

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

CASE NO.: 2011-STA-00036

In the Matter of:

THERON K. CARTER,
Claimant,

v.

TITAN TRANSPORTATION SERVICES, INC.,
Employer.

DECISION AND ORDER DISMISSING CLAIM

I. Statement of the Case

This case arises from a claim for whistleblower protection filed by Theron Carter (“Complainant” or “Carter”) against his employer, Titan Transportation Services, Inc., doing business as Sunset Logistics (“Titan” or “Employer”), under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (“the Act” or “STAA”), 49 U.S.C. § 31105, as amended by Section 1536 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (the “9/11 Act”), Pub. L. 110-53, 121 Stat. 266 (Aug. 3, 2007), and the applicable regulations at 29 C.F.R. Part 1978 (2011). After an investigation, the Occupational Safety and Health Administration (“OSHA”) found the Complainant’s allegations to be without merit. The Complainant objected to OSHA’s findings and requested a formal hearing before the Office of Administrative Law Judges (“OALJ”) pursuant to 29 C.F.R. § 1978.106.

A hearing was held before the undersigned Administrative Law Judge in Grand Rapids, Michigan on August 25, 2011, at which time all parties were afforded the opportunity to present evidence and arguments. The Complainant appeared *pro se*, and the Employer was represented by counsel. The Hearing Transcript is referred to herein as “TR.” The Complainant testified on his own behalf and also called Jeremy Bultema, Chad Bultema, Sandy Bultema and Tari Labinsky to testify. Chad Bultema and Sandy Bultema were also called by the Employer. Documentary evidence was admitted as Employer’s exhibits (“EX”) 1-2 and Complainant’s

exhibits (“CX”) A-E and 1-17.¹ TR 10, 12, 15, 85. The parties submitted post-hearing briefs, and the record is now closed.

II. Issues

The issues in dispute are as follows: (1) whether the Complainant engaged in protected activity under the STAA; (2) whether the Employer took adverse action against (discharged) the Complainant; (3) whether protected activity was a contributing factor in his being discharged; and (4) whether Employer would have taken the same adverse action in the absence of protected activity by the Complainant.

III. Summary of Decision

This case revolves around the hours-of-service regulations promulgated by the Department of Transportation (“DOT”) at 49 C.F.R. Part 395. In particular, 49 C.F.R. § 395.3 mandates that a truck driver have ten consecutive hours off—either off duty or in the sleeper berth—before going on-duty for a maximum of fourteen hours. Of these fourteen hours on-duty, a driver may only drive for eleven hours, and once a driver has reached either eleven hours of driving or fourteen hours on-duty, the driver must take another ten hour break. *Id.* The Complainant alleges that he was fired because he refused to drive on a trip that could not have been driven within these ten-hours-off-before-fourteen-hours-on requirements of 49 C.F.R. § 395.3. To be successful, the Complainant bears the burden of proving that he refused to drive because of an hours-of-service violation, and the Employer retaliated against him because of his refusal.

The Employer’s primary argument is that the trip assigned to the Complainant could have been accomplished legally, and that the Complainant quit his job. Therefore, they argue, there is no protected activity or retaliatory adverse action. Furthermore, even assuming the Complainant was terminated, the fact that he had failed to notify them that he was going to be late, and his subsequent refusal to immediately return their tractor trailer, were sufficient non-protected reasons that demanded the Complainant’s termination.

¹ The Employer submitted the Complainant’s deposition, with its exhibits, but never sought to have the deposition admitted at hearing. The Complainant’s exhibits A-E were initially attached to his request for hearing and admitted at hearing. TR 11-12. Complainant’s exhibits CX 1-17 were documents Complainant offered at hearing and were also admitted. TR 13-16. The Complainant’s objection to EX 1 was overruled. TR 85. Employer objected to a police report from the Complainant’s last day at Titan. TR 170, 173. I admitted the exhibit for the limited purposes of establishing that a police report exists and not for the truth of the statements contained therein. TR 170.

Post-hearing, the Complainant submitted forty-seven additional pages of exhibits with his brief. Complainant labeled the additional pages as CX 18 consisting of four pages (truck inspection form, driver checklist, handwritten hours of service log) and CX 19 consisting of forty-three pages including printout from PC Miler, Google maps, police report of 1/6/11, letter from Complainant to Titan counsel requesting specific documents and admissions, Complainant’s summary of meetings with the OSHA investigator and several log sheets. Many of the documents Complainant submitted post-hearing were discussed or made reference to during the hearing. Employer has filed no post-hearing objections to these submissions. Given the Complainant’s *pro se* status, and the absence of objection by the Employer, the Complainant’s post-hearing documents are admitted. These documents shall be referenced as “Compl.’s Br. add.”

For the reasons set forth below I find that the Complainant engaged in protected activity under the Act and that the Employer took adverse action against him; however the Complainant failed to establish that his protected activity contributed to the adverse action.

IV. Stipulations

The parties submitted a Joint Pre-Trial Stipulation (“Stip.”) of Facts. At hearing, I confirmed that the parties stipulated that: (1) Titan is an interstate trucking company; (2) on or about July 16, 2010, Titan hired the Complainant as an over-the-road truck driver; (3) the Act applies to this case; (4) the claim for violation of the Act was timely filed; and (5) the Complainant’s last day of employment with Titan was January 6, 2011. TR 6-8.

V. Summary of the Evidence

A. Testimony of the Complainant Theron Carter

1. History of Employment at Titan

The Complainant was hired by the Employer in July of 2010 as a long haul truck driver. TR 27, 29. In this position, the Complainant drove tractor trailers on multiple-day journeys, and the tractors were equipped with sleeper berths in which the driver could sleep during his ten hours rest period. TR 113. Because the job involved spending days on end in the tractor, a driver would keep some of his own personal belongings in the tractor. TR 113. When a driver switched tractors, he would customarily remove his belongings from the tractor. TR 113-14. The Complainant testified that he had two special arrangements with Titan. First, he testified that the company was aware that he would not drive between 11:00 p.m. and 4:00 or 5:00 a.m. TR 73. He also testified that he was permitted to “bobtail”² his tractor to his house. TR 89-90.

As a long haul truck driver for Titan, the Complainant testified that he received his assignments from three different dispatchers, Chad Bultema, Sandy Bultema and Ms. Labinsky. TR 29-31. He explained that there were different dispatchers for whether the load was going out or coming back, but the dispatchers covered for each other. TR 29, 100. A typical trip consisted of multiple assignments or loads, and could entail several days of driving to multiple locations. *See e.g.* EX 2. Chad Bultema usually dispatches the original outbound trips leaving Grand Rapids, and once a load had been delivered to its destination, a driver calls Ms. Labinsky to let her know he was available for a reload. TR 29-31, 99-100. Ms. Labinsky would then assign him to a load going farther on, or to a load going back to Grand Rapids. TR 31.

Once a driver has been assigned a load, it is the driver’s responsibility to report to the dispatcher on the progress of the load. TR 99. “[N]ormally, if you’re on [an] outbound load you talk with Chad Bultema before 10:00 a.m. the [] following morning.” TR 99. If Chad Bultema were unavailable, a driver could speak with whoever was available, Sandy Bultema, Jeremy Bultema or Ms. Labinsky. TR 99. Also, the Complainant testified that if there were a problem, such as “if you’re late for a load or if you have an accident scene, if you have a flat tire,” a driver is responsible for reporting that to a dispatcher “at 10:00 am or before every morning.” TR 100.

² Bobtailing is the act of driving a tractor without a trailer attached. TR 39.

The Claimant agreed that he tracks his own hours of service as he works day to day and then added “the dispatcher is supposed to be aware of whether or not you have available hours as he plans your delivery time, [and] your reload time.” TR 100. However, immediately thereafter he conceded that a driver is responsible for tracking his own hours-of-service and for letting the dispatcher know if he has hours available. TR 100-101. The Complainant testified that Titan would sometimes refer to a load as one “that’s got to be there, and if you can log it legally later and not on that specific date, you have to . . . chang[e] your log sheets to be able to get that load there.” TR 101-02. But when asked if Chad Bultema had ever asked him to change his logs, the Complainant responded: “Well, if you can’t legally at the end of the day hand in a log sheet that’s going to be accurate, okay, as far as accurate of fuel stops and scale tickets or tolls, you don’t go any further. And I’ve discussed that with Jeremy Bultema.” TR 102.

The Complainant testified that Titan uses log sheets instead of logbooks because “you can do anything you want with that log sheet,” and the only constraint is that a log sheet had to line up with fuel purchases, bridge tolls or inspections. TR 34. The Complainant described this practice as making “a legal log,” which was submitted to OSHA, “[b]ut it doesn’t really show what [he] was really doing.”³ TR 46, 49. The Complainant’s practice was to regularly record information on his log sheets in a manner that maximized the number of available driving hours. *See* TR 50-54. “[I]f you have a way where you still have hours within your 70 hours, it’s considered to be legal . . . as long as you have those times accurate of where you purchased fuel or actually where you’re driving at that time if you had a toll.” TR 60.

At Titan, “you have to actually have a current legal log with you in the truck and it has to be accurate when you turn in your logs at the end . . . for pay on your pay sheets.” TR 55. The Complainant’s reference to accuracy seems to mean that the logs must reflect “no miles other than the total miles or the miles that you would have [And] the mileage where you purchase fuel that’s on your fuel receipt.” TR 55. The Complainant testified that “what we do at [Titan] is how I was told, that if you can work your logs because they’re log sheets . . . we have to get those loads there.” TR 50. He added that he has always changed his “logs to make them legal for what the request is of the place I’m working.” TR 51. He did not believe accurate log sheets existed that would reflect the actual time he was driving or in the sleeper berth. TR 59.

The Complainant testified that he had had two prior incidents with the Employer that were similar to the circumstances here, where he had refused to take a load when he could not alter his logs to appear legal. TR 73, 144. He first described an incident where he was supposed to meet another driver but the other driver was four hours late, which meant that it would have been impossible for the Complainant to falsify his logs to make them appear legal if he took the load on to New York. TR 73-74. He said that Sandy Bultema told him that the load had “got to get there” and that he could either take that load, or a different load going to Florida. TR 73-74. The Complainant took the load to Florida and said he was able to do so by “shuffling the logs around.” TR 74.

³ The Complainant’s statement that the log sheet was submitted to OSHA appears to reference the log sheet provided to OSHA when it investigated his complaint. The log books or log sheets are required to be maintained under the Department of Transportation’s Federal Highway Administration’s regulations. *See* 49 C.F.R. § 395.8.

Later, the Complainant described a second incident, saying a driver had been four hours late and he had called Sandy Bultema repeatedly after 6:00 p.m. to tell her that there was no way that he could take the load on to Washington, D.C. TR 141, 143. He said that “at 11:00 o’clock or thereabouts I finally said to myself . . . I’m not going to be able to get this load there and I’m tired,” and that he did not call until the following morning to tell Sandy Bultema where he was. TR 143. He said Sandy Bultema had called a sheriff, and told the sheriff that the Complainant should bring the tractor trailer back and that he was to call her. TR 144. The Complainant brought the tractor trailer back to Titan, and Sandy Bultema told him to take a couple of days off and come back and see her on Monday. TR 144.

2. *Trip # 15805, an Impossible Delivery Timetable?*

On January 5, 2011, Titan assigned the Complainant to Trip # 15805, which involved two separate assignments or loads. *See* CX B; CX 14; EX 2. The first assignment required the Complainant to take an empty trailer, # 9320, from Titan’s place of business in Grand Rapids, Michigan, to Filer City, Michigan. CX 5; CX 14. The trailer was loaded in Filer City, and the Complainant was to drop off the loaded trailer back in Grand Rapids later that same day. CX 14; CX 15.

The second assignment involved four stops. CX B; EX 2. First, the Complainant had to pick up a loaded trailer, # 9301, in Holland, Michigan, and then take it to Jackson, Michigan, the second stop, by 8:00 a.m. on January 6, 2011.⁴ *Id.* The Complainant was to exchange trailer # 9301 for a new trailer in Jackson, Michigan, and deliver the new trailer to the third stop, Camp Hill, Pennsylvania, by 4:00 p.m. *Id.* Finally, the Complainant was to take another trailer from Camp Hill, Pennsylvania to Upper Marlboro, Maryland by 8:00 a.m. on January 7, 2011. *Id.*

Prior to receiving Trip # 15805, the Complainant testified that he had just returned from Medford, Oregon, early in the morning of January 4, 2011. TR 55; CX 7. He testified that he made about four more short-range deliveries on January 4, before going home around 8:30 p.m. TR 56-58, 61-62; CX 5; CX 7.

The morning of January 5, Chad Bultema called the Complainant around 10:30 a.m. to ask if he was available, and the Complainant said he would call back when he was free. TR 47-48. The Complainant called back at 1:57 p.m., and Chad Bultema told him about the first assignment going to Filer City, Michigan. TR 36, 48. The Complainant left his home around 2:30 p.m., and arrived at Titan’s yard at approximately 3:00 p.m. TR 48. At Titan’s yard, he spoke to Chad Bultema about the trip. TR 103. The Complainant testified that Chad Bultema said that the second assignment involved going to Jackson, Michigan, and may have mentioned that the destination after Jackson was in Camp Hill, Pennsylvania. TR 103. The Complainant recalled, however, that most of the conversation on January 5 revolved around whether he needed fuel and payment for fuel. TR 36-37. As a consequence, the Complainant did not leave Titan’s yard until around 4:00 p.m., at which time he drove to a truck stop approximately a mile away to fuel up. TR 37.

⁴ I take judicial notice that the distance between Holland, MI and Jackson, MI is approximately 120 miles. 29 C.F.R. § 18.201(b)(2).

After he got fuel, the Complainant proceeded on to Filer City with an empty trailer. TR 37, 62. The Complainant testified that he did not make it to Filer City until around 7:30 p.m. because the weather had gotten bad. TR 37-38. He loaded his trailer and took a different route back, which he hoped would have better road conditions. TR 62-63. He dropped the trailer off in Titan's yard, and drove to a nearby truck stop to spend the night in the sleeper berth. TR 63. He got to the truck stop at approximately 11:00 p.m. on January 5. TR 40, 91. The Complainant testified this was the first time he looked at the trip packet for the second load, and he realized that the trip was impossible. TR 40, 91; *see also* EX 2. The first problem with this trip was that he was supposed to pick up a trailer in Holland, Michigan and switch it for another trailer in Jackson, Michigan by 8:00 a.m. on January 6. TR 40; EX 2. However, the Complainant testified that because getting to Filer City took longer due to adverse weather, and the Complainant did not get to the truck stop on January 5, until 11:00 p.m., he could not get his ten hours rest and get the load to Jackson, Michigan by 8:00 a.m. on January 6. TR 40-41, 104. The second problem with the trip assignment was that the next delivery was then due in Camp Hill, Pennsylvania by 4:00 p.m. on January 6. TR 40-41; EX 2.

The Complainant testified that his immediate thought was that this load was impossible stating he said to himself:

[W]hy am I being given a load to pick up at Filer City and then be down at Jackson, Michigan at 8:00 a.m. the next morning? Now, if you didn't have to have any sleep and you didn't have hazardous driving conditions, I'm going to say things would have been able to have been possibly delivered on time at 8:00 a.m. by changing the logs, okay, on that log sheet, and it would have taken more than one [log sheet]. . . . And then I thought to myself . . . how in the hell can you drive from Jackson, Michigan to Camp Hill, Pennsylvania from 8:00 a.m. until 4:00 p.m. that afternoon? That's an impossible load.

TR 40-41. The Complainant claimed that the drive from Jackson, Michigan to Camp Hill, Pennsylvania would take about eleven hours in good road conditions. TR 41.

Upon realizing that the load to Jackson, MI could not be delivered timely and within the hours-of-service regulations, the Complainant went to sleep, and woke up at 6:00 a.m. on January 6. TR 39; EX 2. The Complainant then drove to Holland, Michigan, picked up the first trailer of the second load, # 9301, around 6:30 a.m., and then got breakfast at a McDonald's in Zeeland, Michigan around 7:30 a.m. TR 39, 41-42; CX 16.

The first time he called the Titan dispatch line was at 8:00 a.m. TR 92. Even though he knew at 11:00 p.m. the previous evening that the load was supposed to be in Jackson, MI by 8:00 a.m., he "also knew that the load wouldn't be there because of the hazardous driving conditions." TR 92-93. He testified that "he had no reason to" call anyone at Titan to tell them that the load would be late. TR 93. Later, the Complainant opined that there would not have been an hours-of-service violation in getting the load to Jackson, Michigan if there had not been hazardous snow conditions, and that he did not tell anyone on January 5 that the load was impossible because he "was trying to focus on getting to Filer City in the snowstorm." TR 104. He

confirmed: “Q: Did you tell anyone in words that there as a potential hours-of-service violation with any of these loads? A: There wasn’t at the beginning.”⁵ TR 105.

3. *Morning, January 6: Telephone Conversations with Sandy Bultema*

The Complainant said he decided to wait until 8:00 a.m. to call Titan to tell them the load would not be in Jackson at 8:00 a.m. as scheduled “because you don’t want to call Sandy too early and you don’t really want to call anybody else because they have to have their sleep”⁶ TR 42. When the Complainant called Sandy Bultema at 8:00 a.m., he told her that the load from Holland to Jackson, Michigan had to be rescheduled. TR 42, 63-64, 95. He said they never really talked about the fact that the delivery to Camp Hill was impossible. TR 42. He testified that “normally I would call the receiver [customer] myself if I was going to be an hour late, but this was a very unusual situation.” TR 42.

The Complainant said he “told her [Sandy Bultema] where [he] was and that the load had to be rescheduled.”⁷ TR 63. He said “she wanted me to tell her what to do [in terms of communicating with the customer expecting delivery at 8:00 a.m.] And I said that you can tell [the receiver] anything you want” TR 42. Sandy Bultema then told him that the load needed to be at the receiver, and to bring the trailer back to Titan’s yard. TR 64, 109. The Complainant believed that Sandy Bultema must not have understood that the roads had been slippery and that he had gotten back late from Filer City. TR 64. At that time, the Complainant did not believe that Sandy Bultema intended to fire him. TR 95-96. On his way back to the Titan yard, he stopped at a truck stop to copy his paper work and do a post-trip inspection. TR 64.

4. *Morning January 6: Telephone Conversation with Chad Bultema*

The Complainant recalled he first spoke with Chad Bultema sometime between 10:00 and 10:30 a.m. on the morning of January 6. TR 64. Chad Bultema called him and wanted to know where the Complainant and the truck were. TR 110. The Complainant testified that he told Chad Bultema that the problem with the load was “not just an hour of service issue, it’s a load for failure.” TR 65. Chad Bultema told him: “I want the truck back right now.” TR 64. Instead of returning the tractor trailer immediately, the Complainant told Chad Bultema that he was doing his post trip inspection, and that he was in the process of putting oil in the tractor.⁸ TR 64.

⁵ The Complainant was asked repeatedly whether he ever told anyone at Titan that taking the loads posed a potential hours of service problem, but the Complainant never directly responded to the question. TR 103-06. In the end he said that it was correct that he never told anyone, but added that he was confused by what was said. TR 105-06.

⁶ The Complainant’s brief suggests that it was the Employer’s practice to have drivers only call in between 8:00 a.m. and 10:00 a.m. (Compl.’s Br. at 12.) However, the record establishes that Titan had a twenty-four hour dispatch line and drivers were to call in whenever an emergency arose, or a load had been delayed.

⁷ Based on his testimony, the Complainant may have spoken with Sandy Bultema again after this phone call at 8:00 a.m. TR 95. However, the substance of the two conversations appears identical.

⁸ The Complainant was doing the post-trip inspection at the truck stop which was approximately one mile from Titan. (OSHA Comp. at 1.)

The Complainant testified that the post trip inspection involved:

a problem that I knew with an ECM light on and . . . I thought, okay, is it water, is it oil or is it a bad ECM light? And so, I did my post trip inspection [at the truck stop] because I knew in my mind I wasn't going to be doing that over there.

TR 66. Chad Bultema told the Complainant that he could do his post trip inspection at Titan's yard, and when the Complainant declined, Chad Bultema "started to get loud," so the Complainant hung up on him, figuring that he would just finish what he was doing. TR 64-65. The Complainant testified that after this conversation he believed "I was going to be no longer an employee of [Titan]." TR 96.

The Complainant believed that Chad Bultema "didn't understand what I was doing because I also had to make a copy of all my paperwork." TR 65. The Complainant testified that the conversation he had with Chad Bultema made him feel threatened, and he called the sheriff's department. TR 65. Specifically, the Complainant thought Chad Bultema was being threatening because he said "I want it brought back right now." TR 65. In the Complainant's opinion, "[y]ou don't talk that way to a driver." TR 65. The Complainant also called his wife and asked her to meet him at Titan's yard. TR 66.

5. *Morning January 6: Upon Return of Truck and Trailer to Titan's Yard*

After he finished his post trip inspection and copying his paperwork at the truck stop, the Complainant drove over to Titan's yard, dropped the trailer on Titan's property, and moved the tractor back to the public road.⁹ TR 66. The Complainant testified that Sandy Bultema called him twice around this time; during the first call "Sandy wanted me to clean up my truck," and in the second call she wanted to know what was taking so long. TR 66. Prior to the police arriving, Sandy Bultema and Jeremy Bultema came outside while the Complainant was cleaning out his truck. TR 67. The Complainant testified that Jeremy Bultema wanted to "know what's going on." TR 67. Instead of explaining himself, the Complainant recalled he said "you'll find out in just a minute" after the police arrive. TR 67-68.

The Complainant testified that he "never really was terminated as the word terminated," by which he meant that Sandy Bultema never used a word like "terminated," or "fired." TR 96. Rather, he felt he was going to be fired after he spoke with Chad Bultema, saying that based upon his understanding of "how the trucking language works, clean out your truck means you're no longer driving for them." TR 96. He testified that Sandy Bultema later told him that she had "to put a driver in my truck." TR 98. He said that "normally . . . [Sandy Bultema] would have said . . . come back to the office, let's sit down and talk." TR 20, 144.

⁹ The Complainant said he refused to go onto Titan's property because he did not want to be a trespasser. Based upon his prior experience with a different employer, the Complainant was concerned Titan would have ordered him off the property and taken his personal belongings that were in the truck. TR 68-69, 115, 118-19.

Despite using “clean out your truck” as the touchstone for firing in the trucking industry, the Complainant’s testimony as to when he was told to clean out his truck is not perfectly consistent. It appears that Sandy Bultema did not tell him to clean out his truck until after she had spoken to him in person:

Q: Okay. And at that point in time [when Sandy Bultema came outside a little while before the police arrived], the two of you were discussing you moving your things out of the tractor so that another driver could put his things in so that the load could get to Jackson as soon as possible, right?

A: Not at that time.

* * *

Q: She used the words we need to get the other driver’s possessions in the tractor, didn’t she?

A: No, not at that time.

Q: She did in an earlier conversation then, didn’t she?

A: No, she didn’t.

Q: Is it your testimony that she never used those words?

A: In the end she did.

Q: In the end?

A: In the end.

Q: Was that in person or on the phone?

A: That was on the phone.

Q: She said we need to get another driver under the tractor and his possessions in the tractor on the phone? Did she say that?

A: That was on the phone.

TR 116-117. The Complainant testified that when he spoke with Sandy Bultema after he returned the trailer to the yard and parked the truck on the road next to the company’s property she:

never said anything about cleaning out the truck [in person]. She wanted to know what was going on. Jeremy Bultema wanted to know what was going on. . . . I wanted to say something to [Jeremy] but I couldn’t because I had already made a phone call [to the sheriff] and I said you’ll find out very soon.

TR 66, 118.

The Complainant stated that by the time he returned the truck to the company’s facility, Sandy Bultema had also called the sheriff; “the sheriff’s deputy approached me” and it looked like things were “in the process, that I’m going to be removed from the property. So I took all my possessions out because I figured I might not have them.” TR 68; *see also* TR 66. The deputy then went into Titan’s office, and the Complainant stated that when she came out she told him that he would no longer be working at Titan. TR 68. Complainant recalls the deputy told him to just leave the tractor where it was, and that the Employer wanted the keys to the truck, his

fuel card, and his trip pack. TR 68. The Complainant explained that his trip pack had not been completed, and stated the deputy told him not to worry about it, to just turn it in, and “get out of here off the premises and then you can talk about it later.” TR 68-69. That was the end of the Complainant’s day; he never had any further contact with Titan outside of legal proceedings. TR 69. The Complainant believed that he was fired because somebody realized that they had made a mistake in scheduling a trip that was impossible to do legally, and that he was set up to be the fall guy. TR 67.

B. Testimony of Sandy Bultema

1. *Working at Titan*

Sandy Bultema testified that she was the operations manager at Titan, and worked with about thirty truck drivers every day, fielded between two and three hundred phone calls a day, and worked ten to twelve hours a day. TR 175-76, 235. Sandy Bultema testified that she did not know, or did not recall, whether the Complainant ever drove a tractor to his home. TR 125-65. Ms. Bultema agreed that in the past there had been problems with some of the tractors and trailers to which the Complainant had been assigned, including safety issues that were violations of DOT regulations.¹⁰ See TR 128-37. She also testified that all drivers were given fuel cards. TR 142.

Regarding assigning loads, Ms. Bultema testified that she usually asks a driver if he has enough hours to deliver a load by a certain time. TR 138. “Then it’s up to the driver to tell me yes, they do, or no, they don’t. If a driver accepts the load and says yes, I can, I have the hours available, I can be there by 8:00 a.m., then I give it to that driver.” TR 138. She added that she would not know if a driver was driving over his hours-of-service unless he told her. TR 138. Sandy Bultema only asks about a driver’s available hours for the next day, and does not ask about whether he has hours further ahead than that. TR 139. She does, though, review all of the destinations on a trip with a driver before assigning him to the load. TR 140.

Sandy Bultema initially said she had no recollection of any previous events where loads assigned to the Complainant did not get where they were supposed to go on time. TR 140. However, upon further questioning by the Complainant, she recalled an incident where another driver was supposed to have met the Complainant at 6:00 p.m., but was late. TR 141. Her testimony on the prior incident was not entirely forthcoming. She responded as follows:

Q: So, you did state to the sheriff that I should bring the tractor trailer back and that I was to call you, and you and I agreed to bring the tractor trailer back to the yard?

A: That could have happened, yes. I don’t recall.

Q: And that you told me when we sat down in the office take your two days off, come in and see me Monday?

A: Could be.

¹⁰ The Complainant has not alleged that these previous safety concerns contributed to the end of his employment with the Employer.

Q: That happened only twice, if I recall?

A: I talked to you a couple of times about some issues, yes.

TR 144.

2. *Events of January 5 – 6*

Sandy Bultema testified that she was present when the Complainant showed up at the office on January 5, and was dispatched on Trip # 15805. TR 236. She initially testified that he never said anything to her about hours-of-service on either January 5 or 6, but later acknowledged that when she spoke with him at 8:00 a.m. on January 6, he said he had “run out of hours.” TR 236, 240. Sandy Bultema testified that if the Complainant did not have enough hours to deliver the loads, he should not have accepted them on January 5, and if there were adverse weather conditions that day, he should have called the twenty-four hour dispatch line. TR 248. Sandy Bultema said she believed that the load could have been delivered without an hours-of-service violation. TR 240-41. However, when asked to provide a timeline by which the two assignments could have been timely delivered with a ten hour break her response was not clear. *See* TR 250-55.

In this regard, Sandy Bultema began by acknowledging that the Complainant did not leave the Titan yard until 4:00 p.m. on January 5 because he had to get fuel. TR 252. She then stated if Complainant left at 4:00 p.m. and headed to Filer City, which takes two and a quarter hours, without adverse driving conditions, plus another hour to load the trailer, the Complainant should have gotten back to Titan’s yard between 9:00 and 10:00 p.m. TR 253. Then he could have had his ten hour break from 10:00 p.m. on January 5 until 8:00 a.m. on January 6. TR 253-54. When it was pointed out to her that the assigned trip required Complainant to be in Jackson, MI by 8:00 a.m. on January 6, she stated “according to what we witnessed that day at, he left at 2:00 p.m.” TR 254-55. She acknowledged that the trip was impossible if the driver did not leave before 2:00 p.m. on January 5. *See* TR 252-55. However, she argued that when Titan “dispatched him, it was 2:00 o’clock in the afternoon. I did not know he did not leave till after 4:00 p.m.” TR 253. She agreed that someone at her company “might have” known the Complainant left at 4:00 p.m. because he had to get fuel. TR 253-55. Sandy Bultema prepared a written statement for the OSHA investigation, in which she said: “Mr. Carter was here in the office at 4pm on the 1/5/2011” CX C at 1; TR 153, 164.

While being questioned by the Complainant, Sandy Bultema testified that Chad Bultema was the person who spoke with the Complainant at 8:00 a.m. TR 167-68; *see also* CX 5. However, she later testified, under questioning by her own counsel, that she spoke with the Complainant at 8:00 a.m. TR 236. By this time, the delivery to Jackson, Michigan was already late. TR 236. Sandy Bultema asked the Complainant where he was and he said that he was not at his destination and that “[h]e had run out of hours.” TR 240. She told the Complainant that he needed “to get the load back here so that I can get somebody else underneath it.” TR 240. Had the Complainant called the night before, Sandy Bultema said she could have “[r]epowered it with another driver.” TR 236-37. She said there was “a little bit of anger” in their 8:00 a.m. conversation, and that the Complainant kept saying “I don’t care what you tell [the client]. It’s totally up to you what you want to tell them.” TR 240.

Regarding her last telephone conversation with the Complainant on January 6, Sandy Bultema testified that “she asked him if he was coming back to the yard with the trailer because [she] needed to get somebody [else to deliver it].” TR 238. The Complainant then told her that the trailer was in the yard, and that he was with the truck off of her property “so that he could clean his stuff out of his truck.” TR 238. She testified that this was the first time anyone had mentioned his cleaning his stuff out of the truck, and that it was the Complainant who brought it up. TR 239.

Sandy Bultema testified that the sheriff’s deputy arrived around 11:30 a.m. or noon on January 6, 2011. TR 169. Sandy Bultema testified that she did not, so far as she recalled, tell the deputy that the Complainant was quitting. TR 169, 174. Rather, the deputy said “I don’t know why I’m here or what I can do to help Mr. Carter, but I believe that I’m going to be here just so nothing else goes wrong. . . . So that he gets his truck cleaned out and you get your truck back” TR 174. Ms. Bultema testified that neither she, nor anyone else at the Employer, has called the Complainant since to take another load. TR 244.

C. Testimony of Chad Bultema

Chad Bultema is a dispatcher, but he also occasionally picks up loads and unloads and cleans trailers. TR 177-78. As a dispatcher, Chad Bultema was the Complainant’s supervisor, and in turn he reported to Sandy Bultema, who was the operations manager. TR 226. Chad Bultema dispatches about forty loads and handles around two hundred telephone calls a day. TR 227. He said he works twelve hours a day, every day of the week. TR 227. As a supervisor, he has the authority to fire a driver who is late on multiple occasions, or who takes a tractor home. TR 232. Chad Bultema testified that he had never talked to the Complainant about driving his tractor to his home. TR 180. When asked whether the Complainant would do anything that would jeopardize his job at Titan, Chad Bultema responded that the Complainant had “[b]y not calling in when [he was] late on a load, by taking [his] truck home when [he was] not supposed to” TR 181.

Chad Bultema confirmed that it is a driver’s responsibility to let a dispatcher know how many hours he has available. TR 228. If a driver says he does not have enough hours, Chad Bultema would just move on to find another driver. TR 228. Chad Bultema testified that dispatch was available twenty-four hours a day, and that drivers are required to call if there is any reason that the load is not going to be on time. TR 228-29.

On January 5, 2011, Chad Bultema testified that he had called the Complainant in the morning, and that the Complainant called him back regarding the load to Filer City sometime around 1:57 p.m. TR 186. However, Chad Bultema did not independently recollect at what time of day he dispatched the Complainant. TR 227. In Chad’s opinion, the Complainant accepted these loads twice—and thus twice represented that he had enough hours to deliver them—first when they discussed the loads on the phone around 1:57 p.m., and again when the Complainant came into the office and took the trip packet. TR 228. Chad Bultema had reviewed the loads, and believed there was nothing wrong with them. TR 187-88. Mr. Bultema stated that in his opinion, there could have been a ten-hour break at some time between January 5 and 6, but when asked to explain when such a break could have occurred he refused to give a response or explanation as to when that ten hour break could have taken place. TR 192-94, 199. He testified

that if the Complainant had told him he did not have enough hours to take the load, he would not have given the load to the Complainant. TR 196.

Regarding the leg from Jackson, Michigan to Camp Hill, Pennsylvania, Chad Bultema first testified that the distance was about six hundred miles and later that it was 496 miles. TR 188, 218. He also testified that according to a computer program, PC Miler 21, the load was legal and possible.¹¹ TR 188. Chad Bultema conceded that the Employer did not reimburse toll roads, and agreed that if it took an hour or two to unload at the first drop point, the load to Camp Hill, Pennsylvania would be impossible. TR 188, 190. However, he emphasized that if there are adverse weather conditions, or if a “load is to be late or delayed, the driver is to call me immediately.” TR 190. Chad Bultema was aware that it was snowing on January 5, 2011, but he testified that the Complainant should have called dispatch if he had a hard time getting to Filer City. TR 195-96. None of the forty drivers Chad Bultema dealt with on January 5—the Complainant included—called in to report that the weather conditions caused delays. TR 190. Chad Bultema testified that he would have been able to get another driver to deliver the loads on January 6 if the Complainant had called at either 11:00 p.m. on January 5, or at 4:00 a.m. on January 6. TR 229.

Chad Bultema recalled only speaking with the Complainant once over the phone on January 6, 2011. TR 230. He could not recall when this call took place, saying “it was between 9:00 and 10:30.” TR 234. During this call, he told the Complainant “to bring the truck back to the yard right now,” and he admitted that there had been “some urgency” in his voice. TR 230-31. Chad Bultema said he wanted the truck back so that he could “get somebody in the truck and get the load delivered.” TR 230. Though he had the authority to fire the Complainant, he testified that he had not, and that he never discussed with his mother whether the Complainant had been fired or quit. TR 230-31. Chad Bultema believed that he and his mother would have discussed it had his mother fired the Complainant. TR 231. Chad Bultema had no recollection of talking with the Complainant in Titan’s office on January 6, 2011. TR 207. He did acknowledge, however, accepting back the tractor ‘as is’ without signing anything. TR 209-10, 213.

D. Testimony of Jeremy Bultema

Jeremy Bultema holds several positions at Titan: “One is safety, recruiting. I do some of the marketing . . .” TR 122. Regarding the events of the morning of January 6, 2011, Jeremy Bultema testified that he went outside with his mother, Sandy Bultema, after the Complainant brought the trailer back to Titan’s lot. TR 122. He testified that Sandy Bultema “said we need to put a driver in this truck. And [the Complainant] said the police are coming now so I can get my things out.” TR 122. Jeremy Bultema testified that he asked the Complainant what was going on, and the Complainant replied that he felt he could not speak because of Jeremy’s family ties and because the police had been called. TR 123.

¹¹ The Complainant submitted, post-hearing, a print-out from the PC Miler program saying the distance is 513.4 miles, and takes eight hours and forty-six minutes to drive. The Complainant also included directions from Google Maps. (Compl.’s Br. add. at 5-8.)

E. Testimony of Tari Labinsky

Ms. Labinsky testified that she overheard Sandy Bultema's phone conversation with the Complainant on January 6. TR 223. She did not remember many details, but did recall hearing Sandy Bultema ask where the Complainant was and say "that the load was hot," meaning that it was important and had to be delivered on time. TR 223-24. She did not remember Sandy Bultema saying anything about firing the Complainant, but she believed Sandy Bultema had mentioned getting another driver to make the delivery. TR 224.

VI. **Conclusions of Law**

A. Legal Standard and Burdens of Proof Under the Act

The STAA prohibits any person from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment because that employee has engaged in protected activity. 49 U.S.C. § 31105(a). There are five categories of protected activity under the Act: (1) complaining of a violation of safety or security regulations;¹² (2) refusing to drive a vehicle because a driver is either out of hours, or reasonably believes the vehicle to be dangerous; (3) accurately reporting hours on duty; (4) cooperating with a safety or security investigation by certain federal agencies; (5) providing information to a regulatory or law enforcement agency about an accident involving a commercial motor vehicle. § 31105(a)(1)(A)-(E).

The burdens of proof under the STAA, as amended effective August 3, 2007, are governed by the burden-shifting framework set forth in Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121(b). See 49 U.S.C.A. § 31105(b)(1). To establish a violation of the STAA under this framework, a complainant must prove by a preponderance of the evidence¹³ that (1) the complainant engaged in protected activity under the STAA; (2) the employer was aware of the protected activity; (3) the employer took unfavorable personnel action ("adverse action") against the complainant; and (4) that there was a causal link between the protected activity and the adverse action—i.e., that the protected activity was a "contributing factor in the unfavorable personnel action."¹⁴ See *Peters v. Renner*

¹² A complaint need not be made to a government agency, internal complaints to management are also protected activity. *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-37, HTML at 6 (ARB Dec. 31, 2002), *aff'd sub nom. Harrison v. Admin. Rev. Bd., U.S. Dept. of Labor*, 390 F.3d 752 (2d Cir. 2004).

¹³ "Preponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-8 PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (*quoting Black's Law Dictionary* at 1201 (7th ed. 1999)). In other words, a complainant must prove his case more likely than not.

¹⁴ A complainant may prove that his protected activity was a contributing factor through either direct, "smoking gun evidence, that conclusively links the protected activity and the adverse action and does not rely upon inference" or may proceed "indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating [complainant's] employment." *Williams v. Dominos Pizza*, ARB No. 09-02, ALJ No. 2008-STA-052, PDF at 6 (ARB Jan. 31, 2011); *Clarke v. Navajo Express, Inc.* ARB No. 09-114, ALJ No. 2009-STA-018, PDF at 4 (ARB June 29, 2011). "One type of circumstantial evidence is evidence which discredits the [employer's]

Trucking & Excavating, ARB No. 08-117, ALJ No. 2008-STA-030, PDF at 4 (ARB Dec. 18, 2009); *Williams v. Dominos Pizza*, ARB No. 09-02, ALJ No. 2008-STA-052, PDF at 5-6 (ARB Jan. 31, 2011); *see also* 49 U.S.C. § 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (*citing Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986)); *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 20-21 (1st Cir. 1998); *Ridgley v. C. J. Dannemiller*, ARB No. 05-063, ALJ No. 04-STA-053, PDF at 5 (ARB May 24, 2007), *aff'd sub nom. Ridgley v. U.S. Dept. of Labor*, 298 Fed.App'x 447, 2008 WL 4646891, at **4 (6th Cir. October 21, 2008).

If a complainant has proven his protected activity contributed to an adverse action, he is entitled to relief unless the employer “demonstrates by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” 49 U.S.C. § 42121(b)(2)(B)(iv). If the employer does so, no relief may be awarded to the complainant. *Id.* “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Williams*, ARB 09-092, PDF at 6 (ARB Jan. 31, 2011) (*quoting with alteration Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006)).

1. *Did the Complainant Engage in Protected Activity on January 6, 2011?*

It is unlawful under § 31105(a)(1)(B) of the Act to discharge an employee “because 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” To establish protected activity under this provision, the statute requires evidence that an actual violation of the motor vehicle regulation at issue would have occurred had the complainant driven. *Hilburn v. James Boone Trucking*, ARB No. 04-104, ALJ No. 2003-STA-45, PDF at 4-5 (ARB August 30, 2005) (*citing Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 2000-STA-48, slip op. at 4 (ARB July 31, 2003)).

The Complainant’s brief cites the protections described by 49 U.S.C. § 31105(a)(1)(B), and alleges that he engaged in protected activity when he refused to deliver the load as he alleged doing so would have violated the DOT’s hours of service rule.

Under 49 C.F.R. § 395.3, titled “Maximum driving time for property-carrying vehicles” provides, in relevant part:

- (a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive . . . (1) More than 11 cumulative hours following 10 consecutive hours off duty; (2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty

49 C.F.R. § 395.3(a)(1) (2011).

proffered reasons for the termination, demonstrating instead that they were pretext for retaliation.” *Williams*, ARB No. 09-092, PDF at 6.

Trip # 15805 included two assignments. Sandy Bultema testified that the Complainant would have had to leave Titan by 2:00 p.m. on January 5 to begin the first assignment of the trip, in order to have completed the trip with a ten hour break. *See* TR 253-55. Her testimony that she believed the Complainant left from Titan on this trip at 2:00 p.m. is not credible given her contradictory testimony that she spoke with the Complainant in her office about getting fuel after 3:00 p.m. *See* TR 236, 250-55; CX C. Moreover, I find that the dispatcher, Chad Bultema, most certainly knew the Complainant did not leave Titan by 2:00 p.m. because the Claimant credibly testified that he did not return Chad's phone inquiry asking if he was available, until 1:57 p.m. on January 5, and he did not arrive at Titan until approximately 3:00 p.m. that afternoon. Once at Titan, conversations regarding Complainant's need for fuel ensued, delaying his departure until 4:00 p.m., or thereabout.

Once the Complainant's departure from Titan was delayed until approximately 4:00 p.m. on January 5, there was not sufficient time for him to take a ten hour break and timely complete the first delivery of the second assignment on the morning of January 6. The Complainant said he first realized he could not complete the trip within the hours of service regulations at 11:00 p.m. on the evening of January 5. At this time he had just completed the first assignment, driving to Filer City, and returned to the truck stop located a mile from the Titan yard. The next morning at approximately 8:00 a.m. the Complainant called and informed Sandy Bultema that he could not complete the second assignment of Trip # 15805, that is, deliver the load to Jackson, MI by 8:00 a.m. on January 6. He told her the load would have to be rescheduled because he did not have enough hours left, and he refused to continue driving as a result. This is protected activity under § 31105(a)(1)(B)(i).¹⁵

2. *Did Titan Take an Adverse Action Against the Complainant?*

Adverse action includes any effort by the employer "to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee because" of protected activity. 29 C.F.R. § 1978.102; *see also Strohl v. YRC, Inc.*, ARB No. 10-116, ALJ No. 2010-STA-35, PDF at 4 (ARB Aug. 12, 2011) (noting that statutory amendments and 2010 implementing regulations broadened the definition of adverse action). The Administrative Review Board ("Board") has also found that "an employer who decides to

¹⁵ The Complainant now appears to argue that he also engaged in protected activity because Chad Bultema knew the check engine light had to be checked out. (Compl.'s Br. at 14.) The Complainant's testimony is that the check engine light came on during his *post* trip inspection at the truck stop, and therefore after he had already refused to continue on Trip # 15805 because he was out of driving hours. He did not mention the check engine light to anyone at Titan until sometime between 10:00 and 10:30 a.m., when he received a call from Chad Bultema asking why it was taking so long to return the truck and demanding that the Complainant return the truck immediately. The Complainant never told Sandy Bultema that he had an issue with the check engine light when he spoke with her at 8:00 a.m., when he had initially refused to continue driving. Rather, he told her he was out of hours. TR 240. The check engine light did not come up for two or more hours after Complainant first told Sandy Bultema he could not complete the trip, and she had directed him to return to the Titan yard so she could get another driver for the load. Furthermore, by the time he mentioned the check engine light, the Complainant was a mere mile from Titan's yard, and nothing in his testimony establishes a reasonable belief that driving the tractor another mile would have been hazardous to his safety or the safety of others. *See* § 31105(a)(1)(B)(ii). Moreover, Complainant's OSHA complaint did not allege protected activity based upon any report concerning a check engine light or refusal to drive for this reason. Nor did the complaint to OSHA claim his termination was related to a check engine light issue. For these reasons, the Complainant's effort to assert protected activity based upon a check engine light fails.

interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee. *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19, PDF at 9 (ARB Sept. 30, 2010) (quoting *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 14 (Oct. 31, 2007) (other citations omitted).

The Employer contends that no one ever told the Complainant he was fired, and asserts that he voluntarily left his employment. (Er.'s Br. at 6-8.) Both the Complainant and Sandy Bultema acknowledged that there was anger in their 8:00 a.m. phone conversation on January 6, when the Complainant informed her that the load would not be on time and would have to be rescheduled. It is apparent, the Complainant was angry that, instead of rescheduling the load, Sandy Bultema directed him to return the tractor trailer to her so that she could get another driver to make the delivery. When Chad Bultema called the Complainant some two hours later to demand he return the truck immediately, a heated exchange occurred. The Complainant was certain he was going to be fired at that point testifying, "you don't talk that way to a driver." TR 65.

The Complainant believed he was fired when he was told to "clean out his truck," stating that in the trucking industry such terminology means you are no longer driving for them. TR 20, 96, 98. The Complainant's testimony is unclear as to whether Sandy Bultema told him to remove his possessions from the truck first, before he started to do this on his own. TR 66-68, 116-118. He testified to cleaning out his truck before he was told to do so as he was concerned that if he did not remove his belongings from the truck he might not have them. *See* TR 66-68. It is undisputed that Sandy Bultema, along with Chad Bultema, told the Complainant that Titan was going to put another driver in his truck to deliver the load. Complainant acknowledged that he would normally remove his personal belongings from the truck when another driver is assigned to the vehicle. TR 113-14. However, he also testified that when similar issues have arisen in the past, Sandy Bultema normally told the Complainant to come back to the office for a talk. TR 20.

Even if the Complainant's actions in removing his things from the truck could have been viewed as a quit or resignation by the Employer, by interpreting the Complainant's actions as a quit under the circumstances here, I find the Employer discharged the Complainant. Here, the Employer ratified the Complainant's actions by asking for his fuel card, which all drivers had, and by never contacting the Complainant about taking another load. *Klosterman*, ARB No. 08-035, PDF at 9; *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, PDF at 14 (Oct. 31, 2007). Based upon the evidence presented, I find that Titan discharged the Complainant.

3. *Did the Complainant's Protected Activity Contribute to the Unfavorable Personnel Actions Taken Against Him by the Employer?*

A complainant must establish a causal connection between his protected activity and the adverse action. *Villa v. D.M. Bowman, Inc.*, ARB No. 08-128, ALJ No. 2008-STA-46, PDF at 4-5 (ARB Aug. 31, 2010). In the present matter, there is no direct evidence of retaliation. Typically, proximity in time between the protected activity and the adverse action may give rise to an inference of a causal connection. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct.

1, 1993) (*citing Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)). Here, the Complainant's termination coincided with his protected activity, supporting an inference of a causal relationship between the two events.

Assuming a finding that Complainant's employment was terminated, the Employer argues that it had a legitimate non-discriminatory reason for the discharge, that is, that the Complainant failed to call and notify the company that the load to Jackson, MI would be late.¹⁶ The Complainant did not return to the truck stop near the Titan yard, after completing the run to Filer City, until 11:00 p.m. on January 5. Regardless of whether the Complainant's arrival at the truck stop at 11:00 p.m. was the result of weather delays as he claimed, or because he did not begin the assignment to Filer City from Titan until 4:00 p.m., it is undisputed that he knew at that time that the delivery to Jackson, MI at 8:00 a.m. the next morning would be delayed.¹⁷

The uncontradicted testimony of Sandy Bultema and Chad Bultema established that Titan had a twenty-four hour dispatch line for notifying the company when a delivery was delayed or could not be made on time. The Complainant was aware that there was a 24 hour dispatch line and that drivers were to call in if they encountered issues. The Complainant's own testimony establishes that he failed to comply with company policy to notify Titan if a delivery was late. The Complainant admits that he knew by 11:00 p.m., that he could not make the delivery to Jackson, MI by 8:00 a.m. the following morning, and yet he failed to call Titan's dispatch line to tell them the load would be delayed. The Complainant knew for nine hours, before he informed Titan, that it was not possible for him to deliver the load on time. Furthermore, the Complainant waited to inform Titan that the second assignment could not be completed until the delivery was already late. When Sandy Bultema expressed annoyance at the inconvenience to the customer expecting the delivery, the Complainant flippantly replied she could tell the customer anything she wanted.

Thereafter, the Complainant compounded both the consequences of his failure to timely notify the Employer, and the difficulty for Titan's customer, by refusing to return the tractor trailer to Titan for at least three more hours. When he spoke with Sandy Bultema at 8:00 a.m. on January 6, the Complainant was approximately twenty miles from Titan. At that time he was directed to return the tractor trailer so that Sandy Bultema could get another driver to make the delivery. However, the Complainant did not return the truck to Titan until 11:00 a.m. at the

¹⁶ The Employer alleged six non-retaliatory reasons for the Complainant's termination: (1) Failing to call dispatch prior to 8:00 a.m.; (2) Failing to report the alleged hours-of-service issues; (3) submitting false logs; (4) seeking payment for false logs; (5) Taking a Titan tractor home; (6) insubordination. (Er.'s Br. at 15.) Other than the failure to call dispatch before 8:00 a.m., I will not address the other purported reasons for the termination as the Employer denied knowledge of several of the alleged infractions at the hearing, and/or had never raised the alleged infractions prior to January 6, and therefore, they could not have been factors in the discharge. (*See Id.*)

¹⁷ It is apparent from the evidence that neither the Complainant nor Titan officials appreciated at the time that the assigned trip could not be completed with a required ten hour break when the Complainant departed from Titan at 4:00 p.m. January 5, regardless of any adverse weather conditions. This error by both parties contributed to the subsequent sequence of events. However, once the Complainant realized that the scheduled 8:00 a.m. delivery to Jackson, MI could not be made, one would reasonably expect Complainant to immediately notify Titan, so the company could make other arrangements to meet its customer needs.

earliest.¹⁸ The Complainant's explanation for this three hour delay in returning the tractor trailer strains credulity. No reason was offered as to why it required three hours for him to copy his paperwork and perform a post-trip inspection at the truck stop a mile from Titan's yard.

After careful consideration of the evidence, I find that the Complainant's effort to establish his protected activity contributed to the termination is unsuccessful. The Complainant failed to demonstrate that the Employer's proffered reason for the discharge, the failure to notify the company at once if a delivery will be delayed, was pretext.¹⁹ In other words, he did not establish by a preponderance of the evidence that retaliation was the true reason for the discharge. Therefore, the Complainant's effort to establish that his protected activity was a contributing factor in his discharge fails. Accordingly, the complaint is dismissed.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

¹⁸ The Complainant testified that he was at a McDonalds when he called Sandy Bultema at 8:00 a.m., and introduced a receipt from the Zeeland McDonalds from January 6 at 7:30 a.m. TR 42; CX 16. According to google.com/maps, the distance from the Zeeland McDonalds to Titan's place of business is approximately twenty miles, or a thirty minute drive. I hereby take judicial notice of these facts pursuant to 29 C.F.R. § 18.201(b)(2).

¹⁹ Additionally, in a previous similar circumstance where the Complainant indicated he did not have the hours to complete a delivery, Sandy Bultema had given the Complainant time off and told him to come back in a couple of days. This testimony appears to undercut the Complainant's effort to establish a connection between his refusing to drive out of hours and adverse employment action.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S- 5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e- mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed

notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).