

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 April 2015

CASE NO: 2012-STA-00061

In the Matter of:

RODERICK A. CARTER,
Complainant,

v.

CPC LOGISTICS, INC., CPC MEDICAL
PRODUCTS, LLC, and HOSPIRA FLEET
SERVICES, LLC,
Respondents.

Appearances: Roderick A. Carter
Complainant, Pro se

Michael F. Harris, Esq.
Harris, Dowell, Fisher & Harris, LC
For Respondent CPC Logistics, Inc.

D. Michael Henthorne, Esq.
Littler Mendelson, PC
For Respondent Hospira Fleet Services, LLC

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act (“STAA” or “the Act”), 49 U.S.C. § 31105 et seq., and the implementing regulations found at 29 C.F.R. Part 1978. Complainant Roderick A. Carter alleges that he was terminated after refusing to drive while fatigued. After a complete review of the record, I find that Respondents did not violate the Act.

Procedural History

Mr. Carter was terminated on October 5, 2011. He filed a complaint naming CPC Logistics, Inc., CPC Medical Products, LLC, (jointly referred to herein as “CPC”) and Hospira Fleet Services, Inc. with the Occupational Safety and Health Administration on December 22,

2011. On September 10, 2012, the OSHA Area Director issued the Secretary's Findings, wherein Mr. Carter's complaint was dismissed because OSHA determined that there was no reasonable cause to find that Respondents violated the Act. Mr. Carter timely filed objections to the Secretary's Findings and a request for a hearing before an administrative law judge.

The case was initially assigned to Administrative Law Judge Alan L. Bergstrom. On January 15, 2014, Judge Bergstrom issued an order denying Respondents' respective motions for summary decision. In the course of that order, however, Judge Bergstrom also dismissed Mr. Carter's complaint to the extent that it was based on his having engaged in the following alleged protected activities: (1) filing a complaint on or about August 11, 2011 with Hospira alleging that the policy of not allowing drivers to take rest breaks during their dispatches was unsafe, (2) filing a complaint with CPC on or about August 16, 2011 alleging that the policy of not allowing drivers to take rest breaks during their dispatches was unsafe, and (3) filing another complaint with CPC at some time after August 16, 2011 alleging that the policy of not allowing drivers to take rest breaks during their dispatches was unsafe. The case was re-assigned to me on the same day.

On February 28, 2014, I held a hearing in Columbia, South Carolina into Mr. Carter's allegations. At that time, Complaint's Exhibits ("CX") 1-3 and Respondents' Exhibits ("RX") 1-37, 47, 48, and 50-54 were admitted into evidence. [Hearing transcript ("Tr.") pp. 9, 13, 15, 51, 85.] Five witnesses, including Mr. Carter, testified. At the conclusion of Mr. Carter's case in chief, both Respondents moved for directed verdicts or for judgment as a matter of law. With respect to Hospira's motion, I examined all of the evidence and found that Hospira was not a joint employer of Complainant, and denied Mr. Carter's complaint as against Hospira on the record. I denied CPC's alternative motions. At the conclusion of the hearing, a schedule for submission of written closing arguments was established, and was later extended. Mr. Carter and CPC submitted written closing briefs, and the matter is ripe for decision.

Summary of Evidence

Testimony of Roderick Carter

Mr. Carter began his truck driving career with Snyder International at the age of 21, and was 43 years old at the time of the hearing. He worked for various trucking companies until 2007, when he started working for CPC. [Tr. pp. 21-22.] When he started with CPC, he was assigned to drive the Rocky Mount leg, driving from Columbia, South Carolina to Rocky Mount, North Carolina and back. [Tr. 22.] The next driver would drive from Rocky Mount to Jacksonville, Florida and back to Columbia. [*Ibid.*] He drove the Rocky Mount leg for about three and a half years, then did one year of the Jacksonville leg until he was terminated. [*Id.*, pp. 22-23.] The Jacksonville leg involved driving a truck from Columbia to Jacksonville, to either the port or the rail yard, and picking up a container to drive back to Columbia. [*Id.*, p. 23.] On Mondays, the driver would drop an empty trailer at the port and then go to the railyard. At other times, the driver would pick up from the port, go to the railyard and pick up the trailer, and drive to Columbia. [*Id.*, p. 35.] At some point during the year he was driving the Jacksonville leg, Complainant started to have problems at work. It started when a co-worker named Kelvin Gordon was teamed up with him for about six or seven months; Mr. Gordon was having

problems staying awake during his day driving and wanted Mr. Carter to leave earlier on his night runs. Mr. Gordon did all the day driving, and Mr. Carter did all the night driving. Mr. Gordon wanted Mr. Carter to leave on his run as soon as Mr. Gordon returned from his own run, and Mr. Carter did not want to do that. [*Id.*, pp. 24-26.] By the time Mr. Gordon started working with Mr. Carter, Mr. Carter was already having problems with CPC; he had filed an EEOC complaint in 2010. [*Id.*, pp. 27-28.]

Even before he started driving the Jacksonville leg, Mr. Carter would get fatigued, and would stop and take breaks. He was not on medication and had no physical problems, and got his full rest, but at a certain point he would get fatigued. Because he was already having problems with CPC, he did not want to have an accident, and he also felt it was unsafe and putting someone else's life in jeopardy if he did not stop and take a break. [Tr., p. 30.] At some point, a dispatcher named Christie called Mr. Carter to ask about a stop at a rest area, and Mr. Carter told her that he had become fatigued and stopped to avoid an accident. He told Christie that he was glad he had stopped, because when he awoke, his stomach had gone bad and if he had been driving he would not have made it to the restroom. [*Id.*, pp. 30-31.] He told Christie that any time he stopped it was because he was fatigued and it had become unsafe for him to drive. [*Id.*, pp. 31-32.] Mr. Carter did not take rest breaks at the port or the railyard in Jacksonville, but only while he was actually on the road. [*Id.*, p. 35.]

At some point after the conversation with Christie, Mr. Carter discussed the matter with Ron Covert, division manager for CPC. He explained to Mr. Covert that the reason that he stopped was because he was fatigued. [Tr., p. 32.] He told Mr. Covert that he was not going to "run over and kill somebody," and that he had plenty of time to make his run. [*Id.*, pp. 32-33.] He spoke with Mr. Covert a second time on the same subject, and it ended up with him and Mr. Covert "exchanging words." [*Id.*, p. 33.] Mr. Carter also had a discussion with Ken Pruitt, and told Mr. Pruitt that he stopped because he was getting fatigued rather than "run over and kill somebody." Mr. Pruitt told Mr. Carter that if Mr. Carter was getting enough rest, he wouldn't have that problem, and Mr. Carter said that he was getting enough rest but that fatigue "just comes." [*Ibid.*] Mr. Carter was driving at night during the time he had the conversations. [*Ibid.*] The company did not have a set turnaround time; they said that the Jacksonville leg should take 12 to 13 hours round trip, but started writing Mr. Carter up when he took 13 hours. [*Ibid.*]

At one point, Mr. Carter got into an argument with Mr. Gordon when he ran out of driving time on his way back from Jacksonville, and Mr. Gordon did not want to come to the truck and drive it the rest of the way. In most cases, when a driver ran out of driving time, the next driver would come out to the truck in their personal vehicles and drive the truck back to Columbia while the first driver drove the personal vehicle back. [Tr., p. 37.] On the day of the argument, Mr. Carter knew that there was going to be a problem with Mr. Gordon, so he called the Ryder shop and asked a manager if one of the mechanics could drive Mr. Gordon to the truck. The manager agreed, and Mr. Carter told Christie, the dispatcher, of the arrangement; Christie approved. Mr. Carter then called Mr. Gordon and told him that a mechanic would drive him to the truck, and Mr. Gordon replied, "Let's have a man-to-man conversation." Mr. Gordon started talking about how Mr. Carter got another driver terminated, and Mr. Carter tried to tell him the arrangements he had made. [*Id.*, pp. 37-38.] The two drivers got into a heated conversation. [*Id.*, p. 38.] Mr. Carter called Christie, who said that Mr. Gordon was going home;

but eventually, Christie told Mr. Carter that Mr. Gordon was coming out to the truck, but Mr. Carter had to leave. Mr. Carter decided he was not going to leave the truck unattended so the company could say that he abandoned it. [*Id.*, pp. 38-39.] Mr. Carter was asked to write a statement about the events, but was not written up. [*Id.*, pp. 39-40.]

Mr. Carter stopped for rest breaks only a few times during August and September. He was terminated on October 6 when he returned a call from Mr. Covert. When he asked Mr. Covert why he was being terminated, he was told it was because he was unable to do his job, and that Mr. Covert would put the rest of it in writing. [Tr., p. 41.]

The only protected activity in which Mr. Carter engaged was stopping for rest breaks. [Tr., p. 43.] Mr. Covert had instituted a rule change requiring drivers not to leave unattended loaded trailers in the yard, and Mr. Carter believed the rule change was directed at him. He called Christie and asked to speak to a Hospira manager, and was directed to Scott Worthington. [*Id.*, p. 44.] Mr. Carter told Mr. Worthington that CPC didn't want him to stop and take rest breaks, and explained how that was unsafe and that he didn't want to run anybody over. [*Id.*, pp. 44-45.] He said, "I'm bringing safety issues direct to you, I'm concerned about this." [*Id.*, p. 45.] Mr. Worthington told him to have the same conversation with Mr. Covert. [*Ibid.*]

The letter that Mr. Carter received after Mr. Covert told him he was terminated referred to Mr. Carter's delaying the run, that Mr. Carter had heated exchanges with Hospira, Mr. Covert, and other drivers, and that he was causing problems in the relationship with Hospira. The letter mentioned 25 incidents in the last 30 months, but with no details. [Tr., p. 47.] The letter did say he was insubordinate for not returning a phone call, and that he was the only driver who experienced numerous unexplained delays. [*Id.*, pp. 51-52.] It additionally said that Mr. Carter had shown a pattern of insubordination by refusing to take phone calls, engaging in heated exchanges with CPC management and the customer, and a disregard for overall policy. [*Id.*, p. 52.] Mr. Carter believes that an additional reason for termination was that Mr. Gordon sent Cathy Kiely the email identified as CX 1. [*Id.*, p. 53.] Any reason for termination other than what was contained in the letter would be an "assumption" on his part. [*Id.*, p. 56.]

At the time he was terminated, Mr. Carter was earning about \$1,100.00 per week before taxes, with about \$800.00 per week as take-home pay. [Tr., p. 48.] Since his termination, he has had no work, although he has been looking for driving jobs. He sends out three to five job applications per month, although he was required to make four contacts per week while he was collecting unemployment insurance from the state of South Carolina. [Tr., pp. 48-49.] Mr. Carter does not think he could work for CPC again after his experiences there. [*Id.*, p. 50.]

Other than weekly trip manifests, Mr. Carter does not have information from the personnel files of any other CPC drivers. [Tr., pp. 57-58.] He has no personal knowledge of whether CPC disciplined any other drivers, or whether other drivers committed any of the same infractions alleged against him. [*Id.*, p. 58.] He has no first-hand knowledge whether any CPC drivers falsified their DOT logs, failed to return phone calls, had heated exchanges with management or other employees, or how long it took other drivers to drive to Jacksonville and back. [*Id.*, pp. 58-59.] Although he has seen other drivers at rest stops, he has no first-hand knowledge of what they were doing or why they had stopped. [*Id.*, pp. 60-61.]

Exhibit 52 consists of Mr. Carter's trip logs. [Tr., p. 61.] He did not record on his trip reports that he had stopped to take a nap, and did not recall receiving instructions from Mr. Covert about the importance of keeping accurate manifests and making sure the manifests matched the computer log at all times. [*Ibid.*] Respondents' Exhibit 13, a letter dated August 18, 2011, documents a conversation that Mr. Carter had with Mr. Covert regarding his logs. According to the exhibit, Mr. Covert reminded Mr. Carter that the driver log and the weekly trip report must match, and that all daily events must be logged as accurate; that Mr. Carter was warned that he could be held liable if there were an accident and his logs were falsified. According to Mr. Carter, Mr. Covert said only that the logs only need to match when he was recording duties like the pre-trip inspection and fuel stops. [*Id.*, pp. 63-64.] Mr. Carter did not receive the August 18 letter, although his correct address appears on it and it was the same address to which his termination letter, which he did receive, was sent. [*Id.*, pp. 64-65.] Mr. Carter did not, at any time during his four-and-a-half-year employment with CPC, record that he stopped and took a rest break. [*Id.*, p. 65.] At the time of the conversation about the DOT logs, Mr. Carter served a five-day suspension. [*Id.*, pp. 65-66.] He had told Mr. Covert that he was performing a pre-trip inspection of his truck before he logged on, so that he would have enough time to do the full Jacksonville run, and doing so was a violation of DOT regulations, could put Mr. Carter and CPC at risk, and could be a serious problem for both him and the company. [*Id.*, pp. 67-68.]

Mr. Carter did not record his rest breaks in the trip manifests because he did not get paid for stopping at the rest area. On the trip manifest, he would put down fuel stops and other paid stops, because the weekly trip sheet was the pay sheet – what the driver gets paid for. [Tr., p. 68.] He was never asked to work with less than 10 hours of off duty time. [*Id.*, pp. 68-69.]

Mr. Carter generally worked a fixed schedule starting at 2:00 a.m., except that on Mondays he sometimes started at 5:00 a.m. or later, if the train was delayed. He was home every day at the end of his shift. He did not have to sleep in the cab of his truck or in a motel, although he is aware that other drivers in the trucking industry have to do so and he has done so in previous jobs. [Tr., pp. 70-71.]

Respondents' Exhibit 21 is a letter regarding a citation that Mr. Carter received from the state of Florida for having an expired fuel sticker. He recalls getting the citation, but does not recall receiving the letter, which bore the same address as RX 13 and his termination letter. [Tr., pp. 71-72.] He missed the expired fuel sticker in his pre-trip inspection. [*Id.*, p. 73.] Exhibit 21 also includes an entry related to a complaint from Cathy Kiely about how Mr. Carter spoke to her on July 7, 2010. [*Ibid.*] It also includes an entry about Mr. Carter having been found guilty by Mr. Covert of log falsification, resulting in a five-day suspension. [*Id.*, p. 74.] In addition to the five-day suspension, Mr. Carter was directed by Mr. Covert to undergo remedial log training, according to RX 13; however, Mr. Carter did not recall receiving a letter from Mr. Covert telling him to do so. He took steps to undergo the training after Mr. Covert called him and told him to complete the training by January 25. [*Id.*, pp. 74-75.] Mr. Carter did not recall receiving two letters telling him to undergo remedial training, but did recall receiving one dated January 4, 2011 (RX 18). Mr. Carter did take the remedial training on January 12, 2011, according to RX 19. Mr. Carter denied knowing about the requirement for remedial training any time between the

date of the log violation in July 2010 and his conversation with Mr. Covert in January of 2011. [Tr., pp. 75-77, 121.] RX 21 also referred to the occasion on which Mr. Carter drove with an expired fuel tax sticker, and informed Mr. Carter that “This type of poor duty performance cannot be tolerated. Your inability or unwillingness to follow company policies and procedures must end now,” with “now” in capital letters. RX 20 also included the language, “I encourage you to turn this negative performance trend around immediately,” with the word “immediately” in capital letters. Mr. Carter did not remember receiving the letter. [*Id.*, pp. 77-78.]

Respondents’ Exhibit 20, a letter dated December 17, 2010, involves a violation by Mr. Carter of the hours of service regulations. He drove 11 hours and one minute, when he is permitted to drive only 11 hours. He explained that he completed his run within 11 hours, but had to spend an extra minute moving the truck to allow another truck to get into the parking lot. [Tr., pp. 77-78.]

Respondent’s Exhibit 28 is a memo dated August 6 to all drivers from Mr. Covert with five bullet points. It is correct that Mr. Covert said in the memo that he was concerned with drivers leaving trailers unattended at the Ryder facility. It is correct that the memo indicates that there were complaints about relay partners reporting to work after the ETA provided by their partners, and that all drivers should report to work before their relay partner’s departure from the Ryder shop. In effect, he was saying that drivers should be at the facility when their relay partners arrive. It is also correct that the memo indicates that Mr. Covert was concerned about drivers taking frequent and extended rest breaks that were required because the drivers did not get proper rest before reporting to work, and drivers needed to report to work properly rested; that he was concerned about late deliveries caused by the extended breaks and reporting late for work; that he wants the relay operation to be completed in a safe, efficient manner, and that all drivers were to report for duty no later than 2:00 a.m. on Monday mornings. Mr. Carter did receive a copy of the memo. [Tr., pp. 78-81.]

Respondent’s Exhibit 31 is a letter from Mr. Covert to Mr. Carter regarding Mr. Carter’s failure to return a voice mail message left for him by Mr. Covert regarding a change to the work schedule. Mr. Carter received the letter, but did not admit either talking to Mr. Covert or receiving a message from Mr. Covert. He only found out about the change in work schedule from other drivers. [Tr., pp. 81-82, 119-120.]

With respect to his job search, Mr. Carter did not bring any documentation to the hearing. In the state of South Carolina, paperwork must be turned in to the government showing that a job search was conducted.

Mr. Carter considered himself an employee of both CPC and Hospira. His paycheck came from CPC Logistics, but he faxed the paperwork for his pay to Hospira. He put the hard copy of the paperwork in a box at Rocky Mount, and a driver would take it to Wisconsin where Hospira is. When he called to speak with Christie, she would say, “This is Hospira,” and when she left a voice message, it would say, “This is a Hospira voice message.” [Tr., pp. 41-42.] All the freight that Mr. Carter picked up was Hospira freight, Hospira’s name was on the truck, and the electronic logs show Hospira as the carrier. [*Id.*, p. 43.] Mr. Carter was present at the depositions of Cathy Kiely and Christie Olson, both of whom said they were employees of CPC

Logistics. [Tr., pp. 83-86.] Mr. Carter was hired by CPC in 2007, and has never been a direct employee of Hospira. At the time of his termination, his direct supervisor was Ron Covert, who said he was an employee of CPC. [*Id.*, p. 88.] Every letter he got from Mr. Covert was on CPC letterhead. Mr. Covert's direct supervisor was Ken Pruitt, who is a CPC employee. Mr. Carter's paychecks came from CPC, and there was no mention of Hospira on his pay stubs. His insurance and benefits came from CPC. [*Ibid.*] During the period of his employment with CPC, if Mr. Carter had a problem, he would call Christie Olson, and he has no evidence that Ms. Olson is not a CPC employee. [*Id.*, pp. 88-89.]

Mr. Carter spoke with other dispatchers, including Cathy Kiely and another person named Rose. He understands that they said in their depositions that they are employees of CPC, but on some paperwork it has "Hospira" beside Christie's name. [Tr., p. 89.] Mr. Carter does not know whether Hospira was CPC's customer, but he knows he was driving Hospira trucks and filling out Hospira reports. [*Id.*, p. 90.]

Mr. Carter testified that at his deposition, he had listed all the reasons he believed that Hospira was a joint employer with CPC. First, he said that the truck belonged to Hospira, and the truck had Hospira's name on it. He does not have paperwork showing who actually owned the truck; however, Hospira represents on its website that it owns a number of trucks and trailers, and that it saves money on fuel by having the trucks governed to 59 miles per hour. The federal logs that are turned into the Department of Transportation list Hospira as the carrier and the shipper. [Tr., p. 92.] In addition, Hospira paid for the fuel. [*Id.*, p. 95, 122-125.]

When Mr. Carter reported to work for CPC, he went to the Ryder truck shop. He believes, but doesn't know, that Hospira leases its trucks from Ryder. [Tr., p. 93.] It was his understanding that all the freight he picked up and delivered was owned by Hospira. [*Id.*, pp. 93-94.] The bills of lading, fuel tickets, and vehicle inspection reports had Hospira's name on them, and when he interacted with other individuals at the Ryder shop, at the port of Jacksonville, and at the railyard, they addressed him as if he worked for Hospira. [*Id.*, p. 94.] Mr. Carter did not work on the days that Hospira did not have trailers. [*Id.*, p. 95.] The trailers he did pick up said "Crowley" on the side, but he is not a joint employee of Crowley or of Ryder. [*Ibid.*] He believes Hospira was his joint employer because he hauled Hospira freight, he filled out his log sheet and inspection sheets for Hospira, and represented Hospira the whole time he was working. [*Id.*, p. 111.]

Mr. Carter faxed his pay sheets to a Hospira place in the 262 area code, to the same place where Cathy Kiely and Christie Olson worked. On two occasions, he called Christie and asked her to speak to Scott, and Christie either put Scott on the phone or turned around and asked him a question. [Tr., pp. 96-97.] When he called Christie on August 11, 2011, he asked to speak with a Hospira manager and was connected with Scott Worthley and complained about the change of work rules. [*Id.*, p. 102-103.] He believes that the real-time computers in the trucks were Hospira's computers, because the printouts from the computers have Hospira's name on them. [*Id.*, p. 98.] He has no document that would show that the computers belonged to Hospira, were installed by Hospira, or transmitted information to Hospira. [*Id.*, p. 99.]

Mr. Carter does not know whether Hospira participated in or had any input into decisions regarding his discipline. [Tr., p. 103.] He does not know who made the ultimate decision to terminate him, but he did know that John Obereiner from Hospira told Ken Pruitt, the CPC division manager, that Mr. Carter did not show up for work on time on October 5, 2011. [*Id.*, pp. 103-104.] Mr. Pruitt did not give Mr. Obereiner any instructions on what to do about Mr. Carter, but in his opinion, the department manager doesn't send an email to the division manager without expecting something to happen. [*Id.*, p. 104.] In addition, Scott sent an email to Ron saying that the dispatchers were complaining about Mr. Carter, and it was time for either an attitude change or an employment change. [*Id.*, p. 112.] Finally, CPC argued in an EEOC proceeding commenced by Mr. Carter that it did not discriminate against him, but only did what Hospira wanted it to do. [*Id.*, pp. 113-115.]

Mr. Carter agreed that if he were the owner of a warehouse containing medical equipment that he also owned, and he hired CPC to transport his products, he would want to know where the products were at any given time. He would also want to know about who was affecting his operations by transporting his products. [Tr., p. 115-116.]

Respondents' Exhibit 21 refers to training, poor customer service, and being rude to dispatch. Mr. Carter denied being rude to anybody, and in fact, testified that it was dispatch who hung up on him, twice. He does not know what the reference to poor customer service means. [Tr., p. 117.] There was never a time that his taking rest breaks caused him to be any later than he was on days when he had to wait for the train, when he would get back at 7:00 or 8:00 at night. When he took rest breaks, he always completed his run within his 14-hour period at 3:00 or 4:00. Arriving at that time inconvenienced the next driver, but did not disrupt the service to or from Jacksonville. [*Id.*, p. 118.]

Testimony of Kelvin Gordon

Kelvin Gordon was hired by CPC Logistics in February of 2010, and assigned to Columbia, South Carolina. [Tr., p. 146.] His initial assignment was to the Columbia-Rocky Mount run. He was assigned to the Jacksonville, Florida run in April or May of 2012. At the time he was making the Rocky Mount run, Mr. Gordon's partner was Complainant Roderick Carter. [*Id.*, pp. 146-147.] His average time to make the run at the time of the hearing was 12 to 12½ hours; before the institution of mandatory lunch breaks, it took 11½ to 12 hours. The drive time from Columbia to the Crowley Terminal at the Jacksonville Port is five hours, and to the Florida East Coast Railyard was five and a half hours. [*Id.*, p. 147.] Mr. Gordon normally takes a five- or ten-minute break on the way to Jacksonville, and a 15-minute to half-hour break on the way back. Even with those breaks, he was able to make the round trip run in 11½ to 12 hours. [*Ibid.*] Currently, the train is late 1-3 times per week, making the start time 5:00 a.m.; when Mr. Gordon was working with Mr. Carter, the train was late once a week or once every two weeks. [*Id.*, pp. 148-149.] Mr. Gordon was able to stay on a fairly regular schedule when making the Jacksonville run; he was able to get proper rest and did not find the need to take frequent rest breaks. [*Id.*, p. 149.]

The Rocky Mount driver and the Jacksonville driver coordinate between themselves. Each driver calls his teammate an hour to an hour and a half before arriving at the terminal, so

that the relief driver could be at the terminal and take over the truck when the driver arrives. [Tr., pp. 149-150.] Mr. Gordon was never disciplined or criticized for taking a rest break. When Mr. Carter was his partner, Mr. Gordon would start driving at about 4:00 p.m., but sometimes by Friday, it would be anywhere from 7:00 to 9:00 p.m. before he started. Normally, the Rocky Mount driver would stay at around 2:00 to 3:00 p.m. for a start time. [*Id.*, p. 150.] Mr. Gordon's start times deviated from the normal times when he was teamed up with Mr. Carter, because Mr. Carter would take 14 hours to complete his run; then Mr. Gordon would take 10½ hours; then Mr. Carter would take another 14 hours, so that Mr. Carter essentially added an hour to Mr. Gordon's start time each day. [*Id.*, pp. 150-151.] On most nights, when Mr. Gordon called in an hour before arrival at the terminal, Mr. Carter would not be there when he arrived. He had to wait 30 minutes on average for Mr. Carter to arrive. When he switched to the Jacksonville run, Mr. Gordon was able to keep on schedule with teammates other than Mr. Carter. [*Id.*, p. 151.] When Mr. Carter took 14 hours to complete his run, he was operating within the 14-hour legal work day, but it but Mr. Gordon's schedule out of whack. [*Id.*, p. 152.] Leaving later and later each day was frustrating, and made it difficult for him to complete his run. It also affected his relationship with Mr. Carter. [*Ibid.*] Mr. Carter was late on Monday mornings, even though the truck had been out of service over the weekend. [*Id.*, p. 152.]

Mr. Gordon spoke with Mr. Carter about the issue on several occasions. [Tr., p. 151.] When he started becoming frustrated with Mr. Carter, he talked to him about not leaving at 2:00 a.m., the predetermined departure time observed by the other drivers. Mr. Carter was leaving at 3:00 a.m. instead; when Mr. Gordon spoke to him about it, Mr. Carter said that he was going to leave at a time that allowed him proper rest. [*Id.*, pp. 153-154.] Mr. Gordon was frustrated by Mr. Carter's response, which he took as a refusal by Mr. Carter to cooperate with him to get the starting time to where it should be. [*Id.*, p. 154.] Mr. Gordon does not recall any complaints by Mr. Carter about the regular schedule. [*Id.*, pp. 154-155.]

After speaking with Mr. Carter about the issue, Mr. Gordon started to involve Mr. Covert. When he spoke to him, Mr. Covert said that he would look into it. When things didn't change, Mr. Gordon made a few more complaints to Mr. Covert. Mr. Covert asked Mr. Gordon to keep him informed, but Mr. Gordon wasn't aware of any actions taken by Mr. Covert to correct the situation. [Tr., p. 155.] Through phone calls, text messages, and emails, Mr. Gordon kept Mr. Covert informed of the days that it took an extended time for Mr. Carter to make his run, as well as the mornings that Mr. Carter was not there to take over the truck when Mr. Gordon arrived at the terminal. [*Id.*, p. 156.] Mr. Gordon eventually told Mr. Covert that he thought Mr. Carter was being spiteful because he complained about Mr. Carter not starting on time. Before Mr. Gordon complained, Mr. Carter was not extending his run, but was not leaving on time; after Mr. Gordon complained, Mr. Carter extended the time to make his run. [*Ibid.*] Eventually, Mr. Gordon's frustration reached the point that he and Mr. Carter had words about the schedule. On one Friday evening, Mr. Carter ran out of drive time and had to stop short of the terminal in Columbia. Mr. Carter called Mr. Gordon and told him that he had arranged for someone to drive him to the truck. Mr. Gordon tried to talk to him about being a little more reasonable with his time, and stop what he was doing. Mr. Carter got a little excited and said some things that made Mr. Gordon feel that he should not engage with Mr. Carter at the side of the road. Mr. Gordon was concerned about his safety. [*Id.*, p. 157.] Mr. Gordon asked Mr. Carter if he wasn't concerned about jeopardizing his job, and Mr. Carter replied, "If Ron could've fired

me, he would've done it by now." [*Id.*, pp. 157-158.] Mr. Gordon reported this conversation to Mr. Covert and to Ken Pruitt that evening, and was told to describe the event in an email. [*Id.*, p. 158.] He did so, and RX 26 is the email that he sent. [*Id.*, p. 159.] Mr. Carter raised his voice to Mr. Gordon during that discussion, and that caused Mr. Gordon to be concerned about meeting him at the truck. [*Id.*, pp. 159-160.] He arranged for a ride to the truck from a neighbor, who drove him there; he waited some distance away until Mr. Carter's ride arrived to pick him up, and the Mr. Gordon approached the truck. [*Id.*, p. 160.] Within a couple days of that incident, a memo to all drivers was issued. [*Ibid.*]

Mr. Gordon does not recall whether Mr. Davis, his next partner after the departure of Mr. Carter, was there waiting every time Mr. Gordon arrived at the terminal. He did not keep a time log of the time that he arrived before Mr. Davis arrived. [Tr., p. 161.] He did not call in and complain about Mr. Davis not being there when Mr. Gordon arrived. [*Id.*, p. 163.] Mr. Gordon did leave loaded trailers unattended in the yard. [*Id.*, p. 161] He was not disciplined for doing so, because when he did, it was on evenings when the morning driver was waiting for the train. [*Id.*, p. 162.] Exhibit 52 identifies several occasions on which Mr. Gordon arrived at the terminal and Mr. Davis was not there, but Mr. Gordon did not complain about Mr. Davis's absence or keep a log. [*Id.*, pp. 164-174.]

Mr. Carter was late more frequently than Mr. Davis was when working with Mr. Gordon. Mr. Carter was late pretty much every day. [Tr., pp. 174-175.] Mr. Davis did not take the same length of time to drive to Jacksonville and back that Mr. Carter did. If Mr. Davis left at 1:45 a.m. or 12:50 a.m., it would not affect Mr. Gordon's schedule; in fact, Mr. Davis was getting ahead of the schedule with his departure times. [*Id.*, p. 175.] The problem with Mr. Carter was that he was pushing the schedule back, and Mr. Gordon was not as concerned with Mr. Davis because he was not doing that. [*Id.*, pp. 175-176.] Mr. Davis never told Mr. Gordon that he was going to take his time going to Jacksonville and back. [*Id.*, p. 178.] Both Mr. Gordon and other drivers left unattended trailers on the Ryder lot, but he was not disciplined for doing so and he was not aware of any other driver, including Mr. Carter, being disciplined for doing so. [*Id.*, pp. 176-177.] One of the reasons that CPC did not want drivers leaving for Jacksonville before 2:00 a.m. was that they may arrive in Jacksonville before the port opens, and then run out of driving hours before making it back. [*Id.*, p. 177.]

The Jacksonville driver gives handwritten manifests to the Rocky Mount driver, who takes them to Rocky Mount and puts them in a locked drop-box there. [Tr., p. 178.] Mr. Gordon believes that another driver picks them up and takes them to the dispatchers in Wisconsin. To Mr. Gordon's knowledge, the handwritten logs are not sent directly to Mr. Covert. [*Ibid.*] Mr. Covert might learn that a driver was late either from complaints from another driver, or from the dispatchers in Wisconsin. [*Id.*, pp. 178-179.] Mr. Gordon never complained to Mr. Covert that Mr. Davis was late. [*Id.*, p. 179.]

Testimony of Ron Covert

Mr. Covert is the regional manager for CPC Logistics, supervising about 150 drivers in a three-state area that includes Columbia, South Carolina. He reports to Ken Pruitt [Tr., pp. 180-181.] He was Mr. Carter's immediate supervisor when Mr. Carter worked for CPC, beginning

when Mr. Covert started his job in October of 2007. [*Ibid.*] He has been in the transportation industry for about 30 years. [*Id.*, p. 181.] Respondents' Exhibit 1 is a job description for drivers assigned to the Hospira private fleet, and it purports to describe the nature of Mr. Carter's job. [*Id.*, pp. 181-182.] One of the job requirements is that the driver must be able to sit and remain alert while driving for an aggregate period of up to 11 hours, which is the legal limit for drive time. [*Id.*, p. 182.] RX 2 is the uniform rules and regulations for drivers assigned to Hospira terminals including Columbia, South Carolina. It applies to all drivers in the Columbia operation. Mr. Covert has the responsibility for enforcing the rules. [*Ibid.*] RX 3 is a receipt signed by Mr. Carter acknowledging that he received a copy of the work rules on June 16, 2008. [*Id.*, p. 183.] Mr. Carter did not comply with all the rules; he had several infractions, including hours of service violations, general logging violations, reporting late to work, communicating improperly, and being unavailable. He did not interact well with others. [*Ibid.*] His interaction with Mr. Carter made him think that Mr. Carter thought he was above the rules; that he was always right and Mr. Covert was always wrong, and the world was out to get him. [*Ibid.*] Frequently, his conversations with Mr. Carter got heated because Mr. Carter didn't want to hear what Mr. Covert had to say, and didn't want to do the job the way he was supposed to do it. [*Id.*, pp. 183-184.] He resisted Mr. Covert's authority, which Mr. Covert believed was insubordinate behavior. [*Id.*, p. 184.] Mr. Covert had also received complaints from dispatch of Mr. Carter's belligerence and his tendency to be very argumentative over policy. [*Id.*, p. 186.]

Mr. Covert never disciplined any driver for leaving trailers unattended. Hospira wanted the trailers attended at all times, if it was feasible to do so operationally. It made operational sense to leave a trailer unattended a driver was delayed at the railyard, or if a driver were to leave early from Columbia and incur wait time at Jacksonville. [*Tr.*, p. 184.] No drivers, including Mr. Carter, were ever disciplined for leaving a trailer unattended, because there were instances when it was necessary. The only requirement was to notify dispatch and get approval. Even if a driver had not obtained approval from dispatch, Mr. Covert did not discipline a driver for leaving an unattended trailer. [*Id.*, pp. 184-185.] Although Mr. Covert recommended termination of Mr. Carter, the fact that Mr. Carter left trailers unattended in the yard did not enter into his decision. [*Id.*, p. 185.]

Respondents' Exhibit 4 is documentation of policy violations by Mr. Carter. [*Tr.*, p. 186.] It addresses speeding violations, logging infractions, and call-in violations. Speeding violations were not a big issue, but there were mistakes not involving falsification on the handwritten and computer generated logs. [*Id.*, pp. 186-187.] In addition, the exhibit documents a conversation that Mr. Covert had had with Mr. Carter about proper call-in procedures, failure to do a driver inspection report, and leaving shipping document numbers off the log. [*Id.*, p. 187.] RX 5 documents similar logging errors and speeding events, and RX 6 is a letter sent to Mr. Carter for failing to follow proper call-in procedures. [*Id.*, pp. 187-188.] The letter included the procedure from the fleet operations manual, because as this was the second event involving call-in procedures, Mr. Covert wanted to make sure that Mr. Carter was aware of the proper procedure. [*Id.*, p. 188.] Mr. Covert's normal procedure in sending such letters was to print it out, print an envelope, sign the letter, put on the postage, and mail out the letter. He assumed that Mr. Carter received RX 6. [*Id.*, pp. 188-189.] RX 7 is an accident determination letter, finding that Mr. Carter had been involved in a preventable accident 15 months earlier. The delay was because it was not a cut-and-dried accident; there were differing versions of what happened and a vague

police report. The company let the police and court actions come to completion before making the determination that the accident was preventable, and the issued the letter. [*Id.*, p. 189.] RX 8 documents a third incident of violating the call-in procedure, on three specific days. [*Id.*, pp. 189-190.] RX 9 documents a logging error violation, where Mr. Carter forgot to enter his miles and did not fill out a vehicle inspection report. [*Id.*, p. 190.]

Respondents' Exhibit 17, a letter dated in November of 2010, reflects that in August of 2010, Mr. Carter had an hours-of-service violation, and Mr. Covert asked him to complete a remedial online training course. [Tr., p. 190.] RX 18, dated January of 2011, reflects that as of January of 2011 Mr. Carter had not completed that training, and Mr. Covert sent him a letter asking him to do so. [*Ibid.*] RX 20 is a letter documenting another hours-of-service violation in December of 2010; this was the incident in which Mr. Carter was one minute over, and explained in his testimony that he had to move his truck. [*Id.*, pp. 190-191.] RX 23 reflects a customer complaint that Mr. Carter failed to make the required call-ins, as required by the fleet operations manual, and makes some reference to an April 29, 2011 letter. RX 22 is the April 29, 2011 letter that Mr. Covert sent to all Columbia drivers reminding them of the call-in procedures. [*Id.*, p. 191.] RX 10 consists of emails reflecting a customer complaint that Mr. Covert received; he met with Mr. Carter to discuss the complaint of poor customer service made by Pete Millar, who was a CPC employee working in Hospira dispatch. [*Id.*, pp. 191-192.] Although Mr. Millar made the complaint, the offended employee was actually Cathy Kiely, the night shift dispatcher. [*Id.*, p. 192.] Mr. Covert met with Mr. Carter to discuss the incident, and the handwriting on RX 10 reflects what Mr. Covert told him. [*Id.*, p. 193.]

Respondents' Exhibit 11 is a random audit that identified some discrepancies between Mr. Carter's logs and his pay manifest. [Tr., p. 193.] RX 12 contains Mr. Carter's explanation of why the logs and pay manifest did not match up; Mr. Covert was concerned by Mr. Carter's response, because it is a DOT requirement to log the events as they occur. [*Id.*, pp. 193-194.]

Mr. Covert wrote RX 13 and mailed it to Mr. Carter. [Tr., p. 194.]

Respondents' Exhibit 14 is a computer-generated log that relates to the issue of log discrepancies, as does RX 15, a handwritten manifest. [Tr., p. 194.] Mr. Covert wrote a "very stern" warning to Mr. Carter in his letter of August 18, suspended Mr. Carter for five days, and asked him to complete remedial training. In the letter, he informed Mr. Carter that all duty events must be logged as they occur, and told him that he could be held liable if some sort of accident occurred and his logs were falsified. [*Id.*, pp. 194-195.] Mr. Covert considered it blatant falsification of the records. [*Id.*, p. 195.]

Respondents' Exhibit 21 is a letter that Mr. Covert wrote to Mr. Carter, listing a number of infractions that showed a definite trend of performance issues. He wanted to "get this turned around." [Tr., p. 195.] Looking at all the events, it appeared that Mr. Carter was not doing his proper pre-trip inspection (as evidenced by failing to notice the expired fuel sticker), was not doing his training, was committing hours-of-service violations, was falsifying his log, was being rude and showing poor customer service. Mr. Covert believed that it showed somebody who was not concerned with doing his job properly. [*Id.*, p. 195.] He encouraged Mr. Carter to end that

type of behavior and turn it around immediately, and placed him on final warning. [*Id.*, p. 196.] The letter entered into Mr. Covert's decision to recommend Mr. Carter's termination. [*Ibid.*]

Mr. Covert knew of issues between Mr. Carter and Mr. Gordon concerning Mr. Carter dragging his feet and coming in late, as well as having verbal confrontations. He spoke with Mr. Gordon about the problems; Mr. Gordon was concerned about Mr. Carter taking longer than normal to complete his work, pushing back Mr. Gordon's schedule. [Tr., p. 196.] By the end of the week, Mr. Gordon would be coming in at an ungodly hour. Mr. Covert asked Mr. Gordon to provide information to him about Mr. Carter's conduct, because Mr. Covert did not have access to manifests or logs. Mr. Gordon kept him informed by text, email, and telephone. [*Id.*, pp. 196-197.] Mr. Covert kept a record of the information provided by Mr. Gordon during July and August 2011, and compiled it into a timeline, RX 35. [*Id.*, pp. 197-198.] Mr. Covert does not recall hearing from anyone else about Mr. Carter's tardiness. He did hear from dispatch about the length of time it was taking to get the work done. [*Id.*, p. 198.] RX 24 is an email from Peter Millar, the CPC dispatch supervisor, concerning an incident where Mr. Carter reported to work late. [*Id.*, p. 199.]

Respondents' Exhibit 25 is an email from Mr. Millar regarding an incident when Mr. Carter was asked by dispatch about his delay, and he told them he wasn't feeling well and was entitled to a break; that if the company pushed the drivers and they had an accident, it would not be good for the company and would fall on the drivers; and that if the DOT were to look at the logbooks and see they were driving without sufficient down time, it would not be good. [Tr., p. 200, 207.] The email reflected that Mr. Carter had stopped for a rest break at 6:00 a.m. for over an hour, and as 6:00 was near the beginning of Mr. Carter's run, he didn't get very far before he had to take an hour-long nap. [*Ibid.*] That concerned Mr. Covert. There was a similar issue with Mr. Williams, another driver, and Mr. Covert gave him a written warning (RX 37), and he took it to heart and did not have further problems taking prolonged breaks. [Tr., pp. 201-203.] Mr. Covert believes that a driver who is tired and needs to stop to refresh himself should do so. [*Id.*, p. 203.] Mr. Williams did the right thing by stopping for a nap, but did not report to work properly prepared to do his job. [*Id.*, pp. 203-204.] Likewise, if Mr. Carter was tired and drowsy, he is doing the right thing if he stops. [*Id.*, p. 204.]

The schedule allowed for the Jacksonville driver to take a couple of rest breaks without affecting the start time of the Rocky Mount driver. [Tr., p. 205.] The Jacksonville drive is about five hours to five hours and fifteen minutes each way, and a driver who took a couple of 10-20 minute rest breaks would keep the Rocky Mount driver on schedule. The Rocky Mount turnaround time was between 9½ and 10 hours, so the total of the two round trips would be about 20½ hours. [*Id.*, pp. 205-206.] That would leave 3½ hours for drivers to load, unload, drop and hook, and take any type of rest breaks they needed. [*Id.*, p. 206.]

Mr. Covert is not aware of any time that any driver was asked to drive after less than 10 hours of off duty time. [Tr., p. 207.] The law requires a minimum of 10 hours. [*Ibid.*]

Mr. Covert was aware of the incident that occurred between Mr. Carter and Mr. Gordon on August 5, and on the next day he issued RX 28, the memo to all drivers regarding customer service. [Tr., p. 208.] The memo contained five bullet points. The first dealt with leaving

unattended loads at the Ryder facility, which was a general violation across the board, sometimes legitimate and sometimes not. The second dealt with relay partners reporting to work later than the ETA provided by their partner; the major offender was Mr. Carter, but there may have been others. The third issue was taking frequent extended rest breaks due to not obtaining proper rest before reporting to work; Mr. Carter and Mr. Williams were the drivers doing that. Another issue was late deliveries caused by extended breaks or reporting late to work; the CPC operation was feeding product to the Gamma facility in Rocky Mount, and it was important to deliver enough material to keep that production process going. Untimely deliveries ultimately would affect their production, and Mr. Carter was contributing to the problem of late deliveries. [*Id.*, pp. 208-210.] The memo also listed expectations of all drivers; one was that all drivers will report to work properly rested before their relay partner's departure. Mr. Covert was concerned because of the instances of drivers coming in and driving for a short period of time, and then having to take a nap, and because of leaving equipment unattended routinely. [*Id.*, p. 211.] Mr. Covert also indicated in the memo that he expected the relay operation to be conducted in a safe and efficient manner. By "safe," he meant coming to work prepared to do the job, going from A to B in a safe, efficient manner, obeying the speed limit, and keeping alert; that included stopping if the driver was fatigued. By "efficient," he meant that if a drive normally takes 5½ hours, then it should take about 5½ hours. [*Id.*, pp. 211-212.]

After the August 6 memo, Mr. Carter's turnaround time seemed to get worse. Mr. Covert continued to get complaints and information about Mr. Carter's scheduling, and there was an additional instance of a communication problem. [Tr., p. 212.] Mr. Covert had called to speak with Mr. Carter about a schedule change, and left a message on his cell phone asking Mr. Carter to call him back. He also tried to leave a message at Mr. Carter's house phone, but it rang with no answer or voice mail. He was unavailable when called, so Mr. Covert sent him a warning letter (RX 31). [Tr., pp. 212-213.] This was not the first problem with Mr. Carter's communications; there had been previous instances of his ignoring the call-in procedures as required under the fleet operations manual. It concerned Mr. Covert that Mr. Carter chose not to return his call. [*Id.*, p. 213.] At around the same time, Mr. Covert got some more information from Mr. Gordon about Mr. Carter's unnecessarily delaying the freight on September 26 and 28. [*Id.*, pp. 213-214.] Mr. Gordon said that Mr. Carter was taking over an hour in breaks. Mr. Covert requested a copy of Mr. Carter's logs for those two dates to verify that information. RX 33 is Mr. Carter's computer log for September 26, and it showed on duty/not driving time of three hours and 22 minutes. Mr. Covert considered that excessive. [*Id.*, pp. 214-215.] RX 34 shows three hours and eight minutes of on duty/not driving time on September 28. Mr. Covert called Mr. Carter and asked him about those two days, and Mr. Carter could not give him a specific reason for the delays. He said that he probably had to go to the bathroom or wasn't feeling well. He did not say that he was too tired to drive, and had to pull over and sleep. [*Id.*, pp. 215-216.] Mr. Covert then prepared a discipline recap (RX 54) and forwarded it to his supervisor, recommending that Mr. Carter be terminated. Mr. Carter was terminated shortly thereafter. [*Ibid.*]

The CPC relay operation involves a driver leaving Columbia every Monday morning at 2:00 a.m., driving an empty trailer to Jacksonville, picking up a load, and bringing it back to Columbia. The relay partner meets the Jacksonville driver at the Ryder shop, takes the load, and

delivers it to Rocky Mount, where he picks up another load and brings it back to Columbia. The process continues all week. [Tr., p. 217.]

Mr. Covert does not recall any specific production delays caused by late delivery of a trailer. [Tr., pp. 217-218.] He also does not recall any occasions when Mr. Carter returned as late as 7:00 or 8:00 at night, which may happen when there is a train delay. [*Id.*, pp. 218-220.] There were times that Mr. Carter was delayed three hours even though he was not waiting for the train. [*Id.*, pp. 220-221.]

The schedule change involved when Mr. Carter did not return Mr. Covert's phone call was put into effect to meet the needs of the production facility. Mr. Covert does not recall specifically what the change was. [Tr., pp. 221-222.] Driving to Port Wentworth meant that the drivers did not have to wait for the containers to be transported from Port Wentworth to the railyard, but could go directly to Port Wentworth and move the material more quickly. [*Id.*, p. 222.] It was a normal day's job if that was what the customer wanted. [*Ibid.*]

Mr. Covert does not know whether Mr. Williams continues to stop and take rest breaks. RX 50-49 shows that Mr. Williams took a rest break from 5:45 to 6:15 on October 3, during the same week that Mr. Carter was terminated. [Tr., p. 223.] Mr. Williams took another break during the same week from 6:00 to 6:45 after starting his run at 2:45. [*Id.*, pp. 223-224.] He took another break from 4:25 to 5:00 after leaving Columbia at 2:15. [*Id.*, pp. 224-225.] Mr. Williams also took a break from 6:50 to 7:15 on a day when he left Columbia at 3:15. Mr. Covert does not regularly see documents such as RX 50, so he does not know when Mr. Williams is taking breaks. [*Id.*, pp. 225-226.] He wouldn't know unless somebody tells him. [*Id.*, p. 226.]

Respondents' Exhibit 51 at page 52 shows driver Moore getting into Columbia at 12:00 and leaving the terminal at 12:10, and Mr. Davis getting to work at 1:00. [Tr., p. 228.] The drivers are expected to remain until their relay partner reports, and Mr. Moore did not wait for Mr. Davis to arrive. [*Id.*, pp. 229-230.] Mr. Covert does not recall whether Mr. Moore was issued a warning letter for being late to work. [*Id.*, p. 230.] On another occasion, Mr. Davis arrived at 12:05 a.m. and Mr. Moore did not arrive until 1:30; Mr. Covert does not recall whether Mr. Moore was written up for being late. [*Id.*, p. 231.] He does not recall whether he disciplined any driver for not reporting timely enough to be present when their relay partner returned to the terminal. [*Id.*, p. 232.]

With respect to RX 10, allegedly documenting Mr. Carter's rudeness to Cathy Kiely, Mr. Covert did not see any specific rudeness, other than laughing and being condescending. [Tr., pp. 233-235.] From his personal experience, Mr. Covert believes Mr. Carter is rude and belligerent, and the two end up in shouting matches. [*Id.*, pp. 234-235.]

The documents in RX 50, 51, and 52 are not sent to Mr. Covert in the routine course of business. [Tr., p. 236.] During the first week of October, he did not have the information regarding other drivers' comings and goings during that week. [*Ibid.*] RX 50-49 shows that Mr. Williams' start time was 2:24 and his end time was 2:45, for a total of 12 hours and 21 minutes. On October 3, he started at 1:45 and ended at 2:30, for a total for 12 hours and 45 minutes. On October 7, he started at 3:00 and ended at 3:45 p.m., for a total of 12 hours and 45 minutes. Trips

of that duration would not affect the schedule. [*Id.*, pp. 237-238.] On October 3, Mr. Williams took two breaks of ½ hour each, and still kept the schedule running properly. [*Id.*, p. 238.] Mr. Covert did not have the manifests with him at the time he evaluated Mr. Gordon's complaints about Mr. Carter in early October. [*Id.*, pp. 238-239.]

Of the 150 drivers supervised by Mr. Covert, very few had a disciplinary record comparable to Mr. Carter's as reflected in RX 54. [Tr., p. 239.] He did not have the same number of problems with any other driver that he had with Mr. Carter. He does not consider any of the other drivers to have been similarly situated to Mr. Carter in terms of discipline. [*Ibid.*] There were four or five violations of the call-in policy alone, and Mr. Covert sent the disciplinary file to Mr. Pruitt with the disciplinary recap. [*Ibid.*] He had not received any information indicating that Mr. Davis was affecting the schedule. [*Id.*, p. 240.]

Testimony of Kenneth Pruitt

Mr. Pruitt is Mr. Covert's supervisor, and has about 600-650 drivers under his authority. He cannot remember a driver with more disciplinary issues than Mr. Carter had. [Tr., p. 241.] After Mr. Gordon complained about Mr. Carter, Mr. Pruitt went through some of the logs to get an idea of how long the trip should take, and determined that Mr. Gordon was right – that Mr. Carter was taking significantly longer than the expected time. [*Ibid.*] Respondents' Exhibit 53 is a trip report summary, listing the average times for each driver for the months of July through September 2011. [*Id.*, p. 242.] When computing the times, Mr. Pruitt did not include runs when there were problems with the equipment, or the driver didn't make the full trip. The averages were based only on the days that the trip was completed. [*Id.*, p. 243.] In July, Mr. Carter's average was 12 hours and 49 minutes; Mr. Moore's average was 11 hours and 39 minutes; and Mr. Williams/Mr. Boston averaged 12 hours and 27 minutes. Mr. Carter's time got worse after July; he averaged 13 hours and 12 minutes in August and 13 hours and 19 minutes in September. [*Id.*, p. 244.] It was Mr. Pruitt's understanding that there was sufficient time to complete the run, even with a couple of rest breaks, without affecting the schedule. [*Id.*, pp. 244-245.]

At the time that Mr. Pruitt recommended Mr. Carter's termination in the first week of October, he was aware of the final warning letter issued to Mr. Carter in April of 2011. [Tr., p. 245.] He asked Mr. Gordon and Mr. Carter to send their written accounts of the incident of August 5, and had input into and approved the memo to all drivers issued on August 6. [*Id.*, pp. 245-246.] The memo's reference to completing a relay operation in a safe and efficient manner meant abiding by all the traffic regulations, and to use the 10 hours or more of off duty time to get sufficient rest to come to work rested, alert, and able to do the job safely. [*Id.*, p. 246.] A driver who becomes fatigued while on the road should pull over and re-alert himself; if it happens too often, Mr. Pruitt attributes it to the driver not getting proper rest before coming to work. [*Id.*, pp. 246-247.] Mr. Pruitt was more concerned about what Mr. Carter was doing during his 10 hours off duty to prepare for work, than about Mr. Carter taking breaks. [*Id.*, p. 247.] Mr. Pruitt reviewed the email from Mr. Gordon reporting that Mr. Carter had said he was going to take longer on his runs because Mr. Gordon complained, and it entered into Mr. Pruitt's decision to recommend termination from the standpoint of Mr. Carter going out of his way to inhibit Mr. Gordon from doing his job, and also implying that Mr. Carter was not going to be any safer by getting enough rest. [*Ibid.*] To Mr. Pruitt, Mr. Carter's statement meant one of two things: either

he was going to retaliate against Mr. Gordon for reporting him, or he was not getting proper rest. [*Id.*, pp. 247-248.]

Mr. Pruitt would not find it unreasonable for Mr. Carter to take a ½-hour break on the way to Jacksonville and another ½-hour on the way back, if they were the only two breaks he took. [Tr., p. 248.] He reviewed the September 26 and September 28 logs before recommending Mr. Carter's termination, and was aware that he had had 3½ hours of on duty/not driving time, which he found to be excessive. [*Id.*, pp. 248-249.]

Before September 9, Mr. Pruitt had had a conversation with Mr. Carter that had been fairly pleasant. On September 9, he learned that Mr. Carter and Mr. Covert had had a conversation that had ended badly, so Mr. Pruitt decided to call him to find out what was going on. Mr. Carter was rude and belligerent with him from the time he answered the phone, and made veiled threats, saying that he was from the South, that Mr. Pruitt didn't know what he was like, and he'd better be glad he was not "down here" which he took to mean in Columbia. He told Mr. Carter that if he was going to threaten him, to do it, or he was wasting everybody's time. [Tr., pp. 249-250.]

The decision to terminate Mr. Carter was made by Butch Wallis, Mr. Pruitt's direct supervisor. [Tr., p. 250.] Mr. Pruitt made Mr. Wallis aware of the interactions he had had with Mr. Carter. He also reviewed and approved the disciplinary recap sheet and sent it to Mr. Wallis. The fact that Mr. Carter was leaving trailers unattended in the lot played no role in his recommendation. [*Ibid.*]

Mr. Pruitt was not aware of any complaint from Hospira that any truck Mr. Carter drove stopped them from making production. [Tr., p. 251.] He did not terminate Mr. Carter when he threatened him, because he does not have the authority to do so. Assuming that Mr. Carter was under the microscope, it would not be expected that he would take more precautions and take longer, making sure not to speed or make other mistakes. He would expect him just to do his job. [*Id.*, p. 252.]

Mr. Pruitt was aware that other drivers were not present when they were supposed to be, because that was included in the memo to all drivers. He was not aware of any specific incidents, and does not believe that anybody was disciplined for not attending the trailer. [Tr., p. 253.] Mr. Pruitt was not aware of the Mr. Moore's reporting for work an hour after Mr. Davis returned to the terminal at the time he recommended Mr. Carter's termination. [*Id.*, p. 254.] The only way Mr. Pruitt would know if a driver committed an infraction was if somebody told him, or if it came up in a random audit, as Mr. Carter's hours-of-service violations did. [*Id.*, p. 255.] The audit, however, does not study the finish time of one driver and the start time of another. That information would not be available through an audit. [*Id.*, p. 257.]

Testimony of Harold Wallis, Jr.

Mr. Wallis has been employed by CPC since 1982. He is vice president of CPC's eastern operations, and is Mr. Pruitt's immediate supervisor. [Tr., p. 258.] The requirement contained in the driver job description, RX 1, that a driver be able to sit and remain alert while driving for an

aggregate period of up to 11 hours, is important because that is the time allowed by the Department of Transportation. [*Id.*, pp. 258-259.] CPC needs the drivers to be alert on the road so that they operate in a manner that's safe for them, their customers' equipment, and the public. [*Id.*, p. 259.] Mr. Wallis would be concerned about a driver needing a lot of rest breaks throughout the day for two reasons: is that driver fit to be a driver under the DOT guidelines, and is that driver doing the things at home to make sure they are coming to work in an alert state? [*Ibid.*] The driver who fails to do the things necessary to come to work in an alert state is potentially more of a hazard because he may not be alert, even though he is driving within the DOT-allowed time period. [*Ibid.*] A driver who does all the right things but becomes fatigued while driving should stop and take a break, and to Mr. Wallis's knowledge he has never terminated a driver for doing so. [*Id.*, pp. 259-260.]

Mr. Wallis did not consider any specific rest stop that Mr. Carter took when terminating his employment. The disciplinary recap was sent to him before he made the decision. [Tr., p. 260.] The standard procedure for termination is that when a regional manager decides to recommend a driver for termination, he will put together a disciplinary recap from a database and forward it to the divisional manager. The divisional manager reviews the disciplinary recap, and sends it to Mr. Wallis. Mr. Wallis reviews it and is ultimately responsible for the decision whether to terminate a driver. [*Ibid.*] Mr. Pruitt and Mr. Covert cannot discharge a driver. [*Id.*, pp. 260-261.] Mr. Wallis reviewed RX 54, the disciplinary recap, before deciding to terminate Mr. Carter. He also got backup documentation and reviewed that, including the final warning that was mailed to Mr. Carter in April of 2010. [*Id.*, p. 261.] That a final warning was issued entered into Mr. Wallis's decision; the company tries to work through a progressive disciplinary process to correct the driver's behavior, because they would rather correct the driver than terminate him. [*Ibid.*] The goal is to change behavior, and in this case the behavior had not changed, so progressive discipline had not worked. [*Id.*, pp. 261-262.] Mr. Wallis checks to make sure that a driver has been made aware that he is on a final warning when imposing discipline; some offenses would result in termination without a final warning, but in most cases there is progressive discipline. [*Id.*, p. 262.] When Mr. Wallis reviewed Mr. Carter's disciplinary recap, he determined that the company had followed the procedures, "and then some." [*Ibid.*]

When he made the decision to terminate Mr. Carter, Mr. Wallis did not know or consider the fact that Mr. Carter had left trailers unattended. [Tr., pp. 262-263.] He reviewed the letters to Mr. Carter concerning log falsification, and considered them because they were part of the disciplinary history. The biggest concern Mr. Wallis had was that there had been a progressive disciplinary process with no sign of correction. In a number of ways, it seemed to be getting worse. Additionally, he was concerned with a driver who had a clear pattern of insubordination with both of his managers and the CPC dispatchers. [*Id.*, p. 263.] Finally, Mr. Carter seemed to Mr. Wallis to take excessive time on his run, leading Mr. Wallis to believe that he either was not fit for the job, was not getting proper rest, or was goofing off. [*Id.*, pp. 263-264.] Mr. Wallis did not know what the reason was for Mr. Carter taking an excessively long time. [*Id.*, p. 264.] Additionally, Mr. Wallis considered the September 29 letter regarding Mr. Carter's failure to return Mr. Covert's phone call, which he considered to be a continuation of Mr. Carter's violation of the company's call-in policy as reflected on four previous occasions. [*Ibid.*]

Mr. Wallis has very rarely seen a disciplinary recap like Mr. Carter's; probably less than one percent of the drivers have recaps that fill up one complete page. [Tr., p. 265.] Even if Mr. Gordon had not complained about Mr. Carter for unexplained delays during the last week of September, Mr. Wallis still would have terminated Mr. Carter due to his failure to improve himself after progressive discipline. [Ibid.] In reviewing Mr. Gordon's complaint, nobody told Mr. Wallis that the excessive time was based on Mr. Carter's taking rest breaks; nobody gave him an explanation for the excessive time. [Ibid.] Mr. Wallis did not consider RX 35, the timeline prepared by Mr. Covert reflecting Mr. Gordon's complaints. [Id., p. 266.]

Mr. Wallis is familiar with the general nature of the schedule in Columbia for the Jacksonville drivers. [Tr., p. 266.] The drivers leave between 2:00 and 5:00 a.m., and are at home every night. One of the reasons for having two drivers share a truck is to allow the drivers to go home. It is safer for any driver to go home and sleep in his own bed. [Ibid.] CPC has operations where drivers are required to sleep in a bunk in the truck, and operations where drivers are required to stay at motels. In his experience in the trucking industry, Mr. Wallis has found that a driver with a schedule such as the one Mr. Carter had could adjust more easily, and it is preferred scheduling that allows the company to attract higher quality drivers. Mr. Wallis is not aware of any driver who doesn't have some degree of fluctuation in his or her schedule. [Id., p. 267.]

Mr. Wallis is not aware of any complaints from Hospira that they lost any money or shut down the production line due to Mr. Carter's stopping. He had received no complaints from anybody but another driver. [Tr., p. 268.]

Testimony of Catherine A. Kiely

Ms. Kiely testified at a deposition on February 5, 2014. [RX 47.] She was hired by CPC in 2005, and works from 6:00 p.m. to 2:30 a.m. as the night dispatcher. She has never been employed by Hospira. Her immediate supervisor is Tim Boland, who is also a CPC employee. [Id., pp. 4-5¹.] Her main duty as night dispatcher is to take calls from the drivers. The drivers are supposed to call her when they get to any location, and let her know what trailer they are dropping or picking up so she can verify whether it's the correct trailer. They give her the temperature, the seal number, the time they are leaving, and their ETA to the next destination. She usually doesn't speak to anyone but drivers during her shift. [Id., p. 6.] There are no Hospira representatives present during her shift, which she works alone. [Id., pp. 6-7.]

Ms. Kiely is familiar with Mr. Carter as a CPC driver. She spoke to him a few times, and her dealings with him were unpleasant. He did not regularly call in as he was supposed to do, or leave voice-coms. The only times she remembers speaking with him were when he had a specific problem or question. [RX 47, pp. 8-9.] He was always unpleasant, and his manner didn't improve over the four years they worked together. [Id., pp. 9-10.] Reviewing an email marked as Exhibit 1², Ms. Kiely testified that on July 8, 2010, at about 6:40 p.m., she called Mr. Carter to tell him to pick up any empty trailer, and he started laughing and said he knew that already. Ms. Olson asked him why he bothered calling her if he already knew what he was supposed to do,

¹ References to page numbers in RX 47 and RX 48 are to the page numbers of the deposition transcript, and not to the page numbers of the exhibits themselves.

² Admitted at the hearing as RX 10.

and hung up. Mr. Carter called a few more times over the evening, but Ms. Kiely made it a point not to answer. When he called from a different number, she answered, and when she realized it was Mr. Carter, she asked him to leave his information on voice-com. She told him that she preferred not to deal with his bad attitude and condescending manner, and didn't want any part of his negative energy. Mr. Carter did leave a voice-com that evening, and actually spoke in a decent, human-like manner. Ms. Kiely told her supervisor that she preferred not to deal with Mr. Carter.

To the best of her recollection, Ms. Kiely does not believe that Mr. Carter's attitude or approach to her improved after her email of July 10, 2010; she does not remember any time that he was not rude and snippy. [RX 37, pp. 14-15.]

Deposition Exhibit 2³ accurately summarizes the conversation that Ms. Kiely had with Mr. Gordon and Mr. Carter on October 5, 2011. [RX 47, p. 16.] She sent the email to her then-supervisor, Pete Millar, and her then-coworker, Tim Boland, both of whom were CPC employees. [*Id.*, p. 21.] The email refers to both drivers telling Ms. Kiely that trailers were left unattended when there was a late start because they had to wait for the train; her understanding was that trailers were not supposed to be left unmanned. [*Id.*, p. 18.] Her concern as reflected in the last sentence was that Mr. Carter did not regularly call in as he was supposed to do. [*Id.*, pp. 19-20.]

Since Mr. Carter's termination, Ms. Kiely is not aware of trailers being left unattended on the lot. [RX 47, p. 22.] She does not know what all the drivers are doing, but only knows when they call and tell her. Others leave voice-com messages, which she does not retrieve until the end of the night. [*Id.*, p. 23.] Her understanding was that trailers were not supposed to be left unattended, and that drivers would call each other with their ETAs so that their time overlaps. [*Id.*, p. 24.]

Testimony of Christie Olson

Ms. Olson testified at a deposition on February 5, 2014. [RX 48.] She has been a dispatcher for CPC since July of 2004, and has never worked for Hospira. [*Id.*, pp. 5-6.] Her immediate supervisor is Tim Boland, whose supervisor is Sam Curry. Both Mr. Boland and Mr. Curry are employed by CPC. [*Id.*, pp. 6-7.] Before Mr. Boland became her supervisor, Mr. Millar was her supervisor, and he was also employed by CPC. Tim Boland or a CPC manager approves her requests for time off, and talk to her about performance when necessary. [*Id.*, pp. 6-8.] Her health and retirement benefits come from CPC, and she gets no benefits from Hospira. [*Id.*, p. 8.]

Ms. Olson knows Mr. Carter, who was assigned to the Columbia team. [RX 48, p. 8.] If Ms. Olson had any issues with any of the Columbia drivers, she would go to Ron Covert, who is the driver manager and their boss. He is a CPC employee. [*Id.*, p. 9.] The Columbia team picks up freight in Jacksonville and brings it to the Gamma facility in Rocky Mount; they pick up freight in Rocky Mount and return it to Jacksonville. [*Id.*, p. 10.] As a dispatcher, Ms. Olson dispatches the drivers, gives them load information, and receives information from the drivers

³ Admitted at the hearing as CX 1 and RX 32.

when they pick up or drop off a delivery. She works with the Hospira plants to make sure they have product there for their lines. [*Id.*, p. 10.] Ms. Olson learns from the Rocky Mount plant what they need, and works with Mr. Covert and the Columbia team to make sure there are enough drivers to pick up the loads and bring them to Rocky Mount. She monitors the loads while they are being transported between Jacksonville and Rocky Mount. [*Id.*, pp. 10-11.] Ms. Olson monitors the loads by taking calls from the drivers with their arrival times in Jacksonville, and she notifies the Gamma facility of the time that the trailers are going to arrive there. She needs to give the information to Hospira because the product that goes on the containers is based by lots, and Hospira needs certain materials at certain times for their product; her job is to make sure Hospira gets what they need. [*Id.*, p. 12.] Hospira does not tell her how to go about doing so, or which drivers to assign. That responsibility is hers and Mr. Covert's. [*Id.*, pp. 12-13.] Ms. Olson does not have the authority to discipline a driver, and Hospira has not asked her to do so. [*Id.*, p. 13.]

Deposition Exhibit 1⁴ is an email thread beginning with an email from Ms. Olson to the Bruce Craver, supervisor at the Gamma facility, informing him when nine containers would be arriving there. [RX 48, p. 14.] The purpose of the email was so that Gamma could plan their production knowing how to prioritize their lots. [*Id.*, p. 15.] In response to her email, Mr. Craver asked to have 3-5 more trailers come in on Saturday, September 10 so that he could avoid 2-5 hours of down time. [*Id.*, p. 17.] Ms. Olson forwarded the email to Mr. Covert and Mr. Pruitt, as it was Mr. Covert's job to find the drivers for the additional trailers. [*Id.*, pp. 18-19.] Mr. Covert replied, saying he had spoken to four of the six drivers on the Columbia team and left messages with Mr. Williams and Mr. Carter. The drivers listed in Mr. Covert's reply are all the Columbia drivers. [*Id.*, p. 20.] Mr. Pruitt replied, saying that Mr. Carter intended to work on Saturday. He then sent another message asking if everything went as planned, and Mr. Millar (Ms. Olson's then-supervisor) replied that everything was okay after checking with Ms. Olson. [*Id.*, pp. 21-22.]

Deposition Exhibit 2⁵ is an email sent by Ms. Olson to Ron Covert on September 9, 2011, after speaking with Mr. Carter about the need to work on September 10. [RX 48, p. 23.] Mr. Carter told Ms. Olson that he wouldn't work on Saturday because he had money invested in other plans for that day. Ms. Olson didn't want to discuss it with Mr. Carter, and sent the email to Mr. Covert. [*Id.*, pp. 23-24.]

Deposition Exhibit 3⁶ consists of four letters from Mr. Covert to Mr. Carter, on all of which Ms. Olson was listed as a carbon copy recipient. [RX 48, pp. 24-25.] On those letters, the word "Hospira" appeared next to her name, but she was not an employee of Hospira during 2008. If Mr. Carter thought she was, he was mistaken. [*Id.*, p. 25, 28-29.]

The drivers were expected to call dispatch when they arrived at their domicile, when they arrived at a location, when they left that location, and when they arrived back at their domicile. [RX 48, p. 26.] The purpose of the calls was so that Ms. Olson would know where the freight is and when it would arrive. At times there were issues with Mr. Carter; he would not call in. The

⁴ Admitted at the hearing as RX 30.

⁵ Admitted at the hearing as RX 29.

⁶ The first page of this exhibit was admitted at the hearing as RX 4, but the other pages were not offered.

only way they can track the freight is by the drivers calling in, but the system they use tells them when the driver has arrived. [*Id.*, pp. 26-27.]

Deposition Exhibit 1 (RX 30) shows Ms. Olson's email signature block as "Fleet Operations, Hospira Worldwide, Incorporated." [RX 48, p. 29.] At the time of the deposition, her signature block read "CPC Logistics on behalf of Hospira." [*Ibid.*] In September of 2010, CPC was successful in getting the extra trailers to Hospira; nobody from Hospira told or directed Ms. Olson how to get that done. [*Id.*, p. 30.]

When Mr. Carter worked at the Columbia trailers, trailers should not have been left unattended, and Ms. Olson does not recall that they were. [RX 48, p. 31.] If a driver came back to Columbia even at 2:00 a.m., he was supposed to wait for the relay partner even if the partner got in at 5:00 a.m. [*Id.*, p. 32.]

Exhibits

Complainant's Exhibits

CX 1 is an email from Cathy Kiely to several individuals reporting conversations she had with Mr. Gordon and with Mr. Carter on October 4-5, 2011. Mr. Gordon told Ms. Kiely that he was waiting for Mr. Carter, that Mr. Carter was late almost every night, and that his continued tardiness is getting the schedule out of sync. Sixteen minutes later Ms. Kiely called Mr. Carter because he still had not reported, and Mr. Carter asked whether she knew that drivers don't report until 5:00 a.m. when the train is delayed. She spoke with Mr. Gordon who decided to go home. She reported that Mr. Gordon sounded frustrated and wanted someone to talk to Mr. Covert about Mr. Carter's tardiness.

CX 2 is the memorandum to all drivers from Mr. Covert dated August 6, 2011.

CX 3 is a copy of CPC's submission to OSHA in response to Mr. Carter's complaint of discrimination.

Respondents' Exhibits

RX 1 is a job descriptions for CPC truck drivers assigned to provide services to Hospira.

RX 2 is the CPC Uniform Rules and Regulations for drivers providing services to Hospira.

RX 3 is a signed acknowledgment by Mr. Carter of his receipt of a copy of the CPC Uniform Rules and Regulations for drivers providing services to Hospira (RX 2).

RX 4 is a letter dated May 29, 2008 from Mr. Covert, commending Mr. Carter for maintaining a speeding rate well below the standard, and asking him to take action to prevent the reoccurrence of three other infractions during the period from April 30 to May 3, 2008.

RX 5 is a letter dated August 27, 2009 from Mr. Covert, again commending Mr. Carter for his low speeding rate, and identifying four other infractions for the period July 27 to August 16, 2009. The document states that “this is your second warning concerning speeding violations since 9/24/08.”

RX 6 is a letter dated August 12, 2009 from Mr. Covert to Mr. Carter, informing him that on August 3 and 4 he had violated CPC call-in procedures. The letter quoted the proper procedures from the CPC Fleet Operations Manual. Mr. Carter was advised that future violations would result in progressive discipline.

RX 7 is a letter dated November 2, 2009 from Mr. Covert to Mr. Carter, informing him that an accident in which he was involved on June 25, 2008 had been determined to have been preventable on Mr. Carter’s part. Mr. Covert imposed a two-day suspension from work, and advised Mr. Carter that future preventable accidents may result in progressive discipline up to and including termination.

RX 8 is a letter dated March 3, 2010 from Mr. Covert to Mr. Carter, informing him that on February 24, 25, and 26 he had failed to follow proper call-in procedures, which had an adverse effect on customer service. The letter again quoted the proper procedures from the CPC Fleet Operations Manual. Mr. Carter was advised that the letter was his second warning for violating call-in procedures since August of 2009, and that future violations would result in progressive discipline.

RX 9 is a letter dated April 6, 2010 from Mr. Covert to Mr. Carter, advising him of errors in his logs of February 24 and 25, and of March 6 and 14. This was Mr. Carter’s first warning concerning logging errors, and he was asked to prevent future similar errors.

RX 10 is an email chain started by Cathy Kiely, in which she characterized Mr. Carter’s demeanor during telephone calls on July 7, 2010 as showing a bad attitude, a condescending manner, and negative energy. She requested permission to communicate with him through voice-com rather than over the phone. The email was forwarded by Scott Worthley to Mr. Covert and Mr. Pruitt, with a notation that other dispatchers feel the same way about Mr. Carter. Mr. Covert asked Mr. Millar for any additional specific instances, and Mr. Millar replied that most are verbal and not in writing, but that most recently Ms. Kiely and he had a conversation with Mr. Carter in which Mr. Carter was very upset because he ran out of hours when he had a flat tire. The exhibit includes a hand-written notation indicating that Mr. Covert met with Mr. Carter on July 15, 2010 and informed him that this type of behavior was unacceptable, and encouraged him to improve his customer service level and personal interaction skills.

RX 11 is a report of an audit conducted on Mr. Carter for the week ending July 10, 2010. The report shows that there were many discrepancies between the manifest and the Ryde.Smart logs, and that many required entries on both the manifest and the Ryde.Smart logs were missing. No entries were made on Ryde.Smart concerning trailer numbers, seal numbers, weight, piece count, or bill of lading numbers, and no fuel stops were recorded. The only information recorded on the manifest was the trailer number and weight.

RX 12 is a handwritten note dated August 9, 2010 signed by Mr. Carter, explaining that he conducted his pre-trip inspection before logging in so that he would not run out of hours and saying it had been done this way “forever.” The note also indicated that when he got to the fuel station he forgot to hit the on-duty mode for the computer, so the computer stayed on “driving.”

RX 13 is a letter dated August 18, 2010 from Mr. Covert to Mr. Carter imposing a five-day suspension and a requirement to complete remedial logging training due to his falsification of logs. Mr. Covert reminded Mr. Carter of the importance of logging events as they occur to avoid personal liability if an accident occurred and logs were falsified.

RX 14 is Mr. Carter’s DOT hours-of-service report from Ryde.Smart for July 8-10, 2010.

RX 15 is Mr. Carter’s manifest for July 8-10, 2010. The times and events listed by handwritten notation do not match the computerized Ryde.Smart entries for the same days.

RX 16 is a document showing that Mr. Carter was suspended from August 7 to August 15, 2010 as a disciplinary action.

RX 17 is a letter dated November 29, 2010 from Mr. Covert to Mr. Carter, saying that on August 18, 2010 Mr. Carter was instructed to take an online remedial training module regarding hours of service and logging, that Mr. Carter had not done so, and that he was required to do so by December 19, 2010. He was warned that if he failed to do so, he would be subject to further disciplinary action up to and including possible termination.

RX 18 is a letter dated January 4, 2011 from Mr. Covert to Mr. Carter, advising him that he had failed to undertake online remedial training as required by the letter of August 18, and directing him to complete it by January 25, 2010 [*sic*: 2011]. He was warned that if he failed to do so, he would be subject to further disciplinary action up to and including possible termination.

RX 19 is a document dated January 12, 2011 signed by Mr. Carter, stating that he had completed the prescribed remedial training.

RX 20 is a letter dated December 17, 2010 from Mr. Covert to Mr. Carter, informing him that he had committed an hours-of-service violation on December 10, 2010 by driving one minute more than the legally allowed 11 hours. Mr. Carter was advised that hours-of-service violations are serious and can result in a fine, liability, or criminal charges, and instructed to take action to prevent future violations. As it was Mr. Carter’s first hours-of-service violation, he was issued a written warning, but was advised that subsequent violations would result in progressive discipline.

RX 21 is a letter dated April 6, 2011 from Mr. Covert to Mr. Carter listing six infractions between July 7, 2010 and March 30, 2011, including:

- poor customer service, rude to dispatcher on July 7, 2010
- log falsification on July 10, 2010, resulting in a five-day suspension
- failure to complete required training on November 29, 2010

- hours-of-service violation on December 10, 2010
- failure to complete required training on January 4, 2011
- failure to conduct a proper pre-trip inspection on March 30, 2011, resulting in a citation from the State of Florida for an expired IFTA sticker.

Mr. Carter was informed that his poor duty performance could not be tolerated, and his inability or unwillingness to follow company policies and procedures must end. He was encouraged to turn around his negative performance trend, and that this was his final warning in regard to poor performance. He was informed that future infractions would result in progressive discipline up to and including termination as described in the Explanatory Notes of General Work Rules that Mr. Carter acknowledged receiving on June 16, 2008.

RX 22 is a memorandum dated April 29, 2011 from Mr. Covert to all drivers assigned to Hospira in Columbia, South Carolina, advising them that some drivers were not following proper call-in procedures, reminding all drivers of the proper procedures, and listing the progressive discipline to be imposed for failing to follow them.

RX 23 is a letter dated May 14, 2011 from Mr. Covert to Mr. Carter, informing him that a customer had complained on May 9, 2011 because Mr. Carter had not made the required call-in, and asking for a written statement from Mr. Carter as part of CPC's investigation into the complaint.

RX 24 is an email exchange on July 14, 2011 between Mr. Millar and Ms. Olson. Mr. Millar asked Ms. Olson if Mr. Carter had told her anything about why the truck is sitting at Ryder for at least 45 minutes every morning after Mr. Gordon arrived, and Ms. Olson replied that Mr. Gordon was calling her every day asking for Mr. Carter's ETA at 0377.

RX 25 is an email exchange between Mr. Millar and Mr. Covert dated July 15, 2011. Mr. Millar told Mr. Covert that he thought Mr. Covert's letter to "Albert" concerning lack of sleep was well stated, and that he was seeing the same thing from "Roderick" (Mr. Carter). He suggested some changes in relay partners to Mr. Covert. Mr. Covert replied that Mr. Carter had told Ms. Olson that he had been delayed because he wasn't feeling well and is entitled to a break; that if drivers were pushed too hard and have an accident, it wouldn't be good for the company but falls on the drivers. Mr. Carter also told Ms. Olson that if the DOT looked at the logs and see insufficient down time it would not be good.

RX 26 is an email dated Sunday, August 7, 2011 from Mr. Gordon to Mr. Pruitt, and forwarded by Mr. Pruitt to Mr. Covert. Mr. Gordon apologized for the disturbance on Friday evening. He said that it started when Mr. Carter called Mr. Gordon and said he had run out of drive time about five miles from the terminal, and Mr. Gordon thought he could use the opportunity to discuss with Mr. Carter the importance of teamwork and to resolve the issue they were having with their schedule. Mr. Gordon said that Mr. Carter started to yell and curse, and said, "You did me a favor by complaining about my times so now I'm gonna take my breaks and take my time coming back." Mr. Gordon asked Mr. Carter if he wasn't worried about losing his job, and Mr. Carter said, "No, Ron can't fire me, if he could he would have by now." Mr.

Gordon said that he told Mr. Carter that he would not meet him at the truck for fear of a verbal or physical altercation.

RX 27 is a one-page⁷ document hand-written by Mr. Carter concerning the events of Friday August 5, 2011. He said that an hour out from the Ryder shop, he called Ms. Olson that he was going to be close on drive time. Ms. Olson told him not to worry, and they would use the 16-hour rule if necessary. There was another wreck, and Mr. Carter called Ms. Olson and told her that he was going to stop when he ran out of drive time; she said to let her know where he stopped. He did so when he was five minutes from the shop, and told Ms. Olson that he would get one of the workers from the Ryder shop give Mr. Gordon a ride to the truck. He then called Mr. Gordon who told him that he was waiting at the Ryder shop for the truck, and told Mr. Gordon that one of the shop workers would give him a ride to the truck. Mr. Gordon said okay, and Mr. Carter called Ms. Olson back and told her of the arrangements.

RX 28 is another copy of the August 6, 2011 memo from Mr. Covert to all drivers that was admitted as CX 2.

RX 29 is an email from Ms. Olson to Mr. Covert dated Friday, September 9, 2011. Ms. Olson said that Mr. Carter had called her that morning, saying that he had heard from other drivers that Hospira wanted him to work on Saturday. She told Mr. Carter that Mr. Covert was trying to contact him regarding the issue, and that they needed all trucks to run. Mr. Carter said that he was not going to work because he had money invested in his plans for the weekend, and to do what they had to do to find other drivers. Ms. Olson told Mr. Carter to call Mr. Covert regarding what he had just told her.

RX 30 is an email string started by a CPC customer who needed additional services on Saturday, September 10, 2011. On the evening of September 8, Mr. Covert wrote that he had contacted four drivers and let them know that he would work on Saturday, and that he had left messages for Mr. Williams and Mr. Carter to call him. On September 9, 2011, Mr. Pruitt wrote that Mr. Carter had said he was going to work on September 10. On September 10, Mr. Pruitt asked whether everything went as planned. Mr. Millar responded that he had spoken to Ms. Olson, and "all is well. Thank you very much for the help."

RX 31 is a letter dated September 29, 2011 from Mr. Covert to Mr. Carter, telling him that on September 21 Mr. Covert had attempted to contact Mr. Carter about a work schedule change. He left a voice message on his phone at 4:15 p.m. asking Mr. Carter to call him, and tried to call Mr. Carter's home number but the phone rang without being answered and without the opportunity to leave a message. Mr. Covert informed Mr. Carter that his failure to return the phone call was a violation of the General Work Rules. Mr. Covert told Mr. Carter what the progressive discipline was for this violation, and informed him that since it was Mr. Carter's first violation, he was receiving a written warning. He told Mr. Carter that progressive discipline would be imposed if there were future violations.

RX 32 is another copy of the document admitted as CX 1.

⁷ The fax header indicates that there should be a second page, but only the first page is in the record.

RX 33 is a DOT hours-of-service report showing Mr. Carter's hours of on-duty, driving, and off-duty time for September 26, 2011. The report shows that Mr. Carter reported to work at 1:59 a.m., started driving at 2:22 a.m., drove from Columbia to Jacksonville, returned to Jacksonville at 3:42 p.m., and went off duty at 3:57 p.m.

RX 34 is a DOT hours-of-service report showing Mr. Carter's hours of on-duty, driving, and off-duty time for September 28, 2011. The report shows that Mr. Carter reported to work at 4:38 a.m., started driving at 5:00 a.m., drove from Columbia to Jacksonville, returned to Jacksonville at 6:25 p.m., and went off duty at 6:36 p.m.

RX 35 is a timeline reflecting that Mr. Carter was late or delayed his runs 33 times between June 27 and September 28, 2011.

RX 36 is a letter dated October 5, 2011 from Mr. Covert to Mr. Carter advising Mr. Carter that his employment was terminated on the same day due to continued poor job performance and insubordinate behavior. Mr. Covert cited unexplained delays, failure to perform satisfactorily, a pattern of insubordination, 25 violations in the past 30 months, and failure to correct his performance and behavior after receiving progressive discipline.

RX 37 is a letter dated July 7, 2011 from Mr. Covert to Albert Williams regarding Mr. Williams' obligation to report to work properly rested. Mr. Williams had taken a nap after driving for only one hour, and when asked, told Mr. Covert that he had gone to bed at 8:00 p.m. and gotten ready to work at 12:30 a.m. Mr. Covert told him that his unpreparedness would not be tolerated, and urged him to take immediate action to reverse his negative performance trend. Mr. Covert told him that CPC, its customer, Mr. Williams, his family, and other drivers on the road all deserved to have him perform safely.

RX 50 consists of handwritten manifests by drivers assigned Team 1 in Columbia for runs made between July 1 and December 31, 2011.

RX 51 consists of handwritten manifests by drivers assigned Team 2 in Columbia for runs made between July 1 and December 31, 2011.

RX 52 consists of handwritten manifests by drivers assigned Team 3 in Columbia for runs made between July 1 and December 31, 2011.

RX 53 is a trip report summary for drivers based in Columbia showing the times for their Jacksonville runs during the months of July, August, and September 2011.

RX 54 is a disciplinary recap showing the infractions by Mr. Carter and disciplinary actions taken by CPC against Mr. Carter during the period between February 16, 2008 and September 26, 2011.

Findings of Fact

Upon review of the testimony and exhibits, I find that Respondent's witnesses were generally credible. To the extent that there is a conflict between their testimony and that of Complainant, I find Respondent's witnesses to have been more credible than Complainant. Complainant's general demeanor demonstrated that he believes he was unfairly wronged, and his belief has caused inaccurate recollection as well as exaggerated or untruthful testimony. In some cases, his testimony was inconsistent with documents admitted: for example, Mr. Carter testified that although he did not record rest breaks on his manifests, he did record fuel stops; however, Mr. Carter's hand-written manifests admitted in RX 52 did not show any fuel stops between the end of June and the beginning of October of 2011. I find specifically that Mr. Carter was not credible when he testified that he did not receive many of the letters sent to him by Mr. Covert, and when he testified that he did not receive a voice mail message from Mr. Covert on September 21, 2011 with regard to a change in his work schedule. All the letters were sent to the same address, and it is not believable that so many of them did not arrive. Likewise, I do not believe that Mr. Carter did not receive Mr. Covert's voice mail message. His failure to return the call is consistent with his long pattern of poor communications, such as failing to call in as required by the Fleet Operations Manual. And it is consistent with Mr. Carter's general preference for doing things on his own schedule and for his own convenience, rather than CPC's schedule.

Resolving the conflicts in the evidence, I make the following findings of fact.

Background and CPC Columbia Relay Operation

Complainant began working for Respondent CPC in 2007, and worked for CPC until October 5, 2011. He was assigned to the Columbia, South Carolina operation. The Columbia operation was dedicated to CPC's client Hospira, delivering Hospira supplies and product between Jacksonville, Florida and Rocky Mount, North Carolina. Two drivers made up a relay team: the first drove between Columbia and Jacksonville, Florida⁸, and the second drove between Columbia and Rocky Mount, North Carolina.⁹ On Monday mornings, the Jacksonville driver reported for work early in the morning and departed from Columbia for Jacksonville at 2:00 a.m. with an empty trailer. The driver dropped the empty trailer in Jacksonville and picked up a load of Hospira products, driving it back to the Ryder shop in Columbia the same day. The Jacksonville driver's relay partner would take over the truck/trailer combination and deliver it to the Hospira production line in Rocky Mount, North Carolina. That driver would pick up a load from Rocky Mount and return it to Columbia on the same day, where the Jacksonville driver would take over the truck/trailer and drive it to Jacksonville. The operation ran continuously from Monday to Friday each week. The round trip between Columbia and Jacksonville took 10 to 10½ hours of driving time, and the round trip between Columbia and Rocky Mount took 9½ to 10 hours of driving time. In a 24-hour day, this would allow the two drivers on a team 3½ to 4½ hours to load, unload, drop and hook, and take any type of rest breaks they needed.

⁸ The driver who drove between Columbia and Jacksonville will be referred to as the Jacksonville driver.

⁹ This driver who drove between Columbia and Rocky Mount will be referred to as the Rocky Mount driver.

As each driver returned to Columbia from his portion of the trip, he was expected to call his relay partner with an estimated time of arrival. The relay partner was expected to arrive at Columbia in time to take over the truck/trailer in person from the returning driver, so that trailers were not left unattended. Although the policy against leaving unattended trailers was in place, it was not strictly enforced; there were sometimes valid reasons for leaving trailers unattended, and no driver was ever disciplined for doing so. Nonetheless, the policy was in place and was communicated to the drivers, including Mr. Carter.

Complainant's Disciplinary History

During the course of his employment with CPC, Mr. Carter received a number of disciplinary warnings and suspensions for violations of law and of CPC policies, including:

- Speeding events: Mr. Covert sent Mr. Carter four letters between May 29, 2008 and September 24, 2008 documenting 32 occasions on which Mr. Carter was speeding; however, Mr. Covert expressed appreciation for Mr. Carter's having maintained a speeding rate below the CPC standard. Mr. Covert sent Mr. Carter another letter on December 11, 2009 regarding 22 occasions on which Mr. Carter was speeding (*see* RX 54); this letter was not offered as an exhibit, but I conclude from the fact that these speeding events were included in the disciplinary history forwarded to Mr. Pruitt and Mr. Wallis (while those in 2008 were not) that the company was more concerned about these events than about the events between May and September of 2008.
- Logging errors: Mr. Covert sent Mr. Carter a letter on April 1, 2008 regarding a log violation. He had a verbal discussion with Mr. Carter on May 16, 2008 about improper logging between April 7 and April 12, 2008. He sent Mr. Carter letters on July 27 and September 24, 2008, August 27, 2009, and April 6, 2010 regarding more logging errors.
- Log falsification: Mr. Covert issued a 5-day suspension on August 18, 2010 to Mr. Carter for falsifying his log during the week of July 10, 2010, and required Mr. Carter to undergo remedial log training on line by September 10, 2010. Although Mr. Carter received the August 18 letter,¹⁰ he did not complete the training, and Mr. Covert sent him a second letter on November 19, 2010, directing him to complete the training by December 19. Again, Mr. Carter received that letter but did not complete the training, so on January 4, 2011 Mr. Covert sent Mr. Carter a third letter directing him to complete the training by January 25. He also discussed this requirement with Mr. Carter. This time, Mr. Carter completed the training, doing so on January 12, 2011.
- Failure to follow call-in procedure: Mr. Covert had a discussion with Mr. Carter on May 16, 2008 by telephone, and sent him a letter on May 29, regarding Mr. Carter's failure to follow call-in procedure. He instructed Mr. Carter to call dispatch daily, and that failure to do so would lead to more severe discipline. Mr. Covert sent Mr. Carter a warning letter on August 12, 2009 regarding Mr. Carter's failure to call in on August 3 and 4, 2009. Mr. Covert included an excerpt from the Fleet Operations Manual describing the call-in requirements for CPC drivers, and informed Mr. Carter

¹⁰ As discussed above, I do not believe Mr. Carter's denial that he received this letter of the letter of November 29, 2010.

that there was “no acceptable reason for not completing call ins.” Mr. Covert sent Mr. Carter a second warning letter on March 3, 2010 for failing to follow call-in procedures on February 24, 25, and 26, 2010; he again included the excerpt from the Fleet Operations Manual and stated that there was no acceptable reason for failing to follow the call-in requirements.

- Preventable accident: Mr. Carter was involved in an accident causing property damage in excess of \$4400 on June 25, 2008. After investigation, it was determined that Mr. Carter was at fault and, by letter dated November 2, 2009, he was suspended for two days as a disciplinary measure.
- Hours of service violation: Mr. Carter drove for more than 11 hours on December 10, 2010, and Mr. Covert issued him a written warning emphasizing the serious nature of the violation, which he said could result in placing Hospira at an undue risk of fines and liability, and placing Mr. Carter at risk of fine, liability, and possible criminal charges.
- Poor customer service/rudeness to dispatcher: On July 7, 2010, Mr. Carter called Ms. Olson to determine which trailer he should pick up to start his run. Ms. Olson checked into it and called Mr. Carter back, telling him to pick up any empty trailer. Mr. Carter started laughing at Ms. Olson and said that he “already knew that.” Ms. Olson interpreted Mr. Carter’s reaction as rude, based on her uniformly unpleasant conversations with Mr. Carter. Mr. Covert issued a verbal warning to Mr. Carter on July 25, 2010.
- Failure to follow procedure: Mr. Carter and Mr. Covert had a verbal discussion on May 1, 2008 concerning Mr. Carter’s failure to follow an unspecified CPC procedure. On March 30, 2011, Mr. Carter failed to conduct a proper pre-trip inspection, and Mr. Covert issued him a “final warning” letter on April 6, 2011. The letter recited some of Mr. Carter’s previous disciplinary history, including his rudeness to the dispatcher on July 7, 2010, log falsification resulting in a five-day suspension, failure to complete the required log training, and hours of service violation, as well as the improper pre-trip inspection on March 30. Mr. Covert warned Mr. Carter that the letter constituted a final warning about poor performance, and that future infractions would result in progressive discipline up to and including termination.
- Lateness/Unexplained delay/Unavailability: On July 6, 2011 Mr. Carter was late for work and had an unknown delay; although RX 54 indicates that he was issued a written warning on August 6, that letter does not appear in the record. On September 21, 2011, Mr. Covert tried to reach Mr. Carter about a change in his work schedule. He left Mr. Carter a voice mail asking him to return the call, but Mr. Carter failed to do so. Mr. Covert also tried to call Mr. Carter on his home phone, but there was no answer and no opportunity to leave a voice mail. On September 29, 2011, Mr. Covert issued a written warning to Mr. Carter for being unavailable when called in violation of the CPC General Work Rules.

Complainant’s Relay Partnership

Mr. Carter initially was assigned to the Rocky Mount portion of the Columbia relay operation. For the last part of his employment, he was assigned to the Jacksonville run. As a Jacksonville driver, he was required to report by 2:00 a.m. on Monday mornings unless there was

a delay due to a late train in Jacksonville, when he could report as late as 5:00 a.m. At whatever time he started on Monday morning, the relay operation would run continuously throughout the week. Occasionally, a start time other than Monday would be delayed by a late train.

Kelvin Gordon was paired with Mr. Carter as his relay partner from February of 2010 through October of 2011. According to Mr. Gordon, the Rocky Mount driver on the other teams assigned to Columbia generally left Columbia at around 2:00 p.m., but he left around 4:00 p.m. on Mondays while teamed with Mr. Carter, and his departure time got later through each week as Mr. Carter either took an excessive time on his run or was late coming in to relieve Mr. Gordon. The driver manifests admitted into evidence bear out Mr. Gordon's testimony. The following charts summarize the start and end times for each run by Mr. Carter and Mr. Gordon during the period from June 27, 2011 through October 5, 2011¹¹:

Week ending July 2, 2011

Date¹²	Driver	Depart Columbia	Return Columbia	Total Run Time
6/27/11	Carter	2:45 a.m.	4:05 p.m.	13 hours 20 minutes
	Gordon	4:35 p.m.	5:50 a.m.	13 hours 15 minutes (flat repair in Rocky Mt)
6/28/11	Carter	6:20 a.m.	6:20 p.m.	12 hours
	Gordon	6:36 p.m.	5:17 a.m.	10 hours 41 minutes
6/29/11	Carter	5:45 a.m.	6:30 p.m.	12 hours 45 minutes
	Gordon	6:55 p.m.	6:46 a.m.	11 hours 51 minutes
6/30/11	Carter	7:35 a.m.	7:35 p.m.	12 hours
	Gordon	7:58 p.m.	6:15 a.m.	10 hours 17 minutes

Week ending July 9, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
7/5/11	Carter	3:00 a.m.	3:40 p.m.	12 hours 40 minutes
	Gordon	4:16 p.m.	3:02 a.m.	10 hours 46 minutes

¹¹ See RX 52. Where the term "no run" is present, one or both drivers either did not drive on the date indicated, or drove a different run from their normal Jacksonville or Rocky Mount runs, and therefore that date is not used for comparison to dates on which the normal runs were made.

¹² The date used is the date of Mr. Carter's Jacksonville run; Mr. Gordon began his Rocky Mount run on the same date, but finished it on the following day. Each "date" represents a complete relay from Columbia to Jacksonville, from Jacksonville to Columbia, from Columbia to Rocky Mount, and finally from Rocky Mount to Columbia.

7/6/11	Carter	3:35 a.m.	6:20 p.m.	14 hours 45 minutes
	Gordon	6:46 p.m.	5:00 a.m.	10 hours 14 minutes
7/7-8/11	(no runs)			

Week ending July 16, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
7/11/11	Carter	2:45 a.m.	3:30 p.m.	12 hours 45 minutes
	Gordon	3:52 p.m.	2:23 a.m.	10 hours 31 minutes
7/12/11	Carter	3:20 a.m.	4:10 p.m.	12 hours 30 minutes
	Gordon	4:28 p.m.	2:37 a.m.	10 hours 9 minutes
7/13/11	Carter	3:15 a.m.	4:15 p.m.	13 hours
	Gordon	4:48 p.m.	3:02 a.m.	10 hours 14 minutes
7/14/11	Carter	3:40 a.m.	4:55 p.m.	13 hours 15 minutes
	Gordon	5:11 p.m.	3:41 a.m.	9 hours 51 minutes
7/15/11	Carter	4:15 a.m.	5:15 p.m.	13 hours
	Gordon	5:50 p.m.	3:41 a.m.	9 hours 51 minutes

Week ending July 23, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
7/18/11	Carter	2:55 a.m.	4:30 p.m.	13 hours 35 minutes
	Gordon	4:52 p.m.	3:00 a.m.	10 hours 8 minutes
7/19-20/11	(no runs)			
7/21/11	Carter	2:55 a.m.	4:20 p.m.	13 hours 25 minutes
	Gordon	4:53 p.m.	3:32 a.m.	10 hours 39 minutes
7/22/11	Carter	5:30 a.m.	6:55 p.m.	13 hours 25 minutes
	Gordon	7:22 p.m.	5:20 a.m.	9 hours 58 minutes

Week ending July 30, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
7/25/11	Carter	2:55 a.m.	3:45 p.m.	12 hours 50 minutes
	Gordon	4:20 p.m.	2:34 a.m.	10 hours 14 minutes
7/26/11	Carter	5:35 a.m.	5:40 p.m.	12 hours 5 minutes
	Gordon	6:11 p.m.*	4:23 p.m.	10 hours 12 minutes
7/27/11	Carter	5:35 a.m.	6:45 p.m.	13 hours 10 minutes
	Gordon	7:03 p.m.	5:54 a.m.	10 hours 51 minutes
7/28-29/11	(no runs)			

* Mr. Gordon's manifest indicates that he started his run at 5:11; however, as he noted an arrival time at Columbia of 5:56 p.m. and Mr. Carter did not return to Columbia from Jacksonville until 5:40 p.m., I find that he mistakenly entered "1711" (5:11 p.m.) when he meant "1811" (6:11 p.m.)

Week ending August 6, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
8/1/11	Carter	2:55 a.m.	3:35 p.m.	12 hours 40 minutes
	Gordon	4:06 p.m.	2:36 a.m.	10 hours 30 minutes
8/2/11	Carter	3:25 a.m.	4:10 p.m.	12 hours 45 minutes
	Gordon	4:50 p.m.	3:13 a.m.	10 hours 23 minutes
8/3/11	Carter	3:45 a.m.	4:55 p.m.	13 hours 10 minutes
	Gordon	5:19 p.m.	3:57 a.m.	10 hours 38 minutes
8/4/11	Carter	4:30 a.m.	4:45 p.m.	12 hours 15 minutes
	Gordon	5:14 p.m.*	3:21 a.m.	10 hours 35 minutes
8/5/11	Carter	4:05 a.m.	6:00 p.m.	13 hours 55 minutes
	Gordon	7:25 p.m.	5:33 a.m.	10 hours 8 minutes

* Mr. Gordon's manifest indicates that he left at "1614" (4:14 p.m.); however, for the reasons set forth above with respect to the entry of July 26, 2011, I find that "1614" was a mistake and he meant to record "1714" (5:14 p.m.).

Week ending August 13, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
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8/8/11	Carter	2:50 a.m.	4:05 p.m.	13 hours 15 minutes
	Gordon	4:33 p.m.	2:45 a.m.	10 hours 12 minutes
8/9/11	Carter	3:20 a.m.	4:15 p.m.	12 hours 55 minutes
	Gordon	4:55 p.m.	2:48 a.m.	9 hours 53 minutes
8/10/11	Carter	3:10 a.m.	4:25 p.m.	13 hours 15 minutes
	Gordon	4:48 p.m.	2:46 p.m.	9 hours 58 minutes
8/11/11	Carter	3:15 a.m.	4:55 p.m.	13 hours 40 minutes
	Gordon	6:24 p.m.	5:03 a.m.	10 hours 39 minutes
8/12/11	Carter	5:40 a.m.	6:55 p.m.	13 hours 15 minutes
	Gordon	7:16 p.m.	5:11 a.m.	9 hours 55 minutes

Week ending August 20, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
8/15/11	Carter	2:20 a.m.	3:50 p.m.	13 hours 20 minutes
	Gordon	5:00 p.m.	2:52 a.m.	9 hours 52 minutes
8/16/11	Carter	4:00 a.m.	4:50 p.m.	12 hours 50 minutes
	Gordon	5:10 p.m.	5:25 a.m.	12 hours 15 minutes
8/17/11	Carter	6:00 a.m.	6:25 p.m.	12 hours 25 minutes
	Gordon	7:15 p.m.	5:19 a.m.	10 hours 4 minutes
8/18/11	Carter	6:00 a.m.	6:05 p.m.	12 hours 5 minutes
	Gordon	6:30 p.m.	4:16 a.m.	9 hours 46 minutes
8/19/11	Carter	5:25 a.m.	6:00 p.m.	12 hours 35 minutes
	Gordon	6:30 p.m.	4:25 a.m.	9 hours 55 minutes

Week ending August 27, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
8/22-25/11	(no runs)			
8/26/11	Carter	6:25 a.m.	5:35 p.m.	11 hours 10 minutes
	Gordon	6:00 p.m.	4:00 a.m.	10 hours

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Week ending September 3, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
8/29-9/2/11	(no runs)			

Week ending September 10, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
9/6/11	(no run)			
9/7/11	Carter	6:00 a.m.	6:55 p.m.	12 hours 55 minutes
	Gordon	7:16 p.m.	5:19 a.m.	10 hours 3 minutes
9/8/11	(no run)			
9/9/11	Carter	5:45 a.m.	6:25 p.m.	12 hours 40 minutes
	Gordon	6:43 p.m.	5:00 a.m.	10 hours 17 minutes
9/10/11	Carter	5:40 a.m.	6:25 p.m.	12 hours 45 minutes
	Gordon	6:45 p.m.	4:38 a.m.	9 hours 53 minutes

Week ending September 17, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
9/12/11	Carter	5:10 a.m.	6:05 p.m.	12 hours 55 minutes
	Gordon	6:24 p.m.	4:24 a.m.	10 hours
9/13/11	Carter	5:55 a.m.	7:20 p.m.	13 hours 25 minutes
	Gordon	7:35 p.m.	5:28 a.m.	9 hours 53 minutes
9/14-16/11	(no runs)			
9/17/11	Carter	6:10 a.m.	6:00 p.m.	11 hours 50 minutes
	Gordon	6:23 p.m.	4:24 a.m.	10 hours 1 minute

Week ending September 24, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
9/19/11	(no run)			
9/20/11	Carter	6:10 a.m.	9:05 p.m.	14 hours 55 minutes
	Gordon	9:21 p.m.	7:13 a.m.	9 hours 52 minutes
9/21-23/11	(no runs)			

Week ending October 1, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
9/26/11	Carter	2:20 a.m.	3:40 p.m.	13 hours 20 minutes
	Gordon	4:04 p.m.	2:11 a.m.	10 hours 7 minutes
9/27/11	Carter	6:15 a.m.	6:10 p.m.	11 hours 55 minutes
	Gordon	6:33 p.m.	4:28 a.m.	9 hours 55 minutes
9/28/11	Carter	4:55 a.m.	6:25 p.m.	13 hours 30 minutes
	Gordon	6:43 p.m.	4:46 a.m.	10 hours 3 minutes
9/29/11	Carter	6:05 a.m.	6:55 p.m.	12 hours 50 minutes
	Gordon	7:13 p.m.	5:08 a.m.	9 hours 55 minutes
9/30/11	Carter	5:45 a.m.	6:15 p.m.	12 hours 30 minutes
	Gordon	6:33 p.m.	4:55 a.m.	10 hours 22 minutes

Week ending October 8, 2011

Date	Driver	Depart Columbia	Return Columbia	Total Run Time
10/3/11	Carter	2:30 a.m.	3:50 p.m.	13 hours 20 minutes
	Gordon	4:09 p.m.	1:54 a.m.	9 hours 45 minutes
10/4/11	Carter	2:45 a.m.	4:05 p.m.	13 hours 20 minutes
	Gordon	4:24 p.m.	2:25 a.m.	10 hours 1 minute
10/5/11	Carter	6:20 a.m.	7:45 p.m.	13 hours 25 minutes
	Gordon	7:48 p.m.	(different run)	

(Mr. Carter	terminated)			
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It is quite apparent that Mr. Carter in fact engaged in the conduct to which Mr. Gordon objected: although he started early on Monday mornings, he consistently took over 13 hours to complete his runs, and by doing so pushed back Mr. Gordon's start and end times over the course of the week. On many occasions, Mr. Carter did not report to work until after Mr. Gordon returned to Columbia, a practice which also pushed back Mr. Gordon's times as Mr. Carter was not there to start his pre-trip inspection and his run immediately upon Mr. Gordon's return. Three examples: (1) at the end of the July 11, 2011 run, Mr. Gordon returned to Columbia at 2:23 a.m., but Mr. Carter did not report until 3:20 a.m., about an hour later; (2) at the end of the July 21, 2011 run, Mr. Gordon returned to Columbia at 3:32 a.m., but Mr. Carter did not report until 5:15; and (3) at the end of the August 18, 2011 run, Mr. Gordon returned to Columbia at 4:16 a.m., but Mr. Carter did not report until 5:05 a.m. Significantly, during the week before Mr. Carter was terminated, he was not present when Mr. Gordon returned to Columbia on three out of five days: (1) September 27, 2011, when Mr. Gordon returned at 2:11 a.m. and Mr. Carter did not report until 6:00 a.m.; (2) September 29, 2011, when Mr. Gordon returned at 4:46 a.m. and Mr. Carter did not report until 5:45 a.m.; and (3) September 30, 2011, when Mr. Gordon returned at 5:08 a.m. and Mr. Carter did not report until 5:30 a.m. Mr. Gordon's starting time was consistently later at the end of the week than it was at the beginning of the week.

Likewise, the records reflect that Mr. Gordon was justifiably frustrated at the length of time it took Mr. Carter to complete his round trip between Columbia and Jacksonville. The following table summarizes the times it took Mr. Carter to complete the round trip, compared to the times it took the Jacksonville drivers on the other two Columbia teams to complete the trip on the same days.

Date	Carter	Team 1 Driver	Team 2 Driver
6/27/11	13 hours 20 minutes	11 hours 45 minutes	10 hours 45 minutes
6/28/11	12 hours	11 hours 59 minutes	10 hours 35 minutes
6/29/11	12 hours 45 minutes	11 hours 10 minutes	10 hours 30 minutes
6/30/11	12 hours	11 hours 58 minutes	10 hours 35 minutes
7/5/11	12 hours 40 minutes	12 hours 30 minutes	11 hours
7/6/11	14 hours 45 minutes*	11 hours 48 minutes	11 hours
7/11/11	12 hours 45 minutes	11 hours 30 minutes	10 hours 45 minutes
7/12/11	12 hours 30 minutes	11 hours 53 minutes	11 hours
7/13/11	13 hours	11 hours 20 minutes	11 hours 25 minutes
7/14/11	13 hours 15 minutes	12 hours 33 minutes	(illegible)
7/15/11	13 hours	12 hours 20 minutes	10 hours 45 minutes
7/18/11	13 hours 35 minutes	11 hours 39 minutes	10 hours 45 minutes
7/21/11	13 hours 25 minutes	n/a	10 hours 45 minutes
7/22/11	13 hours 25 minutes	13 hours 42 minutes	14 hours 30 minutes
7/25/11	12 hours 50 minutes	10 hours 59 minutes	10 hours 45 minutes
7/26/11	12 hours 5 minutes	11 hours 57 minutes	11 hours 45 minutes
7/27/11	13 hours 10 minutes	11 hours 51 minutes	10 hours 30 minutes

7/29/11	13 hours 35 minutes	11 hours 43 minutes	11 hours 15 minutes
8/1/11	12 hours 40 minutes	11 hours 45 minutes	11 hours 30 minutes
8/2/11	12 hours 45 minutes	11 hours 48 minutes	10 hours 45 minutes
8/3/11	13 hours 10 minutes	11 hours 33 minutes	10 hours 33 minutes
8/4/11	12 hours 15 minutes	11 hours 45 minutes	12 hours 5 minutes
8/5/11	13 hours 55 minutes	12 hours	11 hours 25 minutes
8/8/11	13 hours 15 minutes	11 hours 57 minutes	11 hours
8/9/11	12 hours 55 minutes	11 hours 55 minutes	10 hours 45 minutes
8/10/11	13 hours 15 minutes	11 hours 30 minutes	10 hours 35 minutes
8/11/11	13 hours 40 minutes**	11 hours 45 minutes	11 hours 20 minutes
8/12/11	13 hours 15 minutes	12 hours 29 minutes	11 hours 25 minutes
8/15/11	13 hours 30 minutes	11 hours 40 minutes	11 hours
8/16/11	12 hours 50 minutes	12 hours 40 minutes	10 hours 35 minutes
8/17/11	12 hours 25 minutes	11 hours	10 hours 50 minutes
8/18/11	12 hours 5 minutes	11 hours 30 minutes	10 hours 40 minutes
8/19/11	12 hours 35 minutes	13 hours 23 minutes	13 hours 3 minutes
8/22/11	13 hours	11 hours 55 minutes	11 hours
8/26/11	11 hours 10 minutes	10 hours	12 hours 15 minutes
8/29/11	12 hours 5 minutes	12 hours 10 minutes	11 hours 10 minutes
9/7/11	12 hours 55 minutes	13 hours 50 minutes	13 hours 30 minutes
9/9/11	12 hours 40 minutes	12 hours 5 minutes	11 hours 25 minutes
9/10/11	12 hours 45 minutes	11 hours 27 minutes	11 hours 45 minutes
9/12/11	12 hours 55 minutes	11 hours 22 minutes	11 hours
9/13/11	13 hours 25 minutes [†]	11 hours 15 minutes	13 hours 5 minutes
9/20/11	14 hours 55 minutes ^{††}	n/a	12 hours 15 minutes
9/26/11	13 hours 10 minutes	n/a	n/a
9/27/11	11 hours 55 minutes	11 hours 45 minutes	13 hours 15 minutes
9/28/11	13 hours 30 minutes	11 hours 50 minutes	10 hours 45 minutes
9/29/11	12 hours 50 minutes	13 hours 32 minutes	13 hours 25 minutes
9/30/11	12 hours 30 minutes	11 hours 58 minutes	10 hours 45 minutes
10/3/11	13 hours 20 minutes	12 hours 15 minutes	11 hours
10/4/11	13 hours 20 minutes	11 hours 45 minutes	10 hours 55 minutes
10/5/11	13 hours 25 minutes	11 hours 45 minutes	12 hours 50 minutes

* Mr. Carter was at the Jacksonville railyard for three hours and 20 minutes with a “bad tire.”

** Mr. Carter had a tractor breakdown that delayed him by 55 minutes.

[†] Mr. Carter was waiting for the train for 90 minutes in the Jacksonville railyard.

^{††} Mr. Carter was waiting for the train for three hours and 40 minute at the Jacksonville railyard.

To compare the drive times between Mr. Carter and the other drivers driving the Jacksonville run on the same days, I will disregard the four dates on which Mr. Carter recorded on his manifest that he had equipment issues or was delayed at the Jacksonville railyard by a late train. That said, there were 44 days on which Mr. Carter and the team 1 driver (generally Albert Williams, but sometimes Craig Boston) drove the Jacksonville route. On 39 of those days, the team 1 driver made the run in less time than Mr. Carter did, averaging about 67 minutes (one hour and seven minutes) less time than it took Mr. Carter. On each of the five days on which Mr. Carter took less time than the team 1 driver did, the team 1 driver was delayed in Jacksonville for

one to three hours. Likewise, there were 44¹³ days on which Mr. Carter and the team 2 driver, Walter Moore,¹⁴ drove the Jacksonville leg. On 38 of those days, Mr. Moore completed the round trip in an average of 111 minutes (one hour and 51 minutes) less time than it took Mr. Carter. On the other six days, Mr. Moore took longer than Mr. Carter to complete the round trip, but on each of those days Mr. Moore was waiting for the train at the Jacksonville railyard.¹⁵

Mr. Carter's delays in reporting to work and the length of his Jacksonville runs caused a rift between him and Mr. Gordon. Mr. Gordon spoke with Mr. Carter about the issue several times, initially asking him to leave at the 2:00 a.m. departure time used by the other drivers. Mr. Carter replied that he was going to leave at a time that allowed him proper rest; Mr. Gordon interpreted the response as a refusal to cooperate with him on the schedule. After his unsuccessful discussions with Mr. Carter, Mr. Gordon complained to Mr. Covert about the schedule issues. Mr. Covert asked Mr. Gordon to keep him informed, and Mr. Gordon did so through texts, emails, and phone calls. Mr. Covert kept a list of the delays reported by Mr. Gordon (RX 35.) Each of Mr. Gordon's reports corresponds with the times entered on Mr. Carter's manifests, and Mr. Gordon's frustration comes forcefully through his reports. For example, on August 2, 2011, Mr. Gordon told Mr. Covert that although he had returned to Columbia from Rocky Mount at 2:35 a.m., Mr. Carter reported to work late and had taken even longer to complete his run, pushing back the schedule. On September 20, 2011, Mr. Gordon asked Mr. Covert to "please look into Carter's trip today. He departed late and is not returning until 9PM."¹⁶ On September 26, Mr. Gordon told Mr. Covert that "Carter is taking another 14 hour day today," with an ETA of 3:45 p.m. On September 28, Mr. Gordon told Mr. Covert that although he had returned from Rocky Mount at 4:28 a.m., Mr. Carter did not return from Jacksonville until 6:25 p.m.; he said, "Ron today is an excellent example. [Mr. Carter] left [Jacksonville] at 11:59 a.m. and arrived at 6:25 p.m. It took him 6 hours 26 minutes to get to Columbia. That is a 5 hour 10 min drive or less. He is taking over an hour in breaks on the way down and the same on the way back. Please intervene."¹⁷

The problem between Mr. Carter and Mr. Gordon came to a head on August 5, 2011. Mr. Carter called to tell Mr. Gordon that he would not make it all the way to Columbia within the permitted 14-hour duty day, once again contributing to Mr. Gordon's continuing frustration. Mr. Carter had arranged for another CPC employee to drive Mr. Gordon to the truck, so Mr. Gordon could take it all the way in to the Columbia terminal. Mr. Gordon decided to take the opportunity to discuss his frustration with Mr. Carter, and said, "Let's have a man-to-man conversation" about the issue. Mr. Carter responded with anger and hostility, to the point that Mr. Gordon was concerned about his safety and decided not to meet Mr. Carter at the truck. During the

¹³ There were actually 45 days, but Mr. Moore's entry for his return time on July 14, 2011 is illegible, and I will disregard that run as well.

¹⁴ Although it is difficult to read the Team 2 Jacksonville driver's name on the manifest, it appears to be Walter Heath Moore.

¹⁵ Notably, there were three days on which Mr. Moore was delayed at the railyard while Mr. Carter was not, but still completed his round trip in less time than Mr. Carter.

¹⁶ Mr. Carter's manifest shows that he indeed did not return until 9:05 p.m. on September 20; however, it also shows that he recorded the reason for his late return: he spent three hours and 40 minutes in Jacksonville, attributing at least part of the time to a tire repair.

¹⁷ Mr. Carter's manifests shows that he left at 12:05 p.m. rather than 11:59 a.m., resulting in a trip of six hours and 20 minutes rather than 6 hours and 26 minutes – an insignificant difference from Mr. Gordon's report to Mr. Covert.

conversation, Mr. Carter told Mr. Gordon that he was happy that Mr. Gordon had complained, because Mr. Carter could now take more breaks. Mr. Gordon asked if he were concerned about being terminated, and Mr. Carter replied that Mr. Covert would have fired him already if he could have.

In general, Mr. Covert did not have real-time awareness of his drivers' performance. He looked into the issue only when he was made aware of a problem, either by way of a complaint or by way of a random audit. In this case, Mr. Gordon's complaints about Mr. Carter brought Mr. Carter's performance to Mr. Covert's attention.

Conclusions of Law

To prevail under the STAA, Mr. Carter must show: (1) that he engaged in protected activity, (2) that he was subject to an adverse employment action, and (3) that his protected activity was a contributing factor in the adverse employment action. If a complainant establishes each factor by a preponderance of the evidence, then CPC can avoid liability only if it shows by clear and convincing evidence that it would have taken the same adverse action even in the absence of protected activity.

Liability of Hospira

Complainant sought to hold Hospira liable as a joint employer, believing that he was employed by both Hospira and CPC Logistics. The evidence of record, however, shows that he was an employee only of CPC Logistics. For the reasons set forth at pages 141-142 of the transcript of the hearing, I affirm my decision at that time denying the complaint as against Hospira.

Protected Activity

Mr. Carter identified the sole protected activity upon which he bases his complaint: refusal to operate his truck while fatigued. Under 49 C.F.R. § 398.4(c), no driver may be required to operate a vehicle when "his/her ability or alertness is so impaired through fatigue, illness, or any other cause as to make it unsafe for him/her to begin or continue to drive...." Thus, if Mr. Carter refused to operate his vehicle because he was ill or fatigued, then he engaged in protected activity.

Mr. Carter has shown by a preponderance of the evidence that he engaged in protected activity on one occasion. The evidence is clear that he took much longer than other drivers did to complete the Jacksonville run, but he has not established that the extra time he took was caused by taking rest breaks due to fatigue. With one exception, he made only general statements that he was entitled to rest breaks. He did identify one specific time that he took a break because he was ill; on July 15, 2011, Ms. Olson called Mr. Carter to ask about a stop at a rest area. Ms. Olson testified that Mr. Carter told her he was not feeling well and stopped for a break. Although Mr. Carter testified that he told Ms. Olson that he had stopped to rest because he was tired, and when he awoke from a nap realized he was sick; however, I find Mr. Carter's testimony not to be credible, and that he did not stop due to fatigue, but due to illness. In resolving credibility against

Mr. Carter, I note that although the other CPC drivers recorded rest breaks, Mr. Carter did not record a single rest break on his manifests during the entire period of his employment with CPC. Although he was required to call in from his stops, he did not do so. Although he was expected to be at the Columbia terminal when his relay partner arrived, he consistently failed to do so. Throughout his testimony he painted himself in the best possible light, and the company in the worst, and he did not acknowledge his own shortcomings as reflected in his disciplinary history. In short, Mr. Carter was looking out for Mr. Carter, and was uninterested in anything that conflicted with what he wanted to do. Nevertheless, I do credit Ms. Olson's testimony that Mr. Carter told her that he was ill, and a refusal to drive while ill is protected activity.

Likewise, I do not believe Mr. Carter's testimony that he told Mr. Covert, Mr. Worthington, and Mr. Pruitt that his delays were caused by rest breaks due to fatigue. Mr. Covert testified credibly that Mr. Carter could not explain his delay on September 26, 2011 when asked, saying vaguely that he might have been sick. And Mr. Pruitt testified credibly that he was not told that Mr. Carter was taking rest breaks. Mr. Carter testified that he spoke to Mr. Covert and Mr. Pruitt and told them that he was not going to drive while fatigued and risk killing anybody. I find that he did not do so. As previously discussed, his general credibility is poor; and Mr. Covert and Mr. Pruitt identified the occasions when they spoke with Mr. Carter and credibly testified that the conversations did not involve any representations by Mr. Carter that he was taking rest breaks. In particular, on September 9, both Mr. Covert and Mr. Pruitt talked with Mr. Carter about the need to work on Saturday, September 10 to meet Hospira's needs. Mr. Carter at first resisted the schedule change, but ultimately did drive on September 10. Mr. Pruitt, however, credibly described Mr. Carter as threatening during their conversation on September 9, and did not discuss the issue of rest breaks at all.

Mr. Carter had a pattern of taking longer than any other driver to complete the Jacksonville run. I find that this pattern was due to his stopping whenever he wanted to, and that he has not established that the trips were extended because he took rest breaks. Although he testified that they were, I find his testimony not to be credible. Unlike other drivers, he did not record any rest breaks in his manifests. Unlike other drivers, he did not call in to dispatch when he stopped, as he was required to do. In short, I find that Mr. Carter made a judgment about how long he could take to complete his run, and took as long as he wanted to take.

Accordingly, I find that Mr. Carter engaged in protected activity when he stopped due to illness on July 15, 2011, and that he has not shown by a preponderance of the evidence that he engaged in any other protected activity.

Adverse Employment Action

It is undisputed that Mr. Carter suffered an adverse employment action when he was terminated on October 5, 2011, and I so find.

Contributing Factor

Mr. Carter has the burden to show by a preponderance of the evidence that his protected activity was a "contributing factor" in the decision to terminate his employment. Engaging in a

protected activity is a contributing factor if it “alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 11 (ARB Feb. 29, 2012). A complainant can show contribution by either direct or indirect proof. *Id.* If Mr. Carter “does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment.” *Id.* One method of indirect proof is evidence of “temporal proximity” between the protected activity and the adverse action. *Id.*, citing *Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010).

The sole protected activity in which Mr. Carter engaged was his report of illness on July 15, 2011. He was terminated about 2½ months later; this is sufficiently close in time that, in the absence of other factors, it could be assumed that he was terminated for refusing to drive when he felt in in July. However, there is no such absence of other factors. After July 15, Mr. Carter continued to take far longer than other drivers to complete his runs, and he continued to be the subject of complaints by Mr. Gordon throughout August and September. Mr. Carter engaged in behavior that Mr. Gordon found threatening on August 5, 2011, three weeks after the protected activity occurred. Additionally, Mr. Carter had a threatening demeanor during his conversation with Mr. Pruitt on September 9, 2011. After Mr. Covert issued his letter to all drivers in early August, Mr. Carter’s turnaround time got worse rather than better. One week before his termination, Mr. Carter received a disciplinary letter from Mr. Covert regarding his failure to be available for work assignments.

Rather than Mr. Carter’s engaging in a single protected activity, it was Mr. Covert’s review of Mr. Carter’s manifests – motivated by Mr. Gordon’s continuing complaints – that led to his recommendation for Mr. Carter’s termination. Mr. Wallis made the decision to terminate Mr. Carter based on his disciplinary history, his failure to improve his performance, and his unexplained delays on the Jacksonville run. Mr. Wallis, Mr. Pruitt, and Mr. Covert were unaware of Mr. Carter’s having informed Ms. Olson on July 15, 2011 that he had been delayed because he did not want to drive while he was sick or fatigued. That communication to Ms. Olson played no part in the decision to terminate Mr. Carter’s employment.

Affirmative Defense

If Mr. Carter had successfully shown that his July 15 communication to Ms. Olson contributed to the decision to terminate him, the burden would have shifted to Respondent to demonstrate by clear and convincing evidence that he would have been terminated even in the absence of that communication. I have found, however, that Mr. Carter did not carry his burden on that element of his case, and therefore need not address Respondent’s statutory defense.

ORDER

For the reasons set forth above, the complaint in this matter is DENIED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

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).