

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 31 October 2012**

Case No: 2011-STA-00011

In the Matter of:

FERNANDO DEMECO WHITE,

Complainant,

v.

ACTION EXPEDITING, INC.,

Respondent.

APPEARANCES: Fernando Demeco White  
*Pro Se* Complainant

Aimee-Marie Bany  
Attorney for the Respondent

BEFORE: ALAN L. BERGSTROM  
Administrative Law Judge

**DECISION AND ORDER – DENYING COMPLAINT**

The above matter is a complaint of employment discrimination under Section 31105 of the Surface Transportation Assistance Act of 1982, as amended (STAA). The case has been referred to the Office of Administrative Law Judges for formal hearing on Appeal by Complainant of the Occupational Safety and Health Administration October 8, 2010, determination which dismissed the Complainant's case.

The initial formal hearing was held on May 10, 2011 in Atlanta, Georgia, both Parties appeared. The Complainant appeared without representation. The right to representation, issues involved in the case, the ability to present testimonial and documentary evidence, the ability to examine witnesses, and the applicability of the Rules of Procedure as set forth in 29 CFR Part 18, Subpart

A were explained. The Parties entered five oral stipulations of fact<sup>1</sup> (TR 10-11). The nine issues involved in the case remaining for resolution were set forth (TR 11-12).

At the subsequent formal hearing held August 25, 2011 in Atlanta, Georgia, the Complainant continued to represent himself<sup>2</sup>. ALJX 1 to 11; CX 2-7, 10-14, 17-19, and 21; and RX 3 and 4 were admitted as evidence (TR 49-50, 55-85, 208, 221). CX 1 and EX 1 and 2 were related to discovery and not admitted as evidence (TR 14-41). CX 8 was admitted except for attachment 1 thereto (TR 78). CX 22 and 23 were admitted for the limited purpose as used during testimony of the Complainant (TR 230). Respondent's objections based on authentication were overruled (TR 66). Objection to CX 25 was sustained (TR 67-78). CX 9 was withdrawn (TR 80). There were no documents submitted as CX 16 or 20. CX 15 and CX 24 are not relevant to the issues involved and were attached for review purposes (TR 240). CX 1 and RX 1 and 2 were not received into evidence but are attached for record review (TR 14-15, 35). Judicial notice was taken of the Federal Motor Carrier Safety Administration regulations at 49 CFR Parts 392.3 (ill and fatigued operators), 395.1 (scope), 395.3 (maximum driving time), 395.8 (driver's record for duty status), and 396.7 (unsafe operations). The post-hearing written briefs filed by the Parties were also considered.

The findings of fact and conclusions which follow are based upon a complete review of the entire record, the argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent.

### STIPULATIONS

The parties have stipulated to, and this Administrative Law Judge finds, the following as fact (TR 9-11, 49-50):

1. The Respondent is a commercial motor carrier within the meaning of 49 CFR §31.105 engaged in transporting products over the nation's highways in commerce.
2. The Respondent utilizes commercial motor vehicles with a gross weight of 10,001 pounds, or more, to haul products in commerce on the nation's highways.
3. During the period from May 11, 2009 to September 18, 2009, the Complainant was employed by Respondent as a team driver for deliveries of automotive parts, based in Lithia Springs, Georgia.

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<sup>1</sup> The last day of employment, September 17, 2009 or September 18, 2009, was questioned.

<sup>2</sup> The Complainant has extensive experience in representing himself in proceedings before the Office of Administrative Law Judges. See *Fernando D. White v. American Mobile Petroleum, Inc.*, OALJ Case No. 2011-STA-00032 (Feb 16, 2012) – dismissed; *Fernando Demeco White v. Expert Moving and Delivery, Inc.*, OALJ Case No. 2009-STA-00063 (Feb 16, 2012) – dismissed for bankruptcy; *Fernando Demeco White v. Salson Logistics, Inc.*, OALJ Case No. 2009-STA-00065 (Nov. 23, 2009), ARB Case No. 10-044 (May 27, 2010) – settled; *Fernando Demeco White v. Gemini Traffic Sales, Inc.*, OALJ Case No. 2007-STA-00013 (Feb. 27, 2008), ARB Case No. 08-057 (Apr. 23, 2008) – settled; *Fernando Demeco White v. Gresh Transport, Inc.*, OALJ Case No. 2006-STA-00048 (Apr. 27, 2010), ARB Case No. 10-096 (Aug. 30, 2011) – grant limited to non-monetary relief; *Fernando Demeco White v. Naturally Fresh, Inc.*, OALJ Case No. 2006-STA-00016 (Sep. 4, 2007), ARB Case No. 08-005 (Oct. 31, 2007) – settled; *Fernando Demeco White v. J.B. Hunt Transport, Inc.*, OALJ Case No. 2005-STA-00065 (Feb 22, 2006), ARB Case No. 06-063 (May 23, 2008) – dismissed; *Fernando Demeco White v. J.B. Hunt Transport, Inc.*, OALJ Case No. 2003-STA-00044 (Jun 10, 2004), ARB Case No. 04-118 (Jan. 25, 2005) – settled.

4. As a team driver, the Complainant's duties included driving Respondent's commercial motor vehicles with gross weight of 10,001 pounds, or more, over the nation's highways for delivery of automotive parts.
5. Complainant was employed within the meaning of 49 CFR §31.101.

### **ISSUES**

The issues remaining to be resolved are (TR 11-13)<sup>3</sup>:

1. Was the Complainant forced to violate hours-of-service regulations during the period May 20, 2009 through July 13, 2009?
2. Did the Complainant voice concerns over vehicle operation, safety and/or log book qualifications on September 15, 2009?
3. Was Complainant forced to drive on September 15, 2009 after notifying Employer he was unfit to drive for illness?
4. Was Complainant's employment terminated by Employer on September 18, 2009?
5. Is the employment termination causally linked to the alleged protected activity?
6. Was the employment termination for reasons unrelated to the alleged protected activity?
7. Was the reason for employment termination a pretext for retaliation for engaging in protected activity?
8. Is Respondent entitled to legal costs pursuant to 49 U.S.C. §42.121(b)(2)(c), not to exceed \$1,000.00?

### **PARTY POSITIONS**

#### *Complainant's Position:*

The Complainant submits that he engaged in protected activity when he submitted log books in May 2009 and June 2009 indicating he split sleeping berth time into 5-hour increments; when he reported to L. Kyle and J. Wentz, on or about June 1, 2009, that splitting sleeper berth time into 5-hour increments was unlawful; when he reported to R. Baxter safety issues that occurred on or about September 15, 2009 while training co-driver J. Hill; when he orally reported to D. Hardy and R. Baxter on September 15, 2009 his concerns over violating speed limits and falsification of logs; when he reported to J. Wentz on or about September 15, 2009, that he was being forced to falsify his logbook by R. Baxter by recording training time of co-driver J. Jill as sleeper berth time; and when he refused to drive the night of September 15, 2009 due to impaired vision and headaches. He submits that he was discharged by J. Wentz on September 18, 2009, due to his protected activity.

The Complainant argues that the proximity in time of his termination to his refusal to drive while ill and complaints of splitting sleeping berth time and J. Hill's unsafe driving supports the inference the termination was retaliation for his protected activity. He argues that his refusal to drive while impaired and complaints about splitting sleeping berth time upset delivery schedules

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<sup>3</sup> The complaint issue that Respondent engaged in "blacklisting" with Knight Transportation, Inc. in 2009 was denied at the close of Complainant's case as a directed verdict on the record for reasons set forth therein (TR 212-220). The issue is not further addressed herein.

and was a motive for retaliation by Respondent. He argues that Respondent's actions forced him to violate the sleeping berth time regulations under the Federal Motor Carrier Safety regulations. He argues that Respondent has not presented a credible reason for terminating his employment that is unrelated to his protected activity.

The Complainant seeks relief under the STAA in the form of (1) reinstatement to his team-driving position at the same pay, seniority, benefits, privileges and terms of employment as when he was terminated; (2) back pay based on an average weekly wage of \$974.53 per week, less actual earnings from other work subsequent to September 18, 2009; (3) compensatory damages in the amount of \$50,000.00 for "emotional distress and mental pain"; (4) punitive damages in the amount of \$250,000.00; (5) interest on back pay awarded; (6) costs incurred in the pursuit of the cause of action; (7) personnel records be expunged of all references to the employment discharge; (8) amend all reports to consumer agencies made by Respondent, if any, "to delete any unfavorable work record information and to show continuous employment with Respondent; and (9) post a notice in a location where Respondent's drivers report for work for 90 days indicating that the Complainant "was discharged in violation of the STAA and that he prevailed" in his complaint against Respondent.

The Complainant also submits that the STAA does not provide for the award of attorney fees and costs to a Respondent should the Respondent prevail in this dispute.

*Respondent's Position:*

Respondent's counsel submits that the Complainant did not engage in protected activity involving splitting sleeping berth time by merely submitting a driver logbook and that he did not report sleeping berth violations to Respondent as evidenced by J. Wentz's testimony. She submits that the Complainant's testimony regarding sleeping berth time-splitting is not credible and is unsubstantiated.

Respondent's counsel submits that the Complainant's stopping the truck at a fuel station in Memphis, Tennessee, the night of September 15, 2009 was due to "no money available to withdraw from his company issued credit/fuel card for tolls that would be encountered later during the route" and that the Complainant became "very vocal, belligerent and absolute in his refusal to continue on the route" unless money for the tolls was provided. She argues that the refusal to drive escalated into the Complainant reporting being ill and unable to drive, even though he refused to call for an ambulance or rest in a local hotel room or have a replacement driver sent to him. She argues that the Complainant was aware the Respondent would pay for the ambulance and hotel bills and refused that course of action because he was not truly ill. She submits that the Complainant and his wife lack credibility as to their recollection of the events involved while the truck was stopped on September 15, 2009.

Respondent's counsel submits that the Complainant's employment was terminated because to the Complainant's belligerent actions, disruptive actions and delay of customer product in route, which were all unrelated to STAA protected activity.

Respondent's counsel also submits that the Complainant engaged in fraud on the court by manufacturing deposition testimony of M. Smith (CX 25) and that M. Smith testified at oral deposition (RX 4) that "the vast majority of written answers supplied by the Complainant were incorrect." She requests that the complaint be dismissed due to the Complainant's fraud on the court.

Respondent's counsel submits that the Complainant has failed to establish a prima facie case that his termination of employment was related to protected activity under the STAA; that the Respondent has established that the termination of Complainant's employment was for reasons unrelated to protective activity under the STAA; and that the Complainant has failed to demonstrate that the reasons for his employment terminations was a pretext for retaliation for engaging in protected activity under the STAA. She seeks dismissal of the complaint and reimbursement for attorney fees pursuant to 49 U.S.C. §42121(b)(2)(C) for Complainant's filing of a frivolous complaint.

### **DECISIONAL FRAMEWORK**

This complaint was referred for formal hearing under the STAA. The evidence of record establishes that the above captioned matter arose from the Parties' actions in Georgia, which is within the jurisdictional area of the U.S. Court of Appeals for the Eleventh Circuit. Accordingly, the judicial precedents of the U.S. Court of Appeals for the Eleventh Circuit apply.

The "whistle-blower" provisions under the STAA are designed to protect "employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance." *Brock v. Roadway Express, Inc.*, 481 US 252 (1987)

The STAA, at 42 USC §31105, provides in pertinent part:

(a) Prohibitions.

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –

(A)(i) the employee ... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such proceeding ...

(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 vehicle safety, health, or security; or,

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to Chapter 315;

(D) the employee cooperates ... with a safety security investigation ... or;

(E) the employee furnishes ... information to ... any Federal, State or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(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 hazardous safety or security 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 hazardous safety or security condition.

Implementing federal regulations applicable to the STAA at 29 CFR Part 1978 were last revised effective July 27, 2012.<sup>4</sup> The revised regulations are used herein and provide, in pertinent part:

§1978.102 Obligations and prohibited acts.

(a) No person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in any of the activities specified in paragraphs (b) or (c) of this section. ...

(b) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee ... has:

- (1) Filed ... a complaint with an employer, government agency, or others or begun a proceeding relating to a violation of a commercial motor vehicle safety or security regulation, standard or order; or
- (2) Testified or will testify at any proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.
- (3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or any other action to carry out the purposes of such statutes. ...

(c) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee:

- (1) Refuses to operate a vehicle because:
  - (i) The operation violates a regulation, standard, or order of the United States related to commercial vehicle safety, health, or security; or,
  - (ii) He or she has a reasonable apprehension of serious injury to himself or herself or the public because of the vehicle's hazardous safety or security condition;
- (2) Accurately reports hours on duty pursuant to Chapter 315 of Title 49 of the United States Code;
- (3) Cooperates with a safety or security investigation ...; or,
- (4) Furnishes information to ... any Federal, State or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(d) ....

(e) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employer perceives that:

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<sup>4</sup> Fed. Reg., Vol 77, No. 145, 44121-44139 (Jul. 27, 2012)

- (1) Filed ... or is about to file ... a complaint with an employer, government agency, or others or begun a proceeding relating to a violation of a commercial motor vehicle safety or security regulation, standard or order;
- (2) The employee is about to cooperate with a safety or security investigation ...; or,
- (3) The employee has furnished information or is about to furnish information to ... any Federal, State or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(f) For purposes of this section, 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 hazardous safety or security 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 hazardous safety or security condition.

Federal motor carrier regulations from 2009 relevant to this case include:

49 CFR §392.3 Ill or fatigued operator.

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. However, in a case of grave emergency where the hazard to occupants of the commercial motor vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the commercial motor vehicle to the nearest place at which the hazard is removed.

49 CFR §395.1(g) Sleeper berths.

(1) Property-carrying commercial motor vehicle

- (i) In general. A driver who operates a property-carrying commercial motor vehicle equipped with a sleeper berth, as defined in ... this subchapter,
  - (A) Must, before driving, accumulate
    - (1) At least 10 consecutive hours off duty;
    - (2) At least 10 consecutive hours of sleeper-berth time;
    - (3) A combination of consecutive sleeper-berth and off-duty time amounting to at least 10 hours; or
    - (4) The equivalent of at least 10 consecutive hours off duty if the driver does not comply with paragraph (g)(1)(i)(A)(1), (2), or (3) of this section;
  - (B) May not drive more than 11 hours following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(1) through (4); and
  - (C) May not drive after the 14<sup>th</sup> hour after coming on duty following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(1) through (4); and
  - (D) Must exclude from the calculation of the 14-hour limit any sleeper-berth period of at least 8 but less than 10 consecutive hours.
- (ii) Specific requirements. The following rules apply in determining compliance with paragraph (g)(1)(i) of this section:
  - (A) The term "equivalent of at least 10 consecutive hours off duty" means a period of –
    - (1) At least 8 but less than 10 consecutive hours in a sleeper berth, and
    - (2) A separate period of at least 2 but less than 10 consecutive hours either in a sleeper berth or off duty, or any combination thereof.

- (B) Calculation of the 11-hour driving limit includes all driving time; compliance must be re-calculated from the end of the first of the two periods used to comply with paragraph (g)(1)(ii)(A) of this section.
- (C) Calculation of the 14-hour limit includes all time except any sleeper-berth period of at least 8 but less than 10 consecutive hours; compliance must be re-calculated from the end of the first of the two periods used to comply with paragraph (g)(1)(ii)(A) of this section.

49 CFR §395.3 Maximum driving time for property-carrying vehicles.

Subject to the exceptions and exemptions in §395.1:

- (a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any driver drive a property-carrying commercial motor vehicle:
  - (1) More than 11 cumulative hours following 10 consecutive hours off-duty;
  - (2) For any period after the end of the 14<sup>th</sup> hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of §395(o) or §395.1(e)(2).
- (b) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after —
  - (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
  - (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier does operate commercial motor vehicles every day of the week.
- (c) (1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or
  - (2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

49 CFR §395.8 Driver's record of duty status.

- (a) Except for a private motor carrier of passengers (nonbusiness), every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24 hour period using the methods described in either paragraph (a)(1) or (2) of this section.

49 CFR §396.7 Unsafe operations forbidden.

- (a) General. A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle.
- (b) Exemption. Any motor vehicle discovered to be in an unsafe condition while being operated on the highway may be continued in operation only to the nearest place where repairs can safely be effected. Such operation shall be conducted only if it is less hazardous to the public than to permit the vehicle to remain on the highway.

In order to establish a prima facie case for whistleblower protection under the STAA, an employee must establish (1) that the complainant was an employee; (2) that the employee engaged in protected activity; (3) the employer had actual or constructive knowledge of the protected activity; (4) the alleged hostile act occurred; and (5) a causal connection existed making it likely that the protected activity resulted in the alleged discrimination. *Luckie v. Administrative Review Board*, 321 Fed. Appx. 889 (11<sup>th</sup> Cir. 2009) *unpub.*; *Self v. Carolina Freight Carriers Corp.*, ARB No. 89-STA-9 (Jan. 12, 1990); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6<sup>th</sup> Cir. 1987); *Wrenn v. Gould*, 808 F.2d 493 (6<sup>th</sup> Cir. 1987); *Jackson v. Pepsi-*

*Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50 (6<sup>th</sup> Cir.), *cert. denied*, 478 US 1006 (1986); and cases cited in *Roadway Express, Inc. v. Brock*, 830 F.2d 179, FN6 (11<sup>th</sup> Cir. 1987)

If the complainant establishes a prima facie case under the Act, the respondent will not be held to have violated the Act if it establishes that that adverse employment action was the result of events and/or decisions for a legitimate, nondiscriminatory reason independent of protected activity; that is, the evidence raises a genuine issue of fact as to whether the respondent discriminated against the employee. If the respondent successfully raises the issue, the complainant must show by a preponderance of the evidence that legitimate reasons offered by the employer were actually a pretext for discrimination. “The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Texas Department of Community Affairs v. Burdine*, 450 US 248, 253; 101 S.Ct. 1089, 1093 (1981); *Williams v. U.S. Department of Labor*, *supra*, at 569; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 US 133; 120 S.Ct. 2097 (2000).

The Administrative Procedure Act (APA) provides that “except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. §556(d) The STAA, at 49 U.S.C. §31105(a)(2), provides that the legal burdens of the Parties in a STAA complaint are governed by the provisions of 49 U.S.C. §42121(b), set forth in §512 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR-21). Accordingly, the complainant has the burden to establish a prima facie case that protected activity occurred and such activity was a contributing cause to the alleged unfavorable personnel action. If the prima facie case is established, the employer is not liable if it establishes by clear and convincing evidence that it would have taken the same alleged unfavorable personnel action in the absence of the alleged protected activity. Where the credible evidence of record is in “equipoise”, that is evenly balanced, the party proponent with the burden of proof (persuasion) must lose. *Director, OWCP v. Greenwich Colliers*, 512 US 267, 281 (1994); *Schaffer v. Weast*, 546 US 49 (2005)

## **SUMMARY OF RELEVANT EVIDENCE**

### *Complainant’s testimony (TR 164-211)*

Upon examination by this Administrative Law Judge, the Complainant testified that CX 22 and 23 are examples of electronic log book reports that he completed electronically, he did not file them electronically. He reported he sent them in after a trip was completed. He reported turning in the September 13 and 14, 2009 completed driver log books on September 14, 2009 and that he started his second trip on September 15, 2009. He stated he left all his paperwork for the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> in the truck as was protocol and that M. Smith completed the trip paperwork because he was not allowed to do it. He reported that there was a sheriff at the truck yard on the return who was there to get him off the property.

The Complainant testified that he left a voice mail with R. Baxter to tell him about J. Hill speeding in Tennessee while he was in the sleeper berth and to complain that he was feeling fatigued from having to be on-duty helping J. Hill “where [R.] Baxter was helping me to falsify my log book to be on duty showing [J. Hill] how to drive a truck and ... how to govern himself

as a professional truck driver.” He reported receiving an e-mail back saying any safety concerns should be taken up with J. Wentz. He stated he called J. Wentz and was asked “What is it this time, Fernando?” because he was still upset about raising safety issues about 5-on and 5-off with sleeper berths, not having a log book, and the safety issues in the e-mails that had been sent. He testified that he told J. Wentz he was passing tolls and not paying them because the truck had a device in the bumper that pays tolls according to L. Kyle. He reported J. Wentz instructed him not to pass anymore tolls without stopping to pay the tolls and that if he needed a hotel, ambulance or anything, Action Expediting would pay for it. He stated J. Wentz ensured that there would be money for tolls placed on the fuel card before the next scheduled fuel stop.

The Complainant testified that he and M. Smith arrived for work at the Lithia Springs, Georgia, Mitsubishi yard at approximately the same time on September 15, 2009 and were checking the load when approached by R. Baxter and D. Hardy. He stated that this was “when I made the safety complaint about speeding and the falsifying, forcing me to falsify the logs.”

The Complainant testified that the complaint about being forced to violate the hours of service regulations during the May 20, 2009 to July 13, 2009 refers to the 14-1/2 hours of duty performed on May 21, 2009. He stated that driving with sleeper berth split into 5 hour periods is illegal because the only way you can split sleeper berth time in 2009 was 8 hours and 2 hours, or you can drive within the 14-hour rule.

The Complainant testified that Nicole of Knight Transportation called him to come back to work for Knight Transportation, “and they wanted me to go back through orientation and everything.” He stated he did a drug test and a physical and was about four days into the orientation when he was told “I had to leave orientation and discontinue orientation because of something negative that Action Expediting had faxed to them.” He reported he obtained a copy of the information and it indicated that Action Expediting had fired him. He identified CX 12 as the copy of the information.

On direct examination of himself, the Complainant testified that he has driven trucks for nearly 20 years with nearly 2,000,000 miles of safe driving and adherence to DOT regulations. He stated he began driving a truck for Action Expediting about May 18, 2009; however before then, he was paid to drive a rental car around the route with his co-driver at the time, A.M. Patterson. He stated his immediate supervisor was L. Kyle and that R. Baxter was not his supervisor but just another driver. He reported Action Expediting would pay for all the driver expenses like an ambulance or a cab to the hospital. He reported A.M. Patterson quit about July 1, 2009 because he could make more money in Chicago.

The Complainant testified that when he began driving truck for Action Expediting he was expected to violate rules and regulations. The first one was sleeper berth time. The second was that he was supposed to be off-duty when in the driver’s seat instead of on-duty status. He stated L. Kyle was the supervisor then so he sent an e-mail to J. Wentz of the safety department with a copy to L. Kyle. He stated that he didn’t hear anything back from J. Wentz so he assumed J. Wentz wanted him to drive illegal. He stated that after A.M. Patterson quit he was finding himself fatigued at times because of rough roads and not being able to get enough sleep with split sleeping berth time of 5-on and 5-off. He stated he reported his fatigue problem and

complained about the sleeper berth time to L. Kyle who got upset and said he considered the Complainant to be unprofessional to complain about split sleeper berth time and that Action Expediting had to split the sleeper berth time to service their customers. He testified that L. Kyle called J. Wentz, placed the call on speaker phone, and told J. Wentz about the complaint about sleeper berth time. The Complainant reported to J. Wentz that sleeper berth time could only be split 8 and 2 and that then J. Wentz started yelling at him. He stated J. Wentz acknowledged receiving the Complainant's driver log books sent earlier. He reported that J. Wentz "pretty much let me know that I would be terminated if I don't run 5-on, 5-off." He stated that after the telephone call, L. Kyle assigned M. Smith as co-driver and "told me to familiarize [M.] Smith with the route and the truck and the policies."

The Complainant testified that at the start of a trip you are supposed to go into the trailer to check the load, then hook up the tractor and check the rig out, and then depart on your trip. At the end of the trip, you back the empty trailer up to the door to be loaded for the next trip, detach the tractor and park it in a designated area. Then you go over the logs with the co-driver to ensure they are compatible, because sometimes a little 7-minute interval is not compatible. Then you leave the log and all the paperwork on the dashboard and lock the truck up and go home. He testified that at one point M. Smith had almost hit a cop because he was tired so he went back in to let "them" know "it's real hard to operate that way, 5-on, 5-off, splitting your sleeper berth that way." He stated he began "running my log book either straight 10 hours or straight 8 in the sleeper berth and 2 hours off duty, "and they ... in turn for my actions, they took away my log book; they took away my ... company issued telephone, and I had to purchase a computer to do my logs. I had to use my own blackberry phone because theirs broke and they refused to replace mine, but they were replacing everybody else's." He stated this went on until about August when R. Baxter was made supervisor instead of L. Kyle. The Complainant testified that when R. Baxter became supervisor he wanted everyone to falsify log books so they can train and cross-train drivers.

The Complainant testified that he would deliver Mitsubishi parts to dealerships at night when the place was closed and use keys and alarm codes to gain entry to make a delivery. He stated when new drivers came on they were unfamiliar with the routine so the regular driver would help unload and show how to put in the alarm code to make the delivery. He stated a delivery would be usually 15 minutes, but could take up to a ½ hour and that once you're in a new 7-minute log book period you are supposed to be on-duty doing that delivery, even if it's not driving. He reported that if he was out helping the new driver he was not in the sleeper berth and would be running illegal, so he would tell the supervisor about the safety issues that were unfolding.

The Complainant testified that he was assigned J. Hill as a new driver to train but J. Hill was not catching on real well and "you had to pretty much sit beside him and show him how to shift gears." He reported that on September 13, 2009 he was in the sleeper when J. Hill told him he was in trouble because a police officer had turned around and was following them. He stated the vehicle later turned on flashing lights and J. Hill pulled over. When stopped, the police officer reported J. Hill was clocked at 75 MPH in a 45 MPH zone and was cited for doing 54 MPH. He testified that he contacted his supervisor by e-mail after their return to complain about driving with J. Hill and was told to take safety complaints to J. Wentz. He stated that he then gave the information to J. Wentz.

The Complainant testified that L. Kyle was the person who “took my logbook, took my phone from me, and stopped paying me for when I’m down and detained.”

The Complainant testified that he was the one driving when he and M. Smith departed on the September 15, 2009 run at about 4:00 PM. He drove to Birmingham, Alabama and stopped, then drove to Memphis, Tennessee “to get toll money.” He got to the Memphis stop about 11:00 and while walking with M. Smith, Smith told him that R. Baxter had called him about finding another truck because R. Baxter was going to fire the Complainant for “messing up my whole plan on trying to keep the drivers cross-trained [and] he’s done went to Mr. Wentz and reported my methods of getting the auto parts delivered.” He stated he used the bathroom and became worried about being fired and noticed his eyes were red. He reported that he purchased water and “some medication” and returned to the truck for fueling. He stated that when he put truck information into the fueling system, it indicated there was no money on the fuel card available. He then e-mailed his status to R. Baxter. After about 30-40 minutes of no response he climbed into the truck and was told by M. Smith that he looked sick. He reported he “was really feeling a headache coming on” and M. Smith offered to drive at midnight when he would have 8 hours of sleeper berth time. He testified he got back in the driver’s seat and soon his computer rang with a call from his wife. He began talking with his wife when R. Baxter called to ask “why did I stop driving and about the toll situation” over and over. He reported his headache became pounding and his vision became impaired so he told R. Baxter that he was unfit to drive. He reported R. Baxter indicated toll money would be on the card and he should start driving again. He stated he sat in the driver seat when his phone started ringing and fell off his lap. He called back the number and D. Hardy asked similar questions. He stated he told D. Hardy he had a headache, the oncoming lights were having a drastic effect on his sight and was in no shape to drive. He reported D. Hardy told him he might want to call 911 but he let D. Hardy know he did not have any money for the hospital. He testified he knew Action Expediting paid for whatever you need. He indicated M. Smith offered to drive him to the hospital, that he asked D. Hardy to let M. Smith drive him to the hospital, and that D. Hardy “said no in a very hateful manner.” D. Hardy asked something about tolls and he replied he could not “drive until my headache feels better, until I have a chance to relax without people yelling at me.” He stated he was told to contact R. Baxter when “I felt I could continue the trip.” He stated that “I came to a point where I felt better so I started on with the trip” and that if he had felt he needed to stop again, he would have. He stated he completed the route “somewhere around five o’clock,” got the freight off, reached the allotted time, did his post-trip paperwork and got into the sleeper berth, with M. Smith driving.

The Complainant testified that he got his sleep and the next morning changed places with M. Smith when they were near Kansas City and behind because of construction areas M. Smith drove through. At the driver change stop, he obtained money from the fuel card to pay tolls and he called in a status report to R. Baxter and sent him an e-mail “letting him know that we were three hours behind.” He stated he told R. Baxter “that we are behind because ... they would not allow [M.] Smith to drive ... they refused to let him drive me to the hospital ... and the construction.” He stated being told by M. Smith when picking up back-haul racks that another driver had called to report something was going to happen to the Complainant when they got back to the terminal. He reported he drove back to the terminal around 3:00 – 4:00 PM,

September 18, 2009, and was met by R. Baxter. R. Baxter told him he was fired, to remove his property from the truck and to leave the site and not return. R. Baxter gave him some paper to sign but he would not sign it without reading it and it was dark, windy and drizzling. He stated R. Baxter told the sheriff that was there it was not necessary the paper be signed. He stated that the sheriff took him to the headlights in the front of the truck and read the paper about not returning to the terminal or it would be trespassing and that he signed the paper for the sheriff. He reported he used his printer to complete his logs and paperwork and left that on the dashboard. He stated he took his personal property, got in his vehicle and when he drove off the property he thought he saw something blow out the open truck windows.

The Complainant testified that he called the medical insurance company on September 19, 2009 and was told Action Expediting had cancelled his policy. He stated he took some "Goody's" and had a "severe problem sleeping and eating and just a lot of depression and worry."

On cross-examination, the Complainant testified that he suffered from depression and sleeplessness prior to working for Action Expediting. He identified RX 3 as a report of a September 2008 medical examination he gave Action Expediting with an indication he was suffering from depression and sleeplessness due to a prior STAA incident. He stated that the depression and sleeplessness he suffered after being fired by Action Expediting was worse than when he had the September 2008 medical examination. He stated he was employed briefly by American Mobile Petroleum after being terminated by Action Expediting. He stated he has a complaint under the STAA pending against American Mobile Petroleum but doesn't remember if he is seeking damages for emotional distress from American Mobile Petroleum.

On examination by this Administrative Law Judge, the Complainant testified that the medication he bought on September 15, 2009 for the headaches was Goody's or B.C. Powder or something similar. He reported that he did not have any money for an ambulance on September 15, 2009.

On redirect examination, the Complainant testified that his problems that were "brought on by Action Expediting was far more difficult than the problems that I underwent with the period where I experienced the episodes outlined in [RX 3] in 2008."

*Angela D. White testimony (TR 144-163)*

Upon examination by the Complainant, Mrs. White testified that she was in contact with her husband, the Complainant, on September 15, 2009 using MSN messenger video chat between 11:15 and 11:30 PM. She stated that during the chat she could see and hear what was going on in the cab of the truck where the Complainant was located. She stated the Complainant received two telephone calls during the video chat. She overheard a conversation between the Complainant and M. Smith in which M. Smith said someone named Baxter was going to get rid of the Complainant because of making some type of safety complaint earlier that day. She stated that the Complainant received a telephone call from a person with a male voice that was on speakerphone and the voice was asking why did you stop and about a toll.

Mrs. White testified the Complainant "appeared to be in severe pain because he was holding his head back ... and his eyes were red before the phone rung the first time." The Complainant told

the first caller he was too ill to drive and that he had a severe headache that affected his vision. She stated that after the first caller hung up she read scripture to the Complainant and prayed. She stated the phone rang again but the Complainant dropped it and had to call back. She reported the Complainant made the second telephone call and another male voice asked why the Complainant was stopped and discussed tolls and a fuel something. The Complainant told him he was too ill to continue driving. She stated she did not hear an offer to the Complainant to go to a hotel, or go to the hospital, or to send a relief driver. She reported there was an offer a ride in an ambulance, to call an ambulance, a suggestion to call 911 for an ambulance. She testified that the Complainant was explaining he had no insurance and no money when M. Smith “came up from behind the curtain and pat [the Complainant] on the shoulder and [said] ... ‘tell them I’ll take you. Tell him let me take you in.’” She reported the Complainant explained his head felt it was going to explode and he needed to rest his eyes. She reported the second male voice wanted the Complainant to keep driving. She stated the second telephone call ended with the second male voice saying “Well, when you feel better, give us a call.” She stated that the second voice suggested an ambulance but did not order the Complainant to take one. She reported the Complainant did not ask the second voice if M. Smith could take him to the hospital. She stated the video chat ended after midnight.

Mrs. White testified that during the video chat the night of September 15, 2009, she did not hear the Complainant say to anyone that he was not going to give the keys to anyone to drive the truck and did not observe the Complainant get belligerent or exhibit any kind of negative demeanor or behavior.

Mrs. White testified that the Complainant had told her he was terminated by Action Expediting. She stated observing the Complainant, after his employment was terminated, with continued headaches, depression and sleeplessness, stress, and unable to pay bills as the sole bread-winner in the family.

Mrs. White testified that on an occasion she went to Knight Transportation to pick up the Complainant from an orientation class.

On cross-examination, Mrs. White testified she has been married to the Complainant for approximately 10 years. She reported the Complainant had suffered from headaches prior to working for Action Expediting but that those were not as severe as the September 15, 2009 headache. She added that the Complainant suffered from stress but not really depression. She stated the Complainant also suffered from sleeplessness prior to working for Action Expediting but this time he stayed up all night.

On examination by this Administrative Law Judge, Mrs. White testified that the Complainant did not go to the doctors after his return on September 18, 2009, and did not take medicine for headaches, depression or lack of sleep. She stated that the Complainant has taken “Goody’s” for headaches but that it doesn’t help much. Mrs. White testified that when she saw M. Smith come out from the curtain during the September 15, 2009 video chat, M. Smith also offered to take over the driving but the man on the other end of the telephone said “no” to M. Smith driving the Complainant to the hospital but not to taking over the driving.

On re-direct examination, Mrs. White testified that the Complainant's depression was more severe after being fired from Action Expediting.

*James Wentz testimony (TR 81-131, 221-229)*

Upon examination by this Administrative Law Judge, Mr. Wentz testified that he is the Safety Director / Risk Management Director for Action Expediting. He identified CX 2 as a copy of safety standards and CX 3,4 and 5 as documents normally maintained by Action expediting. He identified CX 7 as an invoice for preventive maintenance performed on a vehicle leased from First Lease out of Austell, Georgia. He stated that he signed CX 14 which was a form sent back to Knight Transportation upon that company's request. He testified that CX 22 and 23 were not driver logs and vehicle inspection reports from company records and that the company did not have any daily logs or vehicle inspection reports for September 13 to 18, 2009, involving truck number 548008.

Mr. Wentz testified that he made the decision to terminate the Complainant's employment on September 17, 2009 due to the Complainant's unprofessional conduct. He stated the Complainant "was on the road, had refused to continue his route that he was assigned to, and became very belligerent and detrimental to the well-being of not only his co-driver but also other motorists on the highway and I felt his actions were of such a nature that we had to remove him from employment." He stated that "when I was brought into it, Mr. White had e-mailed me, telling me he was in a vehicle, that he refused to remove that vehicle because of not being compensated for some tolls, and after I made absolutely certain that he had received those funds, he still refused to remove the vehicle, and I informed his immediate supervisor that he was supposed to be removed from the vehicle, [and] taken to a medical facility to be checked out to make sure he was okay for driving. He refused to go to a medical facility. He refused to have an ambulance or any type of emergency equipment come to his location to verify that he was okay, and he continued to be very vocal and very absolute about his conduct and what he was and what he was not going to do. ... then all of a sudden, after he retrieved the funds that [were] necessary for him to continue down the highway, his attitude changed. He continued his route. He returned back to Georgia and at that particular moment in time I removed him from the vehicle, under my direction." He stated that the actions were detrimental to the co-worker and public safety because the Complainant "was in the vehicle with a co-driver and we suggested that the co-driver be allowed to take over the truck and its operation [but the Complainant] refused to allow him to do that." He indicated the events described were the Complainant's belligerence and occurred over the September 15 and 16, 2009 period. He stated that "Other people were involved. ... There was quite a bit of e-mail contact between [the Complainant] and his immediate supervisor [R. Baxter, Jr.], and then the Southeast Regional Manager for Action Expediting [D. Hardy]. Those e-mails were forwarded to my attention so I could review them and to assess what was taking place. ...there was a phone conversation between [the Complainant's] immediate supervisor and myself and [the Complainant] on third party, and [the Complainant] had contacted me directly by telephone."

Upon examination by Complainant, Mr. Wentz testified that he has been employed by Action Expediting for 12 years and was the Director of Safety and Risk Management during the May 18, 2009 to September, 2010 period. He reported his job included "everything related to safety

for the company as well as risk management and human resources” and all logbooks. He stated that his knowledge of the case was also based on the reports of others.

Mr. Wentz testified that M. Smith was a solo driver and also a team-driver for Action Expediting with the Complainant. He stated A.M. Patterson was a driver for Action Expediting but he could not state if he was a team driver with the Complainant. He stated that J. Hill was a driver for Action Expediting but could not state if he was a team driver with the Complainant. He stated that he audits logbooks as part of his job and the log books indicate co-driver names. Mr. Wentz reported that L. Kyle is the Operations Supervisor for Action Expediting at Lithia Springs, Georgia. He stated the R. Baxter, Jr. was a former employee of Action Expediting as a driver supervisor. He reported that D. Hardy was, at one point, the Southeast Regional Manager for Action Expediting.

Mr. Wentz testified that his understanding of the 14-hour rule under the Department of Transportation hourly service regulations was that “you are permitted to drive 11 hours and be on duty for 14 hours before you have to take a break. Then you must take a 10-hour break before you go back to work driving a truck.” He stated that there is no 10-hour rule, no 70-hour rule, and no 80-hour rule. He reported the 11-hour rule permits a driver to drive 11 hours in a 24-hour period and drive over 11 hours under certain circumstances like adverse weather conditions, bad road conditions and situations not under the control of the driver. He stated there is a rule where a driver is permitted to be on duty 70 hours in an 8-day period. He testified that a carrier “may not permit a person to drive a vehicle if that person is ill or fatigued.”

Mr. Wentz testified he expected managers would direct drivers when to report for work and be ready to carry out a trip. It is expected that when the drivers report for work they are not yet supposed to be in a duty status for logbook requirements. It is expected that the drivers observe federal, state, local and company regulations and policies. He stated it would be appropriate for the Complainant to approach his supervisor with safety-related issues.

Mr. Wentz testified that the Complainant’s employment through September 15, 2009 was relatively uneventful. He stated the he did not know the person interviewed as reference in CX 2 and did not recall any attachments to CX 3. He reviewed the Complainant’s CX 4 driver logs for the period May 17 to 23, 2009, and testified that the log entry for May 12, 2009 violated the 14-hour rule “by combining driving time of 8 hours and on-duty time of 6-1/2 hours.” He stated the Complainant was not disciplined for violating the 14-hour rule by being ½ hour over the 14-hour limit.

Mr. Wentz testified that he did not recall being on a speaker phone with M. Kyle and directing the Complainant to split sleeper-berth time and driver status into 5-hour periods if he wanted to keep driving for Action Expediting. He reported not recalling giving any driver direction to split sleeper-berth time. He stated that a team driver could drive for 5 hours, do 5 hours of sleeper berth time, then drive 5 hours, and then spend another 5 hours in the sleeper berth; but you can’t drive more than 11 hours without a 10 hour break. He reported that he did not recall any conversation about DOT requiring sleeper berth time being only split into 8 and 2 hour periods.

Mr. Wentz examined CX 5 and testified that there was no violation that he could see of the 14-hour rule or 11-hour rule. He denied the existence of an 8-2 sleeper berth rule and reported that the Complainant was not disciplined over the log book entries in CX 5. He reported that a point in time the Complainant was granted permission to keep his log books electronically and submit them in lieu of using the company's log sheets.

Mr. Wentz examined CX 7 and testified that it was the first time he had seen that documents. He acknowledged that "TA Invoice" was at the top and it indicated Troy, Illinois as a location with the name "Mark" on it, without a driver's name indicated.

Mr. Wentz testified that he did not recall the Complainant calling him on the morning of September 15, 2009 to report that co-driver J. Hill had driven down a mountain pass in violation of Tennessee speeding law. He reported no recollection of telling the Complainant on September 15, 2009 not to bypass toll booths and to stop at the toll booths to pay the tolls. He stated that he did not recall telling the Complainant on September 15, 2009, that he would put money on the fuel card for tolls though money for tolls was put on the fuel card. He denied receiving a report from the Complainant that his supervisor R. Baxter was forcing him to falsify his log book during the training of drivers. He reported that he did not recall any telephone conversations with the Complainant on September 15 or 16, 2009. He stated that he did not receive any complaint from the Complainant about being forced to run 5-hour duty status from May 2009 through July 2009.

Mr. Wentz testified that the Complainant's employment was terminated on September 18, 2009 and that the Complainant never turned in logs for his last September trip. He examined CX 22 (driver logs for September 13-15, 2009) and CX 23 (driver logs for September 16-18, 2009) and identified the Complainant's name on the documents and the listed co-driver's name as M. Smith. He considered the CX 22 September 15, 2009 entry as indicating a safety complaint had been made, the vehicle departed at 4:00 PM, and the vehicle arrived at Memphis at 11:00 PM. He stated that CX 11 e-mail was not addressed to him and he was unaware of what was discussed between the Complainant and R. Baxter.

Mr. Wentz testified that it was not Action Expediting policy for the non-driving team driver to be doing anything other than getting his rest and sleeping when not driving. He reported that if there was an I-pass in the truck, the truck did not have to stop and pay tolls but if the I-pass was not in the truck, "they would have physically had to stop and pay the toll."

Mr. Wentz examined CX 13 (termination notice) and testified that R. Baxter and D. Hardy were the authors of CX 13 and that since the Complainant had not signed and dated CX 13 he did not know when the Complainant received CX 13. He stated he had no evidence that R. Baxter and D. Hardy were angry with the Complainant for reporting a driver getting a speeding ticket or terminated the Complainant for making a safety complaint before he left Lithia Springs. He stated that he had never before seen CX 24 (J. Hill September 13, 2009, speeding citation) and that eventually Action Expediting would learn of a driver getting a speeding ticket.

Mr. Wentz testified that he was aware that the Complainant and M. Patterson drove a rental car over a route to become familiar with the route and that Action Expediting paid for the rental car.

On cross-examination, Mr. Wentz testified that the decision to terminate Complainant's employment came through his office and he decided to terminate the Complainant "because of his conduct while he was on the road and specifically for that conduct."

Mr. Wentz testified that Action Expediting delivers customer freight from various distribution centers in cities throughout the United States and use a routed delivery structure. He indicated Action Expediting has a contract with Mitsubishi to deliver auto parts to specific locations at specific times and it is a service failure if the delivery is not there on time, which could potentially lose that customer's business. He indicated that the Complainant's actions the night of September 15, 2009 and early September 16, 2009 caused a delay in the route which was problematic in terms of customer relations.

Mr. Wentz testified that as to the September 15 and 16, 2009 events, Action Expediting offered to call an ambulance on behalf of the Complainant and that the Complainant denied the ambulance. He reported that Action Expediting offered for the Complainant to go to the hospital to seek medical attention if he was ill and the Complainant denied that medical service. He stated Action Expediting offered the Complainant a hotel room in Memphis, Tennessee to recover from his reported illness and he denied that offer. He reported that there was no reason the co-driver M. Smith could not have driven the Complainant to the hospital except that the Complainant "refused to relinquish the control of the vehicle and refused to give the keys to anyone other than himself." He stated that since the Complainant had denied assistance, Action Expediting was "going to have another truck pick [the Complainant] up and bring him back to Georgia."

Mr. Wentz testified that drivers are required to report traffic convictions within 30 days of the conviction and there was no requirement that J. Hill report receiving a speeding citation since he might not have been convicted of the reported speeding offense at that particular moment in time. He stated that Action Expediting runs a motor vehicle report on all drivers on an annual basis and find out about all citation convictions.

Mr. Wentz testified that the Complainant's driver logs for September 13, 2009 through September 18, 2009 (CX 22 and 23) were seen by him for the first time in court during his testimony. He reported that the Complainant was scheduled for a meeting upon his return on September 18, 2009; "but he refused to show for that meeting, nor did he turn in any logs for that trip he was on."

On re-direct examination, Mr. Wentz testified that he was not present in Memphis, Tennessee with the Complainant and that he had conducted an investigation into the events of September 2009. He reported that R. Baxter and D. Hardy were in contact with the Complainant during the events in Memphis, Tennessee. He stated he had an e-mail directing the Complainant to attend a meeting on September 18, 2009.

On direct examination in rebuttal, J. Wentz testified he has 35 years in the trucking industry as a safety director. He reported that as of September 15, 2009 the Complainant had never complained to him that he was being forced to falsify his logbooks in order to train another

driver and that he has “absolutely no evidence of that” being the case. He denied speaking with the Complainant on September 15, 2009 by saying “What is it this time” because he never speaks to a person like that. He testified that the only conversation he could recall with the Complainant on September 15, 2009 involved not having sufficient funds to pay tolls and that the Complainant had expected sufficient funds being on the fuel charge card. He reported he did not single out the Complainant to stop and pay tolls because Action Expediting does not permit any driver bypass stopping to pay tolls unless they have an easy-pass or some other type of automatic toll pass. He denied telling the Complainant he was tired of the Complainant’s safety complaints because he never speaks to anybody like that.

J. Wentz testified that it is his responsibility to weigh the evidence in any type of safety complaint made and there is no reason to single out one driver when Action Expediting has over 200 drivers. He testified that he never even inferred to the Complainant that he would get terminated for any reason, including splitting berth time into 5 hour increments. He reported that “I have no evidence, verbal or otherwise, that anybody ever said anything to [the Complainant] about [threats to the Complainant’s employment due to alleged complaints about sleeper berth time].”

J. Wentz testified that it is not Action Expediting’s policy to give a cell phone to company drivers and that he had no idea if “anybody ever [took] away the Complainant’s cellular telephone.” He stated that Action Expediting did not take away log books from the Complainant and that it was the Complainant who requested permission to use his electronic logbook, which request was approved by J. Wentz.

J. Wentz testified that “detention pay” is used by some trucking companies that have regulated tariffs so that if a driver is detained by a customer, or a delivery, or a pick up for a length of time, they potentially get detention pay. He stated that Action Expediting does not have a tariff plan for eligibility for detention pay.

J. Wentz testified that he had a sheriff present when the Complainant and M. Smith returned from their route on September 18, 2009, because he “had a fear that there would be a conflict ... from conversations that were discussed with me about the attitude of the situation.” He stated that to his knowledge the Complainant never signed up for health insurance through Action Expediting and “therefore would not have never been issued health insurance of any type. It is not an automatic at the time an employee is hired. ... After their probationary period, they have 90 days in which to make an application for health insurance.”

J. Wentz testified that it was his final decision to terminate the Complainant’s employment. He stated he had no knowledge of any kind of conflict in sleeper berth time and that was not a factor in his decision to terminate the Complainant’s employment. He stated he also had no knowledge of allegation of being forced to falsify log books and that did not factor into his decision to terminate the Complainant’s employment. He testified that the Complainant’s allegations of being ill on September 15, 2009 did not factor into his decision to terminate the Complainant’s employment. He stated that he looked at the Complainant’s allegation of being ill and his refusal to shut the truck down and refusal to get medical assistance as a behavior pattern “that he was

not willing to concede, if I'm sick, I need assistance and therefore that's why I'm acting the way I am."

J. Wentz testified that "I felt that at that particular moment in time [when he decided to terminate Complainant's employment] it was in the best interest of our company that we separate relationship between employer and employee ... because of his behavior and the fact that the conflict between him and his immediate supervisor could not be resolved." He denied that route delay and customer service was a factor in the termination decision because the termination decision "strictly was a behavior pattern."

On cross-examination, J. Wentz testified that he did not have any firsthand knowledge of the event involving the Complainant on September 15, 2009. He reported that he had a telephone conversation with the Complainant regarding tolls on September 15, 2009.

*Lawrence Kyle testimony (TR 132-143)*

On examination by the Complainant, Mr. Kyle testified that he is employed by Action Expediting as Southeast Operations Manager for 4 years and was the site manager at Applied Technologies when the Complainant worked for Action Expediting. As site manager he was responsible "to make sure that the Applied Technologies freight that was carried by Action Expediting was hauled throughout the southeast area ... excluding the separate off-site, which [R.] Baxter was in charge of." He indicated that R. Baxter was the Complainant's supervisor, not him. He stated he never observed R. Baxter and that R. Baxter was in charge of the Chicago runs out of Mitsubishi. He testified that "I don't know anything about the case except what I heard here this morning."

Mr. Kyle testified that M. Smith use to be a driver, J. Hill was a driver for Action Expediting, and J. Wentz is the safety manager for Action Expediting. He indicated that he is in operations and that D. Hardy is his supervisor. He testified that the 14-hour rule is that you can have a total of 14-hours on duty either driving or not driving. He indicated that if he was aware a driver was violating rules and regulations he would try and correct the violations.

Mr. Kyle testified that he could not recall receiving e-mails from the Complainant. He reported that driver logs were turned into the office and then forwarded to the corporate office. He examined CX 3 and reported that his e-mail address is listed as "copy to" but that since the Complainant who sent the e-mail was never under his control and was under R. Baxter's control "there was no need for me to do anything with that e-mail."

Mr. Kyle testified that he remembered a June 1, 2009 meeting where he assigned M. Smith as a co-driver to Complainant for R. Baxter who was the Complainant's direct supervisor at Mitsubishi. He stated the Complainant got his assignments from R. Baxter and reported to R. Baxter "when you left, when you were on the road, when you had breakdowns, when you had issues ... you did not report to [L.] Kyle at all. ... I had no control to do anything with [the Complainant]. I don't now and I didn't then."

Mr. Kyle testified that he did not remember the Complainant raising safety complaints with him at a meeting on June 1, 2009 and did not remember putting J. Wentz on speaker phone with the Complainant involving sleeper-berth time. He stated that there was not a time in mid-July when the Complainant asked him for some log books and none were given but stated that if there were no log book sheets available there would be none to give out. He testified that it is a driver's responsibility before he leaves to make sure the equipment is safe and to make sure he has the proper log book and the proper materials. If a driver needs a log book, he is to go to the closest truck stop, buy a 99 cent log book, get a receipt, and submit the receipt for reimbursement.

On cross-examination, Mr. Kyle testified that the Complainant never made any safety related complaints directly to him and he never observed the Complainant make safety complaints to anyone at Action Expediting. He stated he never personally retaliated against the Complainant for safety related complaints and never witnessed anyone from Action Expediting retaliating against the Complainant for making safety related complaints. He stated he has never willfully refused to give the Complainant a log book.

*July 29, 2011, Deposition testimony of Mark Smith (CX 8, RX 4)*

On July 29, 2011 M. Smith testified by deposition that he first met the Complainant when he went to Action Expediting for an employment interview and that a few months after he was hired by Action Expediting he was assigned as co-driver with the Complainant. He reported he was a licensed commercial truck driver since 1992.

M. Smith examined an exhibit marked as "Deposition of Mark Smith by Written Questions, Answered Under Penalty of Perjury" (CX 25 not admitted into evidence in this case). He reported that the all the answers to the questions were already typed in when the Complainant came by the house. He stated he glanced over the document and signed it in front of a notary in Kinko's. He reported that it was late when the Complainant came by with the papers and he felt a little pressured to sign the papers.

Mr. Smith testified that he was assigned the Minnesota route with the Complainant on September 15, 2009. He reported he did not witness anyone yelling at the Complainant at the time they left on the route from Action Expediting on September 15, 2009. He stated that the only eventful thing that happened on the route was the Complainant told him Mr. Wentz was supposed to put money on the fuel card for tolls through Chicago and did not do so. He reported that there was no money for tolls on the fuel card when they were at a fuel stop in Memphis, Tennessee. He reported that he was in the back bunk trying to get sleep so he did not hear everything that was going on but was aware that the Complainant had tried to call Mr. Wentz with no answer and subsequently talked to R. Baxter and D. Hardy. He stated that while at the fuel stop another driver by the name of "Hillary" had called him and told him there "was a bunch of chaos going on with [the Complainant] and some of his complaints and he was going to be replaced." He stated he told the Complainant that he was going to be terminated because the route was delayed and he should go on and look for another job "the minute I got off the phone with Hillary."

Mr. Smith testified that the route was delayed because they did not have money for tolls. He stated that they sat at the fuel stop "for a while and then [the Complainant] said that he was sick,

but I couldn't tell if he was sick or not because ... I was in the ... back bunk ... not asleep, but I couldn't see everything that was going on." He stated that they knew they did not have toll money when they left the plant but Mr. Wentz was supposed to have the money on the fuel card by Memphis, Tennessee. They were upset when the toll money was not available at the Memphis stop. The Complainant said he had a headache after several phone conversations with either Mr. Wentz or D. Hardy. He reported he did not observe the Complainant or see any sign of illness. He stated someone told the Complainant to call an ambulance and the Complainant asked if Mr. Smith could drive him but the individual told the Complainant he "didn't want me to drive him. ... I'm assuming that he didn't want to interfere with my rest time."

Mr. Smith testified that he got into the sleeper berth when they began the run and was in the berth 6 hours when they stopped at Memphis. He stated he was supposed to remain in the sleeper berth for exactly 10 hours before driving his shift; but that he "could have come out and started driving, but only to a certain limitation [less than 10 hours]." He stated he was unaware that the Complainant had been offered a hotel room in Memphis.

Mr. Smith testified that they sat in Memphis "maybe about a good two hours, and for some unknown reason, we just started driving so we could go ahead and finish the route.

On cross-examination by the Complainant, Mr. Smith testified he signed CX 25 in front of a notary who did not give him an oath but only checked his driver's license. He stated that he felt he was "kind of up under a little pressure [from the Complainant to sign the document]. The reason I was up under some pressure is because I didn't know how to tell you that I didn't want no part of this predicament. So I went on and signed it and been done with it." He reported that R. Baxter had told him not to contact the Complainant on September 18, 2009; but he called the Complainant after that date and had a conversation about the termination. He stated that he did not discuss all 81 items in CX 25 with the Complainant. He reported the Complainant called him in California and "told me that the Judge instructed you to give me these so-called questions. And you did tell me that if I didn't want to go to court, all I had to do was just go ahead and sign off on it, and I didn't have to go to court. I do recall that." He stated he glanced over the document and signed it.

Mr. Smith testified that the responses in CX 25 to numbers 19, 20, 24, 27, 29, 36-41, 44-46, 49, 54, 55, 58, 60, 67, 68, 72-74, 76, and 78 were accurate<sup>5</sup>. In 79 and 80 Mr. Smith initiated the call to J. Wentz. He stated that he did not remember the other questions. He only glanced at CX 25 when it was given to him and "the only thing that I saw whenever [the Complainant] gave me [CX 25], when I glanced at it, it was just that Fernando White vs. Action Expediting. That's the only thing I looked at. And that's when I flipped and looked at some of the answers."

Mr. Smith testified that he worked for Action Expediting about 1-1/2 years and with the Complainant "a little bit more than 2-1/2 months, but I can't recall." He recalled the Complainant's face at a meeting with J. Wentz during the hiring process, but did not know the Complainant before being assigned with him as a team driver.

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<sup>5</sup> The typed responses to these questions were not inconsistent with testimony given by M. Smith under oath.

Mr. Smith testified that the Complainant had stated he talked to L. Kyle “about [the Complainant] being tired and fatigued and about driving five-on and five-off.” He also stated he sat at a meeting where the Complainant told L. Kyle that driving five hours and only sleeping five hours was illegal while J. Wentz was on speaker phone. He stated that “DOT rules and regulations change every year. ... [The five-on / five-off] may not have been in effect at that particular time when we were doing five-on and five-off. You have to check on that. Now, you can’t drive five-on / five-off, the rules have changed.” He reported that there was a time when you could drive five-on / five-off but the rule changed at some time he doesn’t recall. He stated he was never disciplined for driving five-on / five-off.

Mr. Smith testified that he made up the story that L. Kyle had a video of him stealing \$70,000.00 of fuel with the fuel card and told it to the Complainant so that the Complainant would leave him out of the problem with Action Expediting and be able to maintain a friendship and avoid all the stress it was causing for him and his wife. He also said that his reports of Action Expediting intimidating him were also a lie and made up because he didn’t want to get involved. He reported he never discussed the Complainant’s case with anyone from Action Expediting, though he had called J. Wentz about leaving Quest Trucking and returning to Action Expediting for work.

Mr. Smith testified that he had been instructed to run tolls by D. Hardy because the company would just be billed. He reported one time he had a sinus infection and the Complainant had to take over driving. He stated that when they were stopped at the Memphis fuel stop R. Baxter had called him about four times while he was in the sleeper berth and was upset with the Complainant, which he told the Complainant. He reported one of the calls involved him being placed with another driver. He stated that there were other calls from R. Baxter about the route while they were driving.

Mr. Smith testified that at the Memphis stop he could not tell if the Complainant was sick or not, but just that he had “suggested I would go ahead and drive for you.” He stated that he told the Complainant he would drive for him so the Complainant could get some rest when the Complainant was on the telephone with someone from Action Expediting about getting a doctor or something. He reported being told by driver “Hillary” that the Complainant was going to be terminated for delaying the route. He stated he did not recall the Complainant getting any telephone calls while he was in the driver’s seat while stopped in Memphis.

Mr. Smith testified that the company would give the drivers logbooks to use or they could buy them at a truck stop. He stated that when driving you are on-duty and could be on-duty doing non-driving activity like pre-trip inspection or meeting with supervisors. He reported that on one occasion he and the Complainant went in to get log books and L. Kyle only had one which he gave to Mr. Smith and told them to pick up more logbooks at a truck stop on the way. He stated that he was aware that there was a time when the Complainant purchased and used a software program for logbooks.

Mr. Smith testified that when they returned to Lithia Springs at the end of the September 15-18, 2009 run they “pulled up to the [inside] front entrance and [R. Baxter] came up to the tractor and told [the Complainant] to get out and he wanted [the Complainant] to sign the termination slip

that he had ... and he told [Mr. Smith] go park the truck.” He stated he couldn’t remember who was driving when they got the front gate, but that he dropped the trailer at the required door, separated the tractor and trailer, completed the Federal required inspection of the vehicle, and did the post-trip paperwork.

On re-direct examination, Mr. Smith testified that the answers to CX 25 were already typed in when the Complainant brought them to his house and the words are those of the Complainant. He restated that no one put him under oath as to CX 25.

On re-cross examination by the Complainant, Mr. Smith testified that the Complainant told him to read CX 25 but that he did not read it. He again stated that he and the Complainant went to Kinko’s, some man looked at his driver’s license. He stated that he signed CX 25 but did not see the man in Kinko’s sign it.

#### *September 2009 Termination Action Notice (CX 13)*

This exhibit indicates that the Complainant’s employment was terminated “based on your actions between 09/14/2009 and 09/17/2009, your expressed dissatisfaction and unprofessional action necessitate the termination of your employment. We regret this action, but wish you the best. Per Para. 735: misconduct ... Any action that may be detrimental to Action Expediting, Inc. Per Para. 900: Part B: To comply, at all times, with company operating procedures and policies. Per Para. 900: Part C: To load, transport, unload and secure each shipment from origin to destination without delay en route, unless otherwise directed by supervisor.” The document reflects an effective date of “09/17/2009” and the supervisor’s name as “Rodney Baxter / David Hardy”. There are no signatures on the exhibit, even though the Complainant testified he signed the document for the sheriff before leaving the terminal.

#### *Admissions by Action Expediting (CX 1 and 18)*

In response to Complainant’s “Request for Admissions”, Action Expediting admitted the following, in addition to the stipulations entered at the formal hearing:

1. That the Complainant was formerly an employee, as defined in 49 U.S.C. §31101(2), of Action Expediting.
2. That the Complainant communicated to D. Hardy via telephone, on or around September 15-16, 2009, that he was not feeling well.
3. That the Complainant had communications with R. Baxter and D. Hardy, who were the Complainant’s supervisors, on or around September 15-16, 2009.
4. That the Complainant’s employment with Action Expediting was terminated.
5. That the Complainant’s actions resulted in Complainant’s shipment being delayed.
6. That M. Smith was the Complainant’s assigned co-driver on September 16, 2009.
7. That the Complainant alleged he was too ill to drive on or about September 17, 2009.
8. That the Complainant was not paid detention pay for the June 30, 2009 trip because the Complainant was not entitled to detention pay for the June 30, 2009 trip or any other trip.
9. That Action Expediting began receiving electronic daily log sheets from Complainant on or about August 1, 2009 through September 18, 2009.

*Driver's Daily Logs (CX 4, 5 and 6)*

These exhibits reflect the Complainant's hand written entries that he was off duty 5/11/09 through 5/17/2009; the Complainant considered himself on-duty as of 4:30 PM through 10:45 PM on 5/18/2009; in the sleeper berth from 10:45 PM 5/18/2009 through 4:00 AM 5/19/2009; except for the period 6:15 to 6:45 AM as on-duty from 4:00 AM to 9:45 AM, 5/19/2009; in the sleeper berth from 9:45 AM to 4:15 PM, 5/19/2009; on-duty 4:15 PM to 9:30 PM 5/19/2009; off-duty 9:45 PM to 10:00 PM, 5/19/2009; in the sleeper berth from 10:00 PM 5/19/2009 to 3:00 AM 5/20/2009; and on duty from 3:00 AM to 6:00 AM, 5/20/2009.

The Complainant reported himself off-duty from 6:00 AM to 4:45 PM, 5/20/2009; on duty 4:45 PM to 10:30 PM, 5/20/2009; in the sleeper berth 10:30 PM 5/20/2009 to 3:30 AM, 5/21/2009; on-duty from 3:30 AM to 9:15 AM, 5/21/2009; in the sleeper berth 9:15 AM to 11:30 AM, 5/21/2009; on-duty from 11:30 AM to 8:15 PM, 5/21/2009; in the sleeper berth 8:15 PM 5/21/2009 to 00:30 AM, 5/22/2009; on-duty 00:30 AM to 1:30 AM 5/22/2009; in the sleeper berth 1:30 AM to 2:15 AM, 5/22/2009; on-duty 2:15 AM to 2:45 AM 5/22/2009; in the sleeper berth from 2:45 AM to 6:15 PM, 5/22/2009; on-duty 6:15 PM 5/22/2009 to 1:15 AM, 5/23/2009; in the sleeper berth 1:15 AM to 4:15 AM, 5/23/2009; on-duty for paperwork 4:15 AM to 4:45 Am, 5/23/2009; and off-duty from 4:45 AM, 5/23/2009.

The Complainant reported himself in the sleeper berth until 4:30 AM, 5/26/2009; on-duty 4:30 AM to 9:15 AM, 5/26/2009; in the sleeper berth 9:15 Am to 2:15 PM, 5/26/2009; on-duty 2:15 PM to 7:15 PM, 5/26/2009; in the sleeper berth 7:15 PM, 5/26/2009 to 00:30 AM, 5/27/2009; on-duty 00:30 AM to 3:45 AM, 5/27/2009; off-duty 3:45 AM to 5:00 PM, 5/27/2009; in the sleeper berth 5:00 PM to 10:15 PM, 5/27/2009; on-duty 10:15 PM 5/27/2009 to 4:30 AM, 5/28/2009; in the sleeper berth 4:30 AM to 9:00 AM, 5/28/2009; on-duty 9:00 AM to 2:45 PM, 5/28/2009; in the sleeper berth 2:45 PM to 7:45 PM, 5/28/2009; on-duty 7:45 PM, 5/28/2009 to 2:00 AM, 5/29/2009; on-duty 7:00 AM to 9:00 AM 5/29/2009; and off-duty from 9:00 AM 5/29/2009. He reported himself off-duty the entire day of 5/30/2009.

The Complainant reported himself as on-duty 00:00 AM to 2:00 AM, 6/17/2009; in the sleeper berth 2:00 AM to 7:00 AM, 6/17/2009; off-duty 7:00 AM to 5:00 PM 6/17/2009; on-duty 5:00 PM to 10:45 PM, 6/17/2009; in the sleeper berth 10:45 PM 6/17/2009 to 4:00 AM, 6/18, 2009; on-duty 4:00 AM to 9:45 AM, 6/18/2009; in the sleeper berth 9:45 AM to 2:45 PM, 6/18/2009; on-duty 2:45 PM to 8:30 PM, 6/18/2009; in the sleeper berth 8:30 PM 6/18/2009 to 1:15 AM, 6/19/009; on-duty 1:15 AM to 7:00 AM, 6/19/2009; in the sleeper berth 7:00 AM to 12:15 PM 6/19/2009; and off-duty from 12:15 PM, 6/19/2009. He reported himself off-duty the entire day of 6/20/2009.

The Complainant reported himself off-duty until 5:00 PM, 6/22/2009; on-duty for safety check and paperwork 5:00 PM to 5:15 PM, 6/22/2009; in the sleeper berth 5:15 PM to 10:30 PM, 6/22/2009; on-duty 10:30 PM 6/22/2009 to 4:15 AM 6/23/2009; in the sleeper berth 4:15 AM to 9:30 AM, 6/23/2009; on-duty 9:30 AM to 3:15 PM, 6/23/2009; in the sleeper berth 3:15 PM to 8:30 PM, 6/23/2009; on-duty 8:30 PM 6/23/2009 to 2:07 AM 6/24/2009; on-duty 2:07 AM to

5:30 AM, 6/24/2009; in the sleeper berth 5:30 AM to 5:00 PM, 6/24/2009; and on-duty from 5:30 PM to 10:15 PM, 6/24/2009.

The Complainant reported himself in the sleeper berth until 3:45 AM, 6/30/2009; on-duty 3:45 AM to 9:45 AM, 6/30/2009; in the sleeper berth 9:45 AM to 3:00 PM, 6/30/2009; off-duty 3:00 PM to 5:00 PM, 6/30/2009; on-duty 5:00 PM to 10:30 PM, 6/30/2009; in the sleeper berth 10:45 PM, 6/30/2009 to 3:45 AM, 7/1/2009; on-duty 3:45 AM to 7:30 AM, 7/1/2009; in the sleeper berth 7:30 AM to 4:45 PM, 7/1/2009; on-duty 4:45 PM to 11:30 PM, 7/1/2009; in the sleeper berth 11:30 PM 7/1/2009 to 4:45 AM, 7/2/2009; on-duty 4:45 AM to 10:30 AM, 7/2/2009; in the sleeper berth 10:30 AM to 3:45 PM, 7/2/2009; on-duty 3:45 PM to 9:30 PM, 7/2/2009; in the sleeper berth 9:30 PM 7/2/2009 to 2:15 AM, 7/3/2009; on-duty 2:15 AM to 8:00 AM, 7/3/2009; in the sleeper berth 8:00 AM to 4:00 PM, 7/3/2009; and off-duty from 4:00 PM, 7/3/2009.

*September 13 to 18, 2009, Driver Daily Logs (CX 22 and 23)*

The Complainant introduced CX 22 and 23 at the hearing as copies of his electronic Driver's Logs he kept for the September 13 to 18, 2009 time period. J. Wentz testified that the company did not have inspection or daily logbooks for the Complainant's truck driving period September 13 to 18, 2009; that he inspected the driver log books; and that the first time he saw the logs in CX 22 and 23 were at the hearing during his testimony. The Complainant testified that he printed off his September 2009 log books when he was confronted by R. Baxter and the sheriff upon return to the terminal on September 18, 2009; that he placed the paperwork on the dashboard of the truck; that the truck windows were open; that the night was windy and drizzling; and that he thought he saw some paper blow out of the truck as he was driving off the terminal property in his personal vehicle. He also made detailed entries related to his complaint under the STAA in the vehicle inspection report sections for September 15, 16 and 18, 2009. The entries are as summarized below, but the credibility of the entries is suspect as noted in the Discussion section of this Decision and Order.

The Complainant reports there was no vehicle discrepancy on September 13 or 14, 2009; that he was off-duty to 8:00 AM, 9/13/2009; on-duty for pre-trip inspection 8:00 AM to 8:30 AM, 9/13/2009; in the sleeper berth 8:30 AM to 8:30 PM, 9/13/2009; on-duty 8:30 PM 9/13/2009 to 7:00 AM 9/14/2009 making 8 deliveries, trip inspections and 6-3/4 hours driving; off-duty 7:00 AM to 10:00 AM; on-duty 10:00 AM to 10:45 AM for safety checks and reload; in the sleeper berth 10:45 AM to 10:45 PM, 9/14/2009; and off-duty from 10:45 PM, 6/14/2009.

The Complainant reports off-duty until 3:15 PM, 9/15/2009; on-duty 3:15 PM 9/15/2009 to 5:30 AM, 9/16/2009 which included 9/15/2009 driving entries for 4:00 PM to 6:30 PM and 7:00 PM to 11:00 PM, entries of "fueling delayed" at 11:00 PM, "report unfit to drive" at 11:15 PM, "report unfit to drive status" at 11:30 PM, and "medication taken" at 11:45 PM, a 00:45 AM, 9/16/2009 entry of "completed nearly 15 minutes of phone calls, unfit status improved with medication, rest and prayer, fueling complete", and a 00:45 AM entry indicating the Complainant was again driving the vehicle to West Plains, MO for delivery at 5:15 AM, 9/16/2009. The Complainant reported being in the sleeper berth 5:30 AM to 5:30 PM, 9/16/2009; on-duty 5:30 PM 9/16/2009 to 6:00 AM, 9/17/2009 making four deliveries, two trip inspections and 10-3/4 hours driving; in the sleeper berth 6:00 AM to 5:00 PM, 9/17/2009; on

duty 5:00 PM to 5:30 PM, 9/16/2009 for trip inspections and drop in Normal, Ill.; 5:30 PM to 3:00 AM 9/18/2009 as driving; a 3:00 AM notation of “terminated in violation of the STAA” and on-duty status to 4:00 AM; and off-duty status from 4:00 AM, 9/18/2009.

On the September 18, 2009 vehicle inspection report the Complainant entered “terminated and not allowed to execute post-trip as discrimination in turn for my refusal to drive ill on 09-15/16-2009” The Complainant had entered a “right windshield sprayer faulty” defect comment on the September 17, 2009 vehicle inspection report.

*E-mails while in route (CX 11 and 17)*

Most of the e-mails in the exhibits refer to deliver times at various locations and dates not relevant to the issues involved. It is specifically noted that the manner in which the e-mails are strung together reflects times indicated out of sequence, thus bringing into question the reliability of the timing of events and credibility of the Complainant.

Those e-mails relevant to the issues indicate:

11:56 AM, 9/15/2009 – from R. Baxter to the Complainant. R. Baxter stated that “any safety related issues need to be discussed with the safety director (Jim Wentz).” R. Baxter then listed telephone and e-mail contact information for J. Wentz.

11:21 PM, 9/15/2009 – the Complainant sent an e-mail to R. Baxter advising “Detained due no toll money on fuel card as promised. Need compensation for delayed time caused by this error.”

11:58 PM, 9/15/2009 – the Complainant sent an e-mail to R. Baxter stating, “Still standing by for assistance.”

12:00 PM, 9/15/2009 – the Complainant acknowledged the content of R. Baxter’s 11:56 AM, 9/15/2009, e-mail. It is noted that this e-mail has a subject line and 3:58 PM send time that the 11:56 AM, 9/15/2009 e-mail with the exact same content did not have from R. Baxter.

3:58 AM, 9/16/2009 – the Complainant sent an e-mail to R. Baxter stating, “Detained and down due my unfit to drive status, due to previous conflicting directives.” Credibility an issue in light of self-reported driving logs indicating Complainant was driving from 00:45 AM to 5:15 AM, 9/16/2009 (CX 23).

7:36 PM, 9/16/2009 – the Complainant sent an e-mail to R. Baxter stating, “Route currently nearly 3 hrs. Behind schedule in light of STAA. Incident.”

11:49 PM, 9/16/2009 – e-mail purportedly from R. Baxter states, “Your behind schedule because you chose out of your own decision to shut down your truck down against management decision to continue on and get toll money when you needed it the following day. Therefore it is your fault that your [sic] behind.”

8:09 PM, 9/16/2009 – the Complainant purportedly sent an e-mail to R. Baxter in reply to R. Baxter’s 11:49 PM, 9/16/2009 e-mail, stating in reply, “I mean no disrespect but on the contrary, this truck was shut down in accordance with DOT. Hwy. Safety regulations as I took medication to recovery from my Previously reported Ill/sick unfit to drive state. However, this shipment is behind due to that reason along with road construction/traffic delay issues in addition. And that what my facts will depict.” Three hour discrepancy in e-mail times reported by Complainant raises issue of credibility.

*Correspondence from/to Knight Transportation (CX 12 and 14)*

CX 14 is a “Request for Background Information” from Knight Transportation to Action Expediting, “Attention “Jim.” The form indicates that the Complainant authorized the release of the requested information on 8/30/2010 and it was completed by J. Wentz on 8/30/2010. The form indicates the Complainant worked for Action Expediting from May 2009 to September 2009 as a driver and left Action Expediting due to “terminated” and would not be rehired if company policy so allowed. The form indicates the Complainant drove “TADC; TASL” tractors, hauled a 53’ dry van, drove in 10 states listed, never had his driver’s license revoked or suspended, and was never involved with a stolen load. The form also indicates that the Complainant never tested positive for a controlled substance, never had an alcohol test above .04, never refused a test for drugs or alcohol, and never violated a DOT regulation related to drugs or alcohol.

CX 12 indicates a copy of CX 154 was sent to the Complainant on October 14, 2010 in response to the Complainant’s request of September 29, 2010.

## DISCUSSION

### **I. The Complainant engaged in protected activity under the STAA by reporting to Action Expediting supervisors on or about July 1, 2009 that the practice of splitting sleeper berth time into five hour increments violated federal regulations at 49 CFR §395.1(g)(1).**

Here the Complainant’s cause of action is under Section 31105(a)(1)(A) of the Act, which deals with filing complaints regarding equipment safety on commercial vehicles with a gross vehicle weight rating of 10,001 pounds or more. “Protected activity” under the Act includes reporting violations of Federal Motor Carrier regulations. In this case, the complaints of splitting sleeper berth time into 5-hour increments in May and June 2009 had the potential to violate Federal Motor Carrier regulations at 49 CFR §395.1(g)(1) then in effect.

The Complainant testified that he began driving truck for Action Expediting in May 2009 and was expected to violate rules and regulations with the first being splitting sleeper berth time into 5 hour increments. He reported that 2009 federal regulations stated that driving with a sleeper berth required use of the sleeper berth a minimum of 8 hours followed by 2 hours with the 14-hour rule limiting driving and on-duty time. He stated that requiring on-duty and sleeper berth time to be 5 hours on and 5 hours off violated federal driving regulations at the time. He reported he found himself fatigued and unable to get enough rest with the 5-hour increments in the sleeper berth. He stated he complained about the sleeper berth time to L. Kyle who called J.

Wentz on speaker phone. He testified he told J. Wentz that sleeper berth time could only be split into 8 hour and 2 hour times and “pretty much let me know I would be terminated if I don’t run 5-on / 5-off.” He indicated that this call took place after A.M. Patterson quit driving with him about July 1, 2009 and that he was assigned M. Smith as a co-driver after the telephone call.

J. Wentz, the Director of Safety and Risk Management at Action Expediting testified that the Complainant’s employment through September 15, 2009 was relatively uneventful. He reported that he reviews driver logs and that the Complainant’s May 2009 logs in CX 4 show that the Complainant violated a 14-hour rule by combining 8 hours of driving with 6.5 hours of other on-duty time, thus being ½ hour over the 14-hour limit. He reported the Complainant was not disciplined for violating the 14-hour limit in May 2009. He testified to no recollection of discussions about sleeping berth time being split only into 8 and 2 hour periods and stated drivers could drive 5 hours, use the sleeper berth for 5 hours, drive for 5 hours and again use the sleeper berth for 5 hours as long as driving time did not exceed 11 hours without a 10 hour break. He testified that he did not receive any complaint from the Complainant about being forced to run 5-hour duty status period from May 2009 through June 2009. He testified that he never even inferred to the Complainant that he would get terminated for any reason, including splitting sleeper berth time into 5-hour increments. He testified he did not recall directing any drivers to split sleeping berth time and reported no recollection of being on a speaker phone with the Complainant and L. Kyle and directing the Complainant to split his sleeper berth time in 5 hour increments if the Complainant wanted to keep driving for Action Expediting. J. Wentz denied every speaking to the Complainant with the words “what is it this time” because he never speaks to anyone like that. He denied ever receiving a complaint from the Complainant about being forced to run in 5-hour duty status from May 2009 to July 2009. He testified that when he made the decision to terminate the Complainant he had no knowledge of any conflict involving sleeper berth time.

L. Kyle testified that he was a site manager for Action Expediting during the period the Complainant was employed by Action Expediting and that R. Baxter was the Complainant’s supervisor and not him. He stated he had no recollection of the Complainant raising safety complaints on June 1, 2009 or putting him on speaker phone with J. Wentz about sleeper berth time. He denied receiving any safety related complaints from the Complainant and never observed the Complainant make safety complaints to others.

M. Smith testified he remembered the Complainant’s face during the hiring process and worked with the Complainant about 2-1/2 months. He testified that on one occasion he sat at a meeting with the Complainant and L. Kyle present and J. Wentz on a speakerphone during which time the Complainant told L. Kyle and J. Wentz that driving 5 hours and only sleeping 5 hours was illegal. He did not identify the timeframe involved. He also stated that DOT regulations change every year and the 5-on / 5-off rule may not have been in effect at the particular time they were doing 5-on / 5-off.

In CX 4 the Complainant recorded 40.5 hours of off-duty status before beginning safety checks at 4:30 PM, May 18, 2009 and beginning driving at 5:00 PM, 2009. The Complainant recorded his 11<sup>th</sup> hour of driving time at 8:00 PM May 19, 2009 and continued driving an additional one hour to 9:00 PM. During that period he recorded two sleeper berth periods of 5.25 hours and 6.5

hours, one off-duty period of .5 hours, and on-duty, non-driving periods totaling 4.25 hours. Under 49 CFR §395.1(g) sleeper berth regulations, the Complainant could not exclude sleeper berth time periods under 8 hours on May 19, 2009, so he was not supposed to drive after 6:30 AM, May 19, 2009. Similarly, there was a period where the Complainant was over the permitted hours of on-duty / driving time on May 21, 2009. See also 49 CFR §395.3. The Complainant's use of the sleeper berth on May 22 and 23, 2009 conformed to regulations. Review of CX 6 reveals the Complainant was not compliant with sleeper berth and driving regulations in 2009 on May 26, June 18, and June 19. Review of CX 5 reveals the Complainant was not compliant with sleeper berth and driving regulations on June 23, 2009.

While J. Wentz and L. Kyle may not remember the Complainant reporting that splitting sleeper berth time into 5-hour increments violated federal regulations, M. Smith does recall being present during such a conversation about that very topic. CX 4 and 6 reveal that the Complainant logged times indicating he was driving out of compliance with sleeper berth equipped vehicle regulations May 21, 26, June 18, 19 and 23, 2009. J. Wentz reported he had reviewed those logs and only saw one .5 hour violation of the 14-hour rule.

After deliberating on the credible evidence of record, this Administrative Law Judge finds that the Complainant engaged in protected activity on or about July 1, 2009 by reporting to supervisor J. Wentz that the use of sleeper berths in 5-hour increments violated federal regulations.

**II. The Complainant has failed to establish by a preponderance of the evidence that he engaged in protected activity under the STAA on or about September 13-15, 2009, by reporting to superiors the unsafe operation of a commercial motor vehicle by co-driver J. Hill.**

The Complainant testified that on September 13, 2009, co-driver J. Hill was cited by local police for speeding while driving the assigned commercial motor vehicle. He reported that he left a voice mail with R. Baxter and sent an e-mail about the event to R. Baxter who directed him to make safety complaints to J. Wentz. He states he gave J. Wentz the information about J. Hill speeding. He also testified that on September 15, 2009, while checking a load, he reported to R. Baxter and D. Hardy, in person, that co-driver J. Hill had been driving unsafe on the previous trip and was cited for speeding by local police. He reported this was part of a loud argument at the truck with M. Smith asked to go elsewhere. M. Smith testified that he did not witness anyone yelling at the Complainant around the time they left the terminal on September 15, 2009.

Despite submitting numerous September 2009 e-mails in support of his complaint (CX 11 and 17), there is no mention of the speeding citation issued J. Hill (CX 24). There is an e-mail from R. Baxter at 11:56 AM, September 15, 2009 directing the Complainant to discuss safety complaints with J. Wentz (CX 11) but no reference to co-driver's Hill unsafe operation of the commercial motor vehicle. CX 22 has no reference to being stopped by the police on September 13, 2009 or reports to supervisors, such as those placed on CX 23 log sheets. As noted below, J. Wentz denied seeing CX 22 or CX 23 until handed to him at the formal hearing.

J. Wentz testified he did not recall the Complainant calling him the morning of September 15, 2009 to report co-driver J. Hill had received a speeding citation in Tennessee. He testified that he had never seen a copy of the speeding ticket issued J. Hill (CX 24) until handed the document by the Complainant while testifying at the hearing. He reported that drivers are to report traffic convictions within 30 days of the conviction and that Action Expediting runs an annual check on drivers with the DMV and finds out information on all driver convictions. He stated that there was no requirement J. Hill report receipt of a speeding citation without the conviction.

After deliberation on the evidence of record, this Administrative Law Judge finds that the Complainant has not established by a preponderance of the evidence that he made a safety complaint to Action Expediting involving co-driver J. Hill prior to the Complainant's employment being terminated on September 18, 2009.

**III. The Complainant failed to establish by the preponderance of the evidence that he engaged in protected activity under the STAA by reporting on or about September 15, 2009 that he was being forced to falsify his log book by recording on-duty co-driver training time as in sleeper berth time.**

The Complainant testified he left a voice mail with R. Baxter about being fatigued from having to show J. Hill how to drive a truck and be a professional truck driver and received an e-mail back saying that he should take up safety issues with J. Wentz. He reported that he called J. Wentz and reported they were passing tolls and not stopping to pay them because the truck had a device in the bumper to pay tolls. He did not report that he told J. Wentz about being fatigued from training J. Hill or that he was being forced by R. Baxter to falsify his log book. He did testify at the hearing that R. Baxter was helping him falsify his log book about the time he was training J. Hill to be a driver and make deliveries.

The Claimant's testimony involving J. Hill and CX 22 indicate that J. Hill was the Complainant's co-driver on September 13, 2009 and September 14, 2009. CX 22 fails to demonstrate any false log entries or any drive/sleeper berth/off-duty/on-duty violations. It is noted that CX 22 was produced by the Complainant at the formal hearing and was not part of the business records of Action Expediting; that the September 13 and 14, 2009 do not include any notation about false log book entries; and that the September 15, 16 and 18, 2009 entries include detailed notations related to the Complainant's "unfit to drive" allegation the night of September 15, 2009 and termination on September 18, 2009. He also made a notation at 3:30 PM, September 15, 2009 that he met with J. Wentz "about coercion to operate illegally."

This Administrative Law Judge finds, based on the credible evidence of record, notwithstanding the Complainant's statement that he left his paperwork on the dashboard of the truck on September 18, 2009 and it must have blown out the open windows in the bad weather, that CX 22 and CX 23 are not business entry records made at the time of the event but rather merely part of the Complainant's post-employment termination statements which must be considered in light of all the evidence. Accordingly, the self-serving documents are not given much evidentiary weight beyond that of being a post-event statement of the Complainant.

J. Wentz testified that as of September 15, 2009, the Complainant never complained to him about being forced to falsify his log books in order to train another driver and that he was unaware of any evidence to the contrary. He denied receiving a report from the Complainant that R. Baxter was forcing him to falsify his log book during training of drivers. He reported that it was Action Expediting policy that a driver should be doing nothing but getting rest and sleep when not driving. He testified that when he decided to terminate the Complainant's employment he had no knowledge of any allegation of the Complainant being forced to falsify log books.

After deliberation on the evidence of record, this Administrative Law Judge finds that the Complainant has not established by a preponderance of the evidence that he made a safety complaint to Action Expediting supervisors related to being forced to falsify his log books due to cross training co-drivers.

**IV. The Complainant established by a preponderance of the evidence that he engaged in protected activity between 11:30 PM and midnight, September 15, 2009, by not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision.**

Federal regulations at 49 CFR §392.3 provide that no driver shall operate a commercial motor vehicle while the driver's ability or alertness is so impaired through fatigue, illness, or other cause as to make it unsafe to operate the commercial motor vehicle. Under the STAA it is a violation for any person to retaliate against a driver who refuses to operate a commercial motor vehicle while the driver's ability or alertness is so impaired through fatigue, illness or other cause. 42 U.S.C. §31105(a)(1)(B)(i); 29 CFR §1978.102(a) and (c)(1)(i)

The Complainant testified that he called J. Wentz and reported they (the Complainant and co-driver) were passing tolls and not paying them because the truck had a device on the bumper that pays tolls. He reported being told by J. Wentz not to pass anymore toll areas without stopping to pay the tolls and that there would be money for tolls placed on the fuel card before the next scheduled fuel stop. He reported he got to the Memphis fuel stop at 11:00 PM, September 15, 2009; was told by M. Smith that R. Baxter indicated he was going to fire the Complainant for messing up his cross-training program; realized he had red eyes in the bathroom; purchased medication; returned to the truck for fueling; placed the truck information into the fueling system which indicated there was no money on the fuel card; e-mailed R. Baxter of his status; and climbed into the truck after 30-40 minutes of no response from R. Baxter. CX 11 contains an e-mail from the Complainant to R. Baxter at 11:21 PM, September 15, 2009, in which the Complainant stated "Detained as no toll money on fuel card as promised. Need compensation for delay time caused by this error." CX 11 also contains an e-mail from the Complainant to R. Baxter at 11:58 PM, September 15, 2009, in which the Complainant stated "Still standing by for assistance."

The Complainant testified he got back into the driver seat when his computer rang with a call from his wife and soon thereafter got a call from R. Baxter wanting to know why he stopped and about the toll situation. He reported R. Baxter stated toll money would be placed on the fuel card and he should start driving again. He reported that he returned a phone call he missed when his phone fell off his lap and D. Hardy answered the number. He stated he told D. Hardy he had a

head ache, impaired vision and was in no shape to drive. He reported D. Hardy advised him to call 911 to which he replied he had no money, though he knew Action Expediting would pay for whatever was needed, ambulance, motel room, relief driver, and/or transportation. He stated D. Hardy declined to have M. Smith drive him to a hospital and that he was directed to contact R. Baxter when he felt well enough to drive again. He reported there came a time he felt better so he started driving the trip again.

The Complainant testified that they stopped at a truck stop where he obtained money from the fuel card to pay tolls and sent a status report to R. Baxter indicating they were three hours behind schedule because they would not allow M. Smith to drive him to the hospital, would not allow M. Smith to drive the truck, and construction. CX 11 contains an e-mail from the Complainant to R. Baxter at 3:58 PM, September 16, 2009, in which the Complainant stated "Detained and down due my unfit to drive status, due to previous conflicting directives" and an e-mail to R. Baxter at 7:36 PM September 16, in which the Complainant stated "Route currently nearly 3 hrs. behind schedule in light of STAA incident." The Complainant did not mention road construction delays until an e-mail he sent at 8:09 PM, September 16, 2009. The Complainant testified at the hearing that the construction delays occurred while M. Smith was driving the morning of September 16, 2009, before he changed positions with M. Smith. The Complainant stated in CX 23 that he was in the sleeper berth from 5:30 AM to 5:30 PM, September 16, 2009 and that he retrieved \$.40 for tolls from the fuel card at 11:45 AM, September 16, 2009, in six minutes time.

The Complainant testified that M. Smith told him another driver had called to tell him that something was going to happen to the Complainant when they got back to the terminal. The Complainant testified he was driving when they arrived at the terminal; R. Baxter and a sheriff were waiting at the terminal; R. Baxter told him he was fired, to remove his property from the truck, and to leave the site and not return. He stated he would not sign a paper from R. Baxter until he read it; the sheriff took him to the front of the truck and read the paper about not returning to the terminal or it would be trespassing; and he signed the paper for the sheriff. The Complainant testified that he used his printer to complete his logs and paperwork, left the logs and paperwork on the dashboard of the truck, took his personal property, got in his vehicle and left the property. He stated the windows of the truck were down, the weather was windy and drizzling, and that he thought he saw some papers blow out the truck window as he was driving off the property behind the sheriff's car.

The Complainant's wife, A.D. White, testified that she was in contact with her husband through computer video chat beginning between 11:15 and 11:30 PM, September 15, 2009. She stated the Complainant received two telephone calls during the video chat. In one a male voice was asking, why did you stop and about a toll. She reported the Complainant stated he was too ill to drive and that he had a severe headache. She stated the Complainant looked to be in severe pain because his eyes were red and he was holding his head back. She then read scripture and prayed with the Complainant after the first call.

A.D. White testified that the second call rang and the Complainant dropped his phone and called back. The second male voice asked about being stopped, tolls and "fuel something." She stated the Complainant told the second caller he was too ill to drive and the second caller suggested calling 911 for an ambulance, an offer to ride in an ambulance, and offer to call an ambulance.

She reported not hearing an offer for hotel, hospital or relief driver. She reported the second voice did not order the Complainant to take an ambulance, but did suggest one. She stated that when the Complainant was explaining he had no money or medical insurance, M. Smith stuck out from behind the sleeper berth curtain and told the Complainant to “tell them I’ll take you. Tell them let me take you in.” She reported the second voice said “no” to M. Smith taking the Complainant to the hospital but not to taking over driving. She had also testified that she did not hear the Complainant tell the second voice to let M. Smith take him to the hospital. She stated the second voice wanted the Complainant to keep on driving but ended the call by saying, “Well, when you feel better, give us a call.” She testified that she did not hear the Complainant refuse to give the truck keys to anyone and did not observe the Complainant act in a belligerent manner. She stated the video chat ended around midnight.

A.D. White testified that the Complainant told her about being terminated by Action Expediting. She stated that the Complainant did not go to the doctor after his return on September 18, 2009. She reported the Complainant suffered from headaches, stress and sleeplessness prior to working for Action Expediting but not really depression. She reported the Complainant did not take medication for headaches, depression or lack of sleep, but did use “Goody’s” which didn’t help his headaches much. She reported the Complainant continued to have headaches, depression, sleeplessness and stress after being fired by Action Expediting.

J. Wentz testified that when he was brought into the events of September 15-16, 2009, the Complainant had e-mailed him stating that he was sitting in a vehicle, that he refused to move until he received the toll money even after he assured the Complainant he made absolutely sure the money was available. J. Wentz stated he reviewed the e-mails forwarded to him that had been sent by the Complainant to supervisors. He testified the Complainant called him directly and that there was a three-party telephone conversation with D. Hardy also on the call. He stated he instructed the Complainant’s immediate supervisor at the time, D. Hardy, that the Complainant was to be removed from the vehicle and taken to a medical facility to be checked out to make sure he was OK for driving. He stated the Complainant refused to go to a medical facility or have emergency equipment come to the vehicle to check him out. He reported that the Complainant was offered a hotel room to recover from his illness, but he refused. He stated that it was suggested M. Smith take over driving but the Complainant refused to relinquish the control of the vehicle and refused to give the keys to anyone. He stated that M. Smith could have driven the truck but the Complainant’s actions prevented that. J. Wentz testified that the Complainant was very vocal about his conduct and what he was and was not going to do. He stated that since the Complainant refused assistance, they were going to have another truck pick up the Complainant and bring him back to Georgia. He reported that after the Complainant retrieved the funds necessary to continue, his attitude changed and he continued driving. He reported he was responsible to review all log books and that the Complainant never turned in logs for the September 13, 2009 and September 15, 2009 trips (CX 22 and 23).

M. Smith testified that the reason the route was delayed on September 15-16, 2009 was because they did not have money for tolls and were stopped at a Memphis truck stop where J. Wentz was supposed to have money for tolls on the fuel card. He stated that he was in the sleeper berth at the time. He stated the Complainant reported a headache but that he could not tell if the Complainant was ill. He reported the Complainant had several telephone calls with either J.

Wentz or D. Hardy while stopped. He reported he did not observe the Complainant or see any signs of illness. He stated someone told the Complainant to call an ambulance. He stated he offered to the Complainant to drive so the Complainant could get some rest and that the Complainant asked over the telephone if M. Smith could drive him but was told they didn't want me to drive him. He reported they sat in Memphis "maybe about a good two hours and for some unknown reason, we just started driving so we could go ahead and finish the route."

M. Smith testified that he received about four calls from R. Baxter while he was in the sleeper berth at the Memphis truck stop. He stated R. Baxter seemed upset with the Complainant and at one point stated he, M. Smith, would be placed with another driver.

While there are many inconsistencies in the Complainant's rendition of the events at the Memphis truck stop, J. Wentz acknowledged concern for the Complainant's report of being too ill to drive by instructing the Complainant was to be removed from the vehicle and evaluated by medical personnel, either by emergency vehicle personnel at the truck stop or a medical facility. There was also a discussion with J. Wentz, D. Hardy and the Complainant on the telephone about M. Smith taking over the driving duties. Such actions indicate that the Complainant had made a report to his supervisors that he was stopped and was not driving due of illness.

After deliberations on the evidence of record, this Administrative Law Judge finds that the Complainant has established by a preponderance of the evidence that he engaged in protected activity at some point between 11:30 PM and midnight, September 15, 2009, by not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision

**V. The Respondent had actual knowledge of the Complainant's protected activity of (1) reporting to Action Expediting supervisors on or about July 1, 2009 that the practice of splitting sleeper berth time into five hour increments violated federal regulations, and (2) not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision between 11:30 PM and midnight, September 15, 2009.**

The evidence of record established that J. Wentz was the Director of Safety and Risk Management while the Complainant was employed by Action Expediting in 2009. As the Director, J. Wentz reviewed log books of all drivers and reviewed safety issues raised by the 200 employed drivers. The evidence also established that R. Baxter was the Complainant's initial immediate supervisor and D. Hardy was the Complainant's subsequent supervisor. L. Kyle was not a supervisor of the Complainant.

As noted above, the preponderance of the evidence established that the Complainant raised the use of the sleeper berth in such equipped commercial motor vehicles in 5-hour increments as a violation of federal regulation in existence in May and June 2009. He raised this issue with J. Wentz in a speaker phone call on or about June 1, 2009. Accordingly, Respondent Action Expediting is found to have had actual knowledge through its Director of Safety and Risk Management of the Complainant's report that the policy and practice of requiring drivers to split sleeper berth time into 5-hour increments violated 2009 federal regulations at 49 CFR §395(1)(g)(1).

As noted above, the preponderance of the evidence established that J. Wentz was concerned enough about the Complainant's well-being the night of September 15, 2009 that he instructed the Complainant be removed from the vehicle and examined by medical personnel either at a medical facility or at the Memphis truck stop by emergency vehicle personnel. J. Wentz testified that he discussed this course of action while in a three-party telephone call with the Complainant and D. Hardy, the Complainant's immediate supervisor during September 2009.

After deliberation on the evidence of record, this Administrative Law Judge finds that the Respondent had actual knowledge of the Complainant's protected activity of (1) reporting to Action Expediting supervisors on or about July 1, 2009 that the practice of splitting sleeper berth time into five hour increments violated federal regulations, and (2) not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision between 11:30 PM and midnight, September 15, 2009.

**VI. The Complainant is initially entitled to an inference that the September 18, 2009 employment termination was the proximate result of the Complainant's protected activity of (1) reporting to Action Expediting supervisors on or about July 1, 2009 that the practice of splitting sleeper berth time into five hour increments violated federal regulations, and (2) not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision between 11:30 PM and midnight, September 15, 2009.**

An inference of causal connection that an employer has discharged an employee in retaliation for engaging in protected activity may be raised by the proximity in time when an employee discharge immediately follows that employee's engagement in protected activity. *Kahn v. United States Sec'y of Labor*, 64 F.3d 261 (7<sup>th</sup> Cir. 1995); *Wrenn v. Gould*, 808 F.2d 493 (6<sup>th</sup> Cir. 1987) If the evidence raises an inference that protected activity was the likely reason for the adverse action, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6<sup>th</sup> Cir. 1987) If the employer articulates a legitimate, nondiscriminatory reason for the adverse employment action, the ultimate burden of demonstrating by a preponderance of the evidence that the employer's stated reason for the adverse employment action was pretextual and that intentional retaliation was present shifts to the employee. *Roadway Express, Inc. v. United States Department of Labor*, 495 F.3d 477 (7<sup>th</sup> Cir. 2007); *Buie v Quad/Graphics, Inc.*, 366 F.3d 496 (7<sup>th</sup> Cir. 2004); *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1<sup>st</sup> Cir. 1998) This sequence creates an issue of fact: what was the true cause of the discharge? *Roadway Express Inc.* at 482.

In this case, the sequence of protected activity followed in close proximity of time by the adverse employment action gives rise to the inference that the employment termination was causally connected to the Complainant not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision between 11:30 PM and midnight, September 15, 2009.

Since the Complainant is entitled to the presumption that the September 2009 protected activity was causally connected to the September 18, 2009 employment termination, the role of the June

2009 protected activity in the employment termination is addressed in a consolidated manner in the following paragraph VII.

**VII. The Respondent terminated the Complainant's employment on September 18, 2009, for a legitimate, nondiscriminatory, non-retaliatory reason.**

J. Wentz testified that the Complainant's employment was terminated on September 18, 2009 and that he made the decision to terminate the Complainant's employment on September 17, 2009, even though R. Baxter and D. Hardy prepared the termination notice. He stated the reason for termination was unprofessional conduct on the road. He considered the Complainant's actions to be belligerent and a danger to his co-driver and the public. He reported the Complainant's actions on September 15 and 16, 2009 caused a delay in route which was problematic in terms of customer service. He reported the Complainant was scheduled for a meeting on September 18, 2009, but refused to show for the meeting.

Whether the reasoning presented by the Respondent is clear and convincing turns on evaluating the credibility of the evidence of record and the source of evidence.

In this case, the Complainant's version of September 15, 16 and 18, 2009, events are not credible. The Complainant testified that he arrived at the Memphis truck stop, went to the restroom, was informed by M. Smith that R. Baxter was going to fire him, noticed in the restroom that he had become red-eyed, developed a headache and purchased medication, all prior to going to the fuel system and learning that there was no money on the fuel card. He reported he then e-mailed R. Baxter of the problem and waited 30-40 minutes before going back into the truck and sitting in the driver's seat. In his September 15, 2009 e-mails to R. Baxter (CX 11) the Complainant reported in an e-mail at 11:21 PM "detained due no toll money on fuel card as promised" and in an 11:58 PM e-mail he stated "still standing by for assistance." There was no mention of the headache he claimed to have occurred prior to learning of no money was on the fuel card when he returned to the truck. On the log book for September 15, 2009, which the Complainant produced at the hearing (CX 22), he indicated arriving at the Memphis fuel stop at 11:00 PM; "report unfit to drive" at 11:07 PM; "report unfit to drive status" at 11:30 PM; and "medication taken" 11:45 PM. In the September 16, 2009 log book, also produced at the hearing (CX 23), he indicated "completed nearly 15 minutes of phone calls, unfit status improved with medication, rest and prayer, fueling complete" at 00:45 AM and commencing driving from Memphis to West Plains, MO at 00:45 AM.

M. Smith testified that when they stopped at the Memphis truck stop he was in the sleeper berth. His testimony reasonably infers that he remained in the sleeper berth throughout the stop in Memphis and while stopped in Memphis he received four calls from R. Baxter, one involving him being placed with another driver. He stated he told the Complainant at one point that R. Baxter was upset with the Complainant. Since this call was one of four received from R. Baxter while stopped in Memphis and in the sleeper berth, it is unlikely that the Complainant had been told R. Baxter was going to fire him, as claimed, prior to the Complainant arriving at the Memphis truck stop restroom where he claimed to have noticed red eyes and a headache which prompted him to by headache medication and water before returning to the truck and entering truck information into the truck stop fueling system.

Mrs. A.D. White testified to starting a video chat with the Complainant sometime between 11:15 and 11:30 PM September 15, 2009 while the Complainant was in the truck. She reported overhearing M. Smith tell the Complainant someone named Baxter was going to get rid of her husband. This contradicts the Complainant's testimony that he had been told by M. Smith that R. Baxter was going to fire him prior to using the restroom at Memphis truck stop, noticing a headache, obtaining headache medication, returning to the truck, learning about the lack of funds on the fuel card, sending a status e-mail and later having a video chat with his wife while in the truck.

The Complainant submitted CX 22 to support his complaint, but this exhibit says he arrived at the truck stop at 11:00 PM, reported unfit to drive at 11:07 PM and again at 11:30 PM before taking medication at 11:45 PM. This is an unlikely timeframe if the Complainant parked the truck at 11:00 PM, walked to the restroom, observed red eyes and headache, purchased medication, learned of no toll money on the fuel card and then sent a status report by e-mail to R. Baxter. Additionally, the September 15, 2009 e-mails submitted by the Complainant indicate being detained due to no money on the fuel card at 11:21 PM and that he was still waiting for assistance at 11:58 PM. There was no e-mail from the Complainant to R. Baxter about being unfit to drive until 3:35 AM, September 16, 2009 (CX 23), this is nearly three hours after the Complainant indicated in his September 16, 2009 log book at 00:45 AM (CX 23) that his unfit status had improved and only two hours before he reported arriving in West Plains, MO, a delivery location approximately 200 miles from the south Memphis truck stop.<sup>6</sup> CX 22 and CX 23 contradict the Complainant's testimony and allegations.

The Complainant testified that after he had gone to the restroom, purchased medication, returned to the truck, and learned there was no money on the fuel card, e-mailed R. Baxter as to his status, and waiting 30-40 minutes for a reply, he climbed back into the truck and was told by M. Smith that he looked sick. This is contradicted by M. Smith's testimony that the Complainant told him he was sick after they were at the fuel stop for a while and that he did not observe the Complainant or see any sign of illness. The Complainant is also contradicted by Mr. Smith's testimony that at one point he suggested to the Complainant, while he was on the telephone with someone from Action Expediting, that he drive so that the Complainant could get some rest and that when he made the suggestion to take over driving at the Memphis truck stop, he could not tell if the Complainant was sick.

The evidence established that there was a point in time the Complainant and M. Smith were stopped in Memphis when the Complainant informed D. Hardy and J. Wentz he was ill and unfit to drive due to a headache and impaired vision. M. Smith had overheard the conversation at one point and offered to take over driving while the Complainant rested. J. Wentz testified he instructed D. Hardy to have the Complainant evaluated by medical personnel. As noted above, this conversation took place between 11:30 PM and midnight on September 15, 2009. The evidence establishes that no supervisor from Action Expediting directed the Complainant to operate the truck while the Complainant felt ill and unfit to drive. The evidence establishes that the Complainant's supervisors suggested the Complainant call 911 for evaluation by emergency personnel and that when he felt well enough to drive to advise his supervisor.

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<sup>6</sup> www.mapquest.com

The Complainant testified that his supervisors refused to permit M. Smith to drive him to the hospital or to take over driving. Mrs. White testified that M. Smith suggested to the Complainant he drive the Complainant to the hospital and his suggestion to take over driving. She reported hearing an offer from the supervisor for an ambulance but not for a hotel, going to a hospital or a relief driver. She testified that the supervisor said “no” to M. Smith driving the Complainant to the hospital but not to taking over driving. J. Wentz testified that the Complainant refused to have an ambulance or emergency equipment come to the truck stop to evaluate the Complainant’s medical needs and that the Complainant refused to turn over the truck and truck keys to M. Smith so that M. Smith could take over driving the route when suggested by management. M. Smith testified that he could not hear everything involving the Complainant’s telephone conversations while stopped in Memphis. M. Smith testified that someone told the Complainant to call an ambulance and the Complainant asked if M. Smith could drive him. He reported that the individual told the Complainant he did not want M. Smith to drive him. M. Smith’s testimony did not address his suggestion of driving the truck while the Complainant rested or the testimony that the Complainant refused to relinquish control of the truck and keys so that M. Smith could take over driving the route. The Complainant testified that M. Smith offered to take over driving at midnight when M. Smith would have 8 hours of sleeper berth time. The Complainant’s allegation that the supervisors refused to have M. Smith take over driving the route is contradicted by J. Wentz’s testimony and is an unreasonable course of action by a carrier concerned over timely customer deliveries by its drivers when the co-driver had not yet driven any portion of the preceding 8 hours of the September 15, 2009 trip (CX 22). Since M. Smith’s driving logs were not entered into evidence, it is unknown if M. Smith had additional off-duty time prior to departing on the September 15, 2009 route, though M. Smith did testify that he could have taken over driving for the Complainant for a period of time less than 10 hours and the Complainant stated M. Smith had offered to take over driving.

Mrs. A.D. White testified that while she was on video chat with the Complainant, she did not observe the Complainant get belligerent or exhibit any negative demeanor or behavior. Her video chat was of limited duration and did not include the period after hearing the exchange concerning calling an ambulance or being driven to a hospital. Her testimony of the Complainant’s demeanor in the early periods of September 16, 2009 is of limited value.

J. Wentz testified that his decision to terminate the Complainant was based on the Claimant’s unprofessional conduct, refusal to move the truck until money for tolls was made, refusal of medical assistance to ensure he was fit for driving after reporting illness, refusing to relinquish control of the truck to his co-driver and refusal to give the truck keys to anyone else after management suggested the co-driver take over. J. Wentz testified that he ensured the money for tolls was placed on the toll card and that “all of a sudden, after he retrieved the funds necessary to continue” the Complainant changed his attitude and continued his route.

M. Smith testified that they sat at the Memphis truck stop for a good two hours and then the Complainant just began driving. The Complainant submitted log books to reflect arriving at the truck stop at 11:00 PM, September 15, 2009 and beginning to drive again at 00:45 AM, September 16, 2009. He submitted e-mails to R. Baxter with 11:20 and 11:58 time notations. These are consistent with J. Wentz’s version of events that money for tolls were placed on the

fuel card and the Complainant began driving again after retrieving funds from the fuel card. The Complainant's version that he merely sat in the truck until he felt better and then began driving and obtained money from the fuel card after M. Smith had driven to Kansas City is not consistent with his log book entries that he began driving again at 00:45 AM, September 16, 2009 when he recorded his unfit status improved with medication and he had completed fueling; his 3:58 AM, September 16, 2009 e-mail to R. Baxter reporting he was detained and down due to unfit to drive status; and the ability of a truck driver to cover the distance at night from the Memphis truck stop to West Plains, MO at posted speed limits and still arrive at 5:15 AM, September 16, 2009. The Complainant did testify that R. Baxter told him money was on the fuel card, but he did not make clear when this information was presented. Since his supervisors were aware that there were problems with money on the fuel card by midnight, September 15, 2009 and the Complainant reported fueling completed by 00:45 AM, September 16, 2009, the conversation with R. Baxter about money on the fuel card and the Complainant beginning to drive again must have been made after the Complainant completed his video chat with Mrs. A.D. White and after the Complainant had refused medical evaluation and being directed to advise R. Baxter when he was ready to resume driving.

The Complainant's assertion that management refused to let M. Smith take over driving in Memphis is contradicted by J. Wentz's testimony that management suggested to the Complainant that M. Smith take over driving but that the Complainant refused to relinquish control of the truck and keys to M. Smith. M. Smith's testimony is not conclusive with actual personal knowledge of this event beyond his suggested to the Complainant he take over driving the route while the Complainant was talking to management after midnight September 15, 2009.

J. Wentz testified that he wanted a sheriff present when the Complainant returned to the terminal and would be notified he was fired because he had a fear that there would be a conflict between the Complainant and his supervisor from the attitude of the situation. The Complainant testified about the confrontation with R. Baxter on his return to the terminal, his refusal to sign a paper for R. Baxter, and the role the sheriff played in getting him to sign the paper and leave the property. The Complainant's conduct upon his return is consistent with the conduct described by J. Wentz of the Complainant refusing medical evaluation and refusing to relinquish control of the vehicle in Memphis to his co-driver.

In evaluating the Complainant's credibility, it is specifically noted that the Complainant attempted to manipulate purported testimony by deposition of M. Smith prior to the hearing (CX 25 and exhibit 1 attached to CX 8 and RX 4). In his July 29, 2011 deposition before both Parties, M. Smith recanted the truthfulness of CX 25, the manner in which the Complainant presented a completed question and answer document and the manner in which it was signed without reading before an individual without oath or affirmation. Though submitted by the Complainant CX 25 was not admitted into evidence and not considered beyond the issue of the Complainant veracity.

J. Wentz testified that there was no adverse action taken against the Complainant related to his May to July 2009 log books. There is no credible evidence that the Respondent took any adverse action against the Complainant for reporting that use of the sleeper berth in 5-hour increments violated federal regulations in May to June 2009.

After deliberation on the credible evidence of record, this Administrative Law Judge finds that the Complainant is not credible and that the Respondent has established that no adverse actions were taken against the Complainant for reporting the 5-hour incremental split of sleeper berth time violated federal regulation then in effect and that the Complainant's employment was terminated on September 18, 2009, for legitimate, nondiscriminatory, non-retaliatory reasons independent of his earlier protected activity of (1) reporting to Action Expediting supervisors on or about July 1, 2009 that the practice of splitting sleeper berth time into five hour increments violated federal regulations, and (2) not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision between 11:30 PM September 15, 2009 and 00:45 AM, September 16, 2009.

**VIII. The Complainant has failed to establish by a preponderance of the evidence that the employer's stated reason for the September 18, 2009, employment termination was pretextual for retaliation for engaging in protective activity under the STAA.**

The Complainant argued that his refusal to drive while impaired the night of September 15, 2009 and his complaints about splitting sleeper berth time upset delivery schedules and was a motive for retaliation by Action Expediting.

After deliberations on the credible evidence of record, this Administrative Law Judge finds that the Complainant's argument is without merit. The Complainant contradicted himself through his own testimony and his written documents. He is contradicted by M. Smith and J. Wentz. His refusal to accept medical treatment and then noting he has improved, finished fueling and resumed driving by 00:45 AM, September 16, 2009, undermines his claim of illness. While his wife reported the Complainant looked ill over her video chat, which ended around midnight, September 15, 2009, his co-driver testified he did not observe the Complainant as being ill.

The Complainant reported being three hours behind schedule and tried to blame in on STAA violations and road construction. This is inconsistent with his report of making a scheduled stop, and resuming driving 1-3/4 hours later, after discussions with supervisors about tolls and illness and fueling the truck. It is also inconsistent with the evidence that demonstrates that the Complainant failed to act in a reasonably prudent manner at the Memphis truck stop prior to midnight September 15, 2009. M. Smith testified that he offered to take over driving the delivery route so that the Complainant could recover from his self-proclaimed illness. Mrs. A.D. White testified she overheard M. Smith offer to drive the Complainant to the hospital and to take over driving the route. She reported that the request to drive the Complainant to the hospital was denied but the offer to take over driving was not denied. Since she stated her video chat ended around midnight, the Complainant was aware that M. Smith was available to drive no later than midnight, September 15, 2009. Additionally, J. Wentz testified that the Complainant was told to turn the truck keys and the truck over to M. Smith so the delivery route could continue but the Complainant refused. All evidence supports the finding that the Complainant sat in the driver's seat without moving for at least one hour after he was aware M. Smith was available to drive the delivery route and after being ordered to turn the truck over to M. Smith. The delays in delivery after midnight September 15, 2009 are due to the Complainant's inappropriate actions which interfered with the scheduled delivery service. Complainant's statement that road construction

also played a part in the three hour route delay is given no weight due to the lack of Complainant's credibility and corroborative evidence.

This Administrative Law Judge finds that the Complainant has failed to establish by a preponderance of the evidence that his September 18, 2009 employment termination directed by J. Wentz was a pretext for retaliation against the Complainant for either (1) reporting to Action Expediting supervisors on or about July 1, 2009 that the practice of splitting sleeper berth time into five hour increments violated federal regulations, or (2) not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision between 11:30 PM September 15, 2009 and 00:45 AM, September 16, 2009.

**IX. The Complaint must be denied.**

In view of all the foregoing, the Complainant has failed to establish that the Respondent violated the provisions of the STAA. Accordingly, the complaint must be denied.

**X. The Complainant is not entitled to the requested relief of reinstatement, back pay, compensatory damages, punitive damages, interest, costs incurred, expungement of personnel records, or other relief under the STAA.**

In order to be entitled to reinstatement, compensatory damages, attorney fees and/or legal costs associated under the STAA, the Complainant must have established that the Respondent had taken adverse employment action against the Complainant in violation of the STAA due to his protected activity of complaints related to violations of sleeper berth time requirements or not driving a commercial motor vehicle while ill.

After deliberation on the credible evidence of record, this Administrative Law Judge finds that the Complainant has failed to establish that a violation of the STAA occurred in this case. Accordingly, the Complainant is not entitled to reinstatement, compensatory damages, attorney fees and/or legal costs associated with this complaint.

**CONCLUSION AND FINDINGS OF FACT**

After deliberation on all the evidence of record, including post-hearing briefs of counsel, this Administrative Law judge finds:

1. Throughout 2009 the Respondent was engaged in interstate trucking operations and operated commercial vehicles on the highways in commerce with a gross vehicle weight rating of 10,001 pounds or more.
2. The Complainant was an employee of Respondent from May 2009 through September 18, 2009, and operated commercial motor vehicles with a gross vehicle weight rating of 10,001 pounds or more on the highways in interstate commerce.
3. The Complainant was subject to an adverse employment action on September 18, 2009, in the form of termination of employment.

4. The Complainant engaged in protected activity under the STAA by reporting to Action Expediting supervisors on or about July 1, 2009 that the practice of splitting sleeper berth time into five hour increments violated federal regulations at 49 CFR §395.1(g)(1).
5. The Complainant failed to establish by a preponderance of the evidence that he engaged in protected activity under the STAA on or about September 13-15, 2009, by reporting to superiors the unsafe operation of a commercial motor vehicle by co-driver J. Hill.
6. The Complainant failed to establish by the preponderance of the evidence that he engaged in protected activity under the STAA by reporting on or about September 15, 2009 that he was being forced to falsify his log book by recording on-duty co-driver training time as sleeper berth time.
7. The Complainant established by a preponderance of the evidence that he engaged in protected activity between 11:30 PM and midnight, September 15, 2009, by not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision.
8. The Respondent had actual knowledge of the Complainant's protected activity of (1) reporting to Action Expediting supervisors on or about July 1, 2009 that the practice of splitting sleeper berth time into five hour increments violated federal regulations, and (2) not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision between 11:30 PM and midnight, September 15, 2009.
9. The Complainant is initially entitled to an inference that the September 18, 2009 employment termination was the proximate result of the Complainant's protected activity of (1) reporting to Action Expediting supervisors on or about July 1, 2009 that the practice of splitting sleeper berth time into five hour increments violated federal regulations, and (2) not driving a commercial motor vehicle while alleging health and safety concerns from headaches and impaired vision between 11:30 PM and midnight, September 15, 2009.
10. The Respondent terminated the Complainant's employment on September 18, 2009, for a legitimate, nondiscriminatory, non-retaliatory reason.
11. The Complainant failed to establish by a preponderance of the evidence that the employer's stated reasons for the September 18, 2009, employment termination was pretextual retaliation for protective activity under the STAA.
12. The Complaint must be denied.
13. The Complainant is not entitled to relief under the STAA.

## ORDER

It is hereby **ORDERED** that **the complaint is DENIED**.

ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb  
Newport News, Virginia

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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 may be found to have waived 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(b). 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(b).