

U.S. Department of Labor

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Issue Date: 23 December 2004

Case No.: 2003-STA-00009

IN THE MATTER OF:

CHARLES PERRY MARTIN,
Complainant,

v.
UNITED PARCEL SERVICE,
Respondent.

APPEARANCES:

Paul Taylor, Esq.
Truckers Justice Center
900 West 128th Street, Suite 102
Burnsville, MN 55337
For the Complainant

Taggert Hansen, Esq.
Hill Wellford, Esq.
Gibson, Dunn & Crutcher, L.L.P.
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Denver, Colorado 80202
For the Respondent

BEFORE:

Mollie W. Neal
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the “whistleblower” protections provisions of the Surface Transportation Assistance Act of 1982 and the implementing regulations at 29 C.F.R. Part 1978. In 1982, Congress enacted Section 405 of the Surface Transportation Act (hereinafter referred to as the “Act”), 49 U.S.C. § 31104, to promote safety on the Nation’s highways by protecting

employees from discriminatory action due to an employee's engagement in protected activity. Section 405 of the Act provides the following:

Charles P. Martin ("Complainant") filed a complaint with Secretary of Labor (the "Secretary"), June 4, 2002, alleging discrimination against United Parcel Service ("Respondent") under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. 31101 et seq. The Secretary issued a Determination on November 4, 2002 finding no violation under 49 U.S.C. 31105(a)(1)(B)(1) and (ii). Complainant filed written objections to the Secretary's finding and requested a formal hearing. A hearing was held in Knoxville, Tennessee on April 2-4 and May 13-14, 2003, where the parties were afforded a full opportunity to present testimony, submit documentary evidence, and set forth arguments. The following exhibits were received into evidence at the hearing: (1) *Complainant's Exhibits (Cx.)* 1, 6, 8-9, 11-26, 36, 38, 41-46; (2) *Respondent's Exhibits (Rx.)* 8, 30-36; and (3) *Joint Exhibits (Jx.)* 5, 6-16, 17-37, 38-42, and 43-70.

Mr. Martin worked as a feeder driver for UPS from September 18, 1986 until January 28, 2002, when he was disciplined for exceeding the 1 hour meal period and discharged for (1) failure to follow instructions regarding taking his meal, and (2) for "acts of dishonesty." *Tr.* at 28 and 131. Mr. Martin contends that he was discharged for engaging in protected activity under the Act, i.e. refusing to drive because he was too sick or fatigued. *Tr.* at 39-42.

Respondent contends that Complainant was not engaged in protected activity under wither Section 31105(A)(1)(i) or (b)(ii). Complainant was disciplined and discharged for his consistent failure to follow instructions on how he should take and record his required meal period, and for acts of dishonesty occurring on January 16, 22, and 25, 2002. Respondent maintains that because Complainant did not contact UPS to inform the Company that he was ill or fatigued during his feeder runs on December 4, 7, and 28 and January 4, 2002, he cannot establish that UPS ordered or instructed him to continue driving his tractor-trailer in violation of Section 31105(a)(1)(b)(i) or required or permitted him to operated the vehicle in violation of Section 392.3

FINDINGS OF FACT

1. Jurisdiction

Respondent is engaged in interstate operations, and maintains a place of business in Knoxville, Tennessee. During the regular course of business, Respondent's employees operate commercial motor vehicles, principally to transport common freight. *Jx.* 58, ¶¶ 2 and 3. At all times relevant herein, Respondent has been an employer as defined in Section 311.013 of the Act. *Jx.* 58.

At all relevant times herein, Complainant was an "employee" within the definition of 29 C.F.R. § 1978.101(d). *Jx.* 58. Complainant was employed by Respondent as a driver of a commercial motor vehicle used on highways to transport common freight and, in the course of his employment, directly affected commercial motor vehicle safety. *Jx.* 58, ¶ 2.

Complainant was employed by Respondent as a driver of commercial motor vehicles having a gross weight rating in excess of 10,001 pounds. *Jx.* 58,

Complainant's claim in this case was timely filed. *Jx.* 56 and 61.

2. *Knoxville to Atlanta Run*

At the time of his discharge, Mr. Martin held bid number GA-01 based on his seniority. *Tr.* at 50. According to Mr. Martin the GA-01 started at 5:30 p.m. Monday through Friday, and it would go to Knoxville with a set already hooked together, two trailers hooked together. He would get his tractor and hook under it and take the trailers to Atlanta, Georgia, the Atlanta building. *Tr.* at 51. He carried "bypass loads" from Knoxville to Atlanta and "hot loads" on the return trip to Knoxville. *Tr.* at 51 and 882. His "finish time" for the run was 3:45 a.m.

Complainant indicated that he was uncertain of the "finish time" for his run. His supervisor, Mr. Lindsay Stipes, UPS Feeder Manager, testified that such information is always maintained in the dispatch office and each driver receives a copy of the schedule for a particular run when s/he makes a selection on which run to bid. *Tr.* at 967.

During the Knoxville to Atlanta run, Complainant routinely stopped at the Golden Gallon truck stop in Carbondale for a break while en route from Knoxville to Atlanta. *Tr.* at 85-86. Mr. Martin used this particular truck stop because it was the "most convenient" and the "fastest." *Tr.* at 86.

Complainant testified that he did not punch the meal button on IVIS when using the restroom, unless he was otherwise instructed. *Tr.* at 87. He testified that he did not normally take a meal at Carbondale because it was not a designated stop and he was using the bathroom such that taking a meal would constitute a violation of DOT law. *Tr.* at 93.

In a written statement dated August 6, 2002, Complainant stated that with regard to stopping at the Golden Gallon, for years, he had stopped at fuel stops to relieve myself during a tour of duty for UPS, and never recorded this stop time on his Smart Card or IVIS computer as break time. He presumed that UPS reviewed its records in the past and saw that he had not recorded these bathroom breaks as 'meal break' on the Smart Card or IVIS. Complainant testified that it was his belief that other UPS Feeder Drivers did not record their restroom breaks as 'meal breaks' on their Smart Cards or IVIS. He stated that:

In the past, Lindsay Stipes, UPS Feeder Manager, has told me that I need not 'go on meal' when I take restroom breaks. This position changed, of course, on January 28, 2002. Other UPS drivers are not disciplined for failing to 'go on meal' when they stop to urinate. UPS is using the claim of 'theft of time' as a pretext to discipline for taking breaks when I become ill or sleepy.

Jx. 58 at pp. 7-8. Mr. Stipes contradicted Complainant and testified that he has never sanctioned a failure to record personal stops as meal. *Tr.* at 878. To the contrary, he testified that all personal stops should be recorded and "there's never been a six and a half or seven minute break

authorized by UPS.” *Tr.* at 877. Mr. Rutherford, labor manager for UPS, agreed and noted that Article 54 of the CBA provides that “all stops must be logged.” *Tr.* at 1120. Mr. Stipes testified that “failure to log stops that are indeed personal stops could result in termination because obviously that is time the driver is being compensated for time that he should not be, based on the labor agreement that we have with the Teamsters.” *Tr.* at 921 and 935.

Similarly, Mr. Brewer testified that a driver does not need to record a stop if s/he only uses the bathroom; however, if s/he buys food or something to drink, then it should be recorded as a meal break. *Tr.* at 1048 and 1051.

3. *Turnaround in Atlanta and return to Knoxville*

After dropping his double trailers in Atlanta, Mr. Martin would pick up another set of double trailers and return to Knoxville between 4:30 a.m. and 5:15 a.m. *Tr.* at 52. He testified that he did not normally log a “meal” in Atlanta because he was working trying to find his trailers and performing trip inspections. *Tr.* at 453-54.

4. *“Hot loads” on return to Knoxville.*

The loads on the return trip to Knoxville were considered “hot loads” because of their time-sensitive schedules. Lindsay Stipes, feeder manager, testified that “hot loads” are scrutinized more closely because “there’s just not a lot of time in the schedules for it to get from point A to point B.” *Tr.* at 882.

These loads were destined for the “pre-sort” operation in Knoxville. According to UPS schedules, Complainant’s loads were due back in Knoxville by 3:45 a.m. *Tr.* at 189.

Complainant’s loads were due in Knoxville by 3:45 a.m. and the pre-load operation for the loads was scheduled for 4:00 a.m. *Tr.* at 835. Lindsay Stipes, who has served as “the feeder on road manager for UPS” since 1999, testified that UPS’S “Knoxville pre-load is an operation that starts at about 4:00 in the morning, and basically processes all of the packages coming in for delivery from Knoxville and the surrounding package centers in this area.” *Tr.* at 837. The pre-load operation usually concludes by 8:00 a.m. or 8:30 a.m. *Tr.* at 837. Mr. Stipes explained that feeder driver schedules are designed to bring “loads in for pre-load” during “a very specific time frame in order for that volume to be processed, sorted, loaded in stop by stop order, and have those cars ready to go out for delivery” by 8:00 a.m. or 8:30 a.m. *Tr.* at 837.

Mr. Stipes testified that the pre-load operation is “affected greatly” if a feeder driver is late. *Tr.* at 837-38. Mr. Rutherford agreed and stated that, if a driver is late delivering his or her load to the pre-load operations, then there is a “loss of production for UPS.” Respondent has to pay overtime, and there is a “loss of pieces (processed) per hour. *Tr.* at 1143. With regard to Complainant’s load, Mr. Stipes stated that some of the packages had to go through the pre-load process and be ready to go by 6:00 a.m. *Tr.* at 840. If a load misses its scheduled slot during the pre-load operation, then “you have a problem because there are only so many loads that you can process at one time” and “it really throws a wrench into the operation.” *Tr.* at 843.

If a load arrives late to the pre-load operation, then there are three options: (1) hold delivery drivers who are “already on the clock;” (2) allow the 6:00 a.m. drivers to go and bring in extra drivers to handle the late-delivered packages; or (3) “obviously miss service” on those packages that are not timely delivered to the centers. *Tr.* at 844.

William Rutherford, Labor Manager for UPS testified as to the impact on Respondent’s operations when Complainant’s loads were delivered late to Knoxville:

The cost is – late pre-loads, it’s a loss in production for UPS, again, plan the work, work the plan, all these loads are planned into certain times in the doors. The Knoxville operation is a twenty door input facility that we unload out of eighteen doors, which means that they can process eighteen thousand packages an hour.

The pre-load mans up with anticipation of these loads being available and running their sort. It’s all run by simulation. They know what their projected volume is, what the projected down time is. ... the drivers have a regular start time. So, you need a good clean up, get the drivers out.

If you don’t, you’ve got overtime cost on the drivers because the package car drivers are planned over an eight hour day. So anything in the morning that delays them is overtime cost.

Anything[sic] that the pre-load continues to run longer on production, it results in a loss of pieces per hour of how they’re monitored on their cost plan. UPS runs a very strict cost plan. If you don’t make your cost plan, your contribution to the company as a whole, then you have to explain why. And, we look for the reasons of why we’re not making our cost plan.

And on a pre-load, a large effect of that can be the feeder fees into in not getting there on a timely basis. You can’t get all your loads in here at 7:00 and get a sort down.

Tr. at 1143-44.

4. *Complainant’s delays raised “red flags”.*

Mr. Stipes testified that, because Complainant was pulling “hot loads” from November 2001 to January 2002 and his pattern of arriving late for the pre-load operations raised a “red flag” for management. *Tr.* at 879-882. When a “red flag” is raised to management, Mr. Stipes explained the procedure as follows:

[Y]ou would begin by talking with the driver. And then, you would look at the other pieces of information that I’ve discussed such as the driver’s time card, the driver’s tachograph.

And then the next step obviously would be to have his supervisor to ride with the driver to do what we call an OJS or an on the job supervision.

In other words, the supervisor's job would be then to get on the car with the driver and actually observe, to try to correct problems that the driver identifies, or to make sure that those problems indeed exist.

Tr. at 883.

Mr. Stipes recalled that "red flags" were raised on Complainant's run because he was routinely late for the pre-load operations, "[a]nd not only was he affecting the Knoxville operation, but he was jeopardizing service to both Maryville and Oliver Springs based on the arrival time of those Georgia loads coming into Knoxville." *Tr.* at 884. Mr. Brewer agreed. *Tr.* at 1013.

In December 2001, the peak season for UPS, Mr. Stipes stated that "certain loads (including Complainant's loads) were identified that were causing serious problems on the pre-load." *Tr.* at 887. When asked how Mr. Stipes identified Complainant's loads as being a problem, he stated:

There was a daily voice mail . . . going back and forth between the operation division managers, both the one responsible for the pre-load, and also the division manager in charge of the feeder operation which is the feed for that sort.

Tr. at 887-88.

Mr. Brewer agreed and, when asked what prompted him to review Complainant's records, Mr. Brewer stated:

Just to be truthful, just the every day looking at my WOR and my weekly report, my daily report that I get and seeing where the over allowed is.

And, I don't pull just Mr. Martin's . . . there's a list of three or four at the bottom of the report that are your best performers of the day, and there's the three or four that are the least best performers of the day. And when I'm in the office, I usually go through my report and look at my report. That prompts me to follow up on different things.

Tr. at 1060.

5. *Late arrivals; failure to advise dispatch*

Complainant agreed that he returned to Knoxville later than the scheduled time each time he ran GA-01 in the months of December 2001 and January 2002. *Tr.* at 286. Indeed, Complainant acknowledged that, from October 1, 2001 until the time his employment was terminated, he made 55 runs and arrived early only one time—on the November 7, 2001 on-the-

job supervisory ride with Mr. Brewer. *Tr.* at 481. He testified that he did not call in to dispatch to advise that he was running late unless, in his opinion, service would be missed. He indicated that he “made a point to call whenever ... [he] knew service was going to be missed.” Otherwise, he stated he would have called probably every day. *Tr.* at 289. He recalled that he called dispatch on one occasion when he was sitting in traffic:

At this particular situation, I had my cell phone with me. So, I was able to make that phone call to Ron sitting on the road, and let him know that I was sitting in traffic, that they had a Knoxville driver in Atlanta, and that they could take those, my loads and take them back to Knoxville where they’d make service, and then I could pull his loads, which were bypass loads coming back, and there wouldn’t be no service missed.

Tr. at 441. Complainant stated that he had a “rule of thumb” that, if he was going to be late and service would be missed, then he would call UPS and let them know. *Tr.* at 441. However, he asserts that he was never told by UPS to call in if he was going to be late. *Tr.* at 452.

Complainant maintains that UPS does not issue cell phones to its drivers and the IVIS system did not allow him to notify dispatch from the truck that he would be late. *Tr.* at 457. He did acknowledge that there is a public pay phone in Carbondale, he passes a rest area on his run where “they probably have phones,” and there are “probably” pay phones at the truck stops. *Tr.* at 457-58. When asked why he did not pull over and find a pay phone to call dispatch when he was running late, Complainant reiterated that “unless the loads were going to miss service, then I normally didn’t make a rule to call.” *Tr.* at 459.

Complainant asserted that delays on his run could have been caused by breakdowns, accidents, traffic, longer pre- and post-trip inspections, meetings with supervisors, weather conditions, and undergoing a “fuel and wash” for the tractor. *Tr.* at 381-89, 412-14, and 428-433. He further testified that he gets paid overtime after he has worked for eight hours:

I don’t get paid for meals or off duty, not working or driving. So, and the only thing in my day’s work that I’m not paid for is my meal time. So, and I’m only paid for the time I’m actually working. So, if I went over eight hours of actual work that day, then I was getting overtime at that point.

Tr. at 475.

Mr. Stipes, the Feeder Manager, stated that feeder drivers normally call from the road if they are delayed. *Tr.* at 845. He stated that the instruction from management to its employees is “[t]o call the dispatch location and let them know” when a driver is sick. *Tr.* at 896. He further testified that UPS maintains “1-800” numbers for use by the drivers in such situations. *Tr.* at 846. The evidence of record includes a wallet-sized card with “1-800” numbers for various UPS hubs. *Rx.* 8.

Mr. Stipes maintained that the drivers are instructed on this policy during their training. *Tr.* at 896-97. Mr. Brewer, who conducted training for UPS, agreed. *Tr.* at 981. When asked

whether a driver suffering from illness or fatigue must call in if s/he will be delayed, Mr. Stipes said yes:

COUNSEL: [I]f (the driver) becomes so impaired due to illness or fatigue, he should basically take the next exit ramps and pull off and get some shut eye. Right?

MR. STIPES: No, he should take the next exit and contact UPS. Obviously we couldn't allow the drivers just to get sleep and pull off and go to sleep.

COUNSEL: You wouldn't expect them to knock on a farm house door at three in the morning, would you?

MR. STIPES: If they couldn't proceed, yes.

COUNSEL: You would?

MR STIPES: Yes. I mean, the driver's obviously got to notify us. He can't just stop out there somewhere and sign off. We couldn't run our business that way.

Tr. at 940-41. Mr. Stipes further stated that, if dispatch knows that a driver is ill or fatigued on the road, then they may decide to reroute the load "in another direction to make service." *Tr.* at 942.

Mr. Stipes noted that, immediately after Complainant's January 28, 2002 discharge, Mark Heatherly, Tony Buhl, and Brian Luwellen covered the GA-01 run and they were able to complete the run on time. *Tr.* at 867. He stated that there is a 65 to 85 percent on-time departure from Knoxville and 60 to 80 on-time arrival rate to Knoxville. *Tr.* at 859.

6. Medical concerns.

During the time he was on the GA-01 run, Mr. Martin slept during the day for six to eight hours. *Tr.* at 54. He recalled, however, that in 2001 it was not uncommon for him to get up two or three times to use the bathroom and get a drink of milk. *Tr.* at 54. His testified that his treating physician, Dr. West, prescribed Ambien because Mr. Martin had difficulty sleeping and he was prone to periods of sleepiness from 1:00 a.m. to 5:00 a.m. *Tr.* at 56. Complainant stated that, in the late 1990s and until he was prescribed medication, he health had deteriorated and was not stable:

[T]he medicine had helped. Now, (my health) still has its ups and downs. And, I still have flare ups. I mean, it's not like a shot and it's an instant fix. I'm on steady medication. It didn't help my choking. I still had to have surgery for that.

Tr. at 199. Indeed, Complainant testified that his physical health has "dwindled in the last two, three years." *Tr.* at 39-42. As a result, he would use his one hour meal time to rest and, on occasion, one hour was not enough time. *Tr.* at 57.

Dr. Leon Bogartz testified that he first treated Complainant on February 10, 2003. *Tr.* at 595. As noted at the hearing, the undersigned found Dr. Bogartz's testimony of little probative value because he treated Complainant after the events at issue in this case and he failed to review his medical records for that time period. *Tr.* at 595.

Dr. Bogartz conducted a sleep study of Complainant on March 13, 2003, but he testified that the study could not be used to determine how long his condition had existed. *Tr.* at 616. Dr. Bogartz diagnosed Complainant with obstructive sleep apnea, but stated that he did not have evidence that Complainant was sleepy or subject to a sleep health disorder in December 2001 or January 2002. *Tr.* at 629.

Complainant stated that he only bid runs that he was physically able to handle. *Tr.* at 199-200. Mr. Stipes, feeder manager for UPS, stated that driver fatigue is a safety issue, but has not normally been a problem for UPS employees:

That's not normally a problem within our company because of the nature of our schedules. We don't have . . . the over-the-road drivers that have had problems with fatigue. Most of our drivers start work just like you and I. They start work, basically travel out four hours, swap loads and travel back four hours, and they're all at home every night.

Tr. at 851. Mr. Stipes further stated that UPS usually does not have a problem with "sick" drivers either because the drivers know that they are sick before they start a run and they do not go. *Tr.* at 852.

Mr. Stipes testified that he has had drivers call in when they became sick on the road. *Tr.* at 852-53. As examples, he mentioned Shane Coker, who became ill from a spider bite, Todd May, who suffered from food poisoning, Charlie Osborne, who developed vertigo and called in sick from the road, Rick Hunley, who called in sick two to three weeks prior the hearing and could not complete his run. *Tr.* at 852-53. Mr. Stipes stated that these drivers were not disciplined for being sick and management sent other drivers to take the loads onto their destinations and bring the sick drivers back to their hubs. *Tr.* at 854-55.

7. OTHER FEEDER DRIVERS

James Buhl. James Buhl testified that he has worked for UPS for 12 years and has held the position of feeder driver for five years. *Tr.* at 499-500. He usually takes two bathroom breaks per run, each break lasting five to ten minutes. *Tr.* at 500-501. He purchases something during the break "every other time." *Tr.* at 501. When asked to define what it means to "go on meal," Mr. Buhl stated that "it can mean a lot of things because they require us to take meal sometimes when we're at a stop." *Tr.* at 501-502. Mr. Buhl stated that a "few times" he has logged "meal" during his breaks, but that "most of the time" he does not. *Tr.* at 502. He testified that feeder drivers are trained that if they have to stop and use the bathroom, they can "just pull over and find a place." *Tr.* at 502. He recalled that Mr. Brewer and Mr. Householder advised him that he did not have to record a restroom break as a meal. *Tr.* at 503. Further, Mr. Buhl

stated that he has never recorded his restroom break as a “meal” during an on-the-job supervisory ride. *Tr.* at 504. He stated that, on his last OJS ride with Danny Higgins he stopped for eight minutes, used the restroom and purchased a Coke, and did not record the stop as “meal.” *Tr.* at 504. Mr. Buhl stated that he exceeds his meal time five percent or less of the time and he has not been disciplined for his meal breaks. *Tr.* at 516.

Charles Powell. Charles Powell has worked for UPS since April 22, 1991 and he has been a feeder driver since May 24, 1995. *Tr.* at 538. He testified that he takes a meal at his turnaround on the Spartanburg run because he eats at that time. *Tr.* at 540. He completes his runs on time. *Tr.* at 540. Mr. Powell states that he normally stops at exit 24 in North Carolina to “use the restroom, get a drink of water, whatever.” *Tr.* at 541. Occasionally, he will purchase something. *Tr.* at 541. He does not punch “meal” during this stop on his run. *Tr.* at 541. Mr. Powell testified that he did not punch the “meal” button during his break at exit 24 while on an OJS ride, but he did not know whether the supervisor was aware of this. *Tr.* at 543. He has never been disciplined for not punching “meal” for a “pee break” and he has only rarely exceeded his allowed meal period. *Tr.* at 543. He states that he has never been told by a supervisor that it is dishonest or a “theft of time” to not punch the “meal” button while on a restroom break. *Tr.* at 543.

Carlos Quince. Carlos Quince has worked for UPS for 18 years and has been employed as a feeder driver for the past ten years. *Tr.* at 555. He testified that, on his run, he stops around Cookeville or Monterey, Tennessee to take a restroom break. *Tr.* at 556. Mr. Quince testified with regard to logging a “meal” at the stop that he stops to eat, he records 15 minutes. But, if he just uses the restroom, he does not record the stop. *Tr.* at 556. Mr. Quince stated that he exceeds his one hour meal period on occasion by mistake or if there has been an emergency. *Tr.* at 557. He has been told by Mr. Stipes that it is “dishonest,” but he has never been fired over it. *Tr.* at 558. Mr. Quince testified that he has never been on time with his run because of delays at the sort operations. *Tr.* at 561. He further stated that he will call UPS if he is going to be late and it will cause “some kind of delay.” *Tr.* at 562.

Steven Johnson. Steven Johnson testified that he has been employed by UPS for 25 years and has worked as a feeder driver for the past 14 years. *Tr.* at 667. He works “cover” runs, which are normally 12 hour runs, and he normally finishes his runs on time. *Tr.* at 668. Mr. Johnson recalls that, on occasion, he has stopped and logged a “meal” when he has been fatigued. *Tr.* at 669. He has exceeded his meal time once or twice. *Tr.* at 669.

He will take a restroom break on his runs and will punch the “meal” button if he also stops to eat. *Tr.* at 669. However, Mr. Johnson testified that, “if I go in to buy something and come right back out, I don’t punch any meal.” *Tr.* at 669. He asserts that some management persons state that you must punch a meal during such a break, whereas other management persons do not. *Tr.* at 670. He did not provide the names of the managers in question because he did not want the “get them into trouble.” *Tr.* at 670. He stated that he has “probably” received a warning letter or verbal warning for not recording a restroom break as a meal. *Tr.* at 671.

Mr. Johnson testified that he has been discharged from UPS on three occasions: (1) exceeding the allowed meal period; (2) oversleeping during the allowed meal period; and (3) being caught in an accident where a car stopped in front of him on a wet road. *Tr.* at 680, *Tr.* at 683.

8. ON THE JOB SUPERVISORY OJS RIDE ON NOVEMBER 7, 2001

Mr. Martin testified that James Brewer, his supervisor, went with him on an on the job supervisory (OJS) ride on November 7, 2001. *Tr.* at 90. James Brewer retired from UPS in March 2003, after working 32 years. *Tr.* at 976. He last served as a road feeder supervisor. In his daily duties he supervised about forty to fifty drivers and made sure the payroll was correct. Mr. Brewer was also responsible for doing the OJS rides and the safety rides for his drivers throughout the year. He investigated accidents, conducted audits, taught classes on haz-mat, and kept everybody updated with the DOT rules and regulations. *Tr.* at 978. Mr. Brewer has a commercial driver's license and worked as a feeder driver for UPS for 20 years. *Tr.* at 976 and 979.

Mr. Brewer testified that the purpose of an OJS ride is to assess and correct problem areas with the run. *Tr.* at 984. He participated in an OJS ride with Complainant, because his name continually coming in the morning call, or morning report regarding late loads that affect sorts or affect our hub loads. Mr. Brewer stated that Mr. Martin's name was on the report each morning. Mr. Brewer testified:

And so, they asked me to see why it was that we couldn't get the pre-loads into the morning sort on time. And, that was the basis, main basis for that ride on the 7th.

Also at that time, Mr. Martin was having trouble. He had just went on the new system, the time card system approximately two weeks before that, and he was having a lot of trouble trying to figure out what button to punch. I went over it with him several times on the yard.

And when the request came for me to ride with him, I also rode with him to train him on the new FTD.

Tr. at 993. Mr. Brewer's notes, prepared shortly after the OJS ride, reflected similar reasons for the ride as he wrote "[t]he reason for this O.J.S. ride was to see if I could work with Perry and encourage him to do the job properly."

On this OJS run of November 7, 2001, Complainant left Knoxville at 6:08 p.m. and returned ahead of schedule at 3:29 a.m. *Tr.* at 194.

During this ride, Complainant stated that he clocked "meal" time when he stopped to use the restroom at Carbondale since he had "to go by the book." *Tr.* at 92. He noted that the break

lasted eight minutes. *Tr.* at 92. He did not stop at any other locations on the way to Atlanta. *Tr.* at 93. Mr. Brewer agreed that Complainant punched “meal” during his break in Carbondale and stated the following:

I thought we would take a break there and (Complainant) said, ‘No, we will just go.’ So, we got back in the truck and left at that point.

When we got back to the truck, I asked him if he had punched that as meal. He said he had. And, he punched off of meal and wrote in Carbondale, Georgia where is asks for the city in the FTD where you take your break or whatever, where you’re at, and he typed that in. And then, we left.

Tr. at 999. Mr. Brewer stated that he had not instructed Complainant to punch “meal” during his break in Carbondale during the OJS ride, but noted that Complainant had been instructed on November 5 to take a meal during this break and Mr. Brewer had noted the instructions on Complainant’s record. *Tr.* at 1000.

Complainant states that he felt that he should not have punched meal during this break. However, he did not state his disagreement with logging the meal in his notes, and he did not complete an IVIS correction form to change the fact that he punched “meal” during this break. *Tr.* at 231.

According to Complainant, they arrived in Atlanta at 10:33 p.m. and departed approximately one hour and fifteen minutes later at 11:45 p.m. to return to Knoxville. *Tr.* at 95-96; *Ex.* J-9. He stated that there is no “clean” turnaround in Atlanta, “[T]he Atlanta building is not properly designed to handle doubles or the flow of volume that runs through there.” *Tr.* at 96.

Complainant noted that he does not normally take any meal time in Atlanta because he is working the whole time, which includes waiting on another driver to drop one of the trailers he picks up in Atlanta, locating his trailers, hooking up his trailers to the tractor, and inspecting the tractor, trailers, and dolly. *Tr.* at 96. Mr. Brewer recalled that, after Complainant “dropped his trailers” and “bumped the tires on the post trip” in Atlanta, they were advised that they would have to wait for a driver arriving in Atlanta from Forest Park. *Tr.* at 1000-1002. Mr. Brewer than asked Complainant if he had punched “meal” since they were not doing any work. *Tr.* at 1002. Mr. Brewer then noted the following:

(Complainant) said he hadn’t (punched meal), said he was being delayed. He was waiting on the driver. And, I told him that as we had discussed previously, that any time he couldn’t actually do work, then he was supposed to be punching in his meal period at that point right there.

The run was set up for 15, 30, and 15, that I wasn’t requiring him to take fifteen on the way down, but if he had to wait, then he had to take up to 45 minutes, the same thing I tell everybody else, before returning and starting back up the road,

saving 15 minutes for the safety of getting a cup of coffee or whatever he needed in order to get himself awake.

Tr. at 1001. Mr. Brewer stated that Complainant expressed disagreement with the contractual meal policy, but finally punched “meal” at the turnaround in Atlanta. *Tr.* at 1004.

Complainant testified that he did not get sleepy during his OJS ride because Mr. Brewer “kept me awake very much so.” *Tr.* at 421. Mr. Brewer stated that during the OJS ride the Complainant had done a decent job, He was able to make the run. He was able to get the loads back on time. He did a decent pre-trip. His only concern was he was driving a little slower than he should have been.

Tr. at 1007.

9. NOVEMBER 30-DECEMBER 1, 2001 FEEDER RUN

Complainant testified that his sickness caused him to return late to Knoxville—he did not finish his run until 6:15 a.m. on December 1, 2001. *Tr.* at 204-05. He recalled that UPS was informed of his sickness when he reported it to Danny Higgins on December 3, 2001 at 5:30 p.m. when he reported to work. *Tr.* at 205; *Ex.* J-9.

Mr. Brewer testified that Complainant was sick during the run and Mr. Brewer stated the following:

I remember that (Complainant) said that he had come back up the road and had brought a sandwich at Carbondale or somewhere around Resaca there, which is the exit near Carbondale.

And as he came back up the road, he continually got sicker and sicker. And, he stopped and threw up. Then he got to feeling a little better after he laid down for a while.

Tr. at 1011-12. Mr. Brewer stated that Complainant was not disciplined for the delays on his November 30 run because Mr. Brewer “felt like (Complainant) was telling . . . the truth, that he had actually been sick.” *Tr.* at 1013.

10. DECEMBER 4-5, 2001 FEEDER RUN

Complainant stated that he started work in Knoxville on December 4, 2001 at 5:30 p.m. *Tr.* at 81. He departed the Knoxville terminal at 6:28 p.m. *Tr.* at 82; *Ex.* J-9. Complainant stopped at the Golden Gallon in Carbondale once on the way to Atlanta and took a nine minute and 13 second bathroom stop according to the stopwatch that he used. *Tr.* at 82-83. However, the computer report (tach report) for his vehicle showed an 11 minute stop. *Tr.* at 243. The tach

report also revealed that Complainant spent 72 minutes at the turnaround in Atlanta with no meal taken during this time. *Tr.* at 245; *Ex.* J-37.

On the return trip from Atlanta to Knoxville, Complainant stated that his “stomach affected (him) to the point (he) needed to pull over to the side.” *Tr.* at 98. As a result, he pulled off the interstate and stopped at an “on ramp” in Calhoun, Tennessee at 2:14 a.m. on December 5, 2001. *Tr.* at 98 and 101. He took a “meal” at that point and came off of his meal at 3:58 a.m., one hour and 44 minutes later. *Tr.* at 99. Complainant noted that he exceeded his contractual meal period by 44 minutes. *Tr.* at 99. He explained that:

I set my alarm like I always do, laid my head down for an hour. I arose, my stomach was still burning. I’d already thrown up when I first got there, lost everything I had drank, laid my head down with my alarm set. When it went off, I was – my eyes were still blurry. I still had a fever. I was hot. I got out, thought I was going to throw up again, didn’t throw up, got back up in the truck, laid my head down till I felt that it was safe for me to drive again.

Tr. at 99. He recalled that, even after his alarm went off after one hour, he still could not drive:

I still had the shakes. My stomach had pretty much quit cramping. But I still had the burning sensation. I was fatigued due to the feverish feeling I had. I just couldn’t make it.

Tr. at 103.

When Complainant resumed driving at 3:58 a.m. on December 5, he “still felt bad,” but he “had a scheduled to keep” and he wanted to “keep that as close as (he) possibly could.” *Tr.* at 109. He arrived in Knoxville at 6:15 a.m. *Tr.* at 110. During this run, Complainant was over his contractual one hour meal period by 46 minutes. *Tr.* at 248. In the end, he was 90 minutes late on his return to Knoxville on the morning of December 5. *Tr.* at 248.

Complainant states that he completed the GA-01 run again on the evening of December 5 into the morning of December 6. *Tr.* at 111. On the morning of December 7, he recalls that he spoke with his supervisor, Jim Brewer. *Tr.* at 111. He recalled that Mr. Brewer asked him why he was late returning on December 5. Complainant told him that he “was sick and it was unsafe for (him) to continue on ...” *Tr.* at 111-12.

Mike White, a maintenance mechanic, sat in as the union steward on the meeting between Complainant and Mr. Brewer. *Tr.* at 112-13. Complainant recalls that Mr. Brewer advised him that he exceeded his one hour meal time in violation of Article 54 of the UPS-Teamster contract and a “Letter of Intent to Terminate” would be issued. *Tr.* at 113. Complainant responded:

I told (Mr. Brewer) that they were in violation of 392.3. I also explained to him that I had my alarm clock that had gone off, and I had laid my head back down because I still felt it was unsafe to drive, and, that was what made me go over by forty-four minutes.

Tr. at 114. Complainant explained that citation to “392.3” was in reference to “the DOT handbook that states that for any reason, if you feel fatigued or sick, to pull over, if you feel it wise, if your life or the lives around you are in danger.” *Tr.* at 114.

Complainant testified that Mr. Brewer told him that the DOT regulations did not matter and that he exceeded the contractual one hour meal period, which Complainant had been told was a violation of the contract on previous occasions. *Tr.* at 115. Mr. Brewer countered to state the following:

I was a driver for twenty-two years. And, at no point in my career as a driver, as a supervisor, or as a representative of United Parcel Service have I ever asked a driver to do anything unsafe, which would include driving when your fatigued, ill or, taking a piece of equipment that’s not road-worthy up and down the road.

Tr. at 1026-27.

Complainant stated that it would have been unsafe for him to have attempted to continue driving that morning because he was sick. *Tr.* at 101. Mr. White testified that he also recalled that Complainant advised Mr. Brewer that he was sleepy, his stomach was upset, and Complainant did not feel that it was safe to drive. *Tr.* at 648.

Mr. Brewer testified that Complainant returned to Knoxville “approximately an hour and forty-five minutes past his normal arrival time.” *Tr.* at 1017. Moreover, the tachograph reveals that Complainant took an 11 minute stop on the way to Atlanta, but did not record any meal. *Tr.* at 1019. Moreover, Complainant did not take any “meal” at the turnaround in Atlanta even though the tachography card revealed “several spots in there where (the truck is) dead stopped.” *Tr.* at 1018. Complainant recorded an hour and 46 minutes of “meal” on the return to Knoxville, while he was allegedly sick. *Tr.* at 1020 and 1022. Mr. Brewer stated that, after Complainant returned to Knoxville, he was not advised that Complainant had become ill or fatigued; his meal period had been excessive again; and he failed to follow instruction on meal period. instructions on meal period, and he was told he’d receive a letter for discharge, intent to discharge over this. *Tr.* at 1026.

11. DECEMBER 7-8, 2001 FEEDER RUN

When Complainant arrived for work, he did not tell UPS management that he was sick or fatigued. *Tr.* at 249. On the way to Atlanta, he took a seven and one-half minute break in Carbondale and did not record it as a meal. *Tr.* at 249 and 1028.

Complainant’s turnaround time in Atlanta was one hour. *Tr.* at 250. He took his first break on the run in Resaca, Georgia at 1:15 a.m. in December 8 for 32 minutes. *Tr.* at 115. He then drove to Calhoun, Tennessee, which is about 100 to 130 miles from Resaca, and stopped from 3:02 a.m. until 3:53 a.m. *Tr.* a 115. Originally, he set his alarm for 28 minutes. After 28 minutes, he arose, but stated he could not continue driving because he was sleepy and it would be unsafe. He indicated that he laid his head back down until it was safe to continue. *Tr.* at 116.

Complainant recalled that he had trouble sleeping during the previous day and had sought medical attention and received medicine. *Tr.* at 116. However, Complainant stated:

[T]he combination of when I get sick and also when . . . I get to a point of fatigue, that for any reason it's unsafe for me to keep operating, then I'm not going to operate anymore. And, it did occur on this date when I went over my meal in Calhoun, Tennessee, where there is nothing around, other than a road and a get on/get off ramp.

Tr. at 116. Complainant noted that Calhoun, Tennessee, where he stopped, is about 60 miles from Knoxville, Tennessee. *Tr.* at 116.

On this particular date, Complainant stated that he exceeded his contractual meal period by 23 minutes. *Tr.* at 115-16. He arrived in Knoxville 90 minutes late. *Tr.* at 252 and 1027. He testified that he did not call ahead to the dispatcher to let UPS know that he would be arriving late. *Tr.* at 253.

Complainant talked with his supervisor, Mr. Brewer about going over his meal time and he recalled that his meetings with Mr. Brewer “would always happen a couple days after the occurrence.” *Tr.* at 117 and 253-54. According to Complainant's notes, Mr. Brewer spoke with him about the December 7-8, 2001 run on the morning of December 12, 2001. *Tr.* at 117; *Ex.* J-9. Alan Sharp, a feeder driver and union steward, was also present at the meeting when Mr. Brewer advised that the “Letter of Intent to Terminate” would be reduced to a final warning letter for exceeding meal and not following instructions with regard to taking meal. *Tr.* at 117. Complainant recalls that he advised Mr. Brewer that UPS was in violation of “392.3.” *Tr.* at 118.

Complainant received a warning letter from UPS shortly after his December 12 meeting with Mr. Brewer. *Tr.* at 118-19.

12. DECEMBER 13, 2001 WARNING NOTICE

On December 13, 2001, Lindsay Stipes issued a *Warning Notice Under Article 52 of Labor Agreement* to Complainant. *Jx.* 39. The *Notice* provided the following:

On December 12, 2001, a meeting was held to discuss your continuing failure to follow instructions regarding the taking of the contractual meal period. Present at this meeting was supervisor Jim Brewer representing the company, union steward Alan Sharp, and you.

On your report dates of December 4, and December 7, 2001, you again failed to follow the instructions that you have been given in relation to your meal period. Through prior training you have been instructed on all meal period policies and you have repeatedly been asked to comply with these policies.

This notice is to ensure that you both understand and comply with these instructions in the future in order to avoid further disciplinary action up to and including discharge.

Jx. 39.

13. DECEMBER 28-29, 2001 FEEDER RUN

Complainant arrived to start work on December 28 and did not advise UPS management that he was sick or fatigued. *Tr.* at 255.

Complainant stopped in Carbondale for approximately eight minutes and nine seconds, but did not record it as “meal.” *Tr.* at 119-20, 255, and 1034. He arrived at the Atlanta hub at 10:18 p.m. and left the hub one hour and seven minutes later at 11:27 p.m. *Tr.* at 120 and 255. He did not take any meal at the hub because he was working. *Tr.* at 120. On the return trip from Atlanta to Knoxville, Complainant recalls that he took a one hour and seven minute meal break. *Tr.* at 120-21. He split this meal time into two breaks--first in Dalton, Georgia from 1:07 a.m. to 1:59 a.m. on December 29, 2001 and the second break was taken in Sweetwater, Tennessee from 3:32 a.m. to 3:47 a.m. on the entry ramp. *Tr.* at 121 and 126. He testified that he pulled off the interstate there because:

My stomach was upset. I had the existing part of my meal left, so I laid my head down to rest in a quiet place that was--would present no hazard or danger to myself or anybody else.

Tr. at 121. He stated that it would not have been safe to drive because he “threw up” and was sick. *Tr.* at 121; *Ex. J-9.* Complainant arrived 60 minutes late in Knoxville on December 29. *Tr.* at 256. He did not contact the dispatcher to state that he would be arriving late. *Tr.* at 256.

Complainant states that he could not recall whether he punched the “meal” button on IVIS during the second stop so, according to his notes, he told Mr. Brewer to check his computer records to see whether the “meal” had been punched as Complainant did not want to “cheat the company.” *Tr.* at 125. He met with Mr. Brewer as well as Danny Higgins, a union steward, about taking his meal during the run. *Tr.* at 126. Complainant recalls telling Mr. Brewer that he was “sick.” *Tr.* at 126.

14. JANUARY 4-5, 2002

Complainant testified that he started at his normal time in Knoxville. *Tr.* at 126-27. At the start of his run, he did not report to UPS management that he felt sick or fatigued. *Tr.* at 240 and 257. He took a break in Carbondale, but he did not recall how long the break was. *Tr.* at 127. Mr. Brewer noted that the stop was for 13 minutes, but Complainant did not log it as a “meal.” *Tr.* at 1035. Upon reviewing the tachography report, Complainant agreed that the break was for 13 minutes. *Tr.* at 257; *Ex. J-42.* He also agreed that he did not log this stop as a “meal.” *Tr.* at 257.

Complainant spent one hour and 46 minutes at the Atlanta hub doing turnaround and he did not log a meal. *Tr.* at 258.

Complainant took his first meal in Resaca, Georgia from 1:31 a.m. to 2:35 a.m., which is one hour and four minutes, on January 5, 2002. *Tr.* at 127. He then took a second meal in Ringgold, Georgia from 3:11 a.m. to 3:21 a.m. *Tr.* at 127. Complainant stated that he stopped because his head was heavy, his eyes were drooping and he was drifting. He pulled over to lay his head down, get out of the truck or to do something to wake up. *Tr.* at 127-28. Complainant returned to Knoxville one hour and 51 minutes later than his scheduled time. *Tr.* at 258. He did not notify the dispatcher that he would be late returning to Knoxville. *Tr.* at 259.

15. JANUARY 8, 2002 MEETING WITH MANAGEMENT

Complainant testified that he met with members of UPS management on the morning of January 8, 2002 to discuss taking excessive meal during the December 28-29, 2001 and January 4-5, 2002 runs. *Tr.* at 129. In addition to Complainant, the following individuals were present at the meeting: (1) Mr. Brewer (on-road supervisor); (2) Jeff Householder (on-road supervisor); and (3) Mike Selvidge (fueler-shifter and union steward). *Tr.* at 129.

Complainant recalls that Mr. Brewer advised that he would be receiving a “Letter of Intent to Terminate” for failure to follow instructions on how to take a meal and taking excessive meal. *Tr.* at 129. Complainant further testified:

[A]t that time, I discussed two or three different times with Mr. Brewer, one being that they were having a problem with the smart card and it not responding according to punching buttons, which was an ongoing issue in the past that I had brought to Mr. Brewer's attention, and then had been making up the difference weekly because of this.

And, the other issue that I discussed that he – that the company was in violation of 392.3 for harassing me and unjustly terminating me, due to fatigue.

Tr. at 129. Complainant received a “Letter of Intent to Terminate” after the meeting. *Tr.* at 130; *Ex.* J-43.

Mr. Brewer recalled discussing a variety of issues with Complainant at the meeting, including time card discrepancies, logging activities correctly, and logging all stops. *Tr.* at 1038-39. Mr. Brewer testified that he told Complainant that he needed “to make sure he was punching the buttons as he did the activities” and make sure all stops were logged. *Tr.* at 1039.

16. JANUARY 9, 2002 LETTER OF INTENT TO DISCHARGE

On January 9, 2002, Mr. Stipes issued an *Intent to Discharge Notice Under Article 52 of Labor Agreement* and stated the following:

On January 8, 2002 a meeting was held to discuss your continuing failure to take your meal periods as instructed. Present at this meeting were Jim Brewer and Jeff Householder, UPS supervisors, Mike Selvidge, union steward, and you.

A review of your record has revealed additional violations of the meal policy with the most recent occurrences being December 28, 2001 and January 4, 2002. Previous to this you were issued a final warning letter dated December 13, 2001 for failure to take your meal periods as instructed, and you were once again asked to comply with the meal period policy.

Therefore, this letter will serve as an Intent to Discharge you from United Parcel Service.

Jx. 43.

17. JANUARY 16, 2002 SURVEILLANCE

Allen Steele has worked for UPS for 19 years and has worked for UPS security for the past two and one-half years. *Tr.* at 790-91. He served as Security Representative from March 2000 to October 2002. *Tr.* at 790-91. His duties included “[a]sset protection, . . . dealing with employee theft, customer fraud, (and) claims.” *Tr.* at 791. Employee theft involves a variety of activities ranging from stealing time to stealing merchandise and damaging property. *Tr.* at 791-92.

Mr. Steele testified that he conducted about six employee theft of time investigations each year from March 2000 until October 2002. *Tr.* at 791-93. With regard to such investigations, a person from management reviews a particular employee’s timecards, conducts an on-the-job supervisory ride to ensure that the employee is knowledgeable of Respondent’s expectations, and then continues to observe improper employee conduct. *Tr.* at 794-98. At this point, the security division learns the employee’s run and goes ahead of the employee and sets up cameras at locations that the employee normally stops. *Tr.* at 798. Mr. Steele advised that “it takes a lot of time, money and effort to do a theft of time investigation” and three observations are required for allegations of feeder driver misconduct “to show that the employee has set a pattern, that he has been dishonest in what he’s been doing.” *Tr.* at 798. Mr. Steele states that the investigator will take videos and hand-written notes regarding the surveillance. *Tr.* at 798.

Mr. Steele, along with feeder manager, Lindsay Stipes, participated in surveillance investigation of Complainant on January 16, 2002. *Tr.* at 798. Mr. Steele testified that they received a call from dispatch with Complainant’s trailer numbers and they left Knoxville and observed Complainant exit in Carbondale and go to the Golden Gallon. *Tr.* at 799. Mr. Steele recalled that Mr. Martin pulled into the Golden Gallon and got out, emptied a thermos, walked in, appeared to have struck up a conversation with the people behind the counter, maybe went to the restroom, came back and bought something to eat, went back to his vehicle, got into his tractor and proceeded to leave. *Tr.* at 800. Mr. Steele testified that Complainant did not perform a safety check of his vehicle and the break lasted 11 to 12 minutes. *Tr.* at 800. Mr. Steele’s handwritten notes indicate:

We parked at the Phillips 66 service station across the street from the Golden Gallon service station. Mr. Martin exited at 20:50 hours at the Carbondale Road exit. Mr. Martin proceeded directly to the parking area at the Golden Gallon carrying what appeared to be a thermos or jug of some kind. At 20:55 hours, Mr. Martin was observed walking by the front door inside the store. Mr. Martin remained inside the store about 9 minutes. At 21:01 hours, he exited the Golden Gallon carrying a drink in one hand and a large white bag in the other. He proceeded directly to the tractor, entered in, and began to exit the parking area at 21:02 hours. At no time did he complete any type of safety check of the equipment, which would have required him to walk around the trailers to check hub heat, trailer seals, etc.

Jx. 45. Mr. Steele testified that Respondent does not allow feeder drivers to “take breaks and not record them” as a “meal.” *Tr.* at 817. Lindsay Stipes, feeder manager, also participated in the surveillance on this date. *Tr.* at 900. He testified that he made it known to the feeder drivers under his supervision that they could be placed under surveillance. However, he extended them the courtesy letting them know that they’re subject to being followed, and we already would’ve had numerous discussions about what the problem was before that would take place. *Tr.* at 901. In keeping with this policy, he advised Complainant that he may be observed. Mr. Stipes testified that the meal issue had become a major issue. :There were numerous issues with Mr. Martin, relating to taking the meal period, i.e. from taking too much meal, refusing to take meal at the turnaround point as instructed, and failure to log all meals. *Tr.* at 901-02. During the surveillance, Mr. Stipes recalled that he and Mr. Steele were parked across the street from the Golden Gallon and noticed that Complainant did not “perform any sort of service check whatsoever” on his tractor. *Tr.* at 907. Mr. Steele recalled that Complainant was inside the store at the Golden Gallon for about nine minutes. *Tr.* at 907.

18. JANUARY 22, 2002 SURVEILLANCE

Mr. Stipes also participated in the January 22, 2002 surveillance of Complainant along with Frank Holdren, a UPS security department representative. *Tr.* at 908. Mr. Stipes recalled that he observed the same run that was the subject of surveillance on January 16. *Tr.* at 909. He again observed Complainant go inside the Golden Gallon and come outside about six minutes later with a bag and drink. *Tr.* at 910. Mr. Stipes stated that Complainant did not perform any safety check at the time:

[A]ny type of safety check that we ask our drivers to do when they do stop would include . . . a visual inspection of the condition of each tire on the unit, as well as the hub heat, which you check by actually placing your hand in front of the hub that would indicate any kind of problem with low lubricant, which could cause a tire to catch on fire.

Tr. at 910. Mr. Stipes testified that in order to do a safety check, a driver would have to walk around the entire unit to actually check that on each of the tires of that unit.

Complainant did not walk around the vehicle and check the tires on the January 16 or 22 observation dates. *Tr.* at 910.

According to their typewritten notes, Messrs. Stipes and Holden observed, in part, the following:

At 2107 hours, Mr. Martin pulled off Interstate 75 south at the Carbondale exit and parked in the gravel lot of the Golden Gallon.

At 2108 hours, Mr. Martin exited the feeder tractor and walked straight from his tractor toward the Golden Gallon with empty hands.

Approximately 2109-2115 hours, Mr. Martin is in the Golden Gallon.

At approximately 2115 hours, Mr. Martin exits the Golden Gallon drinking a beverage and carrying a plastic grocery bag of what is believed to be food items.

At approximately 2116 hours Mr. Martin is observed climbing back into the feeder tractor without conducting a safety check of his vehicle.

Jx. 46.

19. JANUARY 25, 2002 SURVEILLANCE

On January 25, 2002, feeder supervisor James Brewer and UPS security representative Jeff Rawlins conducted surveillance of Complainant at the Golden Gallon. *Jx.* 47. Again, Complainant was observed entering the Golden Gallon. He returned to his tractor approximately 12 minutes later to leave. Neither Mr. Brewer nor Mr. Rawlins noted that Complainant conducted a safety check of his vehicle.

20. JANUARY 28, 2002 MEETING WITH MANAGEMENT

Complainant testified that he arrived to start work in Knoxville at his usual time, 5:30 p.m., when he “was instructed to go down to the training room.” *Tr.* at 131. Complainant clocked in and went to the training room:

There at the training room was Bill Rutherford, Labor Manager for UPS, Allen Steele, Loss Prevention Manager for UPS, Lindsay Stipes, Feeder Manager for UPS, myself and Jim Brewer and I think Eric Cottrell was a shifter, part-time shifter, steward present.

Tr. at 131, 803, and 911-12. Complainant recalled the following took place at the meeting:

Mr. Steele asked me several questions regarding my stop in Carbondale, asking me if I kicked the tires, asking me if I punched on meal, asking me what I was doing there. I pretty much told him exactly what I did. I went in to use the

bathroom. I do every night. I had done it every night since I was on that run. I had done it on other runs. Lindsay Stipes . . . had had a meeting with me and Danny Stilles in late 1990 that agreed seven minutes was fair to go in, use the bathroom and get back out and go.

At that point, they gave me a—they told me that I was being terminated for dishonesty. I think they used the phrase stealing time.

Tr. at 131-32.

Mr. Stipes testified that Complainant was discharged for “acts of dishonesty” because he failed to log his stops in Carbondale. Mr. Stipes stated that the decision was reached after (a) verifying that Mr. Martin knew what was a stop to be recorded, and (b), he again went back to taking unrecorded stops of a personal nature (meal period) immediately after the OJS rider with his supervisor. *Tr.* at 889-90. Before the discharge, Mr. Stipes stated that Complainant was placed under surveillance, when, based on the OJS ride, there was no question that Mr. Martin knew what he was supposed to do, and the daily tachographs thereafter showed that he had resorted back to what he always did when the supervisor was not in the car. *Tr.* at 891.

Because Complainant did not log his stop at the Golden Gallon on any of the three surveillance dates, Mr. Stipes convened the January 28, 2002 meeting to inform Complainant that he would be discharged. *Tr.* at 911-12. Mr. Stipes stated that Complainant did not deny any of UPS’s observations presented at the meeting. *Tr.* at 912. Mr. Stipes noted that Mr. Martin had been given every opportunity to try to complete his job with the supervisor’s instructions. And repeatedly, over and over and over with every issue you could have in regards to meal, had proven that he was not willing to do that. So, therefore, we didn’t have any choice but to proceed on with the discharge. *Tr.* at 924.

After the meeting, Complainant was “escorted to the gate to leave” by Eric Cottrell. *Tr.* at 132. That was the last date that Complainant worked for UPS. *Tr.* at 132 and 912.

21. JANUARY 31, 2002 LETTER OF TERMINATION

By letter dated January 31, 2002, Mr. Stipes advised Complainant of his termination with UPS. Mr. Stipes wrote the following:

On January 28, 2002, a meeting was held to discuss your acts of dishonesty and falsifying your timecard. Present at this meeting were Bill Rutherford Labor Manager, Lindsay Stipes Feeder Manager, Allen Steele Security Supervisor, Eric Cottrell union steward and yourself.

This is to advise you that you are being discharged from United Parcel Service effective January 28, 2002, for just cause, acts of dishonesty, falsifying your timecard which resulted in theft of paid time inclusive of the most recent occurrence on January 25, 2002.

Jx. 49.

22. LOCAL HEARING ON MARCH 20, 2002

After his termination, Complainant filed a grievance with UPS regarding the “Letter of Intent to Discharge” that he received. *Tr.* at 133; *Ex.* J-44. There was a “local hearing” on the grievance and Complainant explained this hearing process as follows:

Local hearing is where the company and the union and the involved parties meet to exchange information and possibly resolve the problem.

Tr. at 133. The local hearing is a very informal proceeding. *Tr.* at 135. Mr. Stipes agreed that the purpose of the local hearing was “to basically exchange any information that either side would plan to use when they presented the case in question at the labor panel.” *Tr.* at 913.

In addition to Complainant, the following persons were present at the local hearing: Bill Rutherford; Lindsay Stipes; Jim Brewer; and Wesley Trotterchaud, who was the Labor Business Agent for Local 519. *Tr.* at 134 and 705. Mr. Trotterchaud recalls that he and Mr. Martin presented their position in the grievance at the hearing for about 30 minutes. *Tr.* at 705. He noted that the panel members did not want to discuss issues of illness or fatigue; rather, they were solely concerned with Complainant’s failure to follow instructions regarding taking meal. *Tr.* at 707.

Mr. Trotterchaud noted that Complainant was also charged with a “cardinal sin” under the CBA—engaging in an act of dishonesty based on “theft of time.” *Tr.* at 710.

Mr. Trotterchaud noted that neither of the allegations against Complainant—failure to follow instructions regarding meal and engaging in acts of dishonesty—were resolved at the local hearing level. *Tr.* at 709-10. Mr. Trotterchaud testified that, for non-cardinal infractions such as failure to follow instructions regarding meal, UPS must keep the employee on the payroll until after the SRAPGC hears and decides the grievance. *Tr.* at 702. He stated that, usually, grievances are settled at the local panel hearing level and only ten percent of grievances proceed to the SRAPGC level. *Tr.* at 703.

23 SOUTHERN REGION AREA PARCEL GRIEVANCE COMMITTEE (SRAPGC) HEARING ON MAY 21, 2002

Pursuant to the CBA, on May 21, 2002, a hearing was convened to address Complainant’s grievances against UPS. *Jx.* 54. The Southern Region Area Parcel Grievance Committee (SRAPGC) is comprised of three representatives from UPS and three representatives from the union. *Tr.* at 711. Mr. Trotterchaud testified that, with regard to the “acts of dishonesty,” the Committee was deadlocked but it decided to terminate Complainant’s employment based on the meal infractions. *Tr.* at 713. Complainant agreed that the Committee was deadlocked over his discharged for alleged acts of dishonesty, but they upheld the discharge for failure to follow instructions regarding meal. *Tr.* at 136. As a result, Complainant is not working for UPS anymore. *Tr.* at 136.

At the hearing, Complainant demonstrated that he was aware of the requirement that he log all personal stops. Specifically, during the hearing, he recalled being directed to log personal stops he made to use the restroom and get a drink of water at an Amoco station located directly outside the UPS Knoxville hub:

. . . I have been spoken to on one (1) occasion about taking undocumented meal as a subject. The wording was don't stop in front of the building. As far as stopping a hundred (100) miles down the road and using the bathroom and not showing it was not discussed. They look at my record on a daily basis. They know what was going on. If they had said something *again* about it, giving me a warning letter for it, fine. I would have understood that. I wouldn't have done it *again* regardless of the other seventy (70) people that do it.

Jx. 55 at p. 56 (emphasis added).

24. PROGRESSIVE DISCIPLINE

Generally. Wesley Trotterchaud, who has been employed by Teamsters Local 519 as a Business Agent since 1998 explained the “progressive discipline procedures,” pursuant to the CBA, in less serious cases begins with a letter of warning, and progresses to a one day, three day, five day suspension, and then discharge. *Tr.* at 694 and 700. However, Mr. Trotterchaud stated that, in late 2001, when Stokes Nelson became Tennessee District Labor Manager for UPS in 2001 the normal progression of discipline at the Knoxville facility for “non-cardinal sins” was shortened to begin with a warning letter and moved to discharge, with no interim suspensions. *Tr.* at 701-702.

Mr. Trotterchaud testified that he has been involved in “thousands of grievances” against UPS but has never represented an employee accused of dishonesty for failure to log a restroom break as “meal.” *Tr.* at 700.

Complainant testified that he has “been disciplined for not taking (his) meal” and “for taking (his) meal too much.” *Tr.* at 417. Mr. Trotterchaud testified that he has not known of any other feeder drivers with a disciplinary record similar to that of Complainant with regard to taking meal:

COUNSEL: Do you know of any other feeder drivers since you've been the Business Agent who have received six warning letters, letter of suspension and had 21 talk-withs from their supervisor in a four year period?

MR. TROTTERCHAUD: Over meal? No.

Tr. at 727. Mr. Trotterchaud testified that, to his knowledge, no other feeder drivers have been discharged for failure to log on “meal” when they took restroom breaks. *Tr.* at 762.

Similarly, Mr. Stipes testified that in his “twenty-eight years with UPS, very seldom does progressive discipline end up at that level (of discharge from the company).” *Tr.* at 892. He stated that “[n]ormally, you can correct that problem at some intermediate step in between.” *Tr.* at 892.

William Rutherford serves as the labor manager for the Tennessee District of UPS and has worked for UPS for 28 years. *Tr.* at 1106. During his employment, Mr. Rutherford has worked as feeder driver, feeder manager, and package car driver. *Tr.* at 1107.

Comparison to other feeder drivers. Mr. Stipes testified that other feeder drivers have had “different issues with the meal” and these issues were “addressed to some point in the progressive discipline.” *Tr.* at 915. He recalled no other feeder driver that had “gone as far” in the progressive discipline process as Complainant:

[T]he vast majority of people that we deal with, once you confront them with a problem and you start progressive discipline, normally they agree to correct the problem, and usually never goes as far as a discharge.

Tr. at 916. With respect to other drivers who have had issues regarding “meal,” Mr. Stipes testified that “the other drivers that the meal issues has come up, nobody has made it as far in the progressive discipline as Mr. Martin without correcting the problem.” *Tr.* at 916. As a result, Mr. Stipes noted that, while other feeder drivers have received warning letters for failure to follow meal period instructions, the employee corrected the problem such that it is “not a very common occurrence at all” to pursue a driver for “acts of dishonesty” for failure to log personal stops as “meal.” *Tr.* at 922.

The undersigned asked Mr. Stipes that, if other feeder drivers have testified that they do not log all stops as “meal,” whether there are circumstances where Respondent would not discipline a feeder driver for failure to log a personal stop as a meal. *Tr.* at 963. Mr. Stipes testified that there is “potential” for disciplinary action in such instances, but if a driver does not log a restroom break and still accomplishes on-time delivery of his or her load, then such circumstances would not throw up a “red flag” leading to disciplinary action:

If a driver just simply had a certain urge that he had to go to the bathroom, and a lot of our drivers do drive at night, if they got off, made a quick stop to relieve themselves and got back on the interstate, we would never make an issue with that, about whether that’s an unrecorded stop or not, because it would actually take a driver longer to indicate on the IVIS machine what he was stopping for than it would to actually make the stop. That would just simply be a restroom stop.

Tr. at 963-64.

LAW AND CONCLUSIONS

The Secretary has stated that the Act should be interpreted liberally consistent with congressional intent, namely the promotion of commercial motor vehicle safety on the Nation's highways. *See e.g., Somerson v. Yellow Freight Systems, Inc.*, 1998-STA-9 and 11 (ARB, Feb. 18, 1999); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). The statute provides protection for employees of commercial motor carriers in the event that they are asked to violate federal law in order to comply with company rules or orders. Respondent agrees that it is a commercial motor carrier and that the vehicles operated by Complainant were commercial motor vehicles. As a result, the Act is applicable to this case.

The Act states, in pertinent part, that “[a] person may not discharge an employee . . . because . . . the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle regulation, standard, or order.” 49 U.S.C. § 31105(a)(1)(A).¹ Internal complaints to any level of management have consistently been held to be “complaints” under this provision. *Zurenda v. J&K Plumbing & Heating Co.*, 1997-STA-16 (ARB, June 12, 1998); *Doyle v. Rich Transport, Inc.*, 1993-STA-17 (Sec’y., Apr. 1, 1994). Moreover, Complaints do not have to refer to specific safety standards in order to be protected. *Davis v. H.R. Hill, Inc.*, 1986-STA-18 at pp. 3-4 (Sec’y., Mar. 19, 1987); *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-1 at p. 4 (Sec’y., July 13, 1984). Further, the alleged safety violations need not be proven in order for the complaints to be considered protected activity. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992).

Complainant testified that his discharge pursuant to UPS letters dated December 13, 2001 and January 9, 2002 gave rise to the whistleblower complaint filed in this case. *Tr.* at 216; *Jx.* 39 and 43. To prevail on a whistleblower complaint under the Act, a complainant must establish that the respondent took an adverse employment action against him or her because of the complainant's engagement in protected activity. A complainant may initially demonstrate that a protected activity likely motivated the adverse action. *Byrd v. Consolidated Motor Freight*, 1990-STA-9 (ARB, May 5, 1998) (citing *Shannon v. Consolidated Freightways*, 1996-STA-15 (ARB, Apr. 15, 1998, slip op. at pp. 5-6). A complainant meets this burden by proving that (1) s/he engaged in protected activity, (2) Respondent was aware of the activity, (3) s/he suffered an adverse employment action, and (4) that the adverse employment action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Kahn v. Sec’y. of Labor*, 64 F.3d 261, 277 (7th Cir. 1995).

A respondent may rebut the *prima facie* case of the complainant by demonstrating that the adverse action was motivated by legitimate, nondiscriminatory reasons. The burden then

¹ In this case, Complainant states that he exceeded his one hour meal period on December 4-5, 2001, December 7-8, 2001, December 28-29, 2001, and January 4-5, 2002 because of sickness or fatigue. The provisions at 49 C.F.R. § 392.3 provide that “[n]o driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.”

shifts back to the complainant to establish that the proffered reason was pretextual and the protected activity constituted the basis for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 402, 406-08 (1993).

However, in light of developments in the law in cases arising under the Act, since this case was fully tried on the merits, it is unnecessary for the undersigned to determine whether Complainant presented a *prima facie* case and whether Respondent has rebutted the *prima facie* case. Rather, once Respondent produced evidence attempting to demonstrate that Complainant was subjected to an adverse employment action for legitimate, nondiscriminatory reasons, it no longer serves any analytical purpose to determine whether Complainant has presented a *prima facie* case. *Ciotti v. Sysco Foods of Philadelphia*, 1997-STA-30 at p. 4 (ARB, July 8, 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). The relevant inquiry here is whether Complainant has prevailed by a preponderance of the evidence on the ultimate question of liability.

Requirements of the Collective Bargaining Agreement

The blueprint of policies and procedures for Complainant and Respondent is the *National Master United Parcel Service Agreement and Southern Region Supplemental Agreement* (CBA) covering a time period from August 1, 1997 to July 31, 2002. *Jx. 1*. The CBA contains four requirements central to this case: (1) a feeder driver is allowed a meal time of one hour per run (CBA Article 54, *Jx. 1* (subsection A at p. 176)); (2) a feeder driver must properly record his or her required meal period and “failure to take or properly record the required meal period may be cause for disciplinary action” (CBA Article 54, *Jx. 1* (subsection A at p. 176)); (3) Respondent must follow the “progressive discipline” procedures for any adverse employment actions against an employee (CBA Article 52, *Jx. 1* (subsections A and C at pp. 174-75)); and (4) a driver may be immediately discharged, without requiring that Respondent issue a warning letter, for acts of “dishonesty.” (CBA Article 52, *Jx. 1* (subsection A at p. 174)). It is undisputed that Complainant exceeded his one hour meal time and failed to log all stops on the runs at issue in this case. Moreover, it is undisputed that Respondent followed its contractual “progressive discipline” procedures in terminating Complainant’s employment.

Arguments of the parties

In this case, Respondent has articulated legitimate, nondiscriminatory reasons for its adverse employment actions, *i.e.* that Complainant failed to follow instructions regarding taking his meal and he engaged in “acts of dishonesty.” The burden shifts to Complainant to demonstrate that Respondent’s proffered motivation was pretextual and its actions stemmed from discriminatory motives. *Leveille v. New York Air Nat’l. Guard*, 1994-TSC-3 and 4 at pp. 7-8 (Sec’y., Dec. 11, 1995); *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 at p. 6 (Sec’y., Feb. 15, 1995). Complainant may demonstrate that the reasons given by Respondent were a pretext for discriminatory actions by establishing that discrimination was more likely the motivating factor or by showing that the proffered explanation was not worthy of credence. *Zinn v. University of Missouri*, 1993-ERA-34 at p. 4 (Sec’y., Jan. 18, 1996). As previously noted, Complainant carries the ultimate burden of proving that the adverse employment action was in retaliation for the protected activity and, thus, violated the Act.

The parties do not dispute that Complainant was terminated, which constitutes an adverse employment action. (*Respondent's Post-Trial Brief* at p. 6, fn. 2). Moreover, it is undisputed that Complainant advised his supervisors that, on certain runs relevant to this proceeding, he exceeded his contractual one hour meal period because he was sick or fatigued and felt that he would jeopardize his safety and the safety of others on the highways if he drove without additional rest at the time. Complainant's refusal to drive due to alleged fatigue or sickness, regardless of whether the documentary evidence substantiates these assertions, constitutes protected activity under the Act. A preponderance of the evidence also supports a finding that Complainant's supervisors knew of his engagement in these protected activities at the time they terminated his employment.

Respondent contends that, while it does not require sick or fatigued drivers to operate their vehicles, Complainant was obliged to timely advise Respondent when his meal time would be exceeded. Respondent states that Complainant was late on his return to Knoxville for every run during the month of December and that he did not log meal during all of his break times.

Respondent further asserts that Complainant was advised of, and failed to follow, company procedures for logging his meal times and for advising his supervisors when his meal time would be exceeded. In support of its argument, Respondent offered the testimony of Messrs. Brewer and Stipes to establish that Complainant was notified of company policies on multiple occasions, yet failed to abide by them. Moreover, Respondent presented evidence of surveillance conducted of Complainant establishing that he did not record stops at the Golden Gallon on January 16, 22, and 25, 2002. On two of these occasions, Complainant purchased drink and/or food items.

Complainant is correct that the Act is designed to promote safety on the Nation's highways. He argues that a refusal to drive while fatigued or sick is sanctioned by proposed rulemaking of the Federal Motor Carrier Safety Administration (FMCSA). Specifically, Complainant cites to the May 2, 2000 proposed rulemaking, which references scientific studies on the causes and effects of fatigue, and seeks to encourage "more regular" work schedules for drivers. Complainant maintains that his "wake-sleep pattern was inverted and he was dispatched to work at times when, according to the scientific evidence . . . , his physiological and performance levels reached their low point of their cycles." (*Complainant's Post-Hearing Brief* at pp. 29-30). The FMCSA's proposed rulemaking is not binding on this proceeding and it provides no relevant or material evidence specific to Complainant's physical state or claims of fatigue on the dates in question. Moreover, as noted by Respondent, many of the provisions cited by Complainant were not finally promulgated.

Complainant argues that "[i]t is significant . . . that the IVIS and Smart Card Records are used in lieu of a daily log required for commercial drivers under 49 C.F.R. § 395.8." (*Complainant's Post-Hearing Brief* at p. 39). There is no reasonable explanation for this assertion of "significance" and the undersigned does not find that use of the IVIS or Smart Card systems had any relevant bearing on whether Respondent's termination of Complainant's employment for acts of dishonesty or theft of time was for legitimate, nondiscriminatory reasons.

Complainant further argues that he was not “off-duty” during the “relief” breaks at the Golden Gallon such that he was not required to record the breaks as “meal” (which is considered off-duty time). In this vein, Complainant argues that he continued to be responsible for his tractor trailer. This argument is meritless since the CBA required that feeder drivers take a one hour meal period during their runs. It is obvious that the “off duty” status represented by punching “meal” was that the driver was taking a personal break to get something to eat or drink during the day, which would not be compensated as “on duty” time; it is not required that the driver be absolved of all responsibility for his vehicle and loads in order to be considered “off duty” for purposes of taking his or her meal.

Legitimate, nondiscriminatory reasons for discharge due to dishonesty established

Background of delays. Complainant’s costly delays in delivering his “hotload” to Knoxville caused UPS management to scrutinize his daily logs which, in turn, revealed a failure to follow instructions with regard to meal among other problems. Respondent aptly summarizes Complainant’s chronic pattern of delays in the months leading to his termination:

Martin’s driver notes reflect the fact that he brought his preload trailers back to the Knoxville hub past their scheduled 3:45 a.m. arrival time 23 out of 23 times in October 2001, 18 out of 19 times in November 2001, 17 out of 18 times in December 2001, and 17 out of 18 times in January 2002. *See* Tab 7, *Ex. J-9*. They were not delays of just a few minutes, nor were these delays . . . that can be ascribed to the Thanksgiving-to-Christmas ‘busy season.’ In October 2001 (before the so-called busy season), Martin was never less than 45 minutes late, and more often was more than an hour late. (citation omitted). In November 2001, excluding his single on-time arrival (based on the OJS ride with Mr. Brewer), Martin was never less than 31 minutes late, and most often was 45 minutes to an hour late. (citation omitted). In December 2001, Martin had only one on-time arrival (12/26), and two arrivals within 20 minutes of his scheduled 3:45 a.m. return time, but otherwise was no less than 38 minutes coming back to Knoxville each day. (citation omitted). Finally, in January 2002 – after the supposed busy season, Martin had only one on-time arrival (1/23), and otherwise was never less than 31 minutes late (with 51% of his runs resulting in late arrivals of an hour or more).

Respondent’s Post-Hearing Brief at pp. 35-36. Although Complainant testified, at one point, that he was unaware of the end-time for his run, the undisputed evidence of record demonstrates that he knew that he was due to finish work in Knoxville at 3:45 a.m. It is undisputed that each feeder driver is given a schedule of the run at the time s/he bids on it and copies of the schedules are maintained in the dispatch office. After being presented with his testimony before the SRAPGC, Complainant acknowledged that he knew that the finish time for his run was 3:45 a.m.

Failure to log stop at Golden Gallon. It was against this background of repeated delays in returning to Knoxville that management began to scrutinize Complainant’s activities during his run. Of the issues raised by management with regard to the run, Complainant admitted that, routinely, he does not log his stop at the Golden Gallon in Carbondale while driving from

Knoxville to Atlanta. Moreover, he stated that he usually only uses the bathroom but concedes that, on some occasions, he purchases something to drink or eat.

Complainant testified at the SRAPGC hearing that, although he had been instructed to record his personal stops, he felt that UPS should have instructed him *again* of the policy. Nonetheless, Complainant states that he “does not dispute that he knew that UPS had instructed him to ‘log’ all his stops on UPS’s computer system.” (*Complainant’s Post-Hearing Reply Brief* at p. 18).

Indeed, Complainant’s conduct during his November 7, 2001 on-the-job supervisory ride with Mr. Brewer demonstrated that Complainant was well aware of the requirement that he log a “meal” for the time spent on break in Carbondale. On this particular trip, Complainant logged meal time during his eight minute break at the Golden Gallon in Carbondale. Notably, Complainant testified that he “had to go by the book” because his supervisor was with him. With regard to this recurring violation of the CBA, there is no safety issue stemming from equipment failure, fatigue, or sickness.²

Three surveillance investigations of Complainant conducted by Respondent on January 16, 22, and 25, 2002 document that Complainant made a personal stop at the Golden Gallon on those dates, yet failed to record the stop as a meal. *Jx.* 45, 46, and 47. These investigations were conducted *after* the on-the-job supervisory ride that Complainant had with Mr. Brewer and during which Complainant recorded his stop at the Golden Gallon because, in his words, he had to “go by the book.” Written statements from two of the surveillance dates established that Complainant left the Golden Gallon with a beverage and bag in his hands such that it cannot be argued that he was solely at the stop to use the restroom. Further, observers stated that no safety checks of the vehicle were performed during these stops. It is clear that the break should have been recorded as “meal” under established UPS policies and procedures that had been communicated to, and understood by, Complainant.

Complainant asserts that no other feeder driver has been disciplined or terminated from employment for failure to record “relief breaks” as a meal. (*Complainant’s Post-Hearing Brief* at p. 43). Respondent counters that there were multiple instances where other feeder drivers had “talk withs” and were cited for failure to log all stops and taking excessive meal. (*Respondent’s Response Brief* at pp. 21-22; *Jx.* 70A-W).

In support of his position, Complainant cites to the testimony of Messrs. Buhl, Powell, Quince, and Johnson, who testified that they do not record their “relief breaks” as meal on their IVIS or Smart Card. Moreover, Complainant asserts that none of these drivers has been disciplined for failing to record their breaks as meal. (*Complainant’s Post-Hearing Brief* at p. 43).

² Complainant argues that the SRAPGC’s failure to address the merits of the January 28, 2002 discharge stemming from “acts of dishonesty” constituted an “indication that Martin would not have been discharged in the absence of protected activity. (*Complainant’s Post-Hearing Brief* at p. 45, fn. 10). To the contrary, findings of the SRAPGC are not binding, or persuasive, in this forum. As set forth in this decision, there is ample evidence that Complainant committed acts of “dishonesty” under the CBA which constituted “cardinal sins” that, standing alone, could reasonably support Complainant’s discharge in accordance with the terms of the CBA.

Importantly, none of the above-named witnesses testified that it was proper under the CBA for Complainant to stop to use the restroom *and* purchase food items, yet not record the break as “meal” on the IVIS or Smart Card. Mr. Stipes stated that failure to even log a restroom stop could lead to disciplinary action, but he and Mr. Brewer stated that no such action would be taken if (1) a driver stopped only to use the restroom, and (2) the driver finished his or her run on time.³

Messrs. Quince and Johnson testified that they only used the restroom during their unrecorded “relief breaks.” Messrs. Buhl and Powell stated that they do not record their restroom breaks as meal, even when they occasionally purchase food and/or drink. However, none of the witnesses testified that UPS policy is to allow unrecorded breaks for using the restroom *and* purchasing food or drink items. Moreover, there was no evidence that these drivers were routinely late in completing their work for the day. Indeed, Mr. Quince’s understanding of the policy was that, if he plans to stop and eat, he will record the break as “meal”; however, if he only uses the restroom, then he does not record the stop. Similarly, Mr. Johnson testified that he logs a “meal” when he stops to use the restroom and purchase food or drink.

Complainant’s argument that no other feeder driver has been discharged for failure to log all personal stops is persuasively explained by Messrs. Brewer and Stipes that they have had “talk withs” other drivers about not logging all personal stops and the other drivers corrected their behavior before the disciplinary process reached the level of discharge for “theft of time.” Indeed, there are personnel records of other feeder drivers that demonstrate “talk withs” and “warnings” given to the drivers for failure to follow instructions regarding meal and failure to log all stops. Messrs. Brewer and Stipes state that chronic delays in completing work schedules would prompt them to review the records of any driver and assess his or her problem areas as in this case.

Complainant’s failure to log meal time during his routine breaks at the Golden Gallon, even when he purchased food and/or drink during the surveillance dates, did not stem from safety concerns and, therefore, Complainant’s conduct did not fall within the purview of protected activity under the Act. Respondent’s termination of Complainant’s employment on this ground as an act of “dishonesty” pursuant to the established policies of the CBA was

³ As previously noted, Complainant attempts to argue that these “breaks” at the Golden Gallon did not constitute “off-duty” time such that he would have violated 49 C.F.R. § 395.8 if he had logged the break as a “meal.” Under § 395.8, “on-duty” time must be recorded and Complainant maintains that he remained responsible for his vehicle during these “breaks” at the Golden Gallon. The undersigned is not persuaded by this argument. The CBA required that a feeder driver log a one hour meal on his or her run. Although Complainant was relieved of the obligation to take his meal in 15-30-15 minute increments, this did not absolve Complainant of going on “meal” during personal breaks such as those breaks routinely taken at the Golden Gallon. Moreover, as previously discussed, logging a “meal” on the IVIS or Smart Card system merely placed Complainant in “off duty” status for compensation purposes; it did not absolve him of all responsibility for his tractor and loads. This type of “off duty” status is clearly permitted by federal law and is required under the CBA, which requires that a one hour meal be recorded for each run.

legitimate and non-discriminatory and it is sufficient under the CBA, standing alone, to support Complainant's termination.⁴

ORDER

IT IS ORDERED that the complaint of Charles Perry Martin is hereby denied.

A

Mollie W. Neal
Administrative Law Judge

NOTICE: This *Recommended Decision and Order* and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, D.C. 20210. See 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of, or in opposition to, the *Recommended Decision and Order* within thirty (30) days of the date of issuance of this *Recommended Decision and Order* unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).

⁴ Given the undersigned's findings that Respondent articulated legitimate, nondiscriminatory reasons for discharging Complainant based on his failure to record his stops at the Golden Gallon as "meal", it is unnecessary to address the issues of whether Complainant was properly discharged for exceeding his one hour meal period on December 4-5, December 7-8, December 28-29, 2001 and January 4-5, 2002. It is noted that exceeding the one hour meal period in those instances where sickness or fatigue will jeopardize the safety of other motorists is permissible. However, Complainant's failure to notify dispatch while on the road that he would be exceeding meal time due to sickness or fatigue violated established policies and procedures and left Respondent with no options to ensure timely delivery of Complainant's load of packages to its customers. As demonstrated by the testimony of Mr. Stipes, if Complainant had advised Respondent, while on the road, that he was sick or fatigued, Respondent could have dispatched another driver to continue with the load or it could have re-routed Complainant to another hub after Complainant felt that it was safe to operate the vehicle.