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Issue Date: 03 May 2007

CASE NO. 2006-STA-00001

In the Matter of:

VINCENT A. POLLOCK,
Complainant,

v.

CONTINENTAL EXPRESS,
Respondent.

Appearances:

Paul Taylor, Esq.
For the Complainant

Byron Freeland, Esq.
For the Respondent

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim under the Surface Transportation Assistance Act ("STAA" or "the Act"), 49 U.S.C. § 31105 and the implementing regulations found at 29 C.F.R. Part 1978. Vincent Pollock ("Complainant") alleges that he was fired by Continental Express ("Respondent" or "CE") because he refused to drive on a weight-restricted road. *See, e.g.*, Comp. Reply Br. at 9-10. CE contends that Complainant was fired due to his repeated work policy violations and his insubordinate attitude, *See, e.g.*, Resp. Br. at 44.

A formal hearing was held in this case on August 15-17, 2006 in Louisville, Kentucky at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. At the hearing, both parties offered Exhibits 1-29 as Joint Exhibits, which were admitted into evidence. Tr. at 16. Complainant's Exhibits 1 through 9[1] and Respondent's Exhibits 1 through 3 were also admitted into evidence at the hearing.[2] Tr.

[1] Respondent objected to the admission of pages two and three of Complainant's Exhibit 2, which are handwritten notes of Natalie Brouwer, a former employee of Schilli Transportation Services. *See* Tr. at 6. These two pages were admitted into evidence, however, over the objections of Respondent's attorney. Tr. at 73-74.

[2] The following abbreviations will be used as citations to the record: "JX" for Joint Exhibits, "CX" for Complainant's Exhibits, "RX" for Respondent's Exhibits, "Tr." for Transcript, "Comp. Br." for Complainant's

at 6. Both parties subsequently filed post-hearing briefs; and Complainant then filed a reply brief. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

I. STIPULATIONS

The parties have stipulated and I find that:

1. The parties are subject to the Act. *See, e.g.*, Comp. Br. at 27-29; Resp. Br. at 29-30.
2. Complainant's complaint was timely filed with OSHA, and the objections to the Secretary's preliminary findings were timely filed. *See, e.g.*, Tr. at 60.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Complainant engaged in activity protected by the Act?
2. Whether the adverse employment action taken by Respondent against Complainant was causally related to any putative protected activity in which Complainant engaged?
3. The appropriate remedies pursuant to subsection (b)(3) of the Act for any violation which are found to have occurred.

See, e.g., Complainant's Amended Pre-hearing Statement at 1-4; Respondent's Pre-hearing Submission at 1-3.

III. STATEMENT OF THE CASE

Summary of the Evidence

Testimony of Vincent Pollock

Vincent Pollock, Complainant, resides in Pekin, Indiana. Tr. at 107. He first obtained his "Class A" commercial license in January, 2000 and went to work for Continental Express in May, 2002. Tr. at 109. While he worked for CE, he operated commercial vehicles with a gross vehicle weight rating of 10,001 pounds or more on the highways in interstate commerce. Tr. at 109-110. Complainant testified that his employment with CE was positive in the beginning. Tr. at 112. He had several dispatchers during his employment, and he normally communicated with them via the Qualcomm satellite-based communication system installed in the company trucks. Tr. at 112-113.

Post-Hearing/Closing Brief, "Resp. Br." for Respondent's Post-Hearing/Closing Brief, and "Comp. Reply Br." for Complainant's Post-Hearing Reply Brief.

Complainant described an inspection that was conducted on his truck in Louisiana on March 11, 2004. *See* Tr. at 114; JX-4. He explained that Joint Exhibit 4 is a vehicle inspection report issued by the Department of Transportation and listing him as the driver. Tr. at 114; JX-4. He obtained a copy of the inspection report at the time he received a citation for failing to produce a previous seven days' logs while driving in Louisiana. Tr. at 115-116. He testified that he did have the logs in his possession at the time, but chose not to produce them to the Louisiana law enforcement officer because they showed that he had been dispatched in violation of the law. *See* Tr. at 115. He did not produce the logs for the officer "because the penalty for the violations probably would have outweighed the penalty for not producing the logs." Tr. at 116. He further stated that he did not receive any discipline or counseling from CE for failing to produce the logs, although CE knew about the inspection. Tr. at 115-116; JX 5.

Complainant testified that in April of 2004 CE asked him to falsify his driving logs. Tr. at 116. He described his conversation with Kevin Mayes, a CE manager, as follows:

> He said that they [the logs] were missing – I believe it was three and a half months' worth of logs . . . and [he] said that I had never turned them in. And he told me that before I was going to be dispatched that I would have to recreate those logs.

Tr. at 117-118. Complainant said that he had turned the logs in already, and he thought it odd that CE waited until April to tell him that logs dating as far back as the previous October were missing. Tr. at 119. He stated that CE is "supposed to keep 180 days' worth of logs continuously, by the regulations. And to wait that long, and then expect me to have a duplicate copy when I'm not even required to keep one that long, I just felt was kind of ridiculous." Tr. at 119. He said that he told Mr. Mayes he refused to recreate the logs because he could not certify where he was and what he was doing as far back as the dates at issue. *See* Tr. at 120. Complainant also testified that Pete Campbell, another CE manager, joined the conversation by speakerphone. Tr. at 120. He said that neither Mr. Mayes nor Mr. Campbell offered him the option of creating an "alias" log; something that would at least indicate to the Department of Transportation that CE had made an effort to recreate some type of log for the record. Tr. at 120-121.

Complainant was then asked about Joint Exhibit 9, a collection of transcribed Qualcomm messages that were sent either to his truck or from his truck to the dispatch office. *See* Tr. at 121. The exhibit is a series of written messages between Complainant and his managers at CE that deal with the issue of the misplaced logs. *See* JX-9. He noted that he created the document marked as JX-9 before the above-mentioned conversation with Kevin Mayes took place. Tr. at 125. He testified that the messages comprising JX-9 are an exact transcription of the Qualcomm messages he exchanged with CE; and he said he transcribed them because they indicate "that the company was asking me to do something illegal, and I pointed that out to them." Tr. at 121-122. Complainant stated that even after he told the company of the illegal nature of falsifying logs, CE did not come back and explain that they did not intend for him to falsify logs. *See* Tr. at 132. He said that he transcribed the messages in the exhibit because he was unable to print messages from the message unit in his truck. *See* Tr. at 121. Complainant further testified that he did in

fact turn in to CE the logs at issue; he said he turns in logs every time he arrives at a new destination. Tr. at 127-128.

Complainant also stated that he wrote a letter to the president of CE, Kelly Wooldridge, which set forth his frustration with the company for refusing to dispatch him until he falsified logs. Tr. at 135-136; JX-6. When asked why he felt he was being asked to falsify logs, he stated it was "[b]ecause they couldn't provide me with the information to complete the logs to a level of completeness that I would have been comfortable signing that they were true and correct." Tr. at 136. He said that he delivered the letter to Jim White because he was the highest-ranking company representative present at the time, and that he never received a response from either Mr. Wooldridge or Mr. White. Tr. at 138-139.

The day after Complainant delivered the above-mentioned letter, he said that he received an Employee Disciplinary Report issued by CE for, among other things, failing to turn in recreated logs. *See* Tr. at 139; JX-7. He testified that Kevin Mayes and Pete Campbell met with him to discuss the report, and that Mr. Campbell refused to pay Complainant for the days CE would not dispatch him, but he also agreed to drop his demand that Complainant turn in the unaccounted for logs. *See* Tr. at 139-140. Complainant said that he was dispatched again shortly thereafter. Tr. at 140. He further testified that this was the only notice of service failure, and the only written disciplinary notice, that he received while working for CE. Tr. at 141, 142. He noted that the report, dated April 27, 2004, included alleged offenses committed by him as far back as February of 2003. Tr. at 140-141. He said it was not typical for a trucking company to wait more than a year to reprimand a driver for a service failure. Tr. at 141.

Complainant further testified that he never recreated the logs that CE asked him to recreate in April of 2004. Tr. at 143. He stated however that he began to take dispatches that he knew were illegal, rather than being forced to lose jobs. Tr. at 144. He said:

> If you refuse something that you couldn't do legally, then you got to sit around for four or five days. So it wasn't too long after this that I decided that, rather than playing the game of trying to make my log book look nice for the Mr. DOT Man, that, if they dispatched me on . . . something that was illegal, I would simply do it and log it as I did it. That way at least it was the truth.

Tr. at 144-145. He said this was the reason he was cited in Maryland in June, 2004 for failing to have his record of duty status current and for failing to retain the previous seven days' logs. *See* Tr. at 144.

Complainant then testified about Joint Exhibit 29, pages of printed messages sent between him and dispatch. He noted a particular message from CE, dated December 17, 2004, requesting that Complainant drive from Knoxville to Chattanooga, Tennessee by 4:00 pm that day. Tr. at 150-151; JX-29 at 7. Claimant responded that he could not take the dispatch. Tr. at 151-152; JX-29 at 8. He explained that he could not resume driving to Chattanooga because he was still on a break and did not want to violate the rules pertaining to driving time limitations. *See* Tr. at 152. He recounted that when the dispatcher wrote back "What time can [you be] there? I would hate [for you to] sit [until] Mon[day] waiting on a [load]," he took it to mean that

although he could not make the trip legally, if he did not do it, he would not be dispatched again until Monday. Tr. at 156-157; JX-29 at 9. Complainant testified that this time period, a week before Christmas, was one of the heaviest freight volumes of the year and he "hadn't been dispatched hardly anything." Tr. at 157-158.

Complainant explained that he was primarily paid by the mile, so if he was not dispatched and "rolling" he could not earn money. *See* Tr. at 158. He said that he believed his final rate of pay while at CE was 34 cents per mile. Tr. at 158. He went on to explain that there were additional items aside from driving, such as loading and unloading or sitting without a dispatch, that could earn him "accessorial pay." Tr. at 163. Complainant testified that he sat in Knoxville without being dispatched for four days after he refused to drive to Chattanooga. *See* Tr. at 163. He said that instead of receiving layover pay for the four days, he was fined $25.00 "for not picking up a load I couldn't pick up legally." Tr. at 163.

Next, Complainant described an incident on February 11, 2005 in which he refused a load because he did not have the hours to pick it up or deliver it. Tr. at 165-166. He maintained that he was told by dispatch that he should just go home if he was unable to work. Tr. at 166. He said that he did not receive another dispatch until three days later, which he viewed as retaliation for refusing to drive a load illegally. Tr. at 166; *see also* Tr. at 172.

In another incident which Complainant describes as retaliatory, he testified that he was dropping off a load at a Wal-Mart store in North Carolina. Tr. at 169. He said that the CE dispatchers "changed [his] appointment" and gave it to another driver "because they knew that I wouldn't go ahead and do something illegal." Tr. at 171. Complainant explained that the other driver would continue to drive beyond the legal time limitations, whereas Complainant would not do so. *See* Tr. at 170-172.

Complainant also recounted a letter he wrote and hand-delivered to Jim White, the safety manager at CE, questioning why he had not received safe driver awards and new equipment pursuant to company policy. *See* Tr. at 173-176; JX-13. He said he was bothered that he had not been issued these things, especially because of his contemporaneous dispute with the company over "illegal activity." Tr. at 176. According to Complainant, he turned down loads at least once a week on average, because he did not think they could be legally logged. Tr. at 176.

Complainant testified that Joint Exhibit 14 was a nurse practitioner's certificate he obtained to enable him to return to work after being ill with a strep infection for two-to-three days. *See* Tr. at 177, 673-674; JX-14. He explained that after CE received the note, he was allowed to finish driving his load, but was told afterwards to shut down because he was in violation of company policy and was not supposed to be driving. Tr. at 179. He went on to state that Carol Myers, a CE human resources employee, told him that he had to remain at a truck stop until the nurse practitioner certified, in a more detailed note, that he was fit to drive a commercial vehicle. *See* Tr. at 180-182. After speaking with Ms. Myers over the telephone, Complainant said that he wrote a letter to and then spoke with Tim Hodnett, CE's director of human resources. Tr. at 182-184; JX-17. He said that Mr. Hodnett decided to pay Complainant $100.00 for sitting for the day at the truck stop. Tr. at 182, 185.

Next, Complainant testified about CE's "Driver of the Month" newsletter columns, and specifically about the January, 2005 driver of the month who logged 14,417 miles in December, 2004. Tr. at 185; JX-15. Complainant maintained that such a monthly mileage "can't be done" legally because the "70-hour" rule mandates that a driver cannot drive after being on duty for 70 hours in an eight-consecutive-day period. Tr. at 187. After being asked to do several computations, Complainant figured that to log 14,417 miles in a month would mean driving an average of 60 miles an hour which he said could not be done legally. *See* Tr. at 190-192. Complainant stated that he discussed the newsletter columns with CE supervisors during a meeting on April 1, 2005. Tr. at 193; *see, e.g.*, JX-15 at 1. He said that afterwards, CE continued to publish the columns but left out the mileage figures. Tr. at 193.

In another incident, which Complainant described as retaliatory, Complainant said he was made to sit idle after a delivery in Dallas, Texas. Tr. at 194. He explained that CE's policy was "first emptied, first loaded," but that although he had delivered his load before numerous other drivers, they had all been given new loads sooner. *See* Tr. at 194-195. Complainant believed that this too was an incident of CE retaliating against him for his refusal to drive in violation of the law. *See* Tr. at 195.

Complainant testified that he sent a follow-up request on March 25, 2005 to Tim Hodnett, a CE manager, about scheduling a meeting to address Complainant's concerns with CE. *See* Tr. at 195-196; JX-18 at 11. On April 1, 2005, Complainant met with Darren Moore and John Hulecki, two members of CE's management, for over three hours at CE headquarters. *See* Tr. at 197-198, 200. Complainant said that he asked the managers why they kept telling him the reason he was being dispatched less frequently was because freight volumes were down, when the company reported in its newsletters that "freight volume was way up." Tr. at 198-199. He also asked why he was making 30 percent less pay than he made the previous year, considering he had received two pay increases. Tr. at 199. He told the managers that it appeared his mileage was down because he was being retaliated against for his refusal to drive illegally. Tr. at 200. He testified that Mr. Hulecki responded "that the reason that my mileage was down 30 percent and my pay was down was because I refused to log trips illegally." Tr. at 200.

Complainant said that during the meeting he also spoke to the managers about "the excessive miles that they were essentially bragging about drivers completing in their company newsletters." Tr. at 198. He stated that Mr. Hulecki explained that the totals reported in the newsletters were misprints. Tr. at 198-199. Other issues he said he addressed in the meeting were the company's failure to inform its drivers of changed company policy and an instance in which he was fined "for not picking up loads that I couldn't pick up legally." *See* Tr. at 200-201.

Complainant testified that he told Mr. Hulecki and Mr. Moore that he followed the Department of Transportation rules "to the letter," and that he believed CE was retaliating against him as a result. Tr. at 202. He said that he agreed to start using the phone more often, rather than the Qualcomm system, to communicate with CE. *See* Tr. at 202. He maintained that he did not, however, agree to shorten the messages that he did send via Qualcomm. Tr. at 202-203. Complainant also agreed to address with the safety department the log violations attributed to him from months prior. Tr. at 203. He said that he felt the meeting was "amicable" and "productive." Tr. at 203. There was no indication, according to Complainant, that he was on the

verge of being fired. *See* Tr. at 204-205. He stated, "[i]f anything, what they did indicate was they thought that I was being too strict in my interpretation [of the Federal Motor Carrier Safety Regulations] and too thorough." Tr. at 205.

Complainant next described an incident in which he was assigned to drive from Pennsylvania to California. Tr. at 207. He stated that the total distance was between 2,600 and 2,700 miles and that it took him five-and-a-half days to drive cross-country. *See* Tr. at 206-207. He explained that he had run into a situation whereby he could not complete the load as scheduled since he did not have enough hours available to continue driving. *See* Tr. at 208-209. He said that he was late delivering the load because he had worked too many hours, and that he did not keep with the delivery schedule "[b]ecause, in the meeting that [he] had had with [CE management], Darren Moore assured [him] that he would . . . do everything in his power to make sure that [Complainant] was never, ever, ever, ever again dispatched on a load that couldn't be completed legally as scheduled." Tr. at 209-210. Complainant recounted that his dispatcher chided him for taking so long to deliver the load when another driver who drove the same route and left 48 hours later got there sooner. *See* Tr. at 212; JX-29 at 210. Complainant stated that the other driver drove the route in three-and-a-half days, which would have been impossible unless he broke the hours of service requirements. *See* Tr. at 212-213, 215.

Complainant then told of an episode in which he believed CE was trying to keep him from one of their truck facilities in order to prevent him from airing to auditors his concerns with the company. *See* Tr. at 219-220; JX-29 at 253-259. He stated that he was driving from Dallas, Texas to Maybelline, Arkansas when a former CE employee called to tell him that CE was being audited. *See* Tr. at 220-221. He said that shortly thereafter he received a message from dispatch stating that if he did not need to come to the "yard" he should go directly to pick up another load. *See* Tr. at 222-223. According to Complainant, this was "extremely unprecedented" because the company "always" had him come to the yard before picking up a new load. *See* Tr. at 223.

Complainant was then asked about a May 2, 2005 dispatch he was assigned to at Truck-Lite in McAlhattan, Pennsylvania. Tr. at 224. He stated that he had never been to Truck-Lite or to McAlhattan prior to that time, and said that he requested directions from CE the night before he was due to pick up the load. *See* Tr. at 224-227. He said that the directions he was provided with were insufficient to get him to his destination. *See* Tr. at 227-230; JX-29 at 268. He stated that he referenced his atlas and drove to McAlhattan, exiting off of the Interstate at 220. *See* Tr. at 232-233. Complainant testified that he tried calling CE several times but was not able to get anyone on the telephone to provide him with the directions he needed. *See* Tr. at 233. He said he then followed a sign reading "McAlhattan" and took a left off of the exit where he noticed an industrial-looking facility on the right-hand side of the road. *See* Tr. at 234-235. Complainant stated that he pulled into the facility, and was unsuccessful in obtaining directions to Truck-Lite. *See* Tr. at 236. He said that he then went back to his truck and was able to get directions through one of CE's mapping systems. *See* Tr. at 236; JX-29 at 278. The directions indicated that he should turn onto Linwood Drive. Tr. at 237; JX-29 at 278.

Complainant maintained that when he got to Linwood Drive, there were signs on both sides of the road stating that trucks over 10 tons were prohibited. Tr. at 237-238. According to Complainant, his truck and trailer combination weighed over 10 tons, so he pulled over and did

not drive on the road. Tr. at 239. He stated that he called but was unable to get through to Truck-Lite, and that he then tried contacting his dispatcher. *See* Tr. at 239-240. His dispatcher, however, was unable to provide alternative directions that avoided the weight-restricted road. *See* Tr. at 240-241; JX-29 at 282, 285. Complainant then sent the following message dated May 3, 2005 to dispatch:

> I'm parked on the side of the road, so there isn't anyone around to ask for directions. The shipper isn't answering the phone. The street [the mapping program] advises is weight-restricted. If the [customer service representative] can't get directions, I'm not sure how I'm expected to do so. I guess the planner should find me something else to do.

Tr. at 241; JX-29 at 286. Complainant stated that he did not simply go down Linwood Drive, because "[i]t's not safe." Tr. at 241. He explained that "it's not every day that you see a restricted road that has a sign on each side of the road," and that there could have been a low overpass, a bridge that would not support the weight of his load or that the road might have been too narrow for his truck. Tr. at 242.

After sending his message to dispatch, he received the following message in return: "Vince, I was just told that we go into this shipper all the time and haven't had any problems with weight restrictions on any road. Please go in to shipper. If you have any problems, I'll take care of it, Reagan." Tr. at 242; JX-29 at 287-288. Complainant testified that he understood the message from dispatch to mean that "if I was to get a ticket for driving on the restricted road that the company would pay for it." Tr. at 242. Complainant then received the following message from his dispatcher: "If u won't go in & make PU then I will take u off the [load] & u can wait 4 something else whenever that is. Let me know what u want 2 do. Reagan." Tr. at 243; JX-29 at 293. Complainant said he took that to mean if he did not use the Linwood Road directions that CE provided, he would not be dispatched again for a while. *See* Tr. at 243-244.

Complainant responded to his dispatcher again with the following message:

> I am not refusing to pick up the load. I am, however, refusing to violate the law. Blindly driving down a street from which this truck is clearly excluded is plainly a stupid thing for me to do. I doubt if the police will hesitate to write me a citation when I tell them that it wasn't my idea. Ultimately I'm responsible for my actions. Recent history suggests that the company would deny any knowledge of my actions and leave me to pay the fine. No thanks. If you must punish me for refusing to violate the law, I can't stop you. Do whatever you are required to do. Vince Pollock.

Tr. at 244; JX-29 at 294-295.

The last message related to this incident that Complainant received from dispatch stated, "Okay, I've pulled you off the load . . . find someplace to park for now until we can find another load." Tr. at 245; JX-29 at 296. Complainant said that he assumed CE dispatched another driver to pick up the load. Tr. at 246. He recounted that he then went to an exit off of the interstate,

just below McAlhattan, where he sat until the following night. *See* Tr. at 247. He was then assigned to drive a load from Pennsylvania to Alabama. Tr. at 247. He said that he sat all weekend in Alabama and then picked up a load that went to Little Rock, Arkansas. Tr. at 247.

Complainant was discharged by CE when he arrived in Little Rock on May 10, 2005. Tr. at 246-247. He said that he was instructed to go to Kevin Mayes' office, where Mr. Mayes informed him of his termination. Tr. at 246. Complainant described the conversation and ensuing events as follows:

> He said, where are you going, and I didn't know what he meant. And he said, we're parting ways. I said, oh, okay, so why. And he said, well, I don't know why. What, you don't have anything for me in writing. He said, no, they didn't give me anything. I said, well, who is they. And he said, all them up there, or something to that effect . . . . I think I mentioned a few people by name. I asked, like, do you mean Hulecki . . . . . And he said, all of them . . . . I said, so you don't know why. And he said something about turning in – or, sending in hours or something. But I had sent in my hours, and that was it. I cleaned out my truck and went home.

Tr. at 247-248. Complainant testified that he returned home from Little Rock by a Greyhound bus, and that the ticket price of $105.00 was deducted from his final paycheck. Tr. at 248.

Complainant further testified that he went to work for Schilli Specialized, Inc. after his discharge, earning a total gross income of $3,823.05 in 2005. *See* Tr. at 250; JX-28 at 3. He then went to work for JDC Logistics in January, 2006, where his total gross income earned was $12,952.61. Tr. at 249; JX-28 at 1. In addition, he worked for Baylor Trucking, earning a gross income of $7,123.52. Tr. at 250; JX-28 at 4. He testified that these figures represent all of the income he earned since his discharge from CE, but that he expected to receive an additional paycheck from Baylor Trucking with an estimated gross amount of $800.00. Tr. at 250.

Complainant stated that after his discharge from CE he made efforts to find substantially equivalent employment. Tr. at 250. He testified that he looked through industry publications, looked online, talked to industry contacts and "called a few places." Tr. at 251. He maintained that he talked to "a number of different companies" and was then offered a job at Schilli Specialized in less than two months after his discharge. Tr. at 251. Complainant said that he did not turn down any offers of employment after his discharge from CE, and that he continuously looked for work. Tr. at 251-252.

Finally, Complainant explained what he would like to recover from his claim. Tr. at 252. He said, "I'd like to see some type of enforcement mechanism put in place requiring Continental to abate these types of violations." Tr. at 252. He also stated that he wants to be reinstated in his job with CE because he prefers to do "long-haul" rather than regional drives, and because CE is in a "pretty central location." Tr. at 252. He noted that he is seeking back pay, attorney's fees and "for [CE] to be required to post the decision in all of their terminals for at least 90 days." Tr. at 252.

On cross examination, Complainant stated that he collected unemployment after he was fired from CE in May, 2005 until he began working again in June, 2005. Tr. at 268. He said that he also collected unemployment for approximately six months after he was terminated from Schilli Specialized. Tr. at 268-269. He stated that prior to his termination from CE he never made a formal complaint to a governmental agency about his concerns that CE was violating safety laws. *See* Tr. at 272-273. He said that he did not do so "[b]ecause it's been my experience, just talking to the different [state DOT workers and state troopers], that they don't really take [enforcement] all that seriously." Tr. at 273. He also said that it has been his experience that OSHA does not take their enforcement responsibilities seriously. Tr. at 273. He noted his disappointment that OSHA expected him to bear the expense of traveling to Little Rock in order for them to investigate his claim. Tr. at 274-275.

Complainant admitted that he never filed a claim with OSHA, the Department of Labor or the Department of Transportation when it did not involve the opportunity for him to receive monetary compensation. Tr. at 275-276. He said that throughout his employment with CE he documented all of his complaints concerning the company's risk management department, and that these documents can be found in the Joint Exhibits and in Complainant's Exhibits. Tr. at 279.

Complainant was next asked about a section of a Qualcomm message he sent to Pete Campbell on April 29, 2005, which reads in relevant part: "Apparently, CEI's company policy is nothing more than an excuse to arbitrarily discipline those who do not adhere to Pete Campbell's greedy and impotent idea of risk management." Tr. at 279, 287; JX-29 at 256-257. Complainant gave the following reasons for his belief that CE's risk management was "impotent":

> Given the fact that, by their own publications, they were dispatching drivers well beyond what is legal under the hours of service regulations, given the fact that their hiring practices had deteriorated to the point that they were hiring people that didn't even have a driver's license and which subsequently go on to run over and kill police officers. Those types of incidents and those facts led me to conclude that it was impotent.

Tr. at 672-673. Complainant stated that he thought Mr. Campbell might get the message, but that he did not expect any kind of reaction from Mr. Campbell toward him personally, and that he did not expect him to respond to or take any action regarding the message. Tr. at 288.

Complainant also testified that he intended a portion of that same Qualcomm message to convey to CE that he was no longer interested in settling his safety-related concerns with the company internally. *See* Tr. at 288-290; JX-29 at 259-259. He said that he thought a quote he used in the message, "You may rest assured that your deeds will find you out," was appropriate for CE to see. Tr. at 292; JX-29 at 259. He testified that he was "not particularly" angry when he wrote the message. Tr. at 293.

According to Complainant, he thought CE was a well-run, safe company for the first two years he worked there. Tr. at 292. He testified, however, that he believed the working environment was "definitely unsafe" for the last year he was employed by the company. *See* Tr.

at 292. When asked why he wants to go back to work for a company he contends is unsafe, he replied that it was his understanding that "[a] lot of the safety problems have been corrected." Tr. at 293.

Complainant testified that the Qualcomm message he wrote, dated March 3, 2005, and addressed to Carol Myers, was his first communication with her. Tr. at 296; JX-16. He said that he had never dealt with the process of taking medical leave from CE, but that he believed any policies concerning the process should have been in writing; he indicated that this particular policy—of requiring a doctor's certification before he could return to work—was not a written policy. *See* Tr. at 296-297. The following exchange between Complainant and Employer's counsel ensued:

> Q Do you have any information that Ms. Myers was treating you differently than other employees?
> A Yes, I do.
> Q And what other employees are you aware of that turned in a medical excuse like the one you turned in and weren't required to do another one?
> A She didn't say.
> Q What employees are you aware of that turned in a medical excuse the way you did and were not required to do another excuse?
> A None. I'm simply basing that on the comments of Carol Myers.
> Q What comments of Carol Myers?
> A When I spoke to her on the telephone, she said that she didn't always require[] this. She just only did it when she had a question about what kind of medication someone was on.
> Q Do you have any information that Ms. Myers treated you differently because of the medication that you were on?
> A Yes, she stated that.
> Q All right.
> A Sir, I just said that.
> Q So did you have any information that there was another employee similarly situated who was on the medication you were on and she treated that employee differently?
> A No, we didn't get that involved in the conversation.

Tr. at 297-298.

Complainant next testified that he sent a letter via facsimile, also dated March 3, 2005, to Tim Hodnett and Carol Myers. Tr. at 299; JX-17 at 1. He said that he drafted the letter when he was "pretty angry," but that he does not normally have a problem with his temper. Tr. at 299. He said that although his attorney, Paul Taylor, was carbon copied on the letter, he did not consult with Mr. Taylor in drafting the letter. Tr. at 300. He further testified that he did not intend to appear threatening in the letter, but that he wanted the company to keep their policies consistent. *See* Tr. at 300-302, 307; JX-17 at 1.

Complainant said he thought Ms. Myers could be lying to him about the requirement of a second doctor's note. Tr. at 303. He maintained that "the rule could not be substantiated [in writing] upon my request." Tr. at 308. He concluded that the circumstances pointed toward retaliation against him for "everything else that had gone on up to that point." *See* Tr. at 303. He further testified that he believed Ms. Myers' actions toward him regarding the requirement of a second doctor's note were "untenable" and "patently absurd." Tr. at 303; JX-17 at 2. He explained:

> [T]hat particular statement was based on the fact that she expected this guy who treated me at the community clinic for an infection in my chin to have knowledge of my fitness to drive a truck. And, number one, he's in no position to know. He doesn't do DOT physicals, he wouldn't know if I was qualified, even if he did do a physical. So, to ask me to go back to a guy that has no knowledge and no way of knowing if I'm still qualified to drive a truck, when he didn't know if I was qualified to start with, is patently absurd.

Tr. at 304. Complainant said that he asked the nurse practitioner to provide a second certification to CE stating that Complainant was fit to drive his truck, but that he was unable to obtain "anything else." Tr. at 305. He said it never occurred to him to have the nurse practitioner talk to Ms. Myers directly and try to solve the problem. Tr. at 305. Complainant further testified that he did not intend for portions of the letter to serve as a threat to Ms. Myers personally. *See* Tr. at 309-310. He stated that after he sent the letter he had a conversation with Mr. Hodnett, and he was permitted to go back to work without a second doctor's note. Tr. at 310. He also testified that Mr. Hodnett agreed to pay Complainant for the one day he was out of work. Tr. at 311.

Complainant was then asked about the drivers' miles reported in the "Driver of the Month" columns. Tr. at 311. He said he realized that CE totals miles in various ways, and that some of the reported miles could be miles driven in a previous month or miles that were just dispatched—not necessarily miles that were "driven" during the month reported in the column. *See* Tr. at 311. He said, however, that he understood the miles reported in the columns to be "driven" miles, "not necessarily simply "paid miles." Tr. at 311. He said that he asked Doug Porter, his dispatcher at the time, whether the miles reported for the "Driver of the Month" were miles that carried over from the previous month, and was informed they were the miles for "that particular month." Tr. at 312-313.

Complainant testified that he was terminated by CE on May 10, 2005 and went to work for Schilli on June 14, 2005. Tr. at 600. He stated that he worked for Schilli until July 20, 2005, earning 36 or 37 cents per mile. Tr. at 600. According to Complainant, the pay at Schilli was "a little better" than at CE, but the mileage wasn't quite as good." Tr. at 600. He also testified that at Schilli, "the deductible on the insurance was quite a bit higher." Tr. at 601. He further testified that after he was terminated from Schilli, he did not go back to work until January 13, 2006, when his unemployment benefits were close to expiring. *See* Tr. at 601-602. He said that there was a brief period of time in that six month window, however, where he was not collecting unemployment because of "some appeal issues that had to be resolved." Tr. at 602.

Complainant was again asked about Joint Exhibit 7, the "Employee Discipline Report" he received from CE on April 27, 2004. Tr. at 602; JX-7. The report listed 12 service failures committed by Complainant, including the incident from March 11, 2004 in which he refused to turn his logs over to a Louisiana law enforcement officer during an inspection. Tr. at 603; JX-7. Complainant accused CE of fabricating most of the service violations. Tr. at 603-604; JX-8. He stated that the only service failure he could attest to took place on March 11, 2004—the day he was shut down for failing to produce his logs in Louisiana. Tr. at 605. He explained that he was at fault for a missed appointment as a result of being shut down. Tr. at 605. Complainant stated that he could not recall if he was at fault for any of the other listed service failures, and said that he was unable to confirm the legitimacy of the offenses since he did not keep logs from that far back in time. *See* Tr. at 605.

Complainant testified that he believed CE gave him the "Employee Discipline Report" because he had notified them the day before of his impending claim against CE. Tr. at 607. He said that he believed CE made up "[a]t least part of those violations" in retaliation for his impending claim. *See* Tr. at 607. Complainant could not say whether he had seen any of the violation notification letters before they were produced for the hearing. *See* Tr. at 609; *see also* JX-20. He stated, however, that he spoke with Bernice Baca "on a number of occasions" about the fact that he thought he received some of the violations in error. Tr. at 609.

Next, Complainant said that, assuming the year in question was 2004, he would agree that his logs were behind by approximately 39 days. Tr. at 609-610. He said, however, that he did not consider the absence of logs for 39 days to be a serious offense at CE because it is a fairly common occurrence there. Tr. at 610. He admitted that other drivers who fell behind on their logs were "shut down," but stated that as far as he knew he was the only driver ever fired for the offense. Tr. at 610. He went on to admit that, assuming the letter was referring to a 2004 period, it would be his second log-related violation in 2004. Tr. at 611.

Complainant said that when he received a service violation in 2004 for failing to recreate missing logs, he suffered a monetary loss from not being dispatched for about five days. Tr. at 611-612. He said that he did not know whether he was treated differently in this situation than other CE employees who had failed to turn in logs. Tr. at 612. Complainant next testified that he does not remember receiving another violation letter, dated February 11, 2005, for missing logs during the period November 14th through November 30th. Tr. at 612. He said that CE could be referring to missing logs from November of 2003 even though the violation letter was dated and sent in 2005. Tr. at 612-613.

Next, Complainant was cross-examined about the incident in May, 2005, in which he refused to drive on the weight-restricted road to the Truck-Lite facility in McAlhattan, Pennsylvania. Tr. at 613. He said that he turned left (west) off of the ramp from Route 220, following a sign for McAlhattan, and noticed weight restriction signs for Linwood Drive just as he was about to turn onto it. *See* Tr. at 613-614, 616. He explained that he was not able to turn his truck around so he continued going "farther west and took another Pennsylvania state road south that intersected with the interstate." Tr. at 614. He also noted that he knows now from hindsight that had he gone onto Linwood Road, he would have been traveling the opposite way from the Truck-Lite facility. Tr. at 615.

Complainant testified that after he turned off the ramp from 220, before he got to Linwood Road, he pulled over at a manufacturing facility on McAlhattan Drive that he assumed was the Truck-Lite facility. Tr. at 616. He said that nobody in the shipping department at the facility could tell him where Truck-Lite was, so he went back to his truck and was able to get directions from the "Map To It" service. *See* Tr. at 616-617. Complainant admitted that it seemed odd that nobody could tell him where Truck-Lite was located considering McAlhattan is a small town and "Truck-Lite is a fairly large company." Tr. at 617. He stated, "I would think, in a town the size of McAlhattan, that you could stop just about anybody on the street and they could tell you where it was." Tr. at 618. He further stated that ordinarily he would agree that because he was unable to locate the facility in such a small town, it would be logical for CE to assume that he was not performing at his best." Tr. at 618. However, he suggested that since he had asked CE at least five times for directions and was not able to obtain any that this was an exceptional situation. *See* Tr. at 618-619.

Complainant next stated that he did not know why nobody at Truck-Lite answered the phone when he called for directions. Tr. at 619. He guessed that the number he had was for the shipping department and they had closed for the day, or that his cell phone was failing to get reception. *See* Tr. at 619-621. Complainant then stated that although he had instructed CE not to call him on his cell phone, it was in his best interest in this instance to use his cell phone to call the Truck-Lite facility for directions.[3] *See* Tr. at 620. He went on to state, "[p]robably what I should have done is, when I stopped the first time, I should have asked to use a telephone while I was [at the first facility], but I didn't." Tr. at 621-622. He maintained that he could not recall whether he asked for directions to "Reservoir Road" or to "Truck-Lite" when he was at the facility. Tr. at 622. He further reiterated that it seemed odd that nobody could provide him with directions to Truck-Lite considering there is a large sign at the exit ramp off of 220. *See* Tr. at 622-623. Complainant also testified that although the address he was looking for was "220 and Reservoir Road," he did not take it to mean that the facility was at the intersection of 220 and Reservoir Road. Tr. at 623. He stated, "It's not uncommon, especially in large metropolitan areas, to go somewhere where the address of the place that you're going to is on one street but their shipping facility, the entrance, is on another street." Tr. at 623-624.

Complainant went on to state that it seemed odd to him that he had to go on a restricted route road to get to a company that used large trucks to haul their products. Tr. at 624. He maintained, however, that he was sure such a situation had happened to him before, stating, "[i]t's not uncommon to go somewhere and have the . . . truck entrance be on a residential street where there might be a sign at the end of the street, the international no-trucks symbol, but that was the first time I had ever had an instance where it . . . gave a specific weight restriction." Tr. at 625-626. Complainant denied knowledge of other CE drivers having reached the Truck-Lite facility without any trouble. Tr. at 626. In response to being informed that other CE drivers had successfully driven to Truck-Lite between seven-to-11 times, he stated that he found it strange that CE was unable to provide him with directions. Tr. at 626.

[3] Complainant explained that he did not permit CE to call his cell phone "[b]ecause of the incident in Dallas where they took a load off of me because I didn't answer my phone because it was in the truck, and I wasn't." Tr. at 621. He further explained that he had a standard cell phone plan in which all of his long distance was included; he did not pay by the call. Tr. at 620.

Complainant next stated that he "absolutely" believed that Continental Express was instructing him to go down a restricted road to get to Truck-Lite. Tr. at 627. He further testified that despite the fact that it could have cost CE thousands of dollars in damages to its truck had there been low bridges or underpasses, he believed that CE was willing to risk a vehicle going on a restricted road. Tr. at 628. He stated that it would not have been the first time they ever sent anyone down a restricted route. Tr. at 628. He admitted, however, that he had never before been sent down a restricted route by CE. Tr. at 628.

Next, Complainant stated that when he got to Linwood Drive and saw the weight restriction signs, he did not simply get back on the interstate and go back the way he started, because, "in that case, then, they probably would have charged me out-of-route mileage." Tr. at 630. He went on to testify that he believed his only fault regarding the Truck-Lite incident was that he did not call Truck-Lite from the place where he first pulled over. Tr. at 631.

Complainant testified that he began reading legal cases about protected activity when he worked at a trucking company prior to CE. Tr. at 637. He explained, "it interests me, and it behooves me to know what my rights are. But I wouldn't say I spend a lot of time [doing it]. If there's a new precedent and it comes out in an STAA case, I'll try to get a copy of it and read it." Tr. at 637. He said that he is able to obtain copies of cases off of the internet. Tr. at 637-638. Complainant said that he believed the only statute he had cited in his writings to CE was "18 United States Code Section 1001, which is exactly what Martha Stewart went to prison for, making a false statement to the government." Tr. at 638. He went on to state, "I have read plenty of articles about truck drivers and trucking company executives that have been prosecuted for falsifying logs under that statute." Tr. at 638. He said he thought it was a "very real possibility" that he was in jeopardy of going to jail because of his missing logs. Tr. at 638. Next, he explained that, although he thought it a possibility that he could go to jail, he did not call a government agency to report CE "[b]ecause my past experience was that it didn't really help." Tr. at 640.

Complainant denied losing his temper, or calling Ms. Myers names over the return-to-work incident in March, 2005. Tr. at 648. He admitted, though, that when he subsequently spoke with Mr. Hodnett regarding the incident, Mr. Hodnett told Complainant that his personality or manner was threatening. Tr. at 648. Complainant said that he explained to Mr. Hodnett that it was not his intention to appear threatening. Tr. at 648. He admitted, however, that he does come across as threatening at times. *See* Tr. at 648. Complainant recognized that he was "kind of rough in dealing with people." Tr. at 650. He said, "I admit that sometimes I come across very poorly at times." Tr. at 650. When asked if he thought that was a factor in his termination from CE, he stated, "I wasn't any different than I had been when I was hired, and I had been there for three years." Tr. at 650.

Complainant testified that Jason Hall retaliated against him by taking a load going from Dallas to Ashdown away from him. Tr. at 651. He stated that as a result of being pulled off of the load by Mr. Hall, he lost several days of work while sitting in Dallas. Tr. at 651. According to Complainant, Mr. Hall retaliated against him by pulling him from the load simply because he

refused to pick it up earlier than scheduled. *See* Tr. at 651-653. The following exchange took place between Complainant and CE's attorney:

> Q Now, why didn't you pick up the load early when Mr. Hall asked you to do it?
> A Because I had had an appointment, a delivery appointment, on the other end. Picking it up early, it didn't make – well, it doesn't make any sense to insist that someone pick it up early when they're going to have to sit for the same amount of time, whether it be point A or point B.
> Q Okay.
> A They're still just sitting there.
> Q Would you agree with me, when you work for a company, that the person in management makes the decision on when you pick things up, and that you don't get to question that?
> A Sometimes, yes.
> Q You think that could be a problem, that you want to question what you're asked or told to do?
> A Well, you know, I have to say, though, I don't know at the time what my hours availability was or any of that. There could have been a number of reasons why I said I would pick it up as scheduled.
> Q But it's –
> A Perhaps I had a date, and I was off duty. You know, if I have to remain by the Qualcomm and wait for them to send me a load, then I have to log that duty as – that time as on duty not driving. That is an on duty function, so all that does is take away from available time that I have to drive. It makes me less productive for the company. It makes me less money. So, if I'm out of the truck, maybe I went out with some girl that works at the truck stop. I don't know.
> Q Now, did Jason Hall ask you to do anything that was illegal in that load?
> A Not in that particular load, no.

Tr. at 653-654.

Complainant then testified that John Neale, whom he thought was another dispatcher, also retaliated against him on occasion by not assigning him work when Complainant refused loads. Tr. at 656. He testified:

> And one time, even though you guys didn't produce it, there were a couple of Qualcomms that I received saying well, if you're not going to do that, then you can just go home. That was one incident. And then there was another one where they said, well, if you're not going to do it, then you can just sit there. But, of course, that stuff wasn't produced.

Tr. at 656.

Complainant was next asked about Joint Exhibit 9, the series of Qualcomm messages he transcribed regarding the log controversy, and dated April 26-27, 2004. Tr. at 657-658; JX-9. He stated that he transcribed the messages to "preserve a record," yet he was unable to point to anywhere in his notes where he recorded that he was dispatched illegally. *See* Tr. at 658. In one instance, Complainant stated that the fact that he noted his refusal to take a load "implied" that the load was illegal. Tr. at 659. He said this was because "I never one time with Continental Express refused a load that could be completed legally, never." Tr. at 659. He pointed to a few of his records, in Joint Exhibit 19, that he believes indicate the company's attempts to have him act in violation of the law. *See* Tr. at 661-666. One of his notes states, "I'm supposed to sit while someone else runs illegal freight." Tr. at 661; JX-19 at 2. Another reads, "Informed dispatch could not legally be @ shipper by 1600." Tr. at 662; JX-19 at 7. Complainant did not write down details of the incidents, however, and agreed that the notes in Joint Exhibit 19 were his conclusions only and are not backed up by facts. *See* Tr. at 663; 665.

Complainant testified that CE did not produce the Qualcomm messages that indicated the illegal nature of the dispatches he was assigned. *See* Tr. at 666. He said:

> There were many, many instances where I refused to do things that would have been illegal that were never produced. There are many, many logs that would show violations of the hours of service regulations because I was dispatched illegally that were never produced. You know, it's – I don't retain that stuff, and I have no access to the Qualcomm records . . . . So, in order for me to sit here and . . . delineate every specific instance of what happened, that would mean that you would have to have produced the stuff that contains that information, which your client failed to do.

Tr. at 666. Complainant maintained that he was not in the best position to record the illegal dispatches he was assigned, "because [he relies] on the Qualcomm to be a permanent . . . record." Tr. at 667-668. He went on, "I drive a truck. It's a little hard for me to spend my entire time writing notes. It just so happens that, in many of these instances where I claim that it was retaliatory action against me, I didn't have anything else to do because I was sitting in one spot for five days. That's generally not the case." Tr. at 668.

On re-direct examination, Complainant described the note he wrote to CE, dated May 10, 2005. Tr. at 692; CX-9 at 10. The note reads, in relevant part: "Notified @ approximately 08:45 [b]y Kevin Mayes that my employment is terminated effective today. Refused to provide a definitive reason and would provide nothing in writing. C.E.I. is hereby notified to retain all records, including Qualcomm messages, pending legal action." CX-9 at 10. Complainant explained that he asked CE to retain the Qualcomm messages "[b]ecause that's where most of the information about my complaints would be found." Tr. at 693. He went on to testify:

> I tried several different ways to photograph these messages so that I could keep them, you know, tried to find some way that was a little bit more efficient than actually sitting and writing them out longhand every time there was one that I thought was important. But I was never able to make that work very well.

Tr. at 693.

Testimony of Deputy Victor Foley

Deputy Victor Foley testified for Complainant. Tr. at 42. He stated that he has been a Deputy of the Clinton County Pennsylvania Sheriff's Office for approximately nine years, and that he is familiar with the town of McAlhattan, Pennsylvania and with the Truck-Lite facility. Tr. at 43-44. He estimated that he has seen hundreds of tractor trailer trucks at Truck-Lite. Tr. at 53.

Deputy Foley explained that the town of McAlhattan is left off of the interstate, whereas the Truck-Lite facility is opposite the town, to the right off of the interstate. *See* Tr. at 55. He said that while the sign pointing toward the town of McAlhattan is actually at the exit off of the interstate, the sign for the Truck-Lite facility is nearby the facility, rather than at the exit. Tr. at 55-56. However, he explained that the Truck-Lite sign, with its red letters, is large enough to see from the 220 exit "if you're paying attention." Tr. at 56. He stated that while the sign is at an angle, it is faced in such a way that one could read it while stopped at the stop sign at the exit. *See* Tr. at 59. He testified that at the intersection of Linwood Drive and McAlhattan Drive there are two posted signs, one on each side of the road, stating a weight limit of 10 tons. Tr. at 48. He explained that the signs are approximately 24 inches by 12 inches and stated that they were posted in May of 2005. Tr. at 49.

On cross-examination, Deputy Foley testified that to get to Truck-Lite, the only roads necessary to take are 220 and then McAlhattan. Tr. at 52. He stated that the Truck-Lite facility is located directly off of McAlhattan Drive. Tr. at 52. Deputy Foley further stated that McAlhattan Drive has no restrictions on weight. Tr. at 52. He explained that if one is driving on Linwood Drive, "you're going the opposite way of where Truck-Lite would be." Tr. at 52.

Testimony of Natalie Brouwer

Natalie Brouwer also testified on behalf of Complainant. Tr. at 61. She explained that she is now a stay-at-home mom, *see* Tr. at 61, but previously worked as a recruiter for Schilli Transportation Services (hereinafter "Schilli")[4] during the time that Complainant applied to the company for a driver position. *See, e.g.*, Tr. at 69. She described her job duties at Schilli as follows:

> To sum it up, I just called past employment verifications, and I got the basic history of the drivers . . . to . . . find out the type of driver he was and, you know, through his story and his previous employers, what I could get—anything I could get them to tell me, I wanted to know.

[4] Ms. Brouwer explained that Schilli Specialized is a trucking company; and her employer, Schilli Transportation Services, handled the recruiting, safety and billing for Schilli Specialized. Tr. at 63-64.

Tr. at 63. She further testified that she worked for her father's company—a consulting firm for trucking companies—since she was a child, and that her responsibilities included conducting past employment verifications. Tr. at 62, 64.

Ms. Brouwer was asked about Complainant's Exhibit 1, an employment verification form for Complainant that she received from CE while she was recruiting for Schilli. *See* Tr. at 68; CX-1. She noted that the form indicated that Complainant was "discharged [from CE] due to company policy." Tr. at 68. Ms. Brouwer explained that such a statement "always" raises red flags for her, and that she then must call the former employer to find out what type of policy was violated and how it was violated. Tr. at 69. According to Ms. Brouwer, the verification form that was sent back to her from CE was filled out by Amie Louellen, the verification clerk. Tr. at 74. She said that she then called the company and asked to speak with Pete, because that is who she was originally told to send the verification form to the attention of, and she figured he—and not just a verification clerk—"really knew what was going on." Tr. at 74.

Ms. Brouwer said that her notes from the conversation, which appear on page two of CX-1, were prepared by her as soon as she hung up the phone with Pete. Tr. at 77. Her notes state in relevant part:

> Vince refused to drive on a road that was not scaled to hold the weight of truck even though it was the way he was dispatched that route. The company told him they will pay for any ticket he may get and Vince still refused. Vince was subsequently fired. Pete says his company was breaking the law and the termination was to cover themselves.

CX-1 at 2. Ms. Brouwer stated that the last sentence is the only one she recalls verbatim. Tr. at 104. She stated that although she could not remember all of the specifics of the conversation, she recalled it as being unusual. *See* Tr. at 103. She explained that during her conversation with Pete, she could not "believe he [was] spilling his guts to me right now . . . . Because usually you don't hear that out of management. You hear . . . the standard, you know, oh, it wasn't a safety problem or it wasn't a drug problem, that's all I can tell you." Tr. at 77. She further stated that Pete sounded "like he just had had enough that day, and he also told me that Mr. Pollock was a good kid, he liked him . . . he got screwed." Tr. at 80. Ms. Brouwer explained that the conversation was unusual because of the content, and because it was longer than her typical conversations with trucking companies. Tr. at 104.

Ms. Brouwer then testified that she immediately told her supervisor, Sandy, about the conversation, and that Sandy told her to make follow-up calls to CE to see if any other employees would give her the same story regarding Complainant. Tr. at 82. She said that on June 3, 2005 she spoke with Amie Louellen, Leah Burton and Tim Hodnett. Tr. at 83. She maintained that these CE employees gave her "just the standard statement" that Complainant "didn't violate any DOT rules or regulations, he never failed a drug screen, and he didn't have a safety problem." Tr. at 84.

On cross-examination, Mr. Brouwer was asked if she could have been mistaken about the conversation she had with the man she believed was Pete. *See* Tr. at 93. She stated that she

was certain that it was Pete—or whomever she spoke with from CE whom she believed was Pete—who told her how Complainant was fired, and that she did not mistakenly implant Complainant's own account of the event into Pete's description of the firing. *See* Tr. at 93-98. She went on to state that she felt sorry for Complainant because he got "the run-over." Tr. at 98. However, she never met or had any conversations with Complainant after he was hired by Schilli; nor had she met Complainant's attorney, Mr. Taylor, prior to the night before the hearing. Tr. at 102.

Ms. Brouwer also stated that she used to speak to approximately 50-60 trucking companies a day while employed by Schilli. Tr. at 101. She said she has no knowledge of ever having taken down information in error after speaking to a trucking company. Tr. at 101.

Testimony of Pete Waddell

Pete Waddell testified that he worked in the recruiting and operations departments at CE for nearly five years, and then left in August of 2005 to work for another company for 11 months. Tr. at 331-332. He recently returned to CE in the role of driver manager. Tr. at 331-332. He testified that he knows no other "Petes" at CE other than himself and Pete Campbell. Tr. at 332-333. He further testified that he did not have a conversation with Natalie Brouwer of Schilli during May or June of 2005; and that while he worked at CE he did not know who Vincent Pollock was. Tr. at 333.

Testimony of Leah Burton

Leah Burton testified that she has worked for CE for six years and her current title is compliance manager. Tr. at 338. She was working in the safety department in May, 2005. Tr. at 338, Tr. at 351. Her duties include maintaining the "DOT files, and personnel file[s]" and "making sure that all the physicals . . . and . . . drug screens are met, by DOT regulations." Tr. at 338.

Ms. Burton said that she has never met, or had any dealings with, Complainant. Tr. at 339-340. She said that she occasionally answers inquiries from employers who are recruiting CE's former employees; but only when the inquiries involve drug testing. Tr. at 339-341. According to her, CE only releases the standard information on past employees that is required by law. Tr. at 340. She said she could not recall receiving an inquiry about Complainant from Natalie Brouwer at Schilli. Tr. at 340. She further stated that she does not believe she had ever met or had dealings with Complainant.

Ms. Burton said she handles the compliance issues after hiring, but that she has never audited logs for CE. Tr. at 343-344. She said that she prepared the report on Complainant to the "DAC system," "a program that trucking companies use to [put] information in when a driver leaves or is terminated from a company." Tr. at 345; CX-4 at 2. This information can then be accessed by other companies when determining whether to hire a particular driver. Tr. at 345. She said that she obtained the information for the report, regarding Complainant's log violations, from Complainant's "Employee Separation Report." Tr. at 346-348; CX-4 at 1. She also

obtained information for the report from a CE computer system that records information on each driver. *See* Tr. at 348-350; *see, e.g.*, CX-5 at 4.

Ms. Burton testified that she knows of Amie Louellen, and that the only place she has known her to work is in the recruiting department. Tr. at 351.[5] She said that she also knows Tim Hodnett, who she believes was the human resources director in May, 2005. Tr. at 351-352. She said that she is only familiar with her own toll-free number at CE, which she recited to the Court. Tr. at 352. She said that she was not familiar with the toll-free number 800-666-5623, the number Natalie Brouwer allegedly called to get CE's fax number. Tr. at 353; CX-1 at 1.

Testimony of Jim White

Mr. White testified that he has worked for CE, in the role of safety manager, since February, 2004. Tr. at 355. He said that his first contact with Complainant was in 2004 regarding Complainant's missing logs. Tr. at 363. He rarely had actual conversations with Complainant because Complainant "continually" avoided him and the yard at Little Rock, where all drivers were required to stop for safety inspections when driving through the city. Tr. 363-364. He explained that Complainant would come through the yard late at night when the safety department was closed. Tr. at 364. According to Mr. White, he tried unsuccessfully to talk to Complainant about this habit. Tr. at 364. Finally, CE was forced to shut Complainant down in 2004 when Complainant's logs were missing, and refused to let him leave the yard until his logs were up-to-date and turned in. *See* Tr. at 366-367.

Mr. White, referring to Joint Exhibit 20, noted numerous other violations by Complainant. Tr. at 366-374; JX-20. These violations included exceeding the legal limit on driving hours on several occasions, Tr. at 366-368, 370, 373; JX-20 at 3-5; failing to correctly log the time he fueled his vehicle pursuant to company policy, Tr. at 369; JX-20 at 3; failing to sign and enter required information into his logs, Tr. at 369-370; JX-20 at 4-5; speeding on one occasion, Tr. at 373-374; JX-20 at 5; and missing logs, Tr. at 373-375; JX-20 at 7-8.

Mr. White testified that drivers' original logs are scanned into a computer system and then audited both manually and digitally on a monthly basis to ensure the logs are completed. *See* Tr. at 361, 371. He said that the original logs are destroyed after six months. Tr. at 372. This system went into effect in January, 2005. Tr. at 372. Prior to that, similar reports were generated, although Mr. White said these reports are probably no longer available. Tr. at 372. In 2004, he said the company was two-to-three months behind in the audits because they were all done by hand. Tr. at 362. Since then, the system has turned completely automated and the logs are scanned in. Tr. at 362.

According to Mr. White, the reports are given to drivers when they come to the yard and are also mailed to their homes on a monthly basis. Tr. at 376. The following language appears on each report: "This is not a request for corrected logs. Please return a signed copy of this notice and provide an explanation of why you were in violation." Tr. at 375; *see, e.g.*, JX-20 at 1. Mr. White explained that CE does not want drivers to correct their logs. Tr. at 375. He said,

[5] Ms. Burton had previously testified that the recruiting department handled inquiries concerning former CE employees. Tr. at 339.

"[W]e never want a driver to falsify a document. You turn in the original document, and that's the one we're going to go by. By informing him of these violations, we don't want him to correct the log and send it in to us." Tr. at 375.

Mr. White then testified about Joint Exhibit 13, a letter he received from Complainant, dated February 22, 2005. Tr. at 376; JX-13. In the letter, Complainant questioned why he was overlooked in CE's "Safe Driver Award" program and in receiving equipment upgrades. JX-13 at 1-2. Complainant speculated that he might have been bypassed due to his "ongoing dispute with C.E.I. over illegal activity." JX-13 at 2.

Mr. White explained that drivers reach a different safety award level at every 100,000 miles. Tr. at 377. The award might be "a jacket, plaque, certificates, on achievement, for safe driving." Tr. at 377. At the particular level Complainant inquired about, he would have received a medallion along with a plaque signed by the president of CE. Tr. at 377. However, according to Mr. White, Complainant had mileage deducted, pursuant to company policy, for violations he had received. Tr. at 377-378. The deductions kept Complainant below the next award level. Tr. at 378. Regarding the equipment upgrades, Mr. White testified that when Complainant asked him why he was bypassed, he instructed Complainant to talk to the appropriate person in charge of equipment. Tr. at 379. According to Mr. White, most of his conversations with Complainant were "cut-and-dried." Tr. at 379. He described Complainant as "real professional acting." Tr. at 379.

Mr. White stated that CE uses a third-party company to pick up drivers' logs from truck stops and deliver them to the company to be scanned. Tr. at 379-380. He said that he has never had a driver's logs lost to the extent Complainant claimed his were. Tr. at 380. He maintained that he did not believe Complainant's accounts of missing logs, and that he told Complainant the original logs needed to be turned in. Tr. at 380. According to Mr. White, Complainant said he would not falsify his logs; however Mr. White never asked Complainant to do so. Tr. at 381. He explained, "I wanted the original logs that [Complainant] ran on that date." Tr. at 381. He went on to testify that it is his policy to shut drivers down when they fail to turn in logs, and that he has made no exceptions. Tr. at 381.

Mr. White could not recall a DOT audit, or any investigation by a government agency, regarding the CE yard in April or May, 2005. Tr. at 381. He said that he never made any attempt to keep Complainant away from the yard, and that there was no reason he would ever want to do so. Tr. at 381-381. Referring to Complainant's Qualcomm message dated April 29, 2005, stating that Complainant knew the "'risk management' department has been forced to receive some unwanted visitors," Mr. White said he did not recall any such visitors coming to the yard during that time period. Tr. at 382; JX-29 at 253.

On cross-examination, Mr. White testified that there was an incident attributable to failures in CE's risk management system in July, 2004. Tr. at 386-386. He admitted that he was deposed in his role as safety manager, and documents were collected from CE regarding the incident, however he could not recall when that happened, particularly if it happened in April of 2005. *See* Tr. at 387.

He stated that after Complainant was shut down in April, 2004 for failing to turn in his logs for a three month period, he was not shut down again for the same reason. Tr. at 392, 440. He said, however, that a failure to turn in logs for such an extended time frame was "probably uncommon" and "intolerable." Tr. at 440. He further explained that the third-party audits of drivers' logs are completed in the middle of each month, and that CE does not view the reports until then. *See* Tr. at 394. Thus, he admitted that at least the first page of Joint Exhibit 20, reports based on audits of Complainant's logs, "probably" did not play a role in Complainant's termination; as Complainant was terminated on May 10, 2005 and the report was dated May 18, 2005. Tr. at 394. He further stated that although other CE drivers have been terminated for failing to turn in logs, those drivers have been counseled several times in person prior to their termination. Tr. at 421.

Mr. White testified that if a driver's violation is serious enough to warrant discipline, CE generally documents the violation in writing. Tr. at 432. He said when drivers fail to produce logs, he tries to help them "reproduce" and "revamp the files." Tr. at 442. He maintained that in such a situation he expects a driver to reproduce the logs "to the best of their knowledge, to the best of what they did." Tr. at 443. He said, however, that when a log is recreated, CE clearly indicates that the log has been recreated before turning it into Federal Motor Carriers. Tr. at 455. He further testified that he had no idea why CE could not locate the original copies of Complainant's logs for the months of October, November and December, 2003. Tr. at 446. He explained, "I just don't believe they were turned in [by Complainant]." Tr. at 446.

Testimony of Rick Acklin

Mr. Acklin testified that since June of 2005 he has served as the chief financial officer for Arkansas Trucking Services, a company that provides services to CE and other trucking companies. Tr. at 459-460. He previously worked as the director of fleet management from September, 2004 to June, 2005. In his role as director of fleet management, he dealt with "the problems the drivers may have or . . . on-time deliveries." Tr. at 461.

Mr. Acklin said that Complainant called him via telephone in December, 2004. Tr. at 462. He testified that Complainant complained to him of being passed over by the dispatchers and not getting enough miles. Tr. at 462. He also said that Complainant "made threats about calling the authorities [on CE], and he said he wasn't going to do it right now because he wanted to see if he could get some action . . . on his problems that he had." Tr. at 463. According to Mr. Acklin, he assigned Jason Hall to research Complainant's situation. Tr. at 464. Mr. Hall subsequently concluded that there were no problems; it was simply "that Mr. Pollock was continually complaining." Tr. at 464. Mr. Hall also informed Mr. Acklin that Complainant was missing logs during the final months of 2004. Tr. at 465.

Mr. Acklin said that in his role as dispatch supervisor, he was familiar with the dispatch system at CE. Tr. at 466. He explained that drivers are sent a "pre-plan" upon being dispatched, which includes, among other details, the estimated delivery date and the mileage to be driven. Tr. at 466-467. According to Mr. Acklin, the driver has the ultimate responsibility to determine whether a load can be made based on his available number of hours. Tr. at 468.

On cross-examination, Mr. Acklin admitted that pre-plan reports for subsequent trips are often sent to drivers before they are finished with their current deliveries. Tr. at 468-469. Thus, he said that a driver might sometimes make an "incorrect call" and find himself unable to complete the delivery as scheduled in the pre-plan. Tr. at 469-470.

Mr. Acklin testified that it is unusual for a CE driver to stay with the company for three years or more. Tr. at 470. He further stated that he was uninvolved in Complainant's termination from the company. Tr. at 471. According to him, it was an "ongoing battle" getting drivers to update their hours. Tr. at 475. He said that was true of any trucking company, and that he has worked for over 30 of them. Tr. at 475. He said that CE employs a progressive discipline policy for their drivers. Tr. at 477.

Testimony of Carol Myers

Ms. Myers testified that she has worked for CE for eleven years and has been the benefits manager for over 10 years. Tr. at 480. In this role, she reports to Tim Hodnett and has a variety of duties which include handling employee benefits and monitoring medical leave. Tr. at 480-481. She said that for the 10 years she has worked in the benefits department there has been no written policy on what constitutes proper documentation for employees to return to work after they have taken medical leave. Tr. at 481. However, she explained CE's policy for all drivers is that return to work slips must "state that the driver is released to full duty and can operate a commercial motor vehicle" consistent with "certain DOT regulations." Tr. at 484-485. The policy has been in place "at least five years." Tr. at 484.

Ms. Myers recognized Joint Exhibit 14 as Complainant's return to work slip, dated February 24, 2005. Tr. at 482; JX-14. She said she received Complainant's slip on March 3rd or 4th, and commented that it made no difference to her that the slip was signed by a nurse practitioner and not a doctor. Tr. at 482. According to Ms. Myers, she contacted Complainant after she received the slip to let him know that pursuant to CE's policy, she needed certification from his practitioner that he was fit to resume driving his truck. *See* Tr. at 483-484. She thereafter received a Qualcomm message from Complainant, accusing her of lying about CE's company policy. Tr. at 486. Tr. at 485; JX-16. She said that she had never received a similar message from another employee, and had never had any problem getting other employees to follow the policy. Tr. at 486-486.

Ms. Myers testified that she also spoke with Complainant on the telephone regarding his return-to-work either that same day or the day prior. Tr. at 488. She relayed the same message that she did over the Qualcomm system—that the company needed more information on his medical release. Tr. at 488. According to her, Complainant wanted her to produce everything on the company policy in writing and "didn't believe anything [she] had to tell him. Tr. at 488. After a lengthy exchange yielding no results, she put Complainant through to her supervisor, Tim Hodnett. Tr. at 488.

She testified that during the telephone conversation, she found Complainant to be "very demanding, very controlling, trying to infer that [she] didn't know what [she] was doing in [her]

job." Tr. at 489. She went on to state that it upset her to be questioned in such a manner after having been in her job for 10 years. Tr. at 489. She said that she read the faxed message that Complainant sent to her and Tim Hodnett later that day, and said that she understood Complainant to be threatening her. Tr. at 487; JX-17 at 1. She said that the language Complainant used in the faxed message did not accurately relay their earlier conversation. Tr. at 490. She further stated that Complainant was the first person to have complained about CE's policy for return-to-work slips. Tr. at 491.

According to Ms. Myers, she had no way of knowing from the slip Complainant provided whether he had even told his nurse practitioner that he was a truck driver. Tr. at 492. Further, she said that Complainant had spoken with CE's night dispatch and informed them that he was given medication and could not drive. Tr. at 492. She testified that she knew nothing about Complainant prior to the time she talked to him about his release. Tr. at 494.

On cross-examination, Ms. Myers said that she knew Complainant had been dispatched after he turned in his medical release; however, she said that she had not at that point received the release for review. *See* Tr. at 497-498. She said that no matter what the reason for the visit, anytime a driver seeks medical leave to visit a doctor, a release must be provided stating that the driver can resume operation of a commercial motor vehicle. Tr. at 503.

Testimony of Jason Hall

Mr. Hall testified that he began working for CE in August of 2004 and is currently a "load planner." Tr. at 505. In January through May of 2005 he was a weekend dispatcher. Tr. at 505. Mr. Hall said that he dealt with Complainant for the first time in March, 2005, when he sent Complainant a Qualcomm message, asking him to take a dispatch. Tr. at 509-515. He explained to Complainant that the load was ready at least 24 hours prior to what was scheduled in the computer system. *See* Tr. at 510-514. He said that Complainant refused to pick up the load prior to when the computer system said it would be ready in the "pre-plan," even though Mr. Hall assured Complainant that the load was ready early. Tr. at 510-514; *see also* JX-29 at 77-78. In addition, he said that Complainant refused to update his hours after being asked to do so several times by Mr. Hall, in order to ensure that Complainant was driving legally within his available hours. Tr. at 510-511. By the time Complainant updated his hours, Mr. Hall already had to assign the load to another driver. Tr. at 511. Mr. Hall testified that he had never had a driver conduct himself in such an extreme manner as Complainant. Tr. at 512. He said that most drivers are "usually pretty anxious to run and get going." Tr. at 514.

According to Mr. Hall, he tried calling Complainant twice on his cell phone to make sure that Complainant understood what his Qualcomm messages meant. Tr. at 518. He was unable to reach Complainant however, and subsequently received Qualcomm messages telling CE to take Complainant's cell phone number out of the system and not to call him again on it because it was not for company business. Tr. at 519. Mr. Hall said that his purpose of using the cell phone was to help Complainant "understand that the load was ready, try to get him some freight to get him moving." Tr. at 519. He said that he has never had another driver refuse to take cell phone calls, and that it is common for him to talk to drivers on their cell phones "all day, every day." Tr. at 519.

Mr. Hall testified that he never intentionally dispatched other drivers ahead of Complainant. Tr. at 514-515. He reiterated that this incident was the first time he dealt with Complainant. Tr. at 515; *see, e.g.*, JX-29 at 141-144. Prior to that date he knew nothing about Complainant's employment history with CE or his reputation, and had no reason to retaliate against him, nor was he part of a conspiracy against Complainant. Tr. at 515-516. He also said that he had not tried to reduce Complainant's income in any way. Tr. at 517. At the time of the incident, Mr. Hall was working under Darren Moore. Tr. at 516, 518. He testified that he did not know whether Mr. Moore had any experience with Complainant prior to that time. Tr. at 516. He said that at a certain point, instead of responding to Complainant's messages, he simply forwarded them to Mr. Moore. Tr. at 515, 518.

Testimony of Mike Daniels

Mr. Daniels testified that he has worked for Arkansas Trucking Service, providing services to CE, for 14 years. *See* Tr. at 531. He is currently the "midwest load coordinator," but he was formerly the operations manager for three years, and was serving in that position during the time period of January through May, 2005. Tr. at 531. As the operations manager, Mr. Daniels oversaw the dispatch function for CE, and had 28 dispatchers under him. Tr. at 532. He said that he got personally involved with drivers only after they had a problem that could not be resolved with their dispatcher. Tr. at 532-533.

Mr. Daniels said that he never met with Complainant face-to-face, but had Qualcomm and telephone conversations with him about missing logs and being prompt with deliveries and pickups. Tr. at 536. He recalled having seen the April 26, 2004 Qualcomm message from Complainant, which states, "[e]veryone acts as if the [log] situation is brought about by my acts or omissions. No one seems to lend any merit to the possibility that the log people may have lost or misplaced these records." Tr. at 534; JX-9 at 5. Mr. Daniels said he responded to Complainant that "it wasn't a matter of who lost the logs." Tr. at 534. He explained, "the fact was, the law required that we have them on record and then stored in our facility." Tr. at 534. He said that just as on several other occasions, he took Complainant out of service for falling too far behind with his logs. Tr. at 534. According to Mr. Daniels, Complainant failed to turn in his logs several times. Tr. at 535. He said that as with any driver, he would have ordered Complainant's dispatcher to work with Complainant to get the logs up-to-date or to work with the area planners to route Complainant to the Little Rock terminal to deal with the situation. Tr. at 535.

Mr. Daniels recounted an incident in which Complainant accused him of retaliating against him. Tr. at 536. He described the circumstances surrounding these allegations as follows:

> [It] had to do with his having missed a delivery on a load that he was under. He had routed himself through home, which, if I recall, was a couple of hundred miles out of route, and he stayed home and missed the delivery. And, when I finally got him on the phone, he insisted that he did not have the hours to operate. And, when I looked at his hours in the

> system, he had not updated his hours in at least the last seven days, so I had no other alternative but to have him update his hours so that we could re-evaluate where he stood. And then, when I told him that I was going to submit a profile entry for the failure—that was when he made a direct accusation of retaliation because of the failure.

Tr. at 536-537.

Mr. Daniels testified that Complainant told him he went home because "he just felt like it." Tr. at 537. He said that he gave Complainant a service failure for missing the delivery on his load. Tr. at 537-538. Only then did Complainant protest that the load could not have been legally run. Tr. at 538. He said that Complainant did not answer when he asked him why he had not rejected the load to begin with. Tr. at 538. Complainant did, however, update his hours in the computer after Mr. Daniels asked him to. Tr. at 538. Mr. Daniels could not recall whether he knew Complainant prior to that conversation, but he said that "just about every driver manager and planner that had to deal with [Complainant]" had told him that Complainant was a "problem child." Tr. at 537.

According to Mr. Daniels, if a driver failed to update his hours, it presented problems because the planners, in order to abide by the law and to maximize a driver's time, need to know how many hours the drivers have already used. Tr. at 538-539. He said that he talked to Complainant on at least two occasions about his logs being behind. Tr. at 539. He said such a conversation is "really rare" to have with drivers "because, for the most part, when a driver was requested by his driver manager to update his hours, it usually happened right then and there." Tr. at 539. He further said that he cannot remember any driver, aside from Complainant, whom he "ever had to actually fight with" about turning in logs or updating hours. Tr. at 540. He stated that he had to "fight" with Complainant, "[b]ecause Complainant resisted every request." Tr. at 540. He explained:

> [F]or instance . . . when he insisted that it wasn't his fault . . . that the logs were not turned in, rather than sit there and fight and argue about who had lost logs that were two months past due, he could have simply taken his old log book, which the law requires him to keep, and give us copies as we requested. Instead, his intent was to prove that someone deliberately lost his logs. And updating the hours, there was more than one occasion when he insisted that we just needed to check with him on a daily basis and he would tell us whether or not he could handle a load assignment.

Tr. at 540. Mr. Daniels explained that he has no such time to call each driver to inquire about hours. Tr. at 541. He said, "Our system is set up in such a way, the driver is required to make a daily check call via Qualcomm. The check call asks what trailer is being pulled, whether they're on schedule, and how many hours they burned the day before." Tr. at 541.

Mr. Daniels said that when he asked Complainant about his missing logs from 2004, Complainant accused Mr. Daniels of wanting to falsify the logs. Tr. at 541. According to Mr. Daniels, he was simply trying to get Complainant to fill in the gaps for certain dates. *See* Tr. at

541. He said that CE had dispatch records and fuel reports that would have aided Complainant in filling in missing information. Tr. at 541-542. He maintained, however, that he would not have tried to pass the logs off as originally being completed on the dates in question. Tr. at 542. Rather, he simply wanted to assemble the best information the company had, since the company required a written record of every day's work. Tr. at 542-543.

Mr. Daniels said that he considered it a significant period of time for Complainant to have missing logs. Tr. at 543. He said that other drivers have had logs missing for longer periods of time,[6] and that he took the same action regarding those drivers. Tr. at 544. He explained: "the procedure is to first contact the driver, and, more often than not, the driver has his old log books with him. He makes copies of the records that are requested and sends them in via Trip Pack, Federal Express, or fax if we need them right away." Tr. at 544.

Next, Mr. Daniels told of his involvement in the McAlhattan, Pennsylvania incident, in which Complainant had trouble reaching the Truck-Lite facility. *See* Tr. at 544. He explained that he became involved after Reagan Burks, Complainant's dispatcher, informed him that Complainant could not reach the Truck-Lite facility using the directions provided by CE's "Map To It" system without driving down a restricted road. Tr. at 544-545. Mr. Daniels said that he then called the customer to find out how to get to the facility. Tr. at 545. He testified that he had no trouble contacting the customer, and reached someone in the shipping department using the same phone number provided to Complainant in his dispatch. Tr. at 546. He further stated that CE had serviced this customer before and had never had any problems. Tr. at 546. He described the rest of the incident as follows:

> I contacted the lady in shipping and asked her for directions to guide the driver in to the facility and bypass this restricted route road, and that's when she became aware that the system we had was giving an erroneous route. And she asked that the [driver] contact her directly so that she could talk him right into the road. Apparently he wasn't far from the facility at all. And so we made the driver aware that he needed to contact the facility. He claimed he had already tried and couldn't get anyone to answer the telephone. And, shortly after that, he just shut down and refused to move.

Tr. at 547.

Mr. Daniels said that it was difficult to believe that Complainant could not get anyone to answer the phone, "given that I had already made the call and the lady answered right away." Tr. at 547. He said that he never wanted Complainant to drive on a restricted route, but that he believed there was a way to get to Truck-Lite without using a restricted road. Tr. at 547. He said that Complainant sent him a Qualcomm message, however, making it clear that he would

[6] Mr. Daniels later testified that at least once a month he deals with drivers who are behind in their logs for longer periods than Complainant was, sometimes by months. Tr. at 563, 568. He said that when he gets involved with such a situation he orders the driver routed directly to the Little Rock terminal or, if the driver is uncooperative and perpetually committing the same violation, he shuts him down where he is. *See* Tr. at 563-564. He stated that he runs into a perpetual violator situation, where a driver is missing logs for more than three months, about once every six months. Tr. at 564. He said he was not sure whether those drivers were fired. Tr. at 568.

not pick up the shipment. Tr. at 548. Mr. Daniels then contacted the customer again and told them the load could not be picked up until the next day when a different driver could do the job. Tr. at 548. He said that the other driver had no trouble picking up the load the following day. Tr. at 548. According to Mr. Daniels, Mr. Pollock was assigned a new load the next day. Tr. at 548-549.

Mr. Daniels said that about once or twice a month he runs into a similar incident where a driver refuses to pick up a load. Tr. at 549. He explained that when drivers find themselves on a restricted road, they are supposed to stop and contact CE so that CE can contact the "Map To It" company and the customer to acquire better directions. Tr. at 549.

On cross examination, Mr. Daniels testified that there was no time after April, 2004 when he could recall directing a dispatcher to shut down Complainant for failing to turn in logs. Tr. at 550, 551-552. He said that usually, CE will notify a driver in writing if there has been a service failure. Tr. at 550. He admitted that the fuel slips and copies of dispatches that he would have provided Complainant to help him fill in the missing logs did not indicate the amount of time Complainant spent resting in the sleeper berth, the length of time he spent fueling, the length of time Complainant stopped to make tire checks on hazardous material loads, nor the length of time he spent driving. Tr. at 553-555.

Mr. Daniels explained that he believed the law requires Complainant to have kept his old log book because, "it's a standard practice of drivers to keep their log books at least three months back, because often the drivers have expenses related to that load that they can use as tax deductions." Tr. at 555.

Regarding the Truck-Lite incident, Mr. Daniels was unable to locate in the Qualcomm messages any instructions to Complainant to call the Truck-Lite facility for directions. Tr. at 556. He was also unable to point to a Qualcomm message in which Complainant refused to go to the facility. Tr. at 556. He was asked about the dispatcher's message to Complainant which read, "please go in to the shipper, if you have any problems I'll take care of it, Reagan." Tr. at 556; JX-29 at 288. He said the message did not instruct Complainant to drive down a restricted road. Tr. at p. 557. He reiterated that they tried to get Complainant to call the customer directly for directions. Tr. at 557. However, he was not sure as to how those instructions were relayed to Complainant. Tr. at 557-558.

Mr. Daniels admitted that in looking at the Qualcomm messages, Complainant asked CE several times for directions to Truck-Lite, and that it was part of a dispatcher's job to get directions for the drivers. Tr. at 559. He was then asked about Complainant's message which stated the following: "I'm not refusing to pick up the load. I am, however, refusing to violate the law. Blindly driving down a street from which this truck is clearly excluded is a plainly stupid thing for me to do." Tr. at 559. He said he knew that Complainant was not refusing to pick up the load, and agreed it would be foolish to drive on a restricted road. Tr. at 559-560. He testified that the empty weight of Complainant's tractor-trailer combination was approximately thirty-four thousand pounds. Tr. at 561-562. He further stated that although drivers are supposed to turn around when they come to a restricted route, it would not necessarily have been easy for Complainant to turn his truck around and go back the way he came. Tr. at 566, 568.

Testimony of Pete Campbell

Mr. Campbell testified that he works as executive vice president for Arkansas Trucking Services. Tr. at 569. He has served in this capacity since May of 2005, and prior to that was vice president of risk management from 2002 to the middle of 2005. Tr. at 570. He has been with the company since July, 1994. Tr. at 571. He said that all of his job duties are with CE, and that his office is located within CE's corporate office. Tr. at 571. He reports directly to CE's president. Tr. at 571.

Mr. Campbell first dealt with Complainant at the Little Rock terminal in April of 2004, after Jim White asked Mr. Campbell to explain to Complainant the importance of turning logs in promptly. Tr. at 572. He described the incident as follows:

> I simply told him that I understood he was missing some logs from a previous couple months and we needed him to turn them in if he had them. And he said he didn't have them. And I expressed my concern that he has to turn in logs on time for our safety department to do their job. And he thought that he had turned them in and our safety department had lost them or misplaced them, and I explained to him that if it had been a single log or two or three logs, that it possibly could have happened, but I had a hard time believing that two – the majority of two months were missing or lost by our log department. It was probably a five-minute conversation, five-to-ten minutes of conversation, and we came to an agreement from that day forward that he would do his best to turn his logs in in a timely manner.

Tr. at 572-573.

Mr. Campbell had no other conversations with Complainant about missing logs. Tr. at 574. He stated that he does not recall having asked Complainant to recreate his logs, although he said that he has had employees do so in the past. Tr. at 573. He said such a situation arises "where a driver has misplaced logs via an accident, it could be an accident and logs were destroyed, a couple of other scenarios, but what we do is sit them down at a computer." Tr. at 573. He said that through CE's time-lined computer system, the drivers can tell where they were at certain times and when they went "from point A to point B." Tr. at 573-574. He explained that when a log is recreated, CE will add an attachment to it that notifies the Department of Transportation "that the logs were recreated to the best of our driver's and Continental Express's memory – or, abilities." Tr. at 574. He recalled being personally involved with this procedure "less than five times" while at CE. Tr. at 574.

Mr. Campbell talked with Complainant again on one or two occasions when Complainant called to request a meeting with management to discuss his employment. Tr. at 574. Mr. Campbell said he told Complainant that he was happy to accommodate him and his attorney whenever it best fit Complainant's schedule. Tr. at 574-575. He said Complainant cancelled the first scheduled meeting because his attorney could not be there, and when he actually did come in he came by himself. Tr. at 575. Mr. Campbell was out of town that day and could not attend.

Tr. at 575. He said he asked John Hulecki how the meeting went with Complainant, and he received an encouraging report. Tr. at 575. According to Mr. Campbell, Mr. Hulecki "said it went well, it was a lengthy meeting, and he thought some good things came out of it and everybody agreed what we needed to do, on both sides." Tr. at 575. This episode marked the last time Mr. Campbell interacted with Complainant. Tr. at 576.

Referring to the Qualcomm message addressed to him by Complainant on April 29, 2005 (JX-29 at 253), Mr. Campbell testified that he had not seen it until two weeks before the hearing. Tr. at 576. The message stated that Complainant knew that Mr. Campbell's department "had been forced to receive some unwanted visitors." JX-29 at 253. Mr. Campbell testified that the Department of Transportation had been to the yard on two occasions but he could not recall the specific dates. Tr. at 577. He said he was not aware of any effort to keep Complainant away from the yard at any time. Tr. at 577.

Mr. Campbell said he was not involved in any way with Complainant's discharge, nor did he direct anyone to terminate Complainant or to treat Complainant differently from other employees. Tr. at 578. He further stated that nobody told him at the time why Complainant was discharged. Tr. at 578. He said he knew nothing of the incident involving the Truck-Lite facility in Pennsylvania until preparation began for this hearing. Tr. at 579. Furthermore, Mr. Campbell stated that he never had a telephone conversation with Natalie Brouwer nor is he aware of Schilli Trucking. Tr. at 579; CX-1 at 2. He said that he never had a telephone conversation with any representative from a trucking company inquiring about Complainant. Tr. at 579. Moreover, he said he has never done an employment verification. Tr. at 580. He maintained that on May 18, 2005, he knew nothing about the reason for Complainant's termination or about Complainant's dispatch to Truck-Lite. Tr. at 581. He said that he was aware of Complainant's log problem in 2004, and that he had seen his driver profile in the past, but was not involved with any other problems with Complainant during his employment. Tr. at 582. Mr. Campbell stated that aside from a couple of drivers named Pete, Pete Waddell was the only other "Pete" who worked in CE's corporate office. Tr. at 581.

On cross examination, Mr. Campbell testified that Complainant did not know CE would add an attachment with a disclaimer to any logs Complainant recreated. Tr. at 583. He said they "didn't go that far" in their April, 2004 discussion. Tr. at 582-583. He admitted that the period around May 18, 2005 was a frustrating time for him because the CFO and CEO were terminated the week prior and he was left running the company. Tr. at 586; *see also* Tr. at 580. He said that had a recruiter from another company gotten through to his line, he would have referred him or her to the department who handles employment verifications. *See* Tr. at 587. He was asked to refer to Complainant's Exhibit 1, the notes from Natalie Brouwer dated May 18, 2005, which refer to someone at CE by the name of Pete. Tr. at 590; CX-1 at 2. He said that he "can't say if it's made up or not," but that he does not know who Natalie Brower is. Tr. at 590-591. He noted that the fax number listed on the first page of the exhibit is the number for CE's recruiting department. Tr. at 591. The recruiting department and Mr. Campbell's office are both located in CE's corporate office. Tr. at 591.

Testimony of Tim Hodnett

Mr. Hodnett testified that he has worked for Arkansas Trucking Services, in association with Continental Express, for 19 years. Tr. at 705. He has been the vice president of human resources since March, 2006; prior to that he was the director of human resources since 1997. Tr. at 706. He was the director of safety for eight years before working in human resources. Tr. at 706. In his current role, he is responsible for approving all terminations. Tr. at 707.

His first involvement with Complainant was in the matter of Complainant's return-to-work slip. Tr. at 708; JX-14. He explained that it is the company's policy to require commercial drivers who return to work from an illness to turn in a doctor's note stating that the driver can operate a commercial vehicle. *See* Tr. at 708. He said that Complainant's note, JX-14, did not comply with the policy. Tr. at 709. He became involved with the episode after Ms. Myers showed him Complainant's letter dated March 3, 2005, which threatened to consider it a retaliatory discharge if he was not returned to work that day. Tr. at 709; JX-17. Mr. Hodnett said that although his department "get[s] challenged" by drivers periodically he had never been presented with such a note. *See* Tr. at 710-711. Despite Complainant's assertion that Ms. Myers made an arbitrary determination, Mr. Hodnett stated that the policy is the same one that is enforced at least two-to-three times a day. Tr. at 711. He said the policy, while unwritten, has been in place for about ten years. Tr. at 749.

Mr. Hodnett gave the following account of his telephone conversation with Complainant concerning the episode:

> I would say that it was probably about an hour-long conversation. It started out in an escalated form. He was pretty agitated when he got on the phone. He was pretty threatening. . . . I brought it to his attention that I felt a little threatened by his tone and I guess the way he was speaking in the conversation. And I think at one point he advised me that he was tape recording my conversation, and I told him that I did not agree to be tape recorded, and he said that he was going to do it anyway.

Tr. at 713. Mr. Hodnett said that the conversation ended with him agreeing to pay Complainant for the day and allowing him to return home. Tr. at 714.

Mr. Hodnett next testified that after the conversation, he paid attention to Complainant's actions "[b]ecause," he stated, "if he approached another employee like he approached Ms. Myers or myself, I personally would recommend termination." Tr. at 715. He said that the next time he heard about Complainant was after the McAlhattan, Pennsylvania situation, in which Complainant failed to make a reasonable effort to get to the Truck-Lite facility. *See* Tr. at 716. According to Mr. Hodnett, other CE drivers had previously been to the facility. Tr. at 718.

Mr. Hodnett next testified that he agreed for management to meet with Complainant and his attorney to discuss Complainant's employment with CE. Tr. at 719. He did not attend the meeting, but was asked to review a memo drafted by the managers who did attend. Tr. at 719-

720; JX-21. He said that the meeting lasted around three hours, longer than meetings with any other employees. *See* Tr. at 720.

Mr. Hodnett gave the following explanation for why he approved Complainant's termination:

> Mr. Pollock was terminated for his inability to work with the operations department following their processes and procedures for following dispatches, for submitting the daily hours of service that they need to do their job. I did take into consideration that there was, to me, in my opinion, a continued pattern of violations with regards to the hours of service, with the information that I had at that time, which – I believe that's the basis for that.

Tr. at 729. He also stated that he took into account the incident involving Complainant's return to work, in which Complainant dealt with Ms. Myers. *See* Tr. at 729-730. He further testified that the following information he provided in a fax to another company was truthful:

> Employee was dismissed for conflict with company policy/procedures, failure to comply with 49 C.F.R. 395, submission of truck driver hours of service log book pages, failure to comply with form and manner specifications of 49 C.F.R. 395, failure to acknowledge, sign and return company notice of violation issued to employee, multiple service failures of timely pickup or delivery noted by supervisor, failure to communicate, follow direction of supervisors, managers, employee was combative and confrontational with supervisors and/or managers.

See Tr. at 732-733; RX-2.

According to Mr. Hodnett, the only CE employees involved in terminating Complainant were himself, Mr. Hulecki and Mr. Moore. Tr. at 733. Mr. Hulecki and Mr. Moore requested that Complainant be terminated, and then Mr. Hodnett reviewed Complainant's employment history and approved the termination. Tr. at 733. He said this all happened in accordance with CE's standard procedure used for terminations. Tr. at 733. Mr. Hodnett said he had no conversations with Mr. Hulecki and Mr. Moore about any protected activities that Complainant was allegedly engaged in, and said he knew nothing about the allegations at the time he approved the termination. Tr. at 729, 734.

On cross-examination, Mr. Hodnett testified that it was not until after the McAlhattan, Pennsylvania incident when he began to consider Complainant's termination. *See* Tr. at 740. He was questioned about Complainant's Exhibit 5, a log book containing incidents of Complainant's performance problems, and which he used in his determination to fire Complainant. Tr. at 741. He agreed that there was no incident of a service failure, accident or violation concerning Complainant between June 28, 2004 and May 10, 2005, and said he does not normally wait a year to fire someone. Tr. at 741.

When asked about Joint Exhibit 25, another log documenting Complainant's disciplinary problems, Mr. Hodnett stated that he was motivated to discharge Complainant based on the documentation in 2003 regarding Complainant's uncommunicativeness and

uncooperativeness. Tr. at 742. Mr. Hodnett stated that after April 1, 2005, Complainant was again uncooperative and uncommunicative during the McAlhattan, Pennsylvania incident. *See* Tr. at 742. He explained that CE tries to provide their drivers with necessary tools, however Complainant was better equipped than CE to get directions to the Truck-Lite facility. Tr. at 743-744. According to Mr. Hodnett, "it's not unusual for a truck driver to have to stop and find directions to a customer facility." Tr. at 744.

In regards to Complainant's disciplinary report issued April 27, 2004, JX-7, Mr. Hodnett said it is not unusual to write a driver up for service failures that occur 14 months prior to the write-up. Tr. at 747. He explained that not everything is put in writing, although drivers are usually advised when service failures occur. Tr. at 747.

Regarding Complainant's return-to-work incident, Mr. Hodnett agreed that Complainant was dispatched without the adequate medical release, in violation of company policy. Tr. at 750. The policy was not communicated to Complainant until after he was dispatched to Indianapolis. Tr. at 750. In other words, it was not Complainant's fault that he was dispatched in violation of the policy. Tr. at 751.

Mr. Hodnett noted that Complainant's "Employee Separation Report," dated May 10, 2005, listed "policy conflict" (i.e. failing to turn in his logs) as the sole reason for his termination.[7] *See* Tr. at 754; CX-4. He said that he reviewed the log violations listed in Joint Exhibit 20 in determining whether to terminate Complainant. Tr. at 751; JX-20. Looking at the Exhibit, he could not point to any log violations occurring after April 1, 2005 and before Complainant's termination a month later. *See* Tr. at 758. He said that CE managers had a positive meeting with Complainant on April 1, 2005 and at that point there was no intention to terminate him, however, in arriving at his decision he "would have looked at more than just the 30-day period on [Complainant's] employment." Tr. at 758.

In addition, Mr. Hodnett testified that in a statement he made to OSHA, he did not list the McAlhattan, Pennsylvania incident as the reason for Complainant's discharge. Tr. at 756. Instead, he told OSHA that Complainant was terminated for his failure to comply with the log requirements, for service violations and for being insubordinate toward his supervisors. *See* Tr. at 756, 759-761. He testified that there were no write-ups issued to Mr. Pollock for service failures after April 27, 2004. Tr. at 761.

Regarding the McAlhattan, Pennsylvania incident, Mr. Hodnett testified that as the closest one to the problem, Complainant should have tried harder to get directions to the Truck-Lite facility. *See* Tr. at 767, 768. He said that the dispatcher at the time, Reagan Burks, was not disciplined "because he didn't ask [Complainant] to drive on a restricted road. Tr. at 771. The following exchange ensued between Mr. Hodnett and Complainant's attorney:

> Q Please go in to shipper, if you have any problems I'll take care of it, Reagan. What's that asking him to do?
> A To go to the shipper.

[7] Mr. Hodnett noted that none of the following options were circled as reasons for Complainant's termination: "service," "safety," "excessive complaints," or "late pick-up and delivery." Tr. at 753-754; CX-4.

Q And the only directions Mr. Pollock had at that time were . . . to go on Linwood Drive, correct?
A Yes, sir.
Q You don't think that's telling him to go on Linwood Drive?
A No, sir.

Tr. at 771.

Mr. Hodnett testified that as of March 3, 2005, when he first interacted with Complainant, CE "didn't have any intentions of Mr. Pollock leaving the company." Tr. at 777, 782. He further testified that at that time, he was unaware that Complainant had made any claims of retaliation against CE. Tr. at 783. He said that he read Joint Exhibit 17, Complainant's letter to him, dated March 3, 2005, prior to talking to Complainant later that day. Tr. at 783. The letter states, in relevant part: "It would appear that this current action is of a capricious and retaliatory nature. The ongoing dispute between myself and C.E.I. should require no treatment here." Tr. at 783; JX-17 at 5. He testified that this language did not suggest to him that Complainant believed there was an ongoing pattern of retaliation against him. Tr. at 783.

Mr. Hodnett was unsure as to why there are gaps in the Qualcomm records that were produced. Tr. at 778. He also was unsure as to why CE did not produce all of Complainant's logs, particularly his logs for the first part of April, 2005. Tr. at 779-780. He noted that Complainant's Exhibit 5 confirms that Schilli Transportation Services inquired about Complainant's prior employment by CE on May 18, 2005. Tr. at 781; CX-5.

Mr. Hodnett testified that he reviewed the Qualcomm messages between Complainant and CE in making the determination to fire him. Tr. at 787. He said that one incident in which Complainant was combative toward CE personnel – just as he was during the McAlhattan, Pennsylvania incident – occurred when Complainant was haggling with Reagan Burks, his dispatcher at the time, on April 13, 2005 about getting directions to a facility. *See* Tr. at 789-790; JX-29 at 196-211. This incident occurred after the positive April 1, 2005 meeting between Complainant and CE managers. *See* Tr. at 790.

IV. DISCUSSION

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C. § 31105(a)(1)(A). Protected activity includes filing a complaint or beginning a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order." *Id.* The Act further provides that an employer may not retaliate against an employee-driver if "the employee refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C. § 31105(a)(1)(B)(i)-(ii).

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity under the Act, (2) the respondent was aware of the activity, (3) he suffered adverse employment action, and (4) there was a causal connection between the protected activity and the adverse action.[8] *See Coxen v. United Parcel Service*, ARB No. 04-093, ALJ No. 03-STA-13, slip op. at 5 (ARB Feb. 28, 2006) (*citing Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004)); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

In this case, as will be discussed below, Complainant has demonstrated by direct evidence that CE discharged him, at least in part, due to protected activity. The dual motive analysis is therefore implicated here.[9] *See Smith v. Yellow Freight System, Inc.*, 91-STA-45 (Sec'y Mar. 10, 1993). "Where there is direct evidence that the adverse action is motivated, at least in part, by the protected activity, the respondent may avoid liability only by establishing that it would have taken the adverse action in the absence of the protected activity." *Caimano v. Brink's, Inc.*, 95 STA-4, slip op. at 23-24 (Sec'y Jan. 26, 1996) (citation omitted). In such cases, a respondent "bears the risk that 'the influence of legal and illegal motives cannot be separated . . . .'" *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984), *quoting NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983).

Protected Activity Under the Act and
Employer's Knowledge of Such Activity

Complainant alleged throughout the course of the proceedings that he engaged in numerous protected activities while he was employed by CE.[10] Respondent generally denies that

[8] Where the case is fully tried on the merits, as it has been here, it is unnecessary to determine whether the complainant presented a *prima facie* case and whether the respondent rebutted that showing. Rather, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If he or she did not, it matters not at all whether he or she presented a *prima facie* case. If he or she did, whether a *prima facie* case was presented is irrelevant. *Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia*, 97-STA-30 (ARB July 8, 1998).

[9] In STAA cases where the dual motive analysis is *not* implicated, a different burden-shifting regime is used. *See Moravec v. HC & M Transportation, Inc.*, 90-STA-44, p. 14 (Sec'y Jan. 6, 1992). In such cases, after the complainant establishes adverse action was taken due to protected activity, the respondent can then prove by clear and convincing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The burden then shifts back to the complainant to prove that the proffered reason was not the true reason for the adverse action. *Byrd v. Consolidated Motor Freight*, 97-STA-9, p. 4-5 (ARB May 5, 1998), (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993)).

[10] In his "Pre-Hearing Statement," Complainant maintains that the following activities are protected under the Act: (1) his complaints to CE about the falsification of his logs in violation of 49 C.F.R. § 395.8; (2) his complaints regarding dispatches that would violate hours of service regulations under 49 C.F.R. § 395.3 and 395.8; (3) his complaints to management that he was earning less than other drivers for Respondent due to his failure to drive in violation of 49 C.F.R. § 395; (4) informing CE that he was considering exposing CE's safety practices to the attorney investigating the company in litigation against CE; (5) his complaint about a dispatch that would have required him to violate vehicle weight restrictions in May, 2005; (6) his refusal on "numerous occasions" to drive his truck in violation of 49 C.F.R. § 395.3; (7) his refusal to drive with falsified logs in violation of 49 C.F.R.

"Complainant engaged in many of the protected activities alleged in his Complaint." Respondent's "Prehearing Submission" at 2. Complainant has made it clear, however, that he believes the primary reason for his termination was his activities relating to the Truck-Lite incident in McAlhattan, Pennsylvania. *See Comp*. Reply Br. at 9-10. His attorney maintained, "[w]hile Pollock's refusal to falsify his logs poisoned the well with Continental, the catalyst for Mr. Pollock's discharge (the straw that broke the camel's back) was his protected refusal to drive on Linwood Lane." Comp. Reply Br. at 10. Complainant's attorney further stated that Complainant "alleged no incidents of retaliation for which he asked for relief under the STAA in his pre-hearing statement other than his discharge on May 10, 2005." Comp. Reply Br. at 9, n. 3. Therefore, since Complainant believes his refusal to drive on weight-restricted Linwood Road was the cause of his termination, the Court will focus on that allegation, and not every allegation of protected activity claimed in Complainant's "Prehearing Submission."

As mentioned above, protected activity includes filing a complaint in relation to a violation of a commercial motor vehicle safety regulation. The Board has established that "the 'filed a complaint' language protects from discrimination an employee who communicates a violation of a commercial motor vehicle regulation, standard or order to any supervisory personnel." *Harrison v. Roadway Express, Inc.*, ALJ No. 1999-STA-00037 (Mar. 30, 2000) (*aff'd*, ARB No. 00048 (Dec. 31, 2002)). Moreover, protection under the Act for raising a complaint does not depend on proving an actual violation of a commercial vehicle safety regulation; the complaint need only relate to such a violation. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992). Protected activity also includes refusing to operate a vehicle because such operation would violate a law related to commercial motor vehicle safety or health. The Act provides, in relevant part:

> An employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 31105(a)(2).

It is undisputed that Complainant refused to drive on Linwood Road in McAlhattan, Pennsylvania on May 3, 2005. Tr. at 241; JX-29 at 286. Complainant testified that after he took the wrong turn off of an exit from the highway he was driving on, the directions he was provided by CE's mapping system routed him through Linwood Drive, a weight-restricted road. Tr. at 234-238. Both Complainant and Deputy Foley testified that there were signs posted on both sides of the road stating that trucks over 10 tons were prohibited. Tr. at 237-238; Tr. at 48-49. According to Complainant, his truck and trailer combination weighed over 10 tons, so he pulled over and did not drive on the road. Tr. at 239. He allegedly was unable to reach anyone at Truck-Lite to obtain directions, and he then sent a Qualcomm message to CE asking how he was supposed to deliver the load. Tr. at 239-240; JX-29 at 279, 281. Complainant testified that he believed it unsafe to drive down a weight-restricted road as there could have been a low

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§ 395.8; (8) his refusal to drive his truck in violation of a posted vehicle weight restriction. *See, e.g.*, Claimant's "Pre-Hearing Statement" at 2-3.

overpass, a bridge that would not support the weight of his truck or the road may have been too narrow for his truck. Tr. at 242.

After communicating his refusal to drive his vehicle down Linwood Drive, Complainant received a response from his dispatcher, Reagan Burks, stating, "Vince, I was just told that we go into this shipper all the time and haven't had any problems with weight restrictions on any road. Please go in to shipper. If you have any problems, I'll take care of it, Reagan." Tr. at 242; JX-29 at 287-288. Complainant testified that he believed Mr. Burk's message to mean that CE would pay if he received a ticket for driving on the restricted road. Tr. at 242. CE offered no alternative explanation for Mr. Burk's message,[11] and this Court can deduce no other meaning. Complainant responded to Mr. Burk with the following message:

> I am not refusing to pick up the load. I am, however, refusing to violate the law. Blindly driving down a street from which this truck is clearly excluded is plainly a stupid thing for me to do. I doubt if the police will hesitate to write me a citation when I tell them that it wasn't my idea. Ultimately I'm responsible for my actions. Recent history suggests that the company would deny any knowledge of my actions and leave me to pay the fine. No thanks. If you must punish me for refusing to violate the law, I can't stop you. Do whatever you are required to do. Vince Pollock.

Tr. at 244; JX-29 at 294-295. He was then pulled off the load. Tr. at 245; JX-29 at 296.

Under the Act, an employee-driver may not be retaliated against for refusing "to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C. § 31105(a)(1)(B)(i)-(ii). In this case, had Complainant driven on Linwood Road he would have violated Pennsylvania Regulatory Code Chapter 189, which does not permit vehicles weighing more than the posted limit to enter a roadway. Comp. Br. at 31-32; *see also* 67 PA. CODE §§ 189.1-189.2, 189.4 (2007). Moreover, driving on a weight-restrict road would have also related to violations of § 4902 of the Pennsylvania Statutory Code. Comp. Br. at 32-33; *see also* 75 PA. CONS. STATE. ANN. § 4902(a-b), (e),(g). As Complainant correctly points out, since he was in Pennsylvania during this incident, he had to operate his vehicle in accordance with the laws and regulations of Pennsylvania. *See* Comp. Br. at 33; *see also* 49 C.F.R. § 392.2.

I find that Complainant's refusal to drive down Linwood Road qualifies as protected activity under the Act. He not only refused to violate a safety regulation, but he testified that he also feared for the safety of himself and others. JX-29 at 294-295; Tr. at 241-242. I find that a

[11] When Mike Daniels was asked on cross-examination what he supposed Reagan Burk's message to Complainant meant (i.e. "Please go in to the shipper, if you have any problems I'll take care of it, Reagan"), he said the message did not instruct Complainant to drive down a restricted road. Tr. at 557. In its post-hearing brief, Respondent argues that "the pick-up at Truck-Lite did not require Complainant to travel a weight-restricted road." Resp. Br. at 32. While this is true, the fact remains that Complainant, after making a wrong turn, received re-routing directions from CE's mapping system that required him to go down Linwood, a weight-restricted road. Tr. at 236-238; JX-29 at 278.

reasonable individual in the same circumstances would have concluded that driving down a weight-restricted road could pose a "real danger of accident, injury, or serious impairment to health." I further note that Complainant unsuccessfully tried to obtain from CE alternate directions to the Truck-Lite facility.[12] Finally, as Complainant aired his concerns and stated his refusal to drive over CE's Qualcomm system, I find that CE was aware that Complainant was engaged in a protected activity.

Adverse Employment Action in Violation of the Act

Complainant contends that he was discharged on May 10, 2005 because of his protected activity. *See, e.g.*, Comp. Br. at 38. Respondent, while disputing the reason for Complainant's discharge, squarely "admits that Complainant's termination was an adverse employment action." Respondent's "Prehearing Submission" at 3.

The relevant case law clearly establishes that Complainant suffered an adverse employment action under the Act. According to the Secretary:

> *Any* employment action by an employer which is unfavorable to the employee, the employee's compensation, *terms, conditions, or privileges of employment* constitutes an adverse action. While an employer may have a non-discriminatory reason for taking the action and, therefore, ultimately prevail against a charge of illegal retaliation, that does not alter the fact that the employer took some step or action which adversely affected the employee's compensation, terms, conditions, or privileges of employment. Thus, regardless of the employer's motivation, proof that such a step or action was taken is sufficient to meet the employee's burden to establish that the employer took adverse action against the employee.

Long. v. Roadway Express, Inc., 1988-STA-00013 (Sec'y Mar. 9, 1990)(emphasis added).

Here, there is no question that Complainant was discharged by CE on May 10, 2005. Complainant testified that upon his arrival in Little Rock, Arkansas Kevin Mayes informed him of his termination. Tr. at 246. Other documents in the record attest to Complainant's account. *See, e.g.,* JX-26 ("Driver Profile Data"); CX-4 ("Driver Employee Separation Report"); RX-2. I thus find that Complainant suffered an adverse employment action when he was discharged by CE on May 5, 2005.

Causal Relation Between Alleged Adverse Action and Protected Activity

As noted above, to be successful in a STAA case, a complainant must prove a causal relation between a protected activity and the employer's adverse employment action. Here,

[12] I agree with CE that Complainant did not put forth much of an effort to find the Truck-Lite facility on his own. *See, e.g.*, Tr. at 547, 767-768; Resp. Br. at 32. Complainant even concedes this point, stating, "I think I should have called the shipper from the first stop. I admit that." Tr. at 630-631. The record, however, plainly reveals that CE did not respond to Complainant's request for alternate directions. *See* JX-29 at 277-296; *see also* Tr. at 558-559 (Mike Daniels stating that he did not provide Complainant with directions from the shipper, even though Complainant asked his dispatcher several times for directions).

Complainant has done so through his own testimony, the testimony and direct evidence provided by Natalie Brouwer, and by way of temporal proximity.

First, and most notably, Natalie Brouwer provided direct evidence that Employer terminated Complainant for his refusal to drive on a weight-restricted road. CX-1 at 2. She testified that she made an employment verification call to CE and spoke with "Pete" in the safety department. Tr. at 68-74. She further testified that her notes from the conversation, which appear on page two of CX-1, were prepared by her as soon as she hung up the phone with Pete. Tr. at 77. Her notes state in relevant part:

> Vince refused to drive on a road that was not scaled to hold the weight of truck even though it was the way he was dispatched that route. The company told him they will pay for any ticket he may get and Vince still refused. Vince was subsequently fired. *Pete says his company was breaking the law and the termination was to cover themselves.*

CX-1 at 2 (emphasis added). Ms. Brower testified that the conversation was unusual because of the content and length of the call. Tr. at 104. She said that she immediately went to tell her supervisor about the conversation, stating "Sandy, you're never going to believe this." Tr. at 81.

I find Ms. Brouwer to be a credible witness. She had no evident bias, and therefore no reason to provide untruthful testimony. There is no indication that she knew Complainant before he applied to Schilli. *See* Tr. at 79, 95. She has never worked for Respondent; and in fact is a stay-at-home mom who no longer works for any trucking company. Tr. at 612-62. She does, however, have ample experience conducting employment verifications for trucking companies. She testified that she worked for her father's trucking consulting firm since she was 12 years old, where she performed audits on drivers' logs and conducted past employment verifications. Tr. at 62, 64. She also performed past employment verifications for Schilli. Tr. at 63. She said that she used to speak to approximately 50-60 trucking companies a day while employed by Schilli, and that she has no knowledge of ever having taken down information on a driver in error. Tr. at 101.

Ms. Brouwer's testimony strongly bolsters Complainant's account of his discharge from CE. Complainant testified that he took a wrong turn while en-route to the Truck-Lite facility in McAlhattan, Pennsylvania on May 3, 2005. Tr. at 227-230, 234-235. He said that he received new directions from CE's mapping system which re-routed him onto a weight-restricted road. Tr. at 237; JX-29 at 278. He said he "absolutely" believed that CE was instructing him to go down a restricted road to get to Truck-Lite. Tr. at 627. He received a message from CE telling him to go to Truck-Lite and if he had any problems CE would "take care of it." Tr. at 242; JX-29 at 287-288. He refused to drive on Linwood Road as he believed it was unsafe, and he was subsequently pulled off the load. Tr. at 241, 244; JX-29 at 294-296. He was discharged one week later, on May 10, 2005, when he arrived in Little Rock, Arkansas. *See, e.g.*, Tr. at 246-247.

Finally, temporal proximity, combined with the direct evidence of retaliation, supports a finding of causation. Close proximity between the protected activity and the adverse action may

raise the inference that the protected activity was the likely reason for the adverse action. *Kovas v. Morin Transport, Inc.,* 92-STA-41 (Sec'y Oct. 1, 1993) (*citing Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987)).

Here, Complainant engaged in protected activity on May 3, 2005 when he refused to drive on a weight-restricted road. *See, e.g.*, JX-29 at 294-296. He was discharged exactly one week later, on May 10, 2005. *See, e.g.*, CX-4 at 1. No intervening events occurred between the protected activity and Complainant's discharge; and in fact, Tim Hodnett testified that this incident was the "straw that broke the camel's back" in CE's decision to terminate Complainant. Tr. at 740. As such, I find that this close proximity in time between Complainant's refusal to drive and his discharge supports a finding of a causal relation between Complainant's protected activity and the adverse action taken against him.

Employer's Burden to Show That it Would Have Taken the Same Action Even in the Absence of the Protected Activity.

As mentioned above, once the complainant puts forth direct evidence that the adverse action is motivated, at least in part, by the protected activity, the respondent can prevail only by establishing it would have taken the adverse action in the absence of the protected activity. *Caimano v. Brink's, Inc.*, 95 STA-4, slip op. at 23-24 (Sec'y Jan. 26, 1996) (citation omitted). The respondent must make such a showing by a preponderance of the evidence. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 5 (ARB Mar. 29, 2000) (giving accord to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989)). Here, Complainant presented direct evidence that CE terminated him after his refusal to drive on a weight-restricted road. Although CE argues that it fired Complainant due to his repeated policy violations and his insubordinate attitude, *See, e.g.*, Resp. Br. at 44, they are unable to prove by a preponderance of the evidence that they would have discharged Complainant in the absence of his refusal to drive on the weight-restricted road.

CE argues that they terminated Complainant based on a review of his entire employment history. *See, e.g.*, Tr. at 733. They claim that this case "involves a Complainant who cried retaliation each and every time he was displeased with anything related to his employment." Resp. Br. T 30. They maintain:

> Each time Continental expected [Complainant] to respond promptly to communications, take some initiative to locate customers, or submit a return to work slip to support his ability to drive a truck, Complainant, rather than simply complying with reasonable requests, engaged Continental employees in hostile communications and made repeated allegations related to retaliation . . . . Continental asked nothing of Complainant that it does not ask of every other driver.

Resp. Br. at 30. Mike Daniels testified that almost every manager and planner who had worked with Complainant referred to Complainant as "a problem child." Tr. at 537.

This Court agrees that Complainant was, without a doubt, a difficult employee. Even Complainant admits that he knew he could be "kind of rough in dealing with people," Tr. at 650, and that he used "impertinent" language that would have justified his discharge in the past. Comp. Br. at 44. Carol Myers testified that Complainant called her a liar, and both she and Tim Hodnett testified that Complainant spoke threateningly to them when he was asked to have his nurse practitioner certify that he was able to drive a commercial vehicle. Tr. at 486, 489, 713-714. Such medical certification was required of all drivers who had been temporarily too ill to drive, as was Complainant. Tr. at 484-485. Complainant, however, viewed this reasonable request as "obviously untenable" and "patently absurd." JX-17 at 2. Ms. Myers testified that the policy had been in place for at least five years, and that she had never had any other driver so much as question it. Tr. at 484-486.

Other managers testified that Complainant did not respond promptly to messages, and that he failed to take initiative to locate customers. In one instance, after sending several Qualcomm messages to his dispatcher requesting directions to a facility, Complainant then said, "Oh, I found it without any trouble. It just seems ridiculous to me that you expect me to go on a 'phone search' when (I'm pretty sure) you have one on your desk." JX-29 at 196-204. His dispatcher then responded, "[s]ometimes the things u try 2 pull just baffle me." JX-29 at 205. Jason Hall, another dispatcher, reported that on a different occasion he was unable to reach Complainant on his cell phone. Tr. at 519. Complainant subsequently sent Mr. Hall Qualcomm messages demanding that CE take his cell phone number out of their system and not call him on it again. Tr. at 529. Mr. Hall testified that he has never had another driver refuse to take cell phone calls, and that it is common for him to talk to drivers on their cell phones "all day, every day." Tr. at 529. Even in the McAlhattan, Pennsylvania incident, Complainant appeared to make little effort to contact the Truck-Lite facility on his own. He admitted that he should have used a phone to call Truck-Lite when he first pulled over to ask for directions. *See* Tr. at 631.

Regarding the logs CE asked him to re-create, Complainant seemingly rushed to the conclusion that he was being asked to violate the law.[13] This Court further notes the collection of ranting, and often irrational, Qualcomm messages, memos and letters that Complainant sent to his CE managers.[14] Undeniably, Complainant was a problem employee throughout his employment with CE. Problematic as he was, however, Respondent has not shown by a preponderance of the evidence that it would have fired Complainant had he not refused to drive on a weight-restricted road.

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[13] Jim White testified that CE never wants their drivers to falsify a document. Tr. at 357. Mr. Daniels stated that when he asked Complainant about his missing logs, he was simply trying to get Complainant to fill in the gaps for certain dates. *See* Tr. at 541. He testified that he would not have tried to pass Complainant's logs off as originally being done at the time they were supposed to have been completed. Tr. at 542. Moreover, none of the Qualcomm messages between Complainant and his dispatchers asked Complainant to violate the law. Thus, the Court does not find that Complainant actually believed he was being asked to violate the law, and does not find credible his contention that his refusal to do so was a protected activity. *See* Comp. Br. at 9 (arguing that although the Linwood Road incident was the catalyst for Complainant's discharge, his "refusal to falsify his logs poisoned the well with Continental" in the first place).

[14] In one Qualcomm message, Complainant wrote, "[a]pparently, CEI's company policy is nothing more than an excuse to arbitrarily discipline those who do not adhere to Pete Campbell's greedy and impotent idea of risk management." JX-29 at 256-257. In a fax to Tim Hodnett and Carol Myers, Complainant wrote: "it would appear that Ms. Myers' demand for a Certification are woefully misguided, not to mention her dubious Claims of such a demand being based on C.E.I. policy." JX-17 at 4.

In *Johnson v. Roadway Express, Inc.*, a factually similar case, Respondent attempted to establish, by a preponderance of the evidence, that it would have taken the adverse action of terminating Complainant's employment for his reporting in as too ill to drive even if Complainant had not engaged in protected activity (refusal to drive when too ill). Respondent thus produced a great deal of evidence to show that Complainant had an abysmal attendance and disciplinary record (which, in fact, had been sufficient to convince the ALJ that Respondent had dual motives in discharging Complainant). Respondent also presented evidence that it had a long standing policy to look at an employee's entire work record when determining whether to terminate that employee's employment.

The ARB, however, agreed with the ALJ that there was no evidence to establish that Respondent would have discharged Complainant even if he had not reported as too ill to drive. The ARB noted that "[u]nder the dual motive analysis it is not sufficient for an employer to prove that it had good reason to take adverse action against an employee. Rather, the employer must prove by a preponderance of the evidence that it actually would have taken that action, even if the employee had not engaged in protected activity." ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000) Slip op. at 13.

In the instant case, CE produced a great deal of evidence that Complainant was far from a model employee. They also showed that it was customary to review an employee's entire employment history when deciding whether to terminate him. However, CE has failed to show that it would have fired Complainant if not for his protected activity (refusal to drive on the weight-restricted road). Complainant's attorney points out:

> Even though Mr. Pollock may have been combative and rude, and had an 'obstinate attitude' at times, he worked for Continental for three years, much longer than an average driver for Continental. Continental accepted Mr. Pollock as a combative, rude and obstinate driver until he engaged in a protected refusal to drive on Linwood Lane.

Comp. Reply Br. at 2. Respondent concedes that it was not until after this episode that CE began to consider Complainant's termination. *See* Tr. at 740. Tim Hodnett testified that the incident was the "straw that broke the camel's back." Tr. at 740. As Complainant correctly argues, "when protected activity is the 'straw that broke the camel's back' in an employer's determination to discharge an employe[e], that employer fails to satisfy its burden in a mixed motive case where the discharge is motivated by both protected and non-protected activity." Comp. Br. at 44, (citing *Kovas v. Morin*, 1992-STA-41 p. 4 (Sec'y Oct. 1, 1993); *Dale v. Step 1 Stairworks*, 2002-STA-30 (ALJ Apr. 11, 2003)).

Moreover, CE argued that among the reasons for Complainant's termination was his refusal to turn in logs. As the record indicates, CE issued no disciplinary notices to Complainant after April, 2004. The Court agrees with Complainant that it is difficult to believe that Complainant's "alleged failure to turn in logs motivated a discharge some 14 months later when Continental never issued so much as a written warning to him after April, 2004." Comp. Reply Br. at 5. It is especially difficult to believe Complainant was discharged after just one written warning 14 months earlier, in light of the fact that CE has a progressive discipline policy. *See*

Tr. at 477. Jim White testified that although other drivers have been terminated by CE for failing to turn in logs, those drivers had been counseled several times in person prior to their termination. Tr. at 421. Further, Tim Hodnett testified that he does not normally wait a year to fire someone. Tr. at 741.

Finally, CE argues that Natalie Brouwer never actually spoke with a "Pete" at CE, or that she took incorrect notes of any conversation she did have. *See, e.g.*, Resp. Br. at 33. They contend that she somehow jotted down her notes incorrectly, confusing "Pete's" account with Complainant's account of the termination. *See, e.g.,* Resp. Br. at 33. This argument is not credible. As already stated, I find that, unlike CE employees, Natalie Brouwer had absolutely no motive to provide false testimony. She testified that she specifically asked to speak with "Pete," because that is who she was initially instructed to send the verification form to the attention of, and she figured he—and not just a verification clerk—"really knew what was going on." Tr. at 74. She remarked how surprised she was that a CE manager would have provided such damaging information to her over the phone, and that upon hanging up, she immediately went to report the incident to her supervisor. Tr. at 77, 82. The fact that this conversation was substantially different from the standard employment verification calls she was used to, clearly made this particular conversation more memorable to Ms. Brouwer. Moreover, Ms. Brouwer prepared her handwritten notes with respect to this conversation as soon as she got off the phone, and she testified that she could not recall ever having erred in making similar notes with respect to other employment verification calls she made during the several years she worked in the trucking industry. Tr. at 77, 101.

Although both Pete Wadell and Pete Campbell deny ever speaking with Ms. Brouwer, *see, e.g.*, Resp. Br. at 33, after considering all of the evidence, I find it more likely than not that Ms. Brouwer's notes and testimony are truthful and accurate. She reported that the "Pete" she spoke with on the phone told her that Complainant "was a good kid, he liked him . . . he got screwed." Tr. at 80. She also said "Pete" sounded frustrated, "like he just had had enough that day." Tr. at 80. As noted above, Pete Campbell testified that during that particular time period he was in fact frustrated because of various changes which were taking place at CE. *See* Tr. at 586. Finally, the fax number at CE that Ms. Brouwer sent the past employment verification form to (to the attention of "Pete"), was a fax number within the corporate office where Pete Campbell worked. CX-1 at 1; Tr. at 591.

Based on the foregoing reasons, I find that Complainant has established that he was discharged in violation of the STAA. As a result, Complainant is entitled to relief pursuant to the Act.

Relief

Under the STAA, a prevailing complainant is entitled to relief including abatement, reinstatement and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A)(i)-(iii). Complainant contends that such relief is appropriate in the instant case. *See, e.g.*, Comp. Br. at 46. Respondent argues only that Complainant failed to act reasonably to maintain employment after his termination, and thus "any back pay ceased accrual after May 31, 2006." Resp. Br. at 45.

Reinstatement

The STAA expressly provides that a prevailing complainant is entitled to reinstatement. 49 U.S.C. § 31105(b)(3)(A)(ii). Complainant has indicated that he desires to be reinstated to his former position with CE as he prefers to do "long-haul" rather than regional drives, and because CE is in a "pretty central location." Tr. at 252. Since Respondent has offered no reason as to why reinstatement is inappropriate in this case, I find that Complainant is entitled to reinstatement into his former position as a driver with CE.

Back pay

The ARB has provided the following summary regarding back pay awards in STAA whistleblower cases:

> A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him.
>
> Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988) . . . . Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement . . . . While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude."

Ass't Sec'y & Bryant v. Mendenhall Acquistion Corp., ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005), Slip op. at 5-6 (some citations omitted).

CE terminated Complainant on May 10, 2005. In 2004, Complainant earned $39,251.16 with CE. JX-27 at 2. He earned $13,170.22 with CE in 2005. JX-27 at 3. Complainant calculates that his average weekly wage paid by CE in 2004 and 2005 was $747.08 ($52,421.26/ 70.57 weeks[15]). Comp. Br. at 46. From June 14, 2005 until he was terminated on July 20, 2005, Complainant was employed by Schilli, where he earned $3,823.05. JX-28 at 3; Tr. at 261-262. Complainant then went to work for JDC Logistics from January, 2006 until May 31, 2006, where he earned $12,952.61. JX-28 at 1; Tr. at 249, 263. He then worked for Baylor Trucking from June, 2006 until he was terminated on August 9, 2006. Tr. at 253-254. He earned $7,123.52 while working for Baylor. JX-28 at 4. At the time of the hearing, he also anticipated a final paycheck from Baylor with a gross total of approximately $800.00. Tr. at 250.

[15] The Court has calculated this period to be 70 weeks and 3 days, and has thus rounded the time period to 70 weeks.

Complainant contends that he is entitled to back pay at a rate of $747.08 per week, less his interim wages, until he is reinstated by CE. Comp. Br. at 47. He "projects that he would have earned $49,456.70 ($747.08 x 66.2 weeks) through the date of the hearing in this case had his employment with [CE] continued uninterrupted." Comp. Br. at 46. He further calculates that as of the completion of the hearing in this case, his wage loss damages were $24,757.61, calculated as follows:

Projected CE Wages from 5/10/06 through 8/17/06:	$49,456.79
($747.08 x 66.2 weeks[16])	
Less Schilli Wages:	(3,823.05)
Less JDC Logistics Wages:	(12,952.61)
Less Baylor Trucking Wages:	(7,923.52)
Net Wage Loss as of 8/17/06:	$24,757.61

Respondent, CE, argues that Complainant should not receive back pay for the period following May 31, 2006, when Complainant was terminated from JDC Logistics. *See* Resp. Br. at 45. CE cites to several cases, contending that a wrongfully discharged employee must act reasonably to maintain employment or risk a reduction in any back pay award. Resp. Br. at 45-46. CE appears to contend that because Complainant was fired from JDC Logistics on May 31, 2006 "for refusing to transport a load that he could have legally carried," he should not be awarded back pay after that date. *See* Tr. at 46. CE argues that "it is clear that Complainant's termination from JDC stops the accrual of back pay because his refusal to transport a load is contrary to a trucking company's sole purpose, and thus, a willful violation of instructions and policy." Resp. Br. at 47.

Respondent is correct in referring to *Johnson v. Roadway Express, Inc.*, for the proposition that "a wrongfully discharged employee must act reasonably to maintain employment, or risk a reduction in any back pay award." Resp. Br. at 45 (citing 1999-STA-5, ARB Case No. 01-013 (ARB Dec. 30, 2002)). Complainant, however, correctly maintains that back pay awards are only reduced if an employee was terminated from subsequent employment for "gross" or "egregious" conduct. Comp. Reply Br. at 19 (citing *NLRB v. Ryder System, Inc.*, 983 F.2d 705, 713 (6th Cir. 1993); *NLRB v. PIE Nationwide, Inc.*, 923 F.2d 506, 513 (7th Cir. 1991). Moreover, the burden of showing that a complainant failed to make reasonable efforts to mitigate damages is on the employer. *Polwesky v. B & L Lines, Inc.*, 90-STA-21 (Sec'y May 29, 1991) (citing *Carrero v. N.Y. Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) and *Rasimas v. Michigan Dep't of Mental Health,* 714 F.2d 614 (6th Cir. 1983)).

In the instant case, Respondent has failed to show that Complainant was terminated from JDC Logistics for "gross" or "egregious" conduct. The only evidence in the record indicating

[16] The Court has calculated this period to be exactly 66 weeks.

that Complainant was terminated from JDC was Complainant's own testimony that "there were a couple of instances where I refused loads that couldn't be done legally. But there was a load that I refused that I could have done that I didn't do, so I think they were perfectly justified in firing me." Tr. at 266. This testimony fails to establish that Complainant was fired for gross or egregious conduct.[17]

CE's counsel further contends that I should have allowed him to introduce "evidence related to Complainant's terminations after his termination from Continental." Resp. Br. at 46. He claims that such evidence "is clearly relevant, and is absolutely necessary to calculating any alleged claim for back pay." Resp. Br. at 46. Counsel's argument, however, fails for the following reason. Respondent offered evidence of Complainant's subsequent terminations not for the purpose of calculating damages. Rather, it offered such evidence as a means to impeach Complainant's credibility. *See, e.g.*, Tr. at 256-257, 259-260, 264. As I noted during the hearing, "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action and conformity therewith." 29 C.F.R. 18.404(b) (2006); Tr. at 256.

After considering Respondents arguments and reviewing Complainant's calculations, I find Complainant is entitled to an award of back pay consistent with the following calculations: First, I find Complainant's Average Weekly Wage while at CE in 2004 and 2005 to be $748.88 ($39,251.16 + $13,170.22 / 70 weeks). The remaining calculations are below:

Projected CE Wages from 5/10/06 through 8/17/06: ($748.88 x 66 weeks)	$ 49,426.08
Less Schilli Wages:	(3,823.05)
Less JDC Logistics Wages:	(12,952.61)
Less Baylor Trucking Wages:[18]	(7,923.52)
Wage Loss as of 8/17/06:	$ 24,726.90

Thus, I find that Complainant is entitled to an award of back pay in the amount of $24,726.90 plus pre-judgment interest.

[17] Complainant also testified that he believed he was fired from Schilli because he refused to violate hours of service regulations. Tr. at 266. He maintained that he was terminated from Baylor "for not maintaining the profitability of their vehicle at the expected levels." Tr. at 266. Respondent does not argue that back pay should be tolled during the period when Complainant worked for these companies. Even if it had, however, these reasons, again provided by Complainant, hardly show that he was fired for gross or egregious conduct.

[18] This figure includes the actual wages earned at Baylor (indicated in JX-28 at 4) and Complainant's anticipated final paycheck. Tr. at 250.

Pre-Judgment Interest

Complainant is entitled to pre-judgment interest on his back pay award, calculated in accordance with 26 U.S.C.A. § 6621(a)(2). *See Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), slip op. at 17-18 (citations omitted).

Other Compensatory Damages

Complainant testified that he purchased a bus ticket for his return home after he was terminated in Little Rock. Tr. at 248. He said that the ticket price of $105.00 was deducted from his final paycheck. Tr. at 248. As I have found that Complainant was wrongly terminated by CE, I find that he is entitled to be reimbursed by CE in the amount of $105.00.

Abatement

As previously noted, the Act expressly provides that successful complainants in STAA cases are entitled to abatement. 49 U.S.C. § 31105(b)(3)(A)(i). In this vein, Complainant has requested that CE be ordered to expunge from his personnel file information regarding his wrongful termination to indicate continuous employment with CE, and to order CE "to take such action as is necessary to cause any consumer reporting agencies to whom [CE] furnished a report about Pollock to amend its report about his work record." Comp. Br. at 48. Complainant further requests that the Court order CE to post a copy of the decision in this case at "all of its terminals for 90 consecutive days in all places where employee notices are customarily posted." Comp. Br. at 47. Respondent provided no argument as to why such relief is inappropriate.

In *Michaud v. BSP Transport, Inc.*, the Board affirmed the ALJ's order to expunge from Complainant's personnel records "all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination." 95-STA-29 (ARB Oct. 9, 1997). The employer had objected to the order, arguing that it was vague. *Id*. The Board, however, found the order to be sufficiently clear, and stated that it would not place the burden on Complainant to identify the specific documents to be expunged. *Id*. Since I have similarly found in the instant case that Complainant was wrongfully terminated as a result of his protected activity and have ordered reinstatement, I further find it appropriate for CE to remove from Complainant's personnel file "all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination." *Michaud v. BSP Transport, Inc.*, *supra*.

The Board also held in *Michaud* that it is a standard remedy in discrimination cases for an employer to post written notice advising that the disciplinary action taken against a complainant has been expunged and that the complainant prevailed in his complaint. *Michaud v. BSP Transport, Inc.*, *supra*. As Complainant has requested this remedy in the instant case,[19] and Respondent has offered no argument as to why this remedy would be inappropriate, I further find

[19] Although Complainant has actually requested that a copy of the decision in this matter be posted in the workplace, I find that a notice of the results of this action are sufficient.

that CE should be required to post a written notice notifying its employees of the outcome in this case.

Attorney Fees and Costs

Complainant has requested leave to file a petition for attorney fees and costs. Under the STAA, a prevailing complainant is entitled to litigation expenses including attorney fees and costs. *See, e.g.*, *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004); *Eash v. Roadway Express, Inc.*, ARB Nos. 02 008, 02 064, ALJ No. 2000 STA 47 (ARB Mar. 9, 2004). Fifteen (15) days will thus be allowed to Complainant's counsel for the submission of a petition for attorney fees and costs. Respondent's counsel will be allowed fifteen (15) days thereafter to file any objections thereto.

RECOMMENDED ORDER

For the foregoing reasons, I hereby **RECOMMEND** that Complainant, Vincent A. Pollock, be awarded the following remedy:

1. Respondent, Continental Express, shall reinstate Complainant, Vincent A. Pollock, with the same seniority, status, and benefits he would have had but for Respondent's unlawful discrimination.

2. Respondent shall remit to Complainant:

   A. Back pay in the amount of $ 24,726.90 for the period of May 10, 2005 through August 17, 2006;

   B. Back pay at the rate of $748.88 per week for the period of August 18, 2006 through the date Respondent remits payment of this award;

   C. Interest on the entire back pay award, calculated in accordance with 26 U.S.C. §6621; and

   D. Reimbursement of Complainant's bus ticket from Little Rock Arkansas following his termination, in the amount of $105.

3. Respondent shall immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination;

4. Respondent shall contact each and every consumer reporting agency to whom it furnished a report about Complainant, and request that any such reports with reference to Complainant's termination be amended in the manner described above; and

5. Respondent shall post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of thirty (30) days, advising its employees that

the disciplinary action taken against Complainant has been expunged from his personnel record and that Complainant's complaint has been decided in his favor.

6. Complainant shall have fifteen (15) days from the date of this Order within which to file a petition for attorney fees and costs, and Respondent shall have fifteen (15) days thereafter to file a response to such petition.

A

STEPHEN L. PURCELL
Associate Chief Judge

Washington, D.C.

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

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

The order directing reinstatement of the complainant is effective immediately upon receipt of the decision by the respondent. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).