (36.7 weeks).

Complainant argues that he is entitled to an average weekly wage of \$625.82 (apparently dividing total wages with Respondent of \$1,501.96 by 2.4 weeks.) Although Complainant's wages were based upon miles driven and therefore varied, there is no dispute as to the amount he earned while working for Respondent. Complainant worked somewhat less than 2.4 weeks, as his actual days of employment included 15 days from Tuesday October 21 through Tuesday November 4; however, the period of employment would be 17 days if a start date of October 20

was used and November 5, the day he was fired, was included, and neither the 15-day nor the 17-day period would include preceding or following weekends. Thus, 2.4 weeks is a reasonable estimate of the employment period. On balance, I find that the \$625.82 suggested by Complainant is a reasonable estimate of his weekly wage.

Based upon a period of 36.7 weeks, at an average weekly rate of \$625.82, Complainant is entitled to a back pay award of **\$22,967.59**.

### ***Reinstatement/Front Pay and Compensatory Damages***

Under the STAA's mandate to make wrongly discharged employees "whole," reinstatement and compensatory damages are automatic remedies for a violation. 49 U.S.C. 31105(b)(3)(A). The equitable remedy of front pay in lieu of reinstatement may be appropriate where, as here, the parties have demonstrated "the impossibility of a productive and amicable working relationship." *Creekmore v. ABB Power Systems Energy Services, Inc.*, 1993-ERA-24, slip op. at 9 (Sec'y Feb 14, 1996). In lieu of reinstatement, Complainant has sought an award of front pay as he has been unable to find another job since his wrongful termination and the parties agree reinstatement is not possible given the hostility between the parties. Complainant and his fiancée have described in some detail his fruitless efforts at finding work (Tr. 51-56, 188-189). However, in cases where after-acquired evidence would have given an employer legitimate grounds for termination, neither reinstatement nor front pay are appropriate remedies. *McKennon, supra*. It simply would not make sense, as the Court wrote in *McKennon*, to order an employer to rehire an employee when it has ample grounds for which to fire him immediately. Because Complainant's back pay award ends on July 20, 2009, when Respondent established it learned of Complainant's terminable offense of lying on his employment application, he cannot receive front pay.

Under the STAA, compensatory damages are awarded for emotional pain and suffering, mental anguish, injured reputation, embarrassment, and humiliation associated with a wrongful termination. 49 U.S.C. 31105(b)(3)(A). To recover compensatory damages under the Act, a complainant must show by a preponderance of the evidence that he or she experienced mental suffering or emotional anguish and that the unfavorable personnel action caused the harm. *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-00019 (ARB Nov. 13, 2002). The testimony of medical or psychiatric experts is not necessary, but can strengthen a complainant's case for entitlement to compensatory damages. *Id.* Compensatory damage awards can be awarded based on a complainant's testimony alone, if unrefuted and credible. See, e.g., *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-026, slip op. at 9 (ARB Aug. 31, 2004).

Here, Complainant has asserted entitlement to compensatory damages based upon vague allegations of emotional distress. Specifically, he testified to some general emotional impact, heightened stress over finances, and sleepless nights (Tr. 55-56). His fiancée also testified to his stress, increased irritability, and sleeplessness (Tr. 189-190). These allegations are too vague and minor to warrant a compensatory damages award particularly where, as here, Complainant has in the past had a history of short term employment, lasting less than one year. The emotional harm in this case is too vague and unquantifiable to warrant a compensatory damages award.

Moreover, Complainant has not shown any damage to his reputation or other specific harm that would warrant a compensatory damages award.

### ***Attorneys' Fees and Costs***

Where, as here, an STAA complainant has prevailed on the merits, he or she may be reimbursed for litigation costs, including attorneys' fees. *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004). Under section 31105(b)(3)(B), upon the complainant's request, "the Secretary of Labor may assess against the person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint." The section has not been substantively amended. Complainant's counsel may file a fee petition, including a bill of costs, within 30 days, and Respondent shall have 30 days to file any objections.

### **CONCLUSION**

Complainant has established the requisite employee/employer relationship, his engagement in protected activity, Respondent's notice of the protected activity, an adverse employment action taken against him, and its causal relationship with his protected activity. He is therefore entitled to relief, as summarized above. Accordingly,

### **ORDER**

**IT IS HEREBY ORDERED** that the Complainant's complaint is **GRANTED** to the extent set forth above, and:

1. Respondent Frontier Express shall pay to Complainant Victor Hursh the sum of **\$22,967.59** in back pay, subject to prejudgment interest assessed in accordance with the IRS penalty rate at 26 U.S.C. §6621; and Complainant shall not receive additional back pay, front pay, or compensatory damages; and

2. Complainant's attorney may submit an attorney fee petition and bill of costs within thirty (30) days of the date of this decision and order, and Respondent shall file any objections within thirty (30) days of service of the fee petition and bill of costs, provided, that those periods may be extended by stipulation.

**A**

PAMELA LAKES WOOD  
Administrative Law Judge

Washington, D.C.

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

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

The relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).