

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 April 2010

Case No.: **2009-STA-00030**

In the matter of:

BYRON WARREN,
Complainant,

v.

CUSTOM ORGANICS,
Respondent.

Appearances: Raymond L. Jackson, Esq.
For the complainant

Scott E. Morris
For the respondent

Before: Richard K. Malamphy
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim under the Surface Transportation Assistance Act (STAA or the Act), 49 U.S.C. § 31105 (2007), and the implementing regulations found at 29 C.F.R. Part 1978 (2008). Section 405 of the Act provides protection to covered employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules from retaliatory acts of discharge, discipline, or discrimination.

On July 18, 2008, Byron Warren (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that Custom Organics (“Respondent”) terminated his employment on July 16, 2008 in retaliation for voicing concerns regarding the safety of the company’s trucks, being forced to haul overweight loads and being forced to drive in violation of the Department of Transportation (DOT) hours-of-service rules and regulations, in violation of the employee protection provisions of the STAA. On March 13, 2009, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, found that Complainant’s claim did not have merit. On April 2, 2009, the Complainant filed objections to the Administrator’s findings and requested a formal hearing before an Administrative Law Judge.

A formal hearing was held in Columbus, Georgia on December 16, 2009, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. At the hearing, the following exhibits were admitted: Complainant's exhibits ("CX") 2 through 11 and Respondent's exhibits ("RX") 1 through 22. Transcript ("TR") at 5; 182.

During the hearing and in a letter received January 11, 2010, the Employer objected to CX 3, CX 4, and CX 8. First, the Employer argued that the pre-trip checklist forms in CX 3 represent inadmissible hearsay which cannot be proffered to prove the condition of Custom Organic's trucks. Furthermore, the Employer contended that the checklists are irrelevant because they were never submitted to Custom Organics, so they cannot constitute evidence of complaints that might constitute protected activity under the Act. I will consider CX 3 in light of the Claimant's testimony that he was told to fill the checklists out by a manager who later refused to take them. TR at 14-15. I also find that the records constitute admissible hearsay under 29 C.F.R. § 18.803(a)(6), records of regularly conducted activity. The Complainant identified CX 3 during the hearing as checklists that he routinely filled out before driving his truck and the sheets are signed and dated by the Complainant. TR at 14-15.

Second, the Employer objected to CX 4, a fax sent by the Complainant to the Georgia Department of Transportation, on the grounds that the fax was sent a month after the Complainant was terminated. Therefore, even if the fax could constitute protected activity, it is irrelevant because it could not have been a motive for the Complainant's termination a month earlier. I find that the Employer's objection has merit and will not consider CX 4 in reaching a decision in this matter.

Finally, the Employer opposed admitting CX 8, the Georgia Department of Labor Claims Examiner's Determination in connection with the Complainant's application for unemployment benefits, insofar as it was submitted to establish that Custom Organics lacked grounds to terminate the Complainant's employment. The Employer also stated that CX 8 constitutes hearsay. The Georgia DOL's determination was made using different standards of law and different burdens of proof. Therefore, it is irrelevant to the Complainant's claim before the Office of Administrative Law Judges.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

1. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101 and falls under the Surface Transportation Assistance Act.
2. Complainant is a commercial motor vehicle driver within the meaning of 49 U.S.C. § 31101.

ISSUE

1. Whether Complainant engaged in activity protected under the Act, and if so,
2. Whether the protected activity was a substantial factor in the adverse employment action against Complainant, and if so,
3. Whether the Respondent's reason for suspending and then terminating the Complainant was a pretext for discrimination, and if so,
4. Whether the Complainant is entitled to damages.

SUMMARY OF THE EVIDENCE

A. Testimony of Byron Warren

The Complainant began working as a truck driver for Custom Organics on January 28, 2008. TR at 12. Custom Organics processes waste food products into chicken and cow feed. TR at 9. The Complainant's duties included hauling food waste from food factories to Custom Organics for processing, repairing trailers, and providing customer support. TR at 12. In regards to his employment application, he testified:

Q: Is it your understanding that you would require air brake certification to perform your job as a driver for Custom Organics?

A: Oh, yes, sir.

Q: Didn't you lack air brake certification?

A: Yes, sir.

Q: So then your statement, no, there's no reason you might not be unable to perform the functions [of the job] was not true. Isn't that correct?

A: I left a major trucking company with air brake. I got my license renewed. I guess it's a department error. I had air brakes.

TR at 46; RX 1c. He explained that he believed he had air brake certification because he had driven trucks with air brakes for Star Transportation for eight months. TR at 68.

On February 12, a few days after he was hired, the Complainant hit a light pole and broke the base at Dolly Madison in Columbus, Georgia. CX 6a; TR at 48. He testified that he was not written up for the accident and received a promotion a few months after the accident. TR at 35. He testified that in late May or early June 2008 he was promoted to lead driver and given a dollar-an-hour raise. TR at 12. As lead driver, his duties included making sure the trucks were safe. TR at 13. The Claimant testified that he started verbally reporting problems with the trucks to his manager, Mr. Adam Cowan, and Mr. Cowan requested that he start putting his statements in writing. TR at 14. So the Complainant and other drivers started filling out pre-trip

checklists in which he noted any problem with the truck. TR at 14-15. The checklist created an original and a carbon copy; the original was to go to the plant manager and the carbon copy was to stay in a book in the truck. TR at 57. However, he testified that when he tried to turn them in, Mr. Adam Cowan, his manager, told him to hold on to them. TR at 14-15. The Claimant stated that not all of the pre-trip checklists he filled out are in CX 3 because he started leaving the original in the book. TR at 59.

The Complainant testified that he made numerous verbal complaints to management regarding overweight trucks, working over the hour limits, and missing mud-flaps. TR at 17. He stated that he was told by Mr. Cowan and Mr. Chris Ryko, the plant manager, to drive trailers even if they were overweight and to bypass scales if he was driving overweight. TR at 19, 69. However, he testified that on one occasion he called Mr. Cowan to tell him that the trailer he was to pick up was too heavy and he was told not to carry it that night:

Q: Whether it was one or two days after, the bottom line is you encountered an overloaded trailer; you told Adam Cowan about it, and Adam Cowan got in the car and made two trips down there to deal with it. Correct?

A: Yes, sir. That's correct.

TR at 62-63. The Complainant later explained that the truck also had a problem with broken landing gear, so Mr. Cowan was helping him get the weight down. TR at 69-70.

The Complainant noted that on July 7, 2008, he called Mr. Cowan when he realized that his truck would be overweight and “[Mr. Cowan] basically said, you know, It's got to come back. If you won't pull it, we'll find somebody that will.” TR at 20. He copied the weight ticket that showed his truck weighed 117,560 pounds and put it on Mr. Cowan's desk with a note that they needed to fix the overweight trucks or he would go to the Department of Transportation. TR at 17. He stated that he was not given a written or verbal warning for pulling the overweight truck. TR at 20. The Complainant agreed that in RX 20, six of the approximately 150 weight tickets indicate that his truck was overloaded. TR at 65; RX 20. He testified that it was possible that some of his weight tickets were not included in RX 20. TR at 69.

The Complainant stated that on July 3, 2008, he was trying a new process to make the company more productive when Mike Desmelik started yelling at him for using the Bobcat a certain way. TR at 26-27. He told Mr. Desmelik that he should talk to Mr. Cowan because he had permission to use the Bobcat in that way. TR at 27. He stated that he then went to lunch. *Id.* He called Mr. Cowan while he was out and Mr. Cowan told him to listen to Mr. Desmelik. TR at 51.

The Complainant testified that on July 14, 2008, Mr. Grover Milton, another truck driver, sent him a text message stating that he had been working for 15 hours and had been asked to run an additional trip. TR at 18. The Complainant told Mr. Milton to wait until the morning to make the trip. *Id.* The Complainant stated that he then drove the truck home: “It was so late, I actually drove the truck home, which is not uncommon. Every driver drives a truck home. It's never

been an issue...” TR at 22. He explained that while he worked for Custom Organics, he had driven a truck home more frequently than his own car and had never been warned not to drive the trucks home. TR at 23. He believed that a majority of the drivers, including Grover Milton and Richard Taylor, drove their trucks home. *Id.*

When he got to work at 8:00 AM on July 15, 2008, Mr. Cowan told him that he was not needed for the day. TR at 22. Mr. Cowan then called him back in around 10 AM. *Id.* The Complainant’s timecard for July 15th indicates that he worked for 12 hours and 37 minutes that day. RX 21y. None of the other timecards in evidence exceed 12 hours. RX 21.

On July 16, 2008, the Complainant’s employment was terminated. TR at 24. He was told by Mr. Cowan that he was being let go because he was unable to adapt to the company. TR at 25. The Complainant testified that Mr. Cowan did not mention his taking a truck home or any altercation with management. *Id.* As the Complainant was leaving, he said “I hope you have deep pockets, because you’re going to need them.” TR at 28. He explained that he was not trying to blackmail anyone, but was saying that it would cost them money to fix the operation after he reported safety violations to the Department of Safety. *Id.* After being terminated, he did file a written complaint including a copy of his pre-trip checklists with Doug Ayers at the Georgia Department of Transportation. TR at 28-29.

About a week after being terminated, the Complainant received a termination notice in the mail that stated:

Byron was fired on 7/16/08. During the firing, he was very confrontational and offered a verbal threat to the plant manager. A police report had to be filed on 7/17/08, because Byron trespassed on the company’s premises.

As an employee, Byron was inconsistent in his work. He was becoming increasingly unavailable for work and consistently late. He was not able to be reached by phone. He didn’t work well with management. There was one instance of an altercation with a member of management, & Byron clocked out and left of his own accord. He had a negative attitude while at work. On 7/13/08, Byron took truck #33 home with him without permission. The truck was needed at the facility the next morning & it was not there. Plant manager tried to reach Byron by phone unsuccessfully.

CX 7b. The Complainant testified that prior to receiving the letter, he had not received any notice that there were complaints against him. TR at 31. The Complainant testified that during an unemployment hearing at the Georgia Department of Labor, the only reason given for his termination was that he had driven a truck home. TR at 33. Before OSHA, the Employer stated that the Complainant was terminated for driving a truck home, being late, being unavailable by phone, and causing an accident in February 2008. TR at 35. Prior to the OSHA proceedings, the Complainant had never heard that the accident was one of the reasons he was terminated. TR at

36. Furthermore, he only recalled being late to work once and had never been reprimanded for hauling an overweight truck. TR at 52.

On July 17, 2008, the Complainant went to Custom Organics to return his keys. TR at 32. He stated that when he got in his car to leave, Mr. Cowan asked him to stay so one of the owners could talk to him. *Id.* He testified that he waited for ten minutes and when Mr. Cowan came back with one of the owners they asked if the police had been called and said that they wanted to seize the camera the Complainant had around his neck and any pictures. TR at 32-33. They told the Complainant that he was trespassing. TR at 33. The Complainant left and called the police so he could turn his keys in. *Id.* The officer prepared the following report.

Upon arrival [at Custom Organics] I spoke with plant manager, Adam Cowan, who stated that Byron K. Warren was fired from the location yesterday and he was asked by management not to return. Cowan stated that Warren returned to the location and was taking photographs of the area. Cowan stated that Warren was threatening to sue the company. Cowan stated that Warren had already left the location, but he wanted Warren served with a criminal trespass warning, banning him from the location. I was able to make contact with Warren by phone and met him [] where I was able to serve him with the criminal trespass warning statement for the above address. Warren did agree to stay away from the location from now on. I did observe Warren give two keys back to Cowan who stated that they were job related keys. Warren stated that he only returned earlier because Marty, maintenance supervisor, asked him to come back to the location to turn over his keys. Warren stated that he was not trying to cause a problem and stated that associates from the business blocked him and would not allow him to leave the location. I found no witnesses to this event.

CX 2b.

While working for Custom Organics, the Complainant made \$16 per hour and usually worked approximately 60 hours per week. TR at 36. Since he was terminated, he has found only temporary jobs. *Id.* In late 2008 and early 2009, he worked for Guardian Automotive for twelve weeks earning \$15 per hour for 40 to 50 per week to move everything out of their building. TR at 37-38. In August 2009, he worked for J.B. Hunt, a trucking company, for three or four weeks. TR at 38-39. He stated that after paying for his own fuel, truck, and insurance, he did not make any profit working for J.B. Hunt. TR at 39. On November 19, 2009, he started working for Venture Express earning \$13 per hour for approximately 50 hours a week. *Id.* He testified that if Custom Organics offered him his job back, he would take it. TR at 40-41.

B. Testimony of Richard D. Taylor

Mr. Taylor was employed as a commercial driver at Custom Organics at the same time as the Complainant. TR at 74. He left Custom Organics in mid-August 2009 for another trucking

company. TR at 75. Mr. Taylor testified that the drivers were required by DOT regulations to fill out pre-trip checklists and they were left in the trucks. TR at 76. They were never instructed to give them to anyone. *Id.* He explained that it was up to the drivers to fix some safety hazards, such as missing mud flaps or burned-out headlights, on their trucks. *Id.* Parts were available at truck stops if they were needed. TR at 77. They were not expected to fix bigger problems with the trucks. *Id.*

Mr. Taylor stated that Mr. Cowan and Chris Ryko told the drivers to drive overweight trailers and to drive around DOT scales. TR at 77-78. He was never written up for driving an overweight vehicle. TR at 77. He also noted that he drove over the hour limits in the DOT regulation for commercial drivers. TR at 78. The regulations require no more than 12 hours of driving a day. *Id.* When the Complainant worked for Custom Organics, they were not asked to “fix” their time logs or not record time over 12 hours. TR at 79.

Mr. Taylor explained that he began taking the trucks home when he was hired in January 2008, but seven or eight months later (July or August 2008) Mr. Cowan told them to stop taking them home because it was against the company’s insurance agreement. TR at 84-85.

Mr. Taylor also mentioned that he did not have knowledge of the Complainant being made lead driver. TR at 75.

C. Testimony of Grover Milton

Mr. Milton began working at Custom Organics in May 2008. TR at 93. He testified that he did not recall contacting the Complainant on July 14, 2008 to complain about having to drive excessive hours. TR at 94. He stated that around mid-July 2008 he was driving between 20 and 25 hours per week. *Id.* When he stated working for Custom Organics there were problems with “lights and just little minor stuff,” but the drivers could fix them at truck stops. TR at 95.

Mr. Milton recalled one incident where he drove with the Complainant to the Dolly Madison facility in Columbus and they encountered an overweight trailer. TR at 95. He stated that the Complainant called Mr. Cowan and Mr. Cowan told him not to pull it. *Id.* So, Mr. Milton and the Complainant left the trailer at the facility. *Id.* He testified that other than that one incident, he did not have problems with overweight trailers. *Id.*

Mr. Milton testified that he only drove his truck home once. TR at 95. The next day Mr. Cowan told him he was not allowed to drive the trucks home. *Id.*

D. Testimony of Adam J. Cowan

While the Complainant worked for Custom Organics, Mr. Cowan was the logistics manager and then operations manager for the facility. TR at 103. He now works for Custom Trading & Blending. TR at 102. He was the Complainant’s supervisor the entire time he worked with Custom Organics. TR at 103.

Mr. Cowan explained that in order to retrieve the bakery waste product from a customer's site, the company setup a system at each bakery to load the material into one of the company's containers or trailers. TR at 104-105. The bakeries then call when the trailer is ready to be picked up and Custom Organics sends out a driver to bring the trailer back to the facility. TR at 105.

Mr. Cowan testified that he discovered through a driver report after the Complainant was hired that he did not have air brake certification and he had to be taken off the job for a few days until he could be certified. TR at 111; RX 3. Mr. Cowan wrote the following note and put it in the Complainant's file:

Byron did not have air break certification on his license. He had told Custom Organics that he had the appropriate qualifications. When we discovered that he did not have air break certification we did not allow him to drive a commercial motor vehicle until he had gained the qualification. This presented an undue hardship on the other drivers since they were forced to make up for his absence. It took him over a week to gain his qualification.

TR at 111-112; RX 4. He stated that his policy was to discuss issues verbally with the employees and then make a note to put in their file. TR at 112.

Mr. Cowan noted that the company developed a policy that no unauthorized person can accompany a driver in one of their trucks after he discovered the Complainant returning from a customer with his young child in the passenger seat of a truck: "I told him that was not acceptable. You know, he should never have a baby in the truck with you, especially while you're at work. It's dangerous." TR at 113; RX 2. He also explained that the Complainant damaged a parking lot light pole at Dolly Madison's facility. TR at 113. The pole cost approximately \$4,000 to replace. TR at 114. Mr. Cowan told the Complainant that if "anything like this were to happen again, we would have to terminate him as an employee." *Id.* Mr. Cowan wrote the following note and put it in the Complainant's employment file:

On February 12, 2008 Byron had an accident at Dolly Madison (Interstate Brands) in Columbus, Georgia. In the process of leaving the lot he collided with a light pole and broke it at the base resulting in it falling over.

TR at 114-115; RX 6.

On July 3, 2008, Mike Desmelik, vice president of engineering, called Mr. Cowan to tell him that he had an altercation with the Complainant: "He told me that Mr. Warren had been -- he had been rough on the equipment, you know, very damaging to the particular piece of equipment that he was operating, and that he'd asked him to stop, and that Mr. Warren had gotten upset and left without permission." TR at 116. He testified that the Complainant called him and told him a similar story and that he had left work due to the altercation; Mr. Cowan then told the Complainant to return to work. TR at 117. Mr. Cowan wrote the following note and put it in the

Complainant's file: "Mike told Byron to stop what he was doing and Byron get [sic] upset and left. He then proceeded to come back. Maintained a negative attitude." TR at 120; RX 7.

Mr. Cowan explained that the customers are in charge of loading the trucks and they weigh the product before it goes into the trailer, but not the entire loaded trailer. TR at 147-148. The customers are supposed to call for a driver when the trailer is about ready for pick-up, but they sometimes do not call in time. TR at 148. The first Custom Organics employee who has the opportunity to discover whether the trailer is overloaded is the driver. TR at 148. The drivers are instructed to call their supervisor and let them know if a trailer is overweight. TR at 149. He testified that he never told a driver to haul an overweight load or avoid weigh stations. *Id.* In May or June of 2008, the Complainant called to tell him that a trailer he was to pick up was overweight and Mr. Cowan told him he would come out to look at it. TR at 150. When he got there, it was obvious that the trailer was overweight and the landing gear was broken, so they had to use a wrecking service to move it to a parking space. TR at 151.

Mr. Cowan stated that he verbally reprimanded the Complainant on July 7, 2008 for hauling a 117,000 pound load. TR at 121-122, 151; RX 20ii. He stated that the Complainant did not call him before pulling the load and he learned how much the load weighed when the Complainant brought it back to the Custom Organics facility. TR at 122. He testified that he told the Complainant that he should have known it was overweight and called because it was dangerous to pull. *Id.*

Regarding the Complainant's reliability as an employee, Mr. Cowan testified:

Initially, you know, he was fairly reliable. As time progressed, he -- especially after we gave him that dollar raise for helping out with some maintenance issues, especially after that, he got quite a bit unreliable. It was difficult to reach him by phone, you know, sorts of things like that.

TR at 115. The Complainant also had problems showing up on time. *Id.* On July 9, 2009, Mr. Cowan wrote: "Byron is increasingly unavailable for work and is consistently late." TR at 121; RX 8. Mr. Cowan explained that the Complainant was given a raise, but was not promoted to lead driver or given authority over any of the other drivers. TR at 117. The transportation manager was in charge of communications between the drivers and management, so the company did not need a lead driver. TR at 119-120.

Mr. Cowan testified that there were several instances where the Complainant left some of the product in the trailer and it was exposed to rain:

We carry some of our product in roll-off boxes, like trash boxes that you see going up and down the highways, and if that ram is not pushed forward at the customer and it's left open, then, you know, water can get inside of these things. Now, water's not good for us. We have to dry it out of our product, and it costs us money, so for someone to leave a box unlocked in the rain is unacceptable.

TR at 123. On July 12, 2008, Mr. Cowan wrote in the Complainant's file: "Byron did not dump the Lance compactor box. It sat in the rain all day and night." TR at 126; RX 9. In a note labeled July 13, 2008, he wrote: "Was not able to reach Byron when I called him to pick up at Lance. Byron did not dump all the material out of Lance compactor box and it sat in the rain all night. Byron took truck 33 home with him without permission. We needed the truck first thing on the morning of 7-14-08 and it was not there."¹ *Id.* Mr. Cowan testified that Richard Taylor was allowed to take trucks home when he first started working because he lived in Columbus close to the Kellogg's plant and it made it more convenient to get to the plant. TR at 123-124. No other drivers were allowed to take them home for insurance reasons. TR at 124. Mr. Cowan only recalled the one time that the Complainant took a truck home. TR at 124-125. He noted that the morning after the Complainant took the truck home, he tried to contact the Complainant to find out where the truck was, but he did not get a hold of him until shortly before he arrived at the facility at 10 AM. TR at 125.

Q: What were the consequences to Custom Organics' operations of him bringing the truck back late?

A: ...It caused customer issues, pick-up issues. We got behind schedule.

Id. On July 14, 2008, Mr. Cowan wrote: "I could not reach Byron this morning. There was a pickup at Kellogg's Rome." TR at 126; RX 9; RX 10.

Mr. Cowan explained that the Federal Motor Carrier Safety Regulations require that a commercial motor vehicle driver have at least ten consecutive hours off duty separating each 12 hours on duty and the drivers can work 70 hours in eight consecutive days. TR at 139. Furthermore, companies that operate in a 100-mile radius are not required to maintain logbooks. *Id.* He testified that the Complainant never complained about having to drive excessive hours. TR at 140. Mr. Cowan reviewed the Complainant's timesheets (RX 21) and paystubs (RX 22) and found only one occasion in which the Complainant worked over the legal limit of hours. TR at 141. On July 15, 2008, the Complainant worked 37 minutes over the limit. TR at 141; RX 21y. The time sheets only covered approximately a month and a half of the twelve months that the Complainant worked for the Employer. TR at 159; RX 21.

Regarding the pre-trip checklists, Mr. Cowan testified that the drivers were required to indicate on the forms whether anything was wrong, leave the carbon copy in the truck and give the original copy to Mr. Cowan or his assistant. TR at 142-143. He testified that the Complainant "in particular, didn't necessarily like the practice, and he did not turn in anything. Very seldom did he turn anything in." TR at 143. In a statement to OSHA, Mr. Cowan wrote:

¹ Although neither party mentioned a discrepancy between the dates in Mr. Cowan's notes and Mr. Warren's testimony, I find, based on the evidence, that Mr. Cowan's notes are a day off. Mr. Warren testified that he took the truck home on July 14 when he got off at 1:00 AM (of July 15). His time sheet indicates that he did get off at 1:00 AM on July 14. Mr. Cowan testified that he was not able to reach the Complainant until he arrived at 10:00 AM the next morning, July 15. The Complainant's time sheets indicate that he arrived at 10:00 AM on July 15. I do not find this minor mistake to be material.

The drivers are required to fill out vehicle inspection forms. However, we never received any inspection forms from [the Complainant]. If there was an issue with a vehicle or trailer he verbally told management of the issue. He was asked repeatedly to turn in his proper paperwork. The negligence of his actions was one of many deciding factors leading to his termination.

RX 16a. He did not tell the Complainant that he should not turn in the original or take the original home with him. TR at 144. Drivers were responsible for fixing small maintenance issues themselves and the company kept an open account at truck stops on the interstate if drivers needed to fix something and were not at the facility. TR at 144-145. If a maintenance issue was too big to deal with in-house, the trucks were sent to nearby garages. TR at 145.

After talking with Mr. Desmelik and Doug Craig, the decision was made to terminate the Complainant's employment. TR at 127-128.

Q: And what reasons were discussed during those conversations as for termination Mr. Warren?

A: Being late for work, being unreachable, leaving compactor boxes in the rain. Taking the truck home was the big one.

Q: Was there any discussion between the three of you about terminating Mr. Warren because of any concerns he had raised about safety issues?

A: No.

Q: Was there any discussion among the three of you about possibly terminating because of any complaints he had made about overweight loads?

A: No.

Q: Was there any discussion among the three of you about possibly terminating Mr. Warren because of complaints about excessive hours?

A: No.

TR at 128. On July 16, 2008, Mr. Cowan held a meeting with the Complainant, Mr. Desmelik, and Mr. Foster to terminate the Complainant's employment. TR at 129.

Q: And what was communicated to Mr. Warren during that meeting?

A: It was communicated to Mr. Warren that things just weren't working out. You know, the combination of all these, you know, negligible acts that he, you know, did there at the beginning of July, plus a couple of things that had happened, you know, in previous months, we took all that into consideration, and it was time to let him go.

Q: Did you give him a specific reason for the termination?

A: I did not.

Q: Why not?

A: You know, Mr. Warren had gotten a little hostile in the meeting, and I didn't want to prolong anything. I really wanted to get it over with as soon as possible.

...

Q: What did he say?

A: Well, at the very end of the meeting, he said, well, I think it's time that we should talk about blackmail. And I replied, Byron, you know, we're not going to discuss that; I need you to leave. And then he replied to me, I hope you have deep pockets; you're going to need them.

TR at 129-131.

On July 17, 2008, the Complainant came back to the facility and Mr. Cowan found him taking pictures of the trailers. TR at 134. He asked the Complainant to leave and called the police to have him removed. TR at 135; RX 13; RX 14.

Mr. Cowan worked with his assistant, Alice Stevens, to prepare the termination notice (set out above) that was submitted to the Georgia Department of Labor and the Complainant. TR at 132-133; RX 12b; CX 7b; *see also* RX 11. On July 22, 2008, Mr. Cowan helped complete a questionnaire for the Georgia Department of Labor, in which the following were listed as examples of warnings given to the Complainant prior to termination:

4/11/08 ran into and caused damage to a light pole at one of our customer's locations. Caused \$4,090.00 in damages, which the company paid for. He was given a verbal warning at this time over the incident. 7/3/08 was involved in an altercation with a member of management. Byron then proceeded to clock out and left of his own accord. 7/13/08, Byron took truck #33 home with him without permission. The drivers are told not to take trucks home without permission. All of these warnings were verbal, and were given by the plant manager, Adam Cowan.

TR at 137; RX 15a. Mr. Cowan also wrote a statement for OSHA on January 29, 2009, in which he lists the reasons for termination as (1) falsifying his employment application in two sections, (2) having an altercation with Mr. Desmelik, (3) driving an overweight trailer, and (4) taking a truck home without permission then not responding to phone calls and causing a delay in servicing a customer. TR at 138; RX 16.

On August 22, 2008, Doug Ayres from the Georgia Department of Transportation came to the Custom Organics facility to conduct an audit of the diver's hours, weight tickets and the equipment. TR at 146. No citations were issued. TR at 147.

E. Testimony of Mike Desmelik

Mr. Desmelik, the vice president of engineering for Custom Organics, testified that on July 3, 2008, as the only member of the senior management team on site, he was in charge of the facility. TR at 163. He observed the Complainant operating a Bobcat “in a very erratic, violent motion, might have even had two of the tires off the ground. It was a back and forth, stop and start, and it was something I ascertained at the moment was very detrimental to the machine, to the life of the machine.” TR at 164. When asked to stop for a minute, the Complainant told Mr. Desmelik that he was separating out materials and knew what he was doing. *Id.* Mr. Desmelik told him that he was damaging the equipment and he needed to stop using the Bobcat that way. TR at 165. Mr. Desmelik testified that the Complainant got upset, said “I don’t need this job,” threw around some cardboard pieces and left. *Id.* The Complainant did not tell Mr. Desmelik that he was going to get lunch when he left. TR at 165-166. Mr. Desmelik called Mr. Cowan who told him that he had given the Complainant permission to use the Bobcat to sort the materials, but did not think he would use the equipment in that way. TR at 168. When the Complainant returned to the facility, Mr. Desmelik told him to continue working and they would evaluate his method at the end of the day. TR at 167. At the end of the shift, Mr. Desmelik went back to the area and noticed that no additional work had been done and the area had not been cleaned-up. TR at 168.

Mr. Desmelik was present for the discussions regarding whether to terminate the Complainant’s employment. TR at 169. He testified that they did not discuss the Complainant complaining about driving excessive hours, the condition of the trucks or having to drive overweight loads. *Id.*

Q: What were the subjects discussed as reasons for terminating Mr. Warren?

A: Well, after the incident on July 3, one of the things I remember -- I guess I started paying a little bit more attention to Mr. Warren. His work habits deteriorated visibly.

Q: How so?

A: His -- he became more tardy, a little bit, I hate to say, on the ball, but just a little more lackadaisical in his attitude towards work, didn’t seem motivated to be there, just seemed to have lost interest.

Q: What was discussed by Mr. Cowan and Mr. Craig about reasons why Mr. Warren would need to be terminated?

A: Well, they went through the list of occurrences, and just over the, you know, the body of work that had been created there, and it wasn’t any -- it didn’t seem like it was any one thing, but it just built upon itself. As you sat down and went through all the individual occurrences and incidents, they added up to not a good situation for the company.

TR at 169-170. Mr. Desmelik was also present for the termination meeting on July 16, 2008. TR at 170. He testified that the Complainant seemed surprised, became confrontational and

insisted on seeing his file. TR at 170-171. Mr. Cowan then told the Complainant that he was not required to show him his file. TR at 171. In response, the Complainant stated that they needed to discuss blackmail. *Id.* Mr. Cowan then asked him to leave and Marty Foster escorted the Complainant to the shop area to collect his personal belongings. *Id.* Mr. Desmelik testified that the Complainant never complained to him about driving excessive hours, the condition of the trucks, or overweight loads. TR at 172-173. Mr. Desmelik prepared a statement for OSHA describing the incident on July 3, 2008 and the termination meeting. RX 17.

F. Testimony of Corbey Shelnut

Mr. Shelnut started working for Custom Organics in August 2008, after the Complainant had been terminated but while Richard Taylor was still working there. TR at 177. He testified that the Complainant called him one day to talk, but he told the Complainant that he did not want to talk. *Id.* He claimed that Mr. Taylor approached him and “basically told me if I swung their way, they’d break me off a piece.” TR at 178. In his time with Custom Organics, he had not had problems with maintenance, being required to drive excessive hours or being told to haul overweight loads. TR at 179.

G. Testimony of William Douglas Craig

Mr. Craig has been employed by Custom Organics since September 2007. TR at 183. His main role is to acquire the raw materials and provide customer service. TR at 184. He interacted with the drivers to ensure that they were providing good service to the customers. *Id.* He testified that he observed the Complainant having problems working with management:

Q: How would you characterize Mr. Warren’s attitude towards Mr. Cowan?

A: In my observation, he did not put forth his best effort in trying to communicate and work things out with Adam.

Q: Was Mr. Warren ever unavailable for work to your knowledge?

A: He was tardy several times.

Q: How does that impact Custom Organics’ operations in terms of getting the product to the plant?

A: It makes a tremendous impact, because we need to be there at the customers on a timely basis, and when management doesn’t know where the driver is or when he’s going to arrive, then it creates a problem.

TR at 185. Mr. Craig stated that most the drivers were not allowed to take the trucks home. *Id.* Richard Taylor had the authority to drive trucks home for a while because he lived in Columbus closer to the customer’s factories. TR at 185-186.

Mr. Craig was a party to the discussions with Mr. Cowan and Mr. Desmelik about whether to terminate the Complainant’s employment. TR at 187. They discussed “the problem with leaving work without letting anybody know and not coming back, problem with taking the trucks without permission, and basically not working with management the way that he should.”

Id. They did not discuss complaints about safety violations, excessive hours or hauling overweight loads. TR at 188. The Complainant had approached Mr. Craig with safety concerns:

He did not complain about [anyone having to drive excessive hours]. He complained to me about safety issues in some of the trucks. For example, the mud flaps, that's one thing. And I said, Have you talked to Adam about it? Yes, I've talked to him several times. I said, Well, you're going to have to get something worked out with Adam, but, I said, I'll take the issue and I'll talk to him about it. And I did, and then we got –

I remember one time when he came to me about it, I went to Adam immediately, and I said, Adam, we've got to get some mud flaps on that trailer, whatever it was; that's all there is to it. And within 24 hours, they were on there.

TR at 188-189. He was not aware of any safety issues the Complainant mentioned that were not fixed. TR at 189. He also testified that Custom Organics' policy for overweight trailers was to unload them to the point where they were within the legal limit. TR at 189-190. "We've got scales at most of our facilities. But in most of these facilities, we don't have an automatic cut-off for that weight. So we depend upon the employees to call us and let us know, but you're dealing with humans. Humans make mistakes, and occasionally that's what we've experienced at Dolly [Madison]." TR at 190. He never instructed a driver to drive an overweight trailer or avoid scales and the Complainant was not terminated for complaining about overweight loads. TR at 191.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The STAA employee protection provision prohibits disciplining or discriminating against an employee who has made protected safety complaints or refused to drive in certain circumstances:

- (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because—
 - (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
 - (B) the employee refuses to operate a vehicle because—
 - (i) the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health; or
 - (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
- (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of

accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 31105(a). Subsections (A) and (B) of the quoted provision are referred to as the “complaint” clause and the “refusal to drive” clause, respectively. *LaRosa v. Barcelo Plant Growers, Inc.*, ALJ Case No. 96-STA-10, slip op. at 1-3 (ARB Aug. 6, 1996). The Act protects three types of activities: filing a complaint, refusing to operate a vehicle because of an actual violation or refusing to operate a vehicle because of a reasonable apprehension that the vehicle is unsafe.

In order to prevail on an STAA complaint, a complainant must make a *prima facie* case of discrimination by showing that: (1) he engaged in protected activity, (2) the employer was aware of his activity, (3) he was subject to adverse employment action, and (4) there was a causal link between his protected activity and the adverse action of his employer. *See Clean Harbors Env'tl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987). Under the STAA, the ultimate burden of proof usually remains on the complainant throughout the proceeding. *Byrd v. Consol. Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, slip op. at 5 n.2 (May 5, 1998).

The employer may rebut the *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The employer must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse action. The explanation provided must be legally sufficient to justify a judgment for the employer. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995). Once the employer produces evidence sufficient to rebut the “presumed” retaliation raised by the *prima facie* case, the inference simply “drops out of the picture,” and the trier of fact proceeds to decide the ultimate question. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-11 (1993).

The complainant then has the opportunity to prove, by a preponderance of the evidence, that the employer's reason for the adverse action was mere pretext for discrimination. *Burdine*, 450 U.S. at 253. Specifically, complainant must establish that the proffered reason for the adverse action is false and that his protected activity was the true reason for the adverse employment action. *St. Mary's Honor Center*, 509 U.S. 502, 507-508 (1993); *see also Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995) (holding that the complainant must “establish that the employer's proffered reason is pretextual by establishing either that the unlawful reason, the protected activity, more likely motivated the [employer] or that the employer's proffered reason is not credible and that the employer discriminated against him.”). Although the burden of production shifts, the ultimate burden of persuasion remains with the complainant to show that the employer intentionally discriminated against him. *St. Mary's Honor Center*, 509 U.S. at 507-508. If the proof establishes that the adverse action was undertaken for both discriminatory and nondiscriminatory reasons, i.e. “mixed motives,” the employer must show by a preponderance of the evidence that it would have taken the same

adverse action absent the complainant's protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

A. Complainant's *Prima Facie* Case

1. Protected Activity

The Complainant's claimed protected activity consists of (1) reporting unsafe conditions in the vehicles, (2) complaining about having to haul overweight vehicles, and (3) objecting to working over the statutory hour limits, including telling Grover Milton not to drive when he would be exceeding his hour limits.

a. *Unsafe vehicle conditions*

The Complainant testified that after he became lead driver in May or early June 2008, he began verbally reporting problems with his trucks to Mr. Cowan. TR at 14. When Mr. Cowan requested the statements in writing, the Complainant and other drivers started filling out pre-trip checklists to note problems with the trucks. TR at 14-15. The Complainant stated that he attempted to turn the checklists in to Mr. Cowan, but he was told to hold on to them. *Id.* The Complainant submitted 13 pre-trip checklists from late March to early April 2008. CX 3. In the checklists, he noted that the trucks needed new tires, breaks, mud flaps, and signal lights. CX 3.

Richard Taylor testified that the pre-trip checklists were required by the Department of Transportation and the drivers were not instructed to turn them in to anyone. TR at 76. Mr. Cowan testified that the pre-trip checklists were to be turned in to him and that he never informed the Complainant not to turn them in. TR at 142-144. He also stated that the Complainant was not good about turning them in. TR at 143. Mr. Craig testified that the Complainant complained to him about missing mud flaps, but, after speaking with Mr. Cowan, they were fixed within 24 hours. TR at 188-189. Furthermore, Mr. Taylor, Mr. Milton, and Mr. Cowan explained that drivers were instructed to make small fixes to trucks, such as replacing signal lights and mud flaps, themselves and resources were available for them to fix the vehicles at truck stops. TR at 76, 95, 144-145. Bigger fixes were taken care of by nearby repair shops. TR at 145.

I find that the pre-trip checklists cannot constitute protected activity since the Complainant testified, and Mr. Cowan confirmed, that they were never turned in to management and, therefore, could not constitute notice of a complaint. However, under the STAA, a complainant's safety concerns can be oral rather than written. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that the driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors); *see Clean Harbors Env'tl. Serv. Inc. v. Herman*, 146 F.3d 12, 20-22 (1st Cir. 1998). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. *Clean Harbors Env'tl. Serv.*, 146 F.3d at 20-22 (1st Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance). The Court further stated:

We recognize [the Employer's] legitimate due process concerns that the internal communications to the employer must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. In the absence of such notice, the beneficial purposes of the act cannot be accomplished. Clearly there is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. The risk of inadequate notice to an employer that the employee has engaged in protected activity is greater when the alleged protected complaints are purely oral.

Id. According to the other Custom Organics employees, the drivers were responsible for inspecting their trucks and reporting safety concerns. I do not find that the Complainant mentioning to Mr. Cowan and/or Mr. Craig that trucks need brakes, tires, or signal lights provides sufficient notice that a complaint is being filed. Without evidence that the Complainant made repeated complaints on issues outside of his normal duties, I do not find the oral statements rise to the level of protected activity.

b. Overweight vehicles

The Complainant testified that he made numerous verbal complaints to management regarding overweight trucks. TR at 17. He stated that they "consistently" ran loads over 100,000 pounds. TR at 13. The Complainant's weight tickets indicate that of the 153 loads listed, six were over 80,000 pounds but only one was over 100,000 pounds. RX 20. The Complainant and fellow former employee Mr. Taylor stated that management told the drivers to drive overweight trailers and avoid the Department of Transportation's scales. TR at 19, 69, 77-78.

Mr. Cowan explained that the trucks are filled by the customers and they sometimes forget to call for a pick-up before the trailer is overloaded. TR at 147-148. The first Custom Organics employee to discover if a trailer is overloaded is the driver and they are instructed to call a supervisor if the trailer is overweight. *Id.* He testified that he never told drivers to haul overweight loads or avoid weight stations. TR at 149. His testimony is supported by Mr. Craig who explained that the company depends on the customers to cut-off the weight of a trailer and there is sometimes human error, but company policy is to come out and unload the trailers until they are under the legal limit. TR at 189-190. Mr. Craig stated that he never instructed drivers to driver overweight trailers or avoid scales. TR at 191. Mr. Shelnutt also testified that he was not told to driver overweight trailers. TR at 179.

Mr. Milton testified that he only recalled one incident where he encountered an overweight trailer while with the Complainant. TR at 95. He stated that the Complainant called Mr. Cowan who told him not to pull the trailer. *Id.* Mr. Milton and Mr. Warren left the trailer at the facility. *Id.* Otherwise, Mr. Milton did not have a problem with overweight trailers. *Id.* Mr. Cowan recalled an instance when the Complainant called to tell him that a trailer was overweight, so he went to the facility to help deal with it. TR at 150. The Complainant agreed

that Mr. Cowan came out on two occasions to help him deal with the overweight trailer. TR at 62-63. The trailer ended up having a broken landing gear and a wrecker service had to be called. TR at 69-70, 151.

Mr. Cowan stated that he verbally reprimanded the Complainant for pulling a load on July 7, 2008 which weighted 117,000 pounds and not calling him before pulling it. TR at 121-122. The Complainant's testimony of this event is directly contrary to Mr. Cowan's. The Complainant testified that he called Mr. Cowan before pulling the load, Mr. Cowan told him to pull it, and he was not reprimanded for pulling it back. TR at 20.

I find the Complainant's contradicted testimony is inadequate to establish that he complained about hauling overweight trailers or was told to do so without more corroboration than Mr. Taylor's testimony, especially in light of the instance when Mr. Cowan helped him deal with an overweight trailer.

c. Statutory hour limits

The Complainant also claimed that he made verbal complaints to management regarding having to work over the regulatory hour limits. TR at 17. The month and a half of timesheets submitted into the record show only one instance where the Complainant exceeded the regulatory limit of 12 hours. RX 21. On July 15, 2008, the Complainant worked for 12 hours and 37 minutes. RX 21y. Mr. Taylor also noted that he frequently drove over the regulatory limits. TR at 78.

Mr. Cowan testified that the Complainant had never complained about having to drive excessive hours. TR at 140. Mr. Desmelik stated that the Complainant had never complained about his hours. TR at 172-173. Mr. Craig also noted that the Complainant had never complained to him about anyone having to drive excessive hours. TR at 188. Again, the Complainant's oral complaints must be sufficient to provide notice that a complaint is being filed. Since three members of Custom Organics' management team testified that the Complainant had never complained about having to drive excessive hours, I do not find his alleged statements qualify as protected activity.

The Complainant testified that on July 14, 2008, Mr. Milton sent him a text message stating that he had already been working for 15 hours, had been asked to drive an additional load, and thought he was too tired to do it. TR at 18. The Complainant stated that he told Mr. Milton to wait until the next morning to make the run. *Id.* Mr. Milton testified that he did not recall contacting the Complainant on July 14 to complain about having to drive excessive hours. TR at 94. He stated that he typically drove between 20 and 25 hours a week and did not recall having to drive excessive hours. *Id.*

Refusal to drive when the contemplated run would cause a driver to violate the federal hours of service regulation (49 C.F.R. § 395.3) is protected activity. *Paquin v. J.B. Hunt Transport, Inc.*, 93 STA 44 (Sec'y July 19, 1994). However, according to the plain language of the Act, it must be the employee himself who refuses to drive in order for it to be protected activity. The "complaint" clause (§ 31105(a)(1)(A)) specifically states that the complaint may be

filed by the employee or “another person at the employee’s request.” The “refusal to drive” clause only refers to the employee’s refusal to drive and does not mention “another person” refusing to drive at the employee’s request. Therefore, the Complainant telling Mr. Milton not to carry another load on July 14 does not constitute protected activity for purposes of the Act.

2. Subject to Adverse Employment Action

The employee protection provisions of the STAA provide that “[a] person may not discharge an employee” for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). The Complainant was terminated on July 16, 2008, and I hereby find that he was subject to adverse employment action within the meaning of the Act.

3. Causal Link Between the Protected Activity and the Adverse Action

Assuming the Complainant established that he engaged in protected activity, he must next establish a causal link between the protected activity and the adverse employment action. The Complainant alleged that he established this link through the timing of his termination and comments made by management at the time he was terminated.

A complainant can establish a causal link between the protected activity and the adverse employment action by showing that the employer was aware of the protected activity and that the adverse action followed closely thereafter. *Kovas v. Morin Transport, Inc.*, ALJ Case No. 92-STA-41, slip op. at 4 (Sec’y Oct. 1, 1993) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). The Complainant argues that the following facts are circumstantial proof that there was an illegal motive for his termination: he was fired (1) two weeks after complaining about being told to haul an overweight trailer and (2) two days after telling Mr. Milton not to drive over his hour limits. As discussed above, I did not find the evidence supported a finding of protected activity in either situation. However, if the Complainant had engaged in protected activity on either occasion, close proximity in time would be sufficient to establish the causal link.

The Complainant also argued that Mr. Cowan’s statements during the termination meeting establish an illegal motive for his termination. The Complainant testified that Mr. Cowan stated he was being terminated for not being able to adapt to the company. The Complainant argued that he would not have received a promotion to lead driver or raise six weeks earlier if he had been unable to adapt to the company. Mr. Cowan testified that the Complainant was given a dollar raise for helping with maintenance issues, but was not promoted. TR at 115. He stated that the company did not have a lead driver position because the transportation manager was in charge of communications between the drivers and management. TR at 117, 119-120. Mr. Taylor also mentioned that he did not have knowledge of the Complainant being made lead driver. TR at 75. I find the alleged statement by Mr. Cowan during the termination hearing to be too ambiguous to establish an illegal motive for the Complainant’s termination.

B. Respondent's Rebuttal and Complainant's Pretext Burden

Assuming *arguendo* that the Complainant demonstrated that he had engaged in protected activity and it contributed to the adverse employment action, the Respondent then has the burden to articulate a legitimate, non-discriminatory reason for taking the adverse employment action. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The evidence must be sufficient to raise a genuine issue of fact as to whether the respondent discriminated against the complainant. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.* at 255. As will be discussed below, the Respondent has offered numerous legitimate reasons for the Complainant's termination.

The complainant then has the opportunity to prove, by a preponderance of the evidence, that the employer's reason for the adverse action was mere pretext for discrimination. *Burdine*, 450 U.S. at 253. Specifically, complainant must establish that the proffered reason for the adverse action is false or that his protected activity was the true reason for the adverse employment action. *See St. Mary's Honor Center*, 509 U.S. at 507-508; *see also Bechtel Constr.*, 50 F.3d at 934. For the following reasons, I find that the Complainant has failed to show that the Respondent's reasons for terminating his employment were pretextual.

During Mr. Cowan's testimony, he listed numerous instances of problems the company had with the Complainant; the problems began shortly after he started working. Mr. Cowan testified that soon after hiring the Complainant in late January 2008, the company discovered that he did not have air brake certification and had to be out of work for a few days to get certified. TR at 111. His absence caused "an undue hardship on the other drivers." TR at 111-112; RX 4. On February 12, 2008, the Complainant hit a light pole in a customer's parking lot, causing \$4,000 in damages. TR at 113-114. On February 14, 2008, after discovering that the Complainant had brought his young child with him in one of the company's trucks, Custom Organics developed a policy that no unauthorized person may be a passenger in one of the trucks. TR at 113; RX 2.

The Complainant argued that the incidents in January and February could not be legitimate reasons for his termination since he was given a promotion and raise a few months later, in late May or early June. Mr. Cowan testified that the raise was compensation for helping the company with maintenance issues, not a promotion. Furthermore, many of the reasons listed by the Respondent as reasons for the Complainant's termination occurred in July 2008, after the raise was given.

Mr. Cowan and Mr. Desmelik testified that on July 3, 2008, there was an altercation between Mr. Desmelik and the Complainant. According to Mr. Desmelik, he observed the Complainant using equipment in a detrimental fashion and he asked the Complainant to stop what he was doing. TR at 164-165. He testified that the Complainant then said "I don't need this job," threw around cardboard pieces and left the facility. TR at 165. The Complainant called Mr. Cowan while he was out; Mr. Cowan told him to return to work and listen to Mr. Desmelik. TR at 51, 117; RX 7. The Complainant testified that he did not leave the work site without permission, but just went to lunch. TR at 27. The Complainant's testimony is inconsistent with the testimony of Mr. Cowan and Mr. Desmelik and the note written by

Mr. Cowan at the time. Mr. Desmelik also testified that the Complainant left at the end of his shift without completing what he was working on or cleaning up the area. TR at 168.

Mr. Cowan noted that on July 7, 2008 he verbally reprimanded the Complainant for hauling a 117,000 pound load back to the facility. TR at 121-122, 151; RX 20ii. In contrast, the Complainant testified that he called Mr. Cowan before hauling the load and Mr. Cowan told him to pull it anyway. TR at 20. The Complainant also stated that he copied the weight ticket and left a note that the problem of overweight trucks needed to be fixed or he would report it to the Department of Transportation. TR at 17. It is unclear which account of the July 7 incident is accurate. However, Mr. Cowan and Mr. Milton testified to previous occasions with overweight trailers where Mr. Cowan told the Complainant not to drive it or came out to help reduce the weight. TR at 95, 150-151. Based on this testimony, I do not find that the Complainant has established a pretext for his termination.

Before the decision was made to terminate the Complainant's employment, Mr. Cowan discussed his actions with Mr. Desmelik and Mr. Craig. TR at 127-128. Mr. Cowan stated that they mostly discussed the Complainant being late for work, being unable to reach him, his leaving compactor boxes out in the rain, and his taking a truck home. TR at 128. Mr. Cowan noted that as time progressed, the Complainant became unreliable and on July 9, 2008 he noted that the he was "increasingly unavailable for work and is consistently late." TR at 115, 121; RX 8. He also stated that there were several instances where the Complainant left containers full of product open to the elements. TR at 123, 126; RX 9. Mr. Cowan wrote that on July 14 the Complainant took a truck home without permission and could not be reached the next morning when the truck was needed for a pickup. TR at 123-125; RX 9. Without the truck, the company got behind schedule. TR at 125.

Mr. Desmelik and Mr. Craig's testimony support Mr. Cowan's list of problems that were discussed in the meetings. Mr. Desmelik stated that he noticed after the July 3 altercation that the Complainant was tardy and "just a little more lackadaisical in his attitude towards work." TR at 169. He testified that during the termination discussions, they went over a list of occurrences over the course of the Complainant's employment and together "they added up to not a good situation for the company." TR at 170. Mr. Craig testified that the three discussed "the problem with leaving work without letting anybody know and not coming back, problem with taking the trucks without permission, and basically not working with management the way that he should." TR at 187. All three men agreed that they did not discuss complaints about safety violations, excessive hours or hauling overweight loads. TR at 128, 169, 188.

The Complainant alleged that it was routine for drivers to take their trucks home and it had never been an issue. TR at 22-23. However, the record does not support the Complainant's testimony. Mr. Taylor testified that he was allowed to drive his truck home from January 2008 until July or August of 2008 when he was told it was against the company's insurance agreement to take the trucks home. TR at 84-85. Mr. Cowan testified that only Mr. Taylor was allowed to take his truck home because it made it more convenient to service a customer's location near his home. TR at 123-124. No other drivers were allowed to take the trucks home for insurance reasons. TR at 124. He noted that he only recalled the one occasion when the Complainant took his truck home. TR at 124-125. Mr. Craig also testified that only Mr. Taylor had authority to

drive trucks home to service a customer. TR at 185-186. Mr. Milton stated that he only drove his truck home once and was told by Mr. Cowan the next day not to do it again. TR at 95.

I find that the reasons listed above are legitimate business reasons to terminate the Complainant and would rebut the Complainant's *prima facie* case.

I further find that the Complainant has failed to show that the reasons listed above were mere pretext for his termination. The Complainant argued that Mr. Cowan not allowing him to see his employment file at the time of termination and not telling him at the time why he was being terminated shows that the reasons were pretextual. Mr. Cowan testified that his policy was to verbally discuss issues with employees and then make a note for their file. TR at 112. He did not generally show the notes to the employees. *Id.* He stated that during the termination meeting, he communicated to the Complainant that "things were just not working out." TR at 129. He did not give a specific reason for the termination because the Complainant became hostile during the meeting and he did not want to prolong the meeting. TR at 129-130. Mr. Desmelik, who was also present at the termination meeting, also testified that the Complainant became confrontational and threatened to blackmail the company. TR at 170-171. I find that it was reasonable for the managers to end the meeting when the Complainant became confrontational without explaining their reasoning for the termination in detail.

Finally, the Complainant alleged that the Respondent's reasoning for the termination was inconsistent. While shifting or inconsistent reasoning can constitute circumstantial proof of an illegal motive for termination, I find that the Respondent's reasoning was consistent. On July 21, 2008, Mr. Cowan completed a Separation Notice and sent it to the Complainant and the Georgia Department of Labor. RX 11. The reasons for termination included being unavailable and consistently late for work, not being reachable by phone, not working well with management, having a negative attitude while at work, and taking a truck home without permission. *Id.* On July 22, 2008, Mr. Cowan prepared a questionnaire for the Georgia Department of Labor in which he stated that the complainant was given verbal warnings for doing the following: (1) causing damage to a customer's property, (2) disagreeing with a member of management and (3) taking his truck without permission. RX 15a. The questionnaire also noted that the Complainant was terminated for "an accumulation of things, not just one thing." *Id.* In a detailed statement prepared for OSHA, Mr. Cowan listed the reasons for the Complainant's termination as follows: (1) failing to turn in proper inspection forms, (2) falsifying information on his employment application, (3) having an altercation with a member of management, (4) hauling an overloaded trailer, (5) taking a truck home and (6) being unavailable by phone. Mr. Cowan wrote: "There was no singular incident that caused the termination of Mr. Warren. His termination was dictated by all of the actions mentioned in this statement as well as in the previous statement sent." RX 16. The reasons listed in these documents are the same as those Mr. Cowan, Mr. Desmelik and Mr. Craig provided at the hearing.

C. Conclusion

Although it is undisputed that the Complainant suffered adverse employment action when he was terminated on July 16, 2008, the Complainant has failed to establish that he engaged in any protected activity, that such activity had any causal connection to his termination, or that the

nondiscriminatory reasons offered by the Respondent were mere pretexts. Because he has failed to carry his burdens of proof under the STAA, the Complainant's claim for relief must be denied.

RECOMMENDED ORDER

For the foregoing reasons, I hereby RECOMMEND that Byron Warren's claim be DENIED.

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ahk
Newport News, Virginia

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, Suite S-5220, 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.