

U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (Fax)



Issue Date: 25 June 2008

CASE NO.: 2007-STA-9

In the Matter of:

**RICKY D. FORREST,
Complainant,**

v.

**SMART TRANSPORTATION SERVICES, LLP,
Respondent.**

RECOMMENDED DECISION & ORDER

This proceeding arises under the employee protective provisions of the Surface Transportation Assistance Act (STAA),¹ and the regulations promulgated thereunder.² The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles. The complaint was brought by Ricky D. Forrest (Complainant) against Smart Transportation Services, LLP (Respondent).

Following extensive pre-hearing motions and conferences, on 30 Oct 07 a formal hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs. Respondent was represented by counsel. Complainant appeared pro-se.

¹ P.L. 103-272 at 49 U.S.C. § 31105.

² C.F.R. Part 1978.

My decision is based upon the entire record, which consists of the following:³

Witness Testimony of

Complainant
Oliver Smart
Leroy Chaisson
Steven Johnson

Exhibits⁴

Complainant's Exhibits (CX) 1-2⁵, 4, 6, 8-10, 16-18, 22-23, 25, 27
Respondent's Exhibits (RX) 1, 6-8

My findings and conclusions are based upon the stipulations of the parties, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

ISSUES

Following multiple filings and motions, I previously ruled that based on Complainant's complaint to OSHA that the formal hearing would encompass the following allegations.

Protected activities:

1. On or about 25 Aug 06, Complainant objected to being directed to pick up a load in Stuttgart, AR because of excessive hours.
2. On or about 29 Aug 06, Complainant refused to drive a truck in need of repairs.
3. On or about 21 Sep 06, Complainant objected to being scheduled for a trip in violation of 49 CFR 395.
4. On or about 29 Sep 06, Complainant complained about a truck seat that caused back pain.

³ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁴ Respondent offered a post hearing affidavit, but Complainant objected and it was not considered.

⁵ CX-2 was limited to exclude Complainant's e-mails and statements.

Adverse Actions:⁶

1. On or about 29 Aug 06, Complainant was fired.
2. On or about 21 Sep 06, Complainant was asked by “Hector” “what makes you so perfect.”
3. On or about 25 Sep 06, Complainant was subjected to extensive hours, including being required to report for duty when the load was not ready for two hours.
4. On or about 29 Sep 06, Complainant was informed that there was no truck available for him.
5. On or about 3 Oct 06, Complainant did not receive any assignments.
6. On or about 16 Oct 06, Complainant was teased, harassed and retaliated against.
7. On or about 20 Oct 06, Complainant was fired again.

LAW

The language of the Act in force at the time of the alleged violation provided:

- (a) Prohibitions.--(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--
- (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
- (B) the employee refuses to operate a vehicle because--
- (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
- (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

⁶ Respondent stipulated that it fired Complainant on 29 Aug 06 and again on 20 Oct 06.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the 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.⁷

Once the case is at formal hearing and fully tried on its merits, a *prima facie* analysis is no longer appropriate, particularly once the respondent has articulated a non-discriminatory reason for any adverse action. The burden falls on the complainant to establish, by a preponderance of the evidence, that the reason for his discharge was his protected activity.⁸

To prevail under section (B)(i) the complainant must show an actual violation of a commercial motor vehicle safety regulation; his reasonable good faith belief about a violation is insufficient to afford him protected status.⁹ A complainant must prove that an actual violation would have occurred.¹⁰

Conversely, in order to establish a protected action under section (B)(ii) the complainant need only show that he refused to drive under circumstances that were of such a nature that a reasonable person would conclude that there was a bona fide danger of an accident, injury, or serious impairment of health.¹¹ However, he must also show he sought, and was unable to obtain, correction of the unsafe condition.¹²

To qualify as an adverse action under the Act, the complainant must show he suffered from a tangible job consequence.¹³ A written warning that carries no other tangible consequences is not an adverse employment action within the meaning of the Act.¹⁴

⁷ 49 U.S.C. § 31105 (subsequently amended by Pub. L. No: 110-053 (2007)).

⁸ *Luckie v. United Parcel Service, Inc.*, 2003-STA-39 (ARB June 29, 2007); *Pike v. Public Storage Companies, Inc.*, 1998-STA-35 (ARB Aug. 10, 1999); *Shute v. Silver Eagle Co.*, 1996-STA-19 (ARB June 11, 1997).

⁹ *Cook v. Kidimula International, Inc.*, 1995-STA-44 (Sec'y Mar. 12, 1996).

¹⁰ *Ass't Sec'y & Boyles v. Highway Express, Inc.*, 1994-STA-21 (Sec'y July 13, 1995) (Where the complainant had only 6 additional miles to drive and 30 minutes to do so without violating the seventy-hour on-duty regulation at 49 C.F.R. § 395.3(b)(2), he did not establish by a preponderance of the evidence that he would have violated DOT regulations had he not refused to drive as scheduled. Although the Complainant contended that a violation would have occurred because of the time it would take to unload the truck, Respondent's evidence showed that the Complainant would have been logged off-duty upon arrival.).

¹¹ *Smith v. Specialized Transportation Services*, 1991- STA-22 (Sec'y Apr. 20, 1992).

¹² *Harris v. C & N Trucking*, 2004-STA-37 (ARB Jan. 31, 2007) (Affirming the a finding that the Complainant did not prove that he engaged in protected activity under the Act where, although the Complainant believed that his assigned vehicle was unsafe to drive, the Respondent's owner credibly testified that he examined the truck and explained to the Complainant that there was no reason to remove it from service.).

¹³ *West v. Kasbar, Inc.*, 2004-STA-34 (ARB Nov. 30, 2005).

¹⁴ *Agee v. ABF Freight Systems, Inc.*, 2004-STA-40 (ARB Dec. 29, 2005).

The applicable regulation provides:

(a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(1) More than 11 cumulative hours following 10 consecutive hours off-duty;

(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of § 395.1(o) or § 395.1(e)(2).

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after--

(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or (2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.¹⁵

EVIDENCE

*Complainant testified at trial in pertinent part that:*¹⁶

He cannot remember what day Respondent sent him up to Arkansas. It was before 29 Aug 06, possibly 25 or 26 Aug 06. He had only been working for Respondent about two weeks. He cannot remember on what date he was hired. On about 29 Aug 06, he received a dispatch. He cannot remember where he was supposed to go. He has his logbooks and can tell about what day he started his first day of work.

¹⁵ 45 C.F.R. 395.3.

¹⁶ Tr. 99-297.

His first day of work was 17 Aug 06. The first truck he got had low batteries and would not start. He told Leroy he wasn't going to drive it like that and Leroy ended up getting a brand new set of batteries.

It appears he went to work on 18 Aug 06. That was his orientation day and they gave him a truck. He climbed up, cleaned it out, moved into it, and set it up like he was supposed to. On the day he was hired, a truck was not available. They had a Freightliner, but another driver was already in it. He waited in the yard for the driver to clean and exit the truck. When he entered that truck, it had a strong urine smell. They apologized to him for that.

Respondent sent him to a town south of Oklahoma City. He arrived too late to make a delivery, so he had to spend the night at a truck stop. The stench was bad. He called dispatch and asked for authorization to buy a can of coffee to sprinkle on the floor and cover up the odor. He was able to make the three hour drive without being bothered by the odor because he was able to open the windows to reduce the odor. It was a horrible experience. There were quite a few defects on the truck. The horn didn't work. Ardner, Oklahoma is the place he went with the truck smelling like urine. He estimates it is a practice by drivers to urinate. Concern about the smell of a vehicle is protected activity. Urine stinks and is extremely harsh and unsafe.

It looks like on 19 Aug 06, he took a day off; he returned on 20 Aug 06. He can read from his notes, but cannot remember all of it perfectly. There was an inspection that documented some of the deficiencies and damages on the vehicle in order to avoid Respondent trying to hold him accountable and claim that he caused the damage.

Friday, 24 Aug 06 was the first time that there was a serious problem. The dispatcher that hired him assured him that Respondent provided late model trucks. He does not know exactly how he spent most of the day. Looking at page 15 of RX-6, it appears he did a local pick up and made a delivery. He picked up and delivered two locals. Then he reloaded and was supposed to deliver in Atkins, Arkansas. (When he left, the dispatcher said he had been told he was going to lose a driver. He suspected that the driver was him, because he had previously told Respondent he would not cheat on hours.)

When he got to Shepherd, he ran out of hours and spent the night there. He had a busy and long day on 24 Aug 06. The next day, he drove to Atkins, which took most of the day. That leg was about six or seven hours driving. He had eleven total hours driving that day.

When he got to Atkins, it was rather late in the evening, about 4:00. His truck was unloaded promptly after a short wait. Atkins is just above Little Rock on I-40, about 70 to 100 miles. There was a truck stop close by where he planned to spend the night since he had had a long day. Respondent's dispatcher told him to go to Stuttgart and get loaded before 11:00 that night. He told her it was just too tight for him to get there, since he had started work at 7:00 that morning. That was part of his protected activity.

He finally arrived in Stuttgart at 8:15 and only had 45 minutes left for a 14 hour work day. That was pushing the hours of service rules way too tight. They gave him the wrong number to pick up his load and he spent that entire 45 minutes calling the dispatcher, who had already gone home for the day. They had to call someone else for the number; that person did not have the phone number. He wound up having to spend half his night chasing the pick up number that he could not find.

He was forced to spend the remainder of the weekend in Stuttgart. It was summertime, about 95 degrees and hot. The air conditioner in the sleeper berth was intermittent. It might function all day, and then all of a sudden quit working. He could not sleep in that heat with the motor running. He called the main dispatcher for authorization to go 60 miles to the truck stop to get the AC fixed.

The only reason Respondent ordered him to go to Stuttgart was that they wanted him to utilize all available hours of service available at that time. However, in order to do so, they expected him not to make any mistakes. They also made a serious and grievous mistake that caused an excessive delay. They had him remain there for the weekend. It was extremely uncomfortable without an air conditioner that worked. He became irate and very easily irritable. Before beginning work, he had had a ten hour rest period. He had to shower and eat breakfast before starting work at 7:00. So, he had been up for at least two hours before he began to work at 7:00, and at that point it was 9:00 at night. He was out of hours and in a town with no truck stop. He spent the weekend there in a motel. He does not know if it's true, but believes the dispatcher was fired for authorizing the motel rather than keeping him in the truck.

Apparently, he returned to Houston from Stuttgart on 28 Aug 06 at 9:00 at night. There was a 14 hour violation, but the 14 hour violation does not apply to non-driving. He apologizes, that was a misrepresentation and was misread.

On his way back from Stuttgart to Houston, Respondent's dispatcher, Michelle, kept calling and hounding him about his ETA. He felt she was trying to get him to hurry up and get back. That was on Friday, 25 Aug 06, on his way back from Stuttgart. That's wrong; it was on his way from Atkins to Stuttgart.

At 9:00 in the evening, he went off duty. Ten hours later at 7:00 in the morning he was expected to return to duty. He did show up the next morning. The dispatchers told him when he returned from Stuttgart that they were going to take that truck away because it was a flat bed truck, but he believed it was because the air conditioner in the bunk was not working properly and needed to be fixed. His experience was that if a truck needed repairs and he complained about it, they would give him another truck that needed repairs that somebody else was complaining about. These were fairly decent, good looking trucks. The Freightliner ran well; it pulled well and had decent rubber on it. It was the kind of truck that he preferred to be in, but he is unable to sleep in a hot truck.

He believes Respondent gave him what he thinks was a Volvo. He doesn't remember what truck they gave him. That was on 29 Sep 06. It needed a clutch. He went to the parking lot and moved out of his old truck, putting his belongings in his car. He went to look at the new truck. It had been sitting there for a little while and the inside was all trashed out.

He got an air hose from Respondent and used it to blow all the trash out of the truck off the floor board. The truck was filthy. He spent approximately two to three hours cleaning the truck. He attempted to start the truck prior to moving his belongings inside of it. He just looked at it and thought it was a good looking truck and should be great. So, he started it up and drove it around the parking lot. The clutch was hard as a rock and the steer tires were cupped out.

He had seen new steer tires recently installed on the truck; they were already cupped out. There was something wrong with the front end. He was pulling around to perform a test drive when the safety man approached him. The safety man tried the clutch, agreed that the clutch was hard as a rock, and informed Lloyd Chapman. Lloyd Chapman wanted to make sure there was something wrong with the truck before starting repairs. Aubrey came walking in and said to go get a mechanic and have the clutch checked.

While driving to the mechanic, he noticed every time he hit a bump, the whole front end of the truck was shaking and shimmying. It scared him. King pins on trucks go bad and that is normally what excessive shimmy is from. It leads to immense tire wear on both front wheel tires. The front end will actually come off the truck if a sizable bump is hit. The vibration is extremely uncomfortable and frightening. When he arrived at the shop, the mechanic would not fix it. He drove the truck back to Respondent's yard and told them that Billy the mechanic said the truck needed a clutch, but Respondent would not pay for it.

Lloyd Chapman suggested that the clutch needed an adjustment. Complainant stopped cleaning the truck out, removed his belongings, and told Respondent he was not driving the truck until it was fixed and was going home. That was 2:00 or 3:00 in the afternoon. He does not know whether the clutch was repaired, but was ordered to drive it. He did not go back to the truck and does not know if the clutch was fixed when he refused to load to Dallas. Respondent told him an adjustment had occurred and they wanted him to test drive the truck on a load to Dallas, but Complainant refused. He is not a mechanic and does not know if an adjustment is a repair.

He went home between 5:00 and 7:00 that night and received a call from Billy telling him that Respondent had a mechanic come out and adjust the clutch. Billy also asked him to come in right away and take a load to pick up and deliver to Dallas at 7:00 that morning. He told Billy no, because he was on duty since 7:00 that morning. He does not have the log for that day, but he only had three and a half hours left of work period for that day. It is approximately a four and a half hour drive from Houston to Dallas in an 18-wheeler, and it was rush hour, or about to end rush hour.

It takes approximately an hour and 15 minutes to get to the yard. He then needed to pick up an empty trailer, go to the shipper, and back up to their dock and have them load the trailer. Typically that could not be done in less than three and a half hours without luck and no traffic. Sometimes it can be done in two hours, but usually it takes three and a half. Twenty to thirty minutes later, Billy called and again told him to deliver this load or clean his truck out. He told Billy he had already cleaned out the truck. Billy told him he was fired.

He made a complaint, but eventually they reached a settlement and Respondent brought him back to work on 14 Sep 06. He was out of work from 29 Aug 06 to 14 Sep 06.

Steve Johnson called him on 11 Sep 06 and informed him that there was a truck available to start driving on the 14 Sep 06. Respondent had hired another driver the day before. When Complainant came in to get his truck Respondent had given it to the new driver. The settlement was that he was going to go to an over-the-road position. When they brought him back, instead of giving him an over-the-road position, they put him in a day cab. The day cab was \$13.50 an hour for all compensable time. They had negotiated a \$14.00 an hour wage rate. They misled him and he only received \$11.50 an hour. They did not tell him about that pay rate change until about 29 Sep 06, when all this started hitting the fan. Respondent said they did not have a truck available for over-the-road and would put him local, but led him to believe that as soon as one became available, they

would provide it to him. There were two trucks that became available, but instead of giving them to him, Respondent hired two new drivers.

On 20 Sep 06, he was working on a day cab that had an air leak. It was not a horrible air leak, bad enough to have to be fixed. Respondent had him go over to the brewery and pick up a load of beer, which he did. He went off duty at 9:30 p.m. on 20 Sep 06. He had to drive home, take a break, come back, and go to work. Ten hours was not enough time for rest, so he came back on 21 Sep 06 at 9:00 instead of 07:30. He was scolded for being late and was told that if he was working within a 100 mile radius, he did not have to log his trip.

Respondent wanted him to drive to Louisiana with the same truck. He told them he was not going to take a day cab that far. It was not an hours issue, but the fact that it was a day cab. Drivers were sleeping by putting a board between the seats and logging sleeper berth time, but without a sleeper berth. Respondent's practice was not to reimburse for a motel expense. It is a safety violation to sleep across the seat on boards, because DOT says it is on duty time. Respondent expected him to go out and back without sleeping, but he anticipated that with delays, there would not be enough time. He wanted a sleeper cab. He had already anticipated that Respondent might offer him a motel, but he was going to make them offer it. He was not going to offer or volunteer that information.

He started out with the day cab anyway, and took it to the mechanic to have the air leak fixed. He does not remember that much about it, except for one mechanic. He might not be on the right incident, but a guy came up who could not speak English. They tried to communicate with gestures. He started trying to explain that he had an air leak. They both got frustrated, so finally he went on into the store and waited until somebody that could speak English would help. They made it a point to let him know that he had to wait five to ten minutes before anybody even spoke to him. They called Respondent and Respondent called him to inform him that Hector would go to the mechanic. It was a mad house; like a Chinese fire drill. He had no idea what was going on. When Sheila called to say Hector was on his way, he thought he was fired.

Hector picked him up and it was obvious Hector wanted him to think he was fired. He asked if he was being taken home, but Hector said Respondent just wanted him back at the yard. He does not know what Hector's relationship is to Respondent, and Hector is not in his chain of command, but he has seen Hector hanging around dispatch.

Once they got back to Respondent's yard, Hector said to him, in front of Lloyd, "What makes you so perfect?" That did not have anything to do with the Louisiana trip. It related to a trip to Oklahoma. He is not sure of the day.

His memory is stale. He is not knowledgeable and smart enough to figure out what he has testified to and what he wrote in his complaints and letters, and then put it together. He has a whole statement pieced together in the right order, but he left it at home. It is difficult for him to show up in a proceeding like this as a pro se litigant and keep everything focused properly. He cannot recall the context of Hector asking him on 21 Sep 06, "What makes you so perfect?" He was refusing to log illegally. He thinks it was the one where he was supposed to be going to Oklahoma.

He logged 416 miles that day, and was unable to return home. He worked 10 ³/₄ hours driving, 2 ³/₄ hours on duty. That was 13 ¹/₂ hours on duty for the day.

His complaint on 21 Sep 06 was both a day cab issue and an hours issue. RX-6 page 32 shows which trucks he drove. He does not recall if 602 is a day cab or 612 is a sleeper. He logged sleeper berth time on the Louisiana leg of the trip. The day cab truck had the air leak, so he was not forced to drive the air leak truck to Louisiana.

He did not load with the day cab. It just came back to him. Well, he may have loaded with the day cab. He cannot remember that part. But he wound up in a sleeper. Respondent gave him a Volvo sleeper truck for the trip to Louisiana.

He went to Budweiser and picked up a load, but he does not recall which truck he used. He had to scale it to make sure that the axle weights were right. He cannot remember if this is the trip or some other trip, but he learned Respondent had not paid its scale bill; he does not recall on which trip he learned this information. The scales therefore would not give him service. That caused another delay.

He went to a beer distributor in Alexandria who saw that the load had shifted and panicked. He called Respondent to tell them the load shifted and he was scared that they had lost a lot of beer because they break when they shift. Ultimately, there were only one or two stacks that had tilted. It was about 4:00 or 5:00 in the afternoon and Respondent was trying to book loads and figure out when they could reschedule him.

He had been under the impression for most of that day that all he was going to do was empty the beer and return. Respondent wanted him to stop along the way at DeRidder and pick up a load of paper to deliver to the dock for a ship that was waiting. Respondent wanted that done by 7:00 the next morning. That would result in excess hours and he therefore said no. He was petrified, but went ahead and loaded. He went to DeRidder, which is two hours away from Alexandria,

which was not unreasonable. He made it as far as Orange, Texas by 11:00 that night.

He has in his notes somewhere about the trip that he objected to on or about 21 Sep 06. It looks like a load of beer. It was the day cab problem on the trip to Louisiana. Switching trucks created a delay. RX-6 page 32 shows 19.5 hours available, but that is when Respondent asked him to go to Carolina.

Respondent wanted the paper delivered at 7:00. They said they wanted him on the dock, but he did not have directions. They said they were going to update, but they wanted him in Houston so that in the morning he'd be ready to make a run right then. He said no. If he had kept going from Orange to Houston at that time, he would have violated the 14 hour rule and the 11 hour rule.

He did not go back on duty until 9:00 the next morning. Hector gave him a hard time about it and Sheila kept giving him an incorrect address that was not a dock.

The truck seat on the trip to Louisiana made his back hurt horribly. The seat sat up too erect. When he returned, he thinks he went into the day cab. But then he thinks on 29 Sep 06, no; on 27 Sep 06 he used the same truck seat and went to Louisiana on a tight dispatch. By the time he got back, his back was killing him. Within an hour of being behind the wheel in the truck, his back started hurting horribly. On 29 Sep 06, he told Respondent he needed a different truck seat. The Volvo seat was not defective. It was poorly designed and he made verbal complaints about that. There was something else that happened on 29 Aug 06. He logged 29 Sep 06 off. It had to be the 28 Sep 06 when all this stuff happened.

There was a load that Respondent wanted to send up to Oklahoma.

On 25 Sep 06, he went to load and was originally told to be there at 7:00 in the morning. Then he was told that they wouldn't start loading before 9:00. He therefore waited two hours at a truck stop. He viewed it as an act of harassment. Respondent deliberately gave him that false and misleading information. They wanted to force him to get up at an earlier time than he would have otherwise, to accommodate that dispatch. He was paid for the two hours of waiting, but it was a waste of time.

His notes show him going on duty at 6:00 in the morning and coming off duty at 7:45 that night. Under the local logging standard by DOT, he is only allowed to run 12 hours a day. He was instructed to work to a local standard and not log his time. He was logging it anyway because he knew they were sending him out of town. Respondent was trying to have him do local work without logging it and preserve driving hours for when logging was necessary. He kept track of all his

local logging hours so that there would be no question about regarding the 70 hours he worked. He adopted that practice because the law provides for a 70 hour work week; he will not work more than 70 hours per week for Respondent.

His preference for over-the-road driving is to dispatch on Thursday or Friday and deliver on Monday. He did not enjoy that preference while working for Respondent. From 29 Sep 06 to 20 October 06, Respondent offered him three long haul assignments. From 29 Sep 06 to 3 Oct 06, he received no phone calls offering him loads. That was punitive. He suspects that was the day that Hector said, "What makes you so perfect."

RX-6 shows three days off duty up to 4 Oct 06; following that date he worked. CX-10 appears based upon his failure to turn in logs when requested, but that is a pretext.

On 16 Oct 06, he was issued an over-the-road dispatch, but it was given in such a way that he could not complete it as scheduled. He logged 3 ½ hours. On that morning he reported for work at the normal reporting time. He waited, inspected his truck waiting on a dispatch, probably picked up paperwork, clocked in, had coffee, and for the most part remained eager. He was at work for three and a half hours before Respondent informed him that he was receiving a three day suspension because of the dispatch that he had rejected the Friday before. Although Respondent could have informed him of the suspension the previous Friday, Respondent chose to wait until Monday.

From 14 to 17 Sep 06 and 29 Sep to 3 Oct 06, he had no work; that amounted to being suspended. It created a financial stress.

In early October, Respondent gave him trips that he had to turn down because there was not enough time to do them. For this, he suffered harassment, intimidation, and teasing.

In creating CX-23 he relied on his logbooks. He took RX-6 and summarized those into a table. RX-6 is the exhibit of the driver's daily logs, which are mostly in his handwriting and were signed by him. Some items in that document are false, but every falsification was a result of coercion. Page 11 appears false, but has an inclement weather exception to it. He cannot find a falsehood. There are some instances where he concealed hours worked as a condition for the Employer. Of the 61 pages he has not seen one that he could clearly point out as falsified, but there are some logs he did not sign. He did everything that he could to be compliant with hours of service and accommodate Respondent's demands and accommodate DOT.

Page 23 of RX-6 indicates that he worked on 28 Aug 06 and completed his daily log.

Originally, he objected to the Stuttgart dispatch because he thought that there was no way that he could go there without incurring a violation. If he received a violation, he would be forced to conceal it. RX-6 page 17 shows he started at Shepherd and at the end of that day was headed to Stuttgart. On 26 Aug 06, he had 12 ¼ hours available. He had 10 or 11 driving hours. On 26 Aug 06, he was on duty for half an hour, buying fuel and did not drive. He had 11 hours for 27 Aug 06.

RX-6 page 21 is his 27 Aug 06 log. On 27 Aug 06, he reset to 70 hours. On 28 Aug 06 he drove 9.75 hours.

RX-6 page 17 through page 24 is the Stuttgart truck. The truck number is 506. That was the truck with the stinky sleeper that smelled like urine and the air conditioner that did not properly function. Air conditioning is a safety requirement.

On RX-6 page 24 he checked "I detect no defects."

He does not recall if, after the Stuttgart trip, he was asked by Respondent for his logs. Now he does recall, and he was not asked. Respondent expected drivers to comply with the law and turn logs in within the time period, which he believed to be 13 days of the last log turn in. He never refused to turn logs over to Respondent when they asked for them.

He recalls being approached by Respondent to take a load to California. He remembers kind of liking it and kind of not liking it. He told Respondent he did not have enough hours to go to California as scheduled. He does not recall Respondent asking to see the logs, but they might have. Every time Respondent sent him on a long-haul, they wanted an hours of service violation. Respondent did not tell him that the delivery date on the load had been changed so that then he could make the run without objection. He eventually declined to make the run. The load was dispatched to another driver.

Respondent offered him weekend long hauls three weeks in a row. The California run was during the weekend as he desired, but Respondent was increasing his local hours before he got there. He was expected to exclude those hours from the log and deliver Monday morning. Respondent did not need to see his logbook because hours were not an issue. Respondent did not alter the delivery date until Monday. When they offered the load on Friday, they did not offer to alter the

delivery date. Another reason he turned down the trip was because his father's aunt died and the funeral was in Grossbeck, Texas.

He has a trucking job starting tomorrow. His last job was with SLT Express. He had a complaint about the way they ran their business and quit that job. He worked for Royer Express for about a month and was terminated because he complained about the way they ran their company. At Gainey Transportation, he attended orientation, but never drove a truck. That was the sole result of black listing.

Respondent took a ten year work history when they hired him. In the last five years, he worked for about 16 or 17 trucking companies. He cannot remember them all. He cannot say whether in half of those cases, the reason he left the company is because he disagreed with their policies on dispatching and assigning drivers. He filed complaints. He is a United States citizen and a former elected leader. He has a responsibility and a duty to the public to make sure the system works.

Oliver Smart testified in pertinent part that:¹⁷

He is the owner of Respondent, Smart Transportation. He has updated his MCS-150, but is not sure when he did so. Respondent has approximately 15 or 16 trucks, 20 employees, and about 15 or 16 drivers.

He has been in the trucking business since July 2005. He has no other experience in the industry. He did not initially enter the business as a hazardous material carrier, but did perform in that line of work for while, then stopped. The DOT is tough and the pay was not worth it. It was not related to Respondent's current conditional safety rating. Respondent dropped the hazardous business before the conditional rating. He is unsure of the date, but it was this year.

Aubrey Smart signed CX-4, but he is no longer president. That changed sometime during 2007. Respondent did have an audit this year that resulted in a conditional safety rating. That has nothing to do with Aubrey's departure. He is not aware of Respondent having a program to discipline drivers for violations of 395. Respondent's maintenance files are no longer incomplete.

¹⁷ Tr.301-331.

There may be a difference between Respondent's summary and Complainant's summary tables of the hours, but he does not know which one is right.

He has reviewed the findings of the FMCSA audit this year. Many of the allegations concern the duty hours of the driver's logs and inspection reports. Accidents were the main cause of the conditional rating.

He had no personal knowledge of Complainant's employment with Respondent. He has been involved in managerial responsibilities since the first quarter of 2007. Before that he was the person that funded the enterprise. Complainant first came to his attention when Aubrey mentioned to him that they had a dispute with an employee. It was in 2007. He had nothing to do with a settlement agreement.

***Leroy Chaisson testified in pertinent part that:*¹⁸**

He has been a main mechanic for Respondent for a year and a few months. He knows Complainant from his time driving trucks for Respondent. If there were a safety problem with one of the trucks, he would know about it. If he was unable to fix the problem, the truck would be sent out and fixed. While driving for Respondent, Complainant did not complain to him about defects on trucks. Complainant complained to dispatch and dispatch would tell him whether a truck needs to be fixed. He fixed some lights and other problems, but nothing urgent on trucks Complainant was driving.

He did not work on a clutch problem on a truck associated with Complainant. Clutches take two people, so somebody else performed that maintenance work. There are two ways to fix a clutch. One way is to replace the clutch; the other is to adjust the clutch. If it cannot be adjusted, then it needs to be replaced.

He is not aware that Complainant made a complaint about a truck seat. He never saw anybody tease, harass or retaliate against Complainant.

He may have replaced a set of batteries on a truck for Complainant, but does not remember. He never had difficulties with Complainant.

***Steven Johnson testified in pertinent part that:*¹⁹**

He has been Respondent's safety manager for about a year and a half, except for three months when he was laid off. He now is an independent consultant for Respondent. He has done the same sort of safety manager work for other trucking

¹⁸ Tr.333-345.

¹⁹ Tr.345-418.

companies and has been a safety manager for two and a half years. He works seven to four, Monday through Friday.

He is familiar with the 80% of Department of Transportation and Department of Labor OSHA rules and regulations as applicable to a trucking company. He assembles data and ensures the truck drivers give him driving logs. He does Respondent's reports.

He prepared CX-17. His understanding is that Complainant was terminated or let go for three days on a suspension for refusing a load. In his attempt to return Complainant to operations with the company, they were trying to find a truck adequate for him to drive. They located a truck for him and let him know that it was available. He heard secondhand of a problem with the truck and its clutch, but the clutch was fixed the same day that Complainant complained about it. Complainant was offered that truck and a load after being informed that the clutch problem had been fixed.

It is a common practice for a trucking company to ask its drivers to turn in their logbooks. DOT regulations say drivers must turn in their logs to the safety department every 14 days. Complainant was having a problem with dispatch regarding taking a load to California. He said he was out of hours. They asked Complainant to turn in his logs so they could calculate his hours, but Complainant refused. It was some time in early September and before the settlement agreement that Complainant reached with Respondent.

Complainant refused to show logs more than once. After the settlement, there was another incident where he was called into Sheila Cunningham's office. They went over Complainant's logs with him. Complainant said he was out of hours and could not take a load. They were going over his logs trying to determine whether he was out of hours when Complainant said something about having to go to a funeral for his uncle. They did not obtain the logs from Complainant at that time. They specifically asked Complainant for the logs, but he left.

Those refusals to deliver logs when requested resulted in employee warning notices. Complainant was terminated the second time for refusing dispatch loads and refusing to turn in his logs. It is company policy that failure to accept dispatched loads is grounds for termination of an employee.

He prepared RX-8 based on Complainant's daily driver's logs. On 26 Aug 06, Complainant had 11.7 hours available. Going to Arkansas on those days would not have caused Complainant to be in jeopardy of excessive hours. He would have had time to get the load loaded on Friday to make the Monday delivery. Complainant would be shut down on Saturday to do his restart.

Respondent wanted Complainant to load before they shut down in Stuttgart. They understood he would have to stop at that point. Once loaded, Complainant had the hours to drive on Saturday to get to his destination within the allotted time.

There was no trip on or about 21 Sep 06 that would have violated 49 CFR 395. Respondent never made Complainant drive a truck that had a safety violation. Any driver has the right to turn a truck down. Complainant never complained about something needing repair that Respondent refused to fix.

There were a couple of situations in which Complainant was unhappy with the trucks that Respondent asked him to drive. There were some tire issues and Leroy had to change the tires out. There were times trucks were not available for Complainant because they were being repaired. There was no time that a truck was intentionally made unavailable to Complainant to punish him or to retaliate against him for anything he had done at work.

Complainant was fired on or about 20 Oct 06 for refusing to turn over his logs. Complainant was claiming he was out of hours again. Complainant was never subjected to extensive hours, nor was he required to report for duty when the load was not ready for two hours. He was never punished by making him waste his time. If Complainant performed local work, he was paid for his time.

100 mile radius drivers do not log their hours; they do time cards. If an over-the-road driver used three hours to load as a local driver, it would affect his 14 hours.

He wrote CX-17 at the request of Sheila Cunningham. He never talked to Mr. Clack.

He supported Complainant in working out the settlement with Aubrey Smart. The dispatcher job for Complainant mentioned by Aubrey did not materialize.

RX-8 only reflects the logs he had.

Respondent has four day cabs. Some of those drivers kept logs and some did not. All of them are on the time clock. Some of them felt more comfortable doing a log as well. However, this was not necessary because they stayed within the 100 mile radius.

Complainant failed to turn in his logs on a regular basis. Logs are to be turned in every 14 days. Most drivers turn them in every seven days. If any driver says he is out of hours, this can be confirmed by checking his logs. If a driver is turning down a trip because of hours, Respondent probably will not have his most current

logs yet, so they have to be brought in to audit. Respondent has a \$4,000.00 program that runs these reports.

He does not know if any postings were made as a result of the settlement agreement.

He keeps the maintenance records, but if drivers have a problem, they go to their immediate dispatcher. The immediate dispatcher reports the problem to maintenance and the reports come to him. The final say on safety matters is with the owner of the company.

He does not feel Respondent has a hostile environment. Its turnover rate is about 60 percent every quarter. Drivers move on, drivers go to different companies, and management leaves with drivers.

He did not prepare CX-6, but it shows that on 20 Sep 06 Complainant had 9.25 hours worked and 5.25 hours on duty. Normally driving hours would have to be added to duty non-driving hours to get total hours on duty, so total hours on duty would be greater than the driving hours column.

He personally asked Complainant to turn in his logs, and Complainant refused. Complainant said he was out of hours. He needed the logs to verify the hours. Complainant got mad at Sheila and stormed out. He did not see Complainant or the logs. He does not know what dispatch was involved or if Complainant actually had sufficient hours. That is why he asked to see Complainant's logs.

He does not recall the date Complainant was fired.

Complainant's daily driving logs indicate in pertinent part that:²⁰

On 19 Aug 06, Complainant was off duty for 24 hours.

On 20 Aug 06, Complainant drove for 7.5 hours from Houston to Ardmore, Ok. He had 13.75 hours off duty, 2 hours sleeper, and .5 hours on duty.

On 21 Aug 06, Complainant drove for 3.5 hours to McAlister TX. He had 4.25 hours off duty, 14.5 hours sleeper, and 1.75 hours on duty.

On 22 Aug 06, Complainant drove for 11.75 hours to Baton Rouge, LA. He had 1.5 hours off duty, 9 hours sleeper, and 1.75 hours on duty. He had 44.75 of 60 hours available.

²⁰ CX-18; RX-6.

On 23 Aug 06, Complainant drove for 7.5 hours to Houston, TX. He had 6.5 hours off duty, 8.5 hours sleeper, and 1.5 hours on duty. He complained the sleeper AC was not cool.

On 24 Aug 06, Complainant drove for 4.25 hours to Shepherd, TX. He had 11 hours off duty, 4.25 hours sleeper, and 4.5 hours on duty. He had 22.5 of 60 hours available. He complained about the AC control and that the battery was weak.

On 25 Aug 06, Complainant went on duty at 0700 and drove from 0715 to 0900 to Lufkin TX. He was off duty from 0900 to 0945, and then drove until 1130 to Marshal, TX, where he was off duty until 1145. He then drove to Texarkana, AR from 1145 to 1315, stayed on duty until 1330, and then drove to Atkins, AR arriving at 1700. He stayed on duty until 1745 and drove to Stuttgart, AR, arriving at 2015. There, he stayed on duty until 2100, when he began a sleeper berth period. For the day, he totaled 11 hours driving, 1 hour off duty, 10 hours sleeper, and 2 hours on duty. He complained about the AC control in the sleeper.

On 26 Aug 06, Complainant had 15.5 hours off duty, 8 hours sleeper, and .5 hours on duty. He complained about the AC control in the sleeper.

On 27 Aug 06, Complainant had 24 hours off duty.

On 26 Aug 06, Complainant drove for 9.75 hours to Houston. He had 11.25 hours off duty and 3 hours on duty. He complained about the AC control in the sleeper.

On 16 and 17 Sep 06, Complainant was off duty.

On 18 Sep 06, Complainant drove local for 4.5 hours. He had 14.25 hours off duty and 5.25 hours on duty. He had 60.25 of 70 hours available.

On 19 Sep 06, Complainant drove for 8.75 hours to Port Arthur, Baytown, and LaPorte, TX. He had 11.25 hours off duty and 4 hours on duty.

On 20 Sep 06, Complainant drove local for 9.25 hours. He had 9.5 hours off duty and 5.25 hours on duty. He had 33 of 70 hours available.

On 21 Sep 06, Complainant went on duty at 0900 and drove local from 0930 to 1000 and 1015 to 1045. He departed Baytown at 1100 and arrived in Alexandria, LA at 1700. He remained on duty for 15 minutes and then went into his sleeper berth for 30 minutes, followed by an additional 15 minutes on duty. At 1800 he departed for DeRidder, LA, arriving at 2000. He remained on duty there until 2100 and drove to Orange, TX, arriving at 2300. For the day, he had 10.75 hours

driving, 9 hours off duty, 1.5 hours sleeper, and 2.75 hours on duty. He had 19.5 of 70 hours available.

On 22 Sep 06, Complainant drove for 3.25 hours to Houston, TX. He had 7.5 hours off duty, 10.5 hours sleeper, and 2.25 hours on duty.

On 25 Sep 06, Complainant went on duty at 0600, drove from 0615 to 0700, stayed on duty from 0700 to 0730, went off duty from 0730 to 0830, and went back on duty from 0830 to 1700. He then drove from 1700 to 1900.

On 27 Sep 06, Complainant drove 9.5 hours to Louisiana.

On 28 Sep 06, Complainant drove 4.5 hours to Texas.

On 29 Sep 06 through 3 Oct 06, Complainant was off duty.

On 4 Oct 06, Complainant drove 8.5 hours to Louisiana.

On 5 Oct 06, Complainant drove 7.75 hours to Texas.

On 6 Oct 06, Complainant drove 7 hours to Fort Worth, TX.

On 7 Oct 06, Complainant drove 5.75 hours to Houston, TX.

On 8 Oct 06, Complainant was off duty.

On 9 Oct 06, Complainant drove 7.25 hours to Milano, TX.

On 10 Oct 06, Complainant drove 6 hours to Houston, TX.

On 11 Oct 06, Complainant drove 7.25 hours to Crockett and Houston, TX.

On 12 Oct 06, Complainant drove 5.5 local hours.

On 13 Oct 06, Complainant drove 5.5 local hours.

On 14 and 15 Oct 06, Complainant was off duty.

On 16 Oct 06, Complainant was non-driving on duty for 3.5 hours.

On 17 Oct 06, Complainant was off duty.

On 18 Oct 06, Complainant drove 3.75 local hours.

*A driver hours summary table prepared by Respondent indicates in pertinent part that:*²¹

Date (06)	Driving Hours	On Duty Hours²²	7 Day On Duty Hours	Hours Available
17 Aug	0	0	0	70
18 Aug	0	5	5	65
19 Aug	0	0	5	65
20 Aug	7.75	8.25	13.25	56.75
21 Aug	3.5	5.25	18.5	51.50
22 Aug	11.75	13.5	32	38
23 Aug	7.5	9	41	29
24 Aug	4.25	8.75	49.75	20.25
25 Aug	11	2	46.75	23.25

Date (06)	Driving Hours	On Duty Hours	7 Day On Duty Hours	Hours Available
13 Sep	0	0	0	70
14 Sep	4.5	13.5	13.5	56.5
15 Sep	6	9	22.5	47.5
16 Sep	0	0	22.5	47.5
17 Sep	0	0	22.5	70
18 Sep	4.5	5.25	27.75	64.75
19 Sep	8.75	4	31.75	60.75
20 Sep	9.25	5.25	37	55.5
21 Sep	10.75	13.5	37	42
22 Sep	3.75	6	34	36

²¹ CX-6.

²² Driving plus non-driving. There are obvious errors when compared to the daily log. The entries (25 Aug, 19 Sep, and 20 Sep) which show total duty hours to be less than driving hours failed to add the driving hours to the non-driving duty hours.

*A driver hours summary table prepared by Respondent indicates in pertinent part that:*²³

Date (06)	Driving Hours	On Duty Hours²⁴	Accumulated Hours	Hours Available
17 Aug	0	0	0	70
18 Aug	0	5	5	65
19 Aug	0	0	5	65
20 Aug	7.75	.5	8.25	61.75
21 Aug	3.5	1.75	13.5	56.5
22 Aug	11.75	1.75	27	43
23 Aug	7.5	1.5	36	34
24 Aug	4.25	4.5	44.75	25.25
25 Aug	11	2	57.75	12.25

Date (06)	Driving Hours	On Duty Hours	Accumulated Hours	Hours Available
13 Sep	0	0	0	70
14 Sep	4.5	9	13.5	56.5
15 Sep	6	3	22.5	47.5
16 Sep	0	0	22.5	47.5
17 Sep	0	0	0	70
18 Sep	4.5	5.25	9.75	60.25
19 Sep	8.75	4	22.5	47.5
20 Sep	9.25	5.25	37	33
21 Sep	10.75	2.75	50.5	19.5
22 Sep	3.75	2.25	56.5	13.5

²³ RX-8.

²⁴ Non-Driving.

*A driver hours summary table prepared by Complainant indicates in pertinent part that:*²⁵

Date (06)	Off Duty Hours	Sleeper Hours	On Duty Hours	Driving Hours
13 Sep	24	0	0	0
14 Sep	10.5	0	9	4.5
15 Sep	15	0	3	6
16 Sep	24	0	0	0
17 Sep	24	0	0	0
18 Sep	14.25	0	5.25	4.5
19 Sep	11.25	0	4	8.75
20 Sep	9.5	0	5.25	9.25
21 Sep	9	1.5	2.75	10.75
22 Sep	7.5	10.5	3.75	2.25

*A driver hours summary table prepared by Complainant indicates in pertinent part that:*²⁶

Date (06)	Driving Hours	On Duty Hours	Total Daily Hours	7 Day Hours	Available Hours
17 Aug	0	0	0	0	70
18 Aug	0	5	5	5	65
19 Aug	0	0	0	5	70
20 Aug	7.75	.5	8.25	13.25	61.75
21 Aug	3.5	1.75	5.25	18.5	56.50
22 Aug	11.75	1.75	13.5	32	43
23 Aug	7.5	1.5	9	41	34
24 Aug	4.25	4.5	8.75	49.75	25.25
25 Aug	11	2	13	57.75	12.25

²⁵ RX-7.

²⁶ CX-23.

Date (06)	Driving Hours	On Duty Hours	Total Daily Hours	7 Day Hours	Available Hours
13 Sep	0	0	0	0	70
14 Sep	4.5	9	13.5	13.5	56.5
15 Sep	6	3	9	22.5	47.5
16 Sep	0	0	0	22.5	70
17 Sep	0	0	0	22.5	70
18 Sep	4.5	5.25	9.75	32.25	60.25
19 Sep	8.75	4	12.75	45	47
20 Sep	9.25	5.25	14.5	59.5	32.5
21 Sep	10.75	2.75	13.5	59.5	19

***A Texas Department of Public Safety Audit Report indicates in pertinent part that:*²⁷**

Respondent was audited in June 2006 and determined to have adequate safety controls in place. Respondent was familiar with safety regulations and required drivers to turn in logs within 13 days. Respondent did not have a disciplinary program for drivers who failed to comply with hours limitations. Respondent had incomplete maintenance records.

***A federal safety compliance review report indicates in pertinent part that:*²⁸**

A 5 Jul 07 Compliance Review was conducted and determined Respondent had 14 drivers. The review discovered the following violations: 1 11-hour rule; 7 14-hour rule; 4 70-hour rule; 9 false logs; 5 failure to log; 6 failure to submit logs; and 8 failure to maintain logs for 6 months. The review resulted in a conditional safety rating.

***A compliance website report indicates in pertinent part that:*²⁹**

During the period from April 2006 to August 2007, Respondent's drivers had 21 log and hour violations.

***Respondent's responses to interrogatories state in pertinent part that:*³⁰**

Respondent entered into a settlement agreement with Complainant in good faith and returned him to his original employment with the same pay, benefits, and

²⁷ CX-4.

²⁸ CX-25.

²⁹ CX-27.

³⁰ CX-8.

privileges. Respondent terminated Complainant because he failed to submit his logs upon request and refused loads without good reason.

***Respondent's warning letters to Complainant state in pertinent part that:*³¹**

On 8 Sep 06, Complainant was dispatched to take a load to North Carolina with an 11 Sep 06 delivery date. Complainant accepted the load and asked for an early delivery on 10 Sep 06. Complainant then refused the load, stating he had insufficient hours. Respondent asked Complainant to bring his log book in to verify his hours, but Complainant refused. Complainant was issued a warning letter on 8 Sep 06.

On 11 Sep 06, Complainant brought in his log books. Respondent examined the book and determined Complainant had sufficient hours available to take the load. He was issued a warning letter for refusing a load.

On Friday, 20 Oct 06, Complainant requested a long haul load. He was dispatched to take a load to California for delivery on 23 Oct 06. Complainant responded that he had insufficient hours for that trip. Complainant offered no logs beyond 17 Oct 06. Respondent contacted the customer and obtained approval for a 24 Oct 06 delivery. When informed of the change, Complainant responded that he did not want to take that run or go to California. On 20 Oct 06, Complainant was issued a warning letter for not submitting logs and refusing loads.

On 23 Oct 06, Complainant told Respondent he had refused the load to attend his uncle's funeral. Complainant was informed he was terminated for refusing loads.

***A settlement agreement states in pertinent part that:*³²**

On or about 19 Sep 06, Respondent agreed to maintain its trucks in a safe condition, expunge any disciplinary records, reinstate Complainant as a driver, and not discharge or discriminate against any driver for making safety complaints. On or about 22 Sep 06, Complainant agreed to accept reinstatement. No posting was required.

***A letter from Steven Johnson to DOL states in pertinent part that:*³³**

On 6 Sep 06, Complainant was having trouble with his truck and Respondent offered him another truck to drive. Complainant turned the truck down, saying it had wobbly steering and a tight clutch. Respondent had a mechanic look at the

³¹ CX-10; RX-1.

³² CX-16.

³³ CX-17.

truck. He adjusted the clutch and said the steering was not a safety concern. Complainant refused to drive until the steering was fixed, so Respondent sent him home as having refused a load.

On 8 Sep 06, Complainant met with Respondent and was offered a dispatcher job until a new truck was found. Complainant would have the option of returning to driving at any time. Complainant accepted the offer. Complainant was informed on 11 Sep 06 that a truck would be available on 14 Sep 06. Complainant returned to driving duties on 14 Sep 06.

***Pay records indicate in pertinent part that:*³⁴**

Complainant worked for Respondent at times between 13 Aug 06 and 4 Nov 06.

ANALYSIS

Credibility of the Evidence

Throughout his testimony, Complainant shuffled through his papers and appeared to have only limited specific and accurate first hand recollection of factual details. He repeatedly contradicted and corrected himself and only when discussing generalities or making arguments was his testimony fluid and without significant hesitation and uncertainty. His demeanor and appearance were not convincing. I found his testimony to be of very limited probative value, and then only to the extent it was corroborated by independent sources. Steven Johnson was comparatively much more credible in his appearance and demeanor and I afforded his testimony much more credibility.

Protected Activity

The 25 Aug 06 Excessive Hours Objection

The fundamental problem with Complainant's trip to Stuttgart on 25 Aug 06 was that he had to arrive early enough on that Friday to load that evening, since the freight could not be loaded on Saturday or Sunday. Steven Johnson testified that Respondent's plan would not have caused Complainant to be in danger of excessive hours. Complainant would have had time to get the load loaded on the Friday and make the Monday delivery. Respondent wanted Complainant to load before the pick up location in Stuttgart shut down. Respondent understood Complainant would have to stop then. Once loaded, Complainant had the hours to drive on Saturday to get to his destination within the allotted time.

³⁴ CX-22.

Complainant testified that when he got to Atkins, it was late in the evening, about 1600.³⁵ He said they unloaded him pretty promptly, but he had had a long day and planned on spending the night there at a truck stop. However the dispatcher told him to go to Stuttgart and get loaded before 2300 that night. He told her it was too tight for him to get there, since he had started work at 0700 that morning. Nonetheless, he left Atkins at 1745 and arrived in Stuttgart at 2015. The dispatcher kept calling him all day to check on his progress and make sure he could get to Stuttgart in time. Once he got there, Respondent gave him the wrong number to pick up his load and he spent 45 minutes calling the dispatcher. He did not get the freight loaded and spent the weekend there, with no truck stop.

The most probative evidence on this issue was Complainant's testimony that Respondent wanted him to utilize all available hours of service available at that time, but added that in order to do that, they expected him not to make any mistakes, only to make a mistake themselves. That is consistent with Steven Johnson's testimony that Respondent simply wanted Complainant to get to Stuttgart as early as possible. The logs show that had Complainant arrived at Stuttgart early enough to load, he would have had sufficient hours remaining to drive back to Houston on Saturday.

Consequently, the weight of the evidence shows Respondent wanted and expected Complainant to arrive at Stuttgart earlier than he did. There is no indication they asked him to exceed driving or duty hours, either for the day or multi-day period. He had an accumulation of one hour off duty time during the day, before arriving in Atkins. Had he not taken that off duty time, he may have been able to load his Stuttgart freight and deliver it to Houston on Saturday.

In any event, while there may have been a dispute about why Complainant got to Stuttgart when he did, his hour of off duty time, and who was to blame for the initial 45 minute delay in Stuttgart, there was no direction to pick up a load in violation of 49 CFR 395, and therefore no protected activity.

The 29 Aug 06 Refusal to Drive a Truck in Disrepair

Complainant testified that the clutch was as hard as a rock, the steer tires were cupped and the front end was shimmying. Respondent's mechanic testified that a hard clutch could be fixed with an adjustment. Complainant conceded that Respondent told him the clutch was adjusted and that he could take the truck to Dallas, but noted he is not a mechanic and does not know if adjusting a clutch is a way of repairing it. In his letter, Steven Johnson stated that the mechanic adjusted the clutch and stated there was no safety problem related to the steering. I found that to be more credible than Complainant's testimony. Thus I find that the safety concerns raised by Complainant

³⁵ His log shows it was 1700.

were addressed by Respondent's mechanic and that Respondent so informed Complainant, but that Complainant refused to return to determine whether that was accurate. Thus, I find no protected activity under the Act related to Complainant's refusal to drive a truck in an unsafe mechanical condition.

The 21 Sep 06 49 CFR 395 Objection

Complainant testified that he arrived at work at 0900 on 21 Sep 06 and that Respondent wanted him to drive to Louisiana. He told them he was not going to take a day cab that far. It was not because of the hours, but the fact that it was a day cab. Eventually he got a sleeper, but it caused a delay. He logged 416 miles that day, and was unable to return home. He went to Budweiser and picked up a load of beer, which he drove to Alexandria, LA and delivered. It was about 4:00 or 5:00 in the afternoon and Respondent was trying to book loads and figure out when they could reschedule him.

Complainant said he had been under the impression for the most part of that day that all he was going to do was deliver the beer and dead-head back. However, Respondent wanted him to stop at DeRidder and pick up a load of paper to deliver to the dock. Respondent wanted that done by 7:00 the next morning. Complainant said he could not do that because it would require excess hours. He went back to DeRidder, only two hours away from Alexandria, at which point they made a grievous mistake that caused an excessive delay. He made it as far as Orange, Texas, by 11:00 that night. He worked 10 $\frac{3}{4}$ hours driving, and 2 $\frac{3}{4}$ hours on duty. He worked 13 $\frac{1}{2}$ hours on duty for the day.

The logs show Complainant had at least 33 hours available at the end of 20 Sep 06. On 21 Sep 06, Complainant went on duty at 0900 and drove local from 0930 to 1000 and 1015 to 1045. He departed Baytown at 1100 and arrived in Alexandria, LA at 1700. He remained on duty for 15 minutes and then went into his sleeper berth for 30 minutes, followed by an addition 15 minutes on duty. At 1800 he departed for DeRidder, LA, arriving at 2000. He remained on duty there until 2100 and drove to Orange, TX, arriving at 2300. For the day, he had 10.75 hours driving, 9 hours off duty, 1.5 hours sleeper, and 2.75 hours on duty.

Steven Johnson testified that there was no trip on or about 21 Sep 06 that would have violated 49 CFR 395. However, his testimony appears to be based on a review of the logs which would show only what Complainant actually did, not what Respondent wanted him to do. The logs show that the next day it took Complainant about 2 hours to go from Orange to the delivery point. Had Complainant done that on the evening of 21 Sep 06, he would have driven in excess of 11 hours. Thus, if Complainant was objecting or refusing to do so, he was engaging in protected activity.

The only evidence that Respondent was asking him to complete the drive on the 21 Sep 06 is Complainant's testimony. As highly unreliable as that testimony is, it is somewhat corroborated by the logs, and completely un-rebutted by any evidence offered by Respondent. Thus I find that Complainant at least reasonably believed that Respondent wanted him to continue to drive that evening and his refusal to do so, even if accepted by Respondent without objection, was a protected activity under the Act.

The 29 Sep 06 Truck Seat Complaint

Complainant testified that the seat of the Volvo truck caused him great discomfort. He also stated that the problem was one of design and not of state of repair. There was no testimony that the discomfort was so acutely severe that it made it difficult or dangerous for him to operate the truck. Thus, there is no evidence that would bring this complaint within the Act and I find it was not a protected activity.

Adverse Action

The 21 Sep 06 "What makes you so perfect"

There was no evidence showing Hector was acting as Respondent's officer, agent, or employee. Even if he had been, the utterance of those words was not shown by any evidence to have tangible job consequences. Thus, there was no adverse action under the Act.

The 25 Sep 06 Extensive Hours

Complainant's log indicates he arrived at work on 25 Sep 06 at 0600, was on duty for 15 minutes, drove for 45 minutes, was on duty for 15 minutes, was off duty for an hour, and then was on duty non-driving from 0830 to 1700, when he drove for another two hours. Complainant testified that he was told to arrive at 0700, then was informed that they wouldn't start loading before 0900. As a result, he had two hours to waste and went to a truck stop and just waited. He conceded he was paid for those hours. Complainant's testimony was inconsistent with the log and not credible. In any event, being paid for two hours while he was waiting for a load is not a negative and tangible job consequence. Therefore, I find no adverse action.

The 29 Sep 06 No Truck Availability and The 3 Oct 06 No Assignments

Complainant testified and the logs show that he complained about the seat in the Volvo truck and said he could not drive it. Complainant testified that on 29 Sep 08 he told Respondent he could not drive the truck. The logs show Complainant was off duty

from 29 Sep through 3 Oct 06, but then drove daily from 4 through 7 Oct 06 and again from 9 through 13 Oct 06. Thus, the weight of the evidence is that Respondent did not actively deny Complainant any assignments, but rather accommodated his complaints about the Volvo cab. Therefore, I find no adverse action. However, even if the lack of assignments were considered adverse action, the fact that Respondent sent him back out on the road and offered him weekend long haul trips, consistent with his request, is evidence that the lack of assignments from 29 Sep through 3 Oct 06 was not related to any protected activity. Consequently, I find Complainant has failed to carry his burden on this issue.

The 16 Oct 06 Teasing, Harassment, and Retaliation

Complainant testified that on 16 Oct 06, he was issued an over-the-road dispatch, but it was given in such a way that he could not complete it as scheduled. He stated that he went in and waited three and a half hours before Respondent informed him that he was going to get a three day suspension because of the dispatch that he had rejected the Friday before. Respondent could have informed him of the suspension on Friday, but chose not to do so until Monday. Complainant also stated that in early October, Respondent gave him trips that he had to turn down because there was not enough time to actually do them; he claims that he suffered harassment, intimidation, and teasing as a result.

The logs show that on that day, Complainant was finishing two days off and had a reset with maximum hours available. He arrived at work at 0800 and was on duty until going home at 1130.

Complainant simply failed to offer any credible evidence of any specific tangible job consequence he suffered on this date in terms of teasing or harassment.

To the extent that the suspension was an adverse action and is properly within this allegation, I find Steven Johnson's testimony to be more credible than that of Complainant. I find that Respondent suspended Complainant because Complainant refused a dispatch for reasons unrelated to any protected activity (he did not want to go and had a family member's funeral to attend) and refused to provide his logs. Thus, I find Complainant failed to establish Respondent suspended him because of any protected activity.

The 29 Aug 06 Firing

As Complainant's only protected activity occurred on 21 Sep 06, Complainant's 29 Aug 06 firing could not have been motivated by a protected activity.

The 20 Oct 06 Firing

The 20 Oct 06 firing was clearly a tangible job consequence. It occurred after and close enough in time to warrant an inference of motivation. However, Respondent articulated a non-discriminatory reason for the firing and the burden is on the Complainant to show he was fired because of his protected activity. I find Steven Johnson's testimony to be more credible than that of Complainant. Even though Complainant refused to continue his trip on 21 Sep 06, Respondent continued to give Complainant dispatches and even tried to accommodate Complainant's preference for weekend long haul trips. The weight of the evidence is that Respondent fired Complainant not because of his refusal to continue his trip on 21 Sep 06, but because Complainant refused a dispatch for reasons unrelated to any protected activity (he did not want to go and had a family member's funeral to attend) and refused to provide his logs.

ORDER AND DECISION

The Complaint is **Dismissed**.

ORDERED this 25th day of June, 2008 at Covington, Louisiana.

A

PATRICK M. ROSENOW
Administrative Law Judge

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, Suite S-5220, 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.