U.S. Department of Labor

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Issue Date: 30 June 2008

CASE NO.: 2007-STA-00042

In the Matter of

ALVIN B. JACKSON,
Complainant,

v.

ARROW CRITICAL SUPPLY SOLUTIONS, INC. and CRITICAL SUPPLY SOLUTIONS INC.,
Respondents.

Appearances:

Complainant Pro Se

Matthew Cohen, President of Respondent Companies,
For Respondents

Before:
Administrative Law Judge Janice K. Bullard

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105[1] ("the Act" of "STAA" hereinafter), and implementing regulations set forth at 29 C.F.R. part 1978. Section 405 of the Act provides protection from retaliation against employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules. The pertinent provisions of the Act prohibit the discharge or discipline of, or any

[1] On August 3, 2007, President Bush signed "The Implementing Recommendations of the 9/11 Commission Act of 2007" (hereinafter "9/11 Act"). The 9/11 Act includes the "National Transit Systems Security Act of 2007." ("NTSSA"). This is a new law which has the purpose of minimizing security threats and of maximizing the abilities of public transportation systems to mitigate damage that may result from terrorist attacks. Section 1413 provides employee protection (or "whistleblower") coverage for public transportation employees. The Act did not include a specific provision for retroactivity, and therefore, I conclude that it does not apply to the instant adjudication. See, Elbert v. True Value Co., No. 07-CV-03629.

other discriminatory act against, covered employees. This recommended decision and order is also governed by those provisions, and the provisions of 29 C.F.R. Part 18.

I. PROCEDURAL BACKGROUND

In September, 2005, Alvin B. Jackson ("Complainant" hereinafter) began his employment with the companies owned by Matthew Cohen, Arrow Critical Supply Solutions and Critical Supply Solutions ("Respondents" or "Arrow" hereinafter). Complainant made deliveries of various types of cargo for third parties who contracted with Arrow. On March 13, 2007, Complainant was discharged from his position as a commercial truck operator. Complainant had been placed on probation on March 7, 2007. On March 26, 2007, Complainant filed a complaint against Respondents with the United States Department of Labor's Office of Occupational Safety and Health Administration ("OSHA" hereinafter) alleging that he was terminated for refusing to continually drive in violation of Department of Transportation ("DOT" hereinafter) hours of service. OSHA investigated the complaint under its Section 11(c) authority, in addition to the whistleblowing provisions of the STAA. In Findings issued on July 24, 2007, OSHA dismissed Complainant's complaints.

Complainant appealed that determination to the Office of Administrative Law Judges ("OALJ") and requested a hearing in correspondence docketed August 17, 2007. The case was assigned to me and by Order and Notice issued August 17, 2007, I scheduled a hearing for September 5, 2007. On August 30, 2007, Complainant requested a continuance of the matter, and by Order issued September 4, 2007, I granted a continuance and rescheduled the hearing for November 26, 2007.

The hearing was held on November 26, 2007, in New York, New York. The parties appeared and gave testimony and submitted documentary evidence. Complainant represented himself at the hearing, and the President of the corporate Respondents, Matthew Cohen, represented those entities. After the hearing, the corporate Respondents retained counsel, and attorney Jeffrey M. Schlossberg entered his appearance on behalf of Respondents.

At the hearing, I admitted to the record exhibits that were subsequently identified as CX-1 through CX 11, which included evidence that I received post-hearing. I admitted all of Respondents' documents as well, which were identified generally as EX 1 through EX 20[2]. Some were duplicative of Complainant's records, and of the administrative record involving OSHA's investigation and findings. I shall provide a more specific description of those documents later in this decision. I also received Respondents' post-hearing submissions, which were sent in response to an Order that I issued on November 29, 2007. That evidence is identified as EX 21 and is hereby admitted to the record. The parties' written prehearing statements and written closing arguments were submitted at the hearing and are identified as

[2] In the written closing argument, Respondents refer to exhibits by different numbers than those that I have used to identify the evidence. At the hearing Respondents submitted documents that were not completely identified by number. I subsequently identified the documents for reference in this decision. Although the numbers may vary, Respondents' evidence has all been admitted and considered.

ALJX 1 through ALJX 4. The parties also submitted written closing final statements post hearing, and those are received and admitted, and the record is closed.

The findings of fact and conclusions of law set forth in this Recommended Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties may not be specifically referenced throughout, but each has been carefully reviewed and thoughtfully considered.[3]

II. ISSUE

1. Whether Respondents took adverse employment actions against Complainant in retaliation for his alleged protected activities in violation of the STAA.

III. CONTENTIONS OF THE PARTIES

A. Complainant

Complainant contends that he was given driving assignments that required him to exceed the permissible hours allowed under Department of Transportation ("DOT") rules for consecutive driving. In addition, Complainant alleged that he was required to document fraudulent hours in his log book in violation of DOT rules. Complainant filed formal complaints with DOT in which he raised these issues. Complainant denied the validity of Respondents' stated reasons for his termination.

B. Respondents

Respondents contend that Complainant cannot establish that he engaged in protected activity. Respondents had no knowledge that Complainant had made complaints to government agencies and assert that Complainant did not raise internal complaints. Respondents deny that they violated any rules pertaining to a motor vehicle safety regulation, and furthermore deny that Complainant's discharge was related to protected activity. Respondents assert that they had legitimate purposes for terminating Complainant's employment that were not pretext for discrimination.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

1. **Testimonial Evidence**

The following summary of the testimony of the witnesses who appeared at the hearing emphasizes those facts that I consider most consistent, probative and relevant to my findings. However, in reaching my findings of fact and conclusions of law, I have carefully considered all

[3] In this Recommended Decision and Order, "ALJX" refers to exhibits identified by the Administrative Law Judge; "CX" refers to the Complainant's exhibits; "EX" refers to Respondent's exhibits; and "Tr." refers to the hearing transcript.

of the testimony of all of the witness, taking into account all relevant and probative evidence. I have evaluated the testimonial evidence by assessing its inherent consistency and its consistency with other evidence of record. I have also made assessments of the credibility of the witnesses, considering the source of information, its reasonableness, and the demeanor and behavior of the witnesses.

Alvin Jackson (Tr. at 9 - 19; 23 - 71)

Complainant testified that Respondents had a practice of promising delivery times to customers that drivers could not meet. Complainant began his employment as a driver for Arrow in September, 2005. At that time, Arrow had two trucks including a sleeper truck. During Complainant's employment, Respondents added to the fleet, and eventually had vans and box trucks. Complainant drove all of the vehicles, delivering various cargos for third parties under contract with Arrow. He traveled throughout the east coast usually, and occasionally drove to Syracuse and Buffalo. Complainant recalled driving to Indiana and Chicago. Most of the hauls were long.

Complainant reported to work at about 11:00 a.m. or noon, and would be given assignments that often required him to report to the airport for deliveries. He explained that he often had to wait for hours at the airport, and then leave for a trip that would take nine or ten hours of driving time. In such instances, he'd have as many as 18 hours on the clock. Complainant explained that DOT rules prohibited driving for more than eleven consecutive hours. Complainant kept his hours in log books, which he purchased. He said that Arrow only recently began to provide the drivers with log and inspection books.

Complainant described the log books as broken into sections for off duty and on duty time, and for driving and not driving time. He documented his daily activities in the books. As an example, Complainant described his log for December 4, 2005, which reflected that he reported for duty at 5:00 a.m. at the company's office in Great Neck. He performed a pre-trip inspection, and at 7:30 was in Elkton Maryland. He took a 45 minute break and continued to Richmond Virginia, arriving around noon. He believed that in this instance, the cargo was already loaded, but he often went to the airport and loaded the cargo himself. Complainant observed that although the sample he described did not show a violation of time, there are other "log books when [he] actually went to Nashville Tennessee, or Knoxville, in one day. Or, going to Buffalo, New York and returned. Which Buffalo is ten hours from here. You can't go to Buffalo and return back to Great Neck in one day, but [he] did…" Tr. at 31.

Complainant testified that he did not keep accurate records of his time on the road in the logs, but started to record his actual hours sometime around Thanksgiving, 2006. He recalled that he left Great Neck at 4:00 a.m. for a trip to Boston and New Hampshire. Complainant stated:

> This is the actual log. I left Great Neck at three o'clock in the morning. Didn't get to Boston till nine o'clock that morning, traffic. Boston is worse than New York. I get to Boston. The freight was not ready. I actually went to Boston to pick up freight, which is very seldom we do that. A lot of times,

> we pick up freight at JFK. So, I had to wait one, two, three hours in Boston to pick this freight up. Then, I had to make the delivery. The delivery was also made in Massachusetts. It's a place called Leominster, Massachusetts, which was another two hours away…from Boston. When I get to this place, it was five o'clock. I get a call from dispatch. They wanted me to go to New Hampshire to pick up another order and bring it back down to Boston. And, at that time, I told them I did not have any hours, I cannot do this. Half an hour later, I get a phone call telling me, Matt Cohen told them to tell me that they did not want me to come to work the rest of the week. They were suspending me for three days.

Tr. at 33-34.

Complainant then complained to the DOT anonymously because he did not want to lose his job. Complainant was told that an anonymous complaint would not be investigated, and so he provided his name, the DOT truck numbers and information about his excess hours. Before his suspension, Complainant did not report his actual hours in his log books, and stated that he "cheated on the books". Tr. at 36. No one told Complainant to report fewer hours than he drove, because he was protecting himself from potential problems. Complainant explained, "if you was to get caught over the road violating, of course they pull you out of service for ten hours. And it affects your driver's license. You get so many violations that, of course, they might yank your license. You go out there and kill or maim somebody and you in a DOT violation, you go to jail. So I did it at that particular time, basically, just to protect myself." Tr. at 38. After the incident in Boston in November, Complainant started to record his actual hours, and carried around his DOT complaint form. Complainant kept a copy of his logs but turned them in every day. To his knowledge, no one at the company looked at the log books because no one ever said anything to him about his hours.

Complainant testified that he did not tell anyone about the DOT complaint, but told Mr. Cohen that he was "going to stop violating". Complainant stated that DOT investigated the company and found that the company did not have proper records of driver's information. He believed the investigation was in January, but he was on the road when DOT investigators came to the business site. His information about the inspection came from other people. Complainant testified that he discussed the inspection with Mr. Cohen during an argument about deductions that Arrow was taking from his pay.

Complainant described an incident that occurred in September, 2006, when he came to the office and was told by another employee that Mr. Cohen had charged him with attempting to use the company gas card for personal use. Complainant denied using the card for gas for his own use. The company had credit cards for gas that were always left in the trucks. The trucks were never locked, and were sometimes parked on the street. When employees used a card, they were supposed to also input the last four numbers of their social security numbers. Employees get receipts for gas purchases which are turned in to the company. Mr. Cohen told Complainant that his number was associated with unauthorized gas purchases. Mr. Cohen told Complainant that he would not go to the authorities, but rather would deduct the costs of the purchases from his pay. Complainant advised Mr. Cohen that the deductions were illegal.

Complainant complained about working excess hours from the beginning of his employment with the company. He complained that he was not being paid fairly for the hours he worked, because he thought he would be paid a weekly salary, and learned that hours would be deducted.

Complainant admitted that he had been in an accident on a Friday that he reported by phone to his dispatcher. Complainant described the incident, which was noted by Port Authority police, and which ended with the other party declining to make a report to the police. Complainant did not believe that the Port Authority officer made a report. He advised the dispatcher that no harm was done in the accident, and that he would make a report when he next returned to the office. He returned to the office site at about 9:30 or 10:00 p.m., and no one was there. Complainant completed an accident report when he came into the office on Monday. Meanwhile, he learned from his dispatcher that the other individual involved in the accident had called the company and reported the accident. He had given the company's number to the other person involved in the accident. Complainant stated that he had not seen a company procedure regarding reporting accidents, but was aware of the accident report form. At the time of this accident, Mr. Cohen was in Israel, and Complainant could not say when he learned of the accident.

Complainant recalled having had an accident when he first started working for Arrow that was resolved "off the books". Tr. at 53. Complainant was at fault in that accident, and paid for the damages by having his pay docked. He was not suspended or otherwise disciplined for that first accident.

Shortly after the accident, Complainant's dispatcher personally gave him a letter that talked about putting him on probation. The letter was dated March 12, 2007. Complainant agreed that the date of the accident was February 23, 2007, as noted in the letter. The letter also referred to a job for Rochester, New York on March 1, 2007. Complainant's log book reflected that he left Great Neck at 4:00 a.m. and got to Albany at about 8:00 where he gassed up, and then continued to Rochester, arriving around noon. Complainant's truck had a broken side window, but Complainant decided to take a chance and drive the truck anyway. He was charged with driving a truck with broken glass, and for being in Kingston, only two hours out of the local area. Complainant did not understand this charge, as Kingston is about 35 minutes from Albany, which is when he called the office about the broken glass. He was also charged with not verifying that a defect was repaired in a timely fashion. Complainant did not do any work on March 12, 2007, when he was given the letter.

Complainant went to work on March 13, 2007, intending to speak to Mr. Cohen about the letter and the probationary period. He had a discussion with the dispatcher first, who consulted with Mr. Cohen, and then told Complainant he was fired. Complainant contended that the dispatcher couldn't fire him, and then Mr. Cohen met with him and told him he was fired.

Yao Yao (Tr. at 83 - 96)

Mr. Yao works for Respondents as a driver. He generally drives the company van. He recalled an occasion where Mr. Cohen accused him of using the company credit card to buy

gasoline for his own car. Mr. Yao denied that he had done so, and told Mr. Cohen that. Mr. Yao was insulted by the accusation, and observed that the gas that was purchased is not the grade that he would use in his personal vehicle. He could not say whether his pay was docked for the cost of the gas. Mr. Cohen based his accusation on the fact that purchases were made using Mr. Yao's identification number. Mr. Yao was able to show that he was not working at the time of the gas transactions. Mr. Yao talked about the incident with a supervisor "Rich", who told Mr. Yao that he suspected another individual of using Mr. Yao's number for the purchases. Mr. Yao did not know the name of the suspect. He changed his identification number and has heard nothing more on the subject.

Mr. Yao stated that the gas receipts don't show the personal identification number, and the only way someone could use another's number was if they knew his social security number, or if the individual shared the information personally. Mr. Yao explained that his social security number is printed on his paycheck, and that all of the employees' paychecks are kept in a public area that is accessible to anyone, and that is not locked. He testified that the envelopes containing paychecks were not always sealed.

Alfonso Miller (Tr. at 97 - 125)

Mr. Miller testified that he worked for Arrow on and off from 2005 until September, 2007. He worked two jobs, and went to Arrow when his other job was over. Mr. Miller stated that he often under reported the hours that he drove, and he left Arrow because he was uncomfortable being in violation. Mr. Miller testified that he was ordered to keep driving by the dispatcher or Mr. Cohen despite the number of hours he had worked. He was over his hours limit, but his log book did not reflect that. Mr. Miller kept false books because he did not want to be given a citation that would go against his driving record. He recalled an incident when he was stopped by the DOT and issued a violation for a broken taillight. He continued to his destination and said he could not drive any more because of his hours. Mr. Miller testified: "And it didn't matter to them. It didn't matter to Matt. It didn't matter to him. He wanted the job done. So in order not to incur any further repercussions, I just did it. But at some point, you know, you got to stop". Tr. at 101-102. Mr. Miller complained that he was out of time to Mr. Cohen, who did not care about that. Mr. Miller brought up the citation because it showed where and when he was stopped, and corroborated that he could not have completed his assignment within the requisite hours. He explained that the driver was punished for infractions regarding time, not the company.

One of Mr. Miller's duties was to move trucks parked on the street in order to prevent parking citations. He was not completely happy with that assignment. He earned a flat weekly salary for that work, but if he worked a haul, he could earn $200.00 per day. Mr. Miller would earn the weekly salary in addition to the rate for a haul, even if he didn't move cars and instead drove a haul. The hours he spent moving cars was not counted against his driving hours, as he wasn't traveling more than a city block. Mr. Miller testified that his delivery vehicles had a sleeper most of the time.

Afzal Basrudin (Tr. at 125 - 154)

Mr. Basrudin was employed by Respondents as an over the road driver at the time that Complainant joined the company. He had worked for the company for five and one half years. He drove a truck equipped with a sleeper, television and microwave. The only other truck at that time did not have a sleeper. Mr. Basrudin drove other trucks when needed, and violated rules regarding the hours he drove and the proper documentation of those hours. At times he continued to drive past his allowed hours in order to get deliveries completed. There were many times when he waited for hours at the airport to pick up a delivery before being able to start the drive to the destination of the load. Mr. Basrudin did not turn down work often, and usually only because he had a personal conflict with a job.

At the time of the hearing, Mr. Basrudin's hours had not been reduced, though he was doing more local driving because business was slow. Mr. Basrudin kept logs since he started driving over the road. He was familiar with the procedures and practiced them. Respondents did not provide the log books, but he obtained them himself. He was reimbursed for the cost of the books. He handed his log books into the company's office personnel, and consistently did that throughout his employment with Arrow. He does not keep a copy of the books for his own records. He believed the company was enforcing the rules regarding the maintenance of log books, but he had practiced the rule from the start. Mr. Basrudin testified that he had manipulated log books to keep his license clean. He did not want his log books to reflect that he was a repeat offender. He testified that he frequently under-reported hours, but not on every job. He cited the traffic in and around New York City as presenting problems with hours, as well as congestion in picking up freight.

Mr. Basrudin also kept maintenance records on his truck. When maintenance or repairs were required, he informed Rich, who made an appointment for the repair. Mr. Basrudin believed that the company followed up on reported repairs on his vehicle, noting that he was the usual driver of that truck. He acknowledged that if a driver did not report a defect, the office would not know about the problem. Mr. Basrudin explained that if a defect occurred during a road trip, the DOT rules allowed time for repairs, even if issued a citation. Mr. Basrudin testified that many deliveries are staged for drivers, in that a local driver or part-time driver would retrieve freight and bring it back to the work site.

Mr. Basrudin testified that he is not directed to leave for a trip at a specific time. Drivers leave for a trip when they think it is best to meet the time set for delivery. He acknowledged that a two hour window for the delivery time is typical. Mr. Basrudin explained that if he has to pick up freight and then deliver it, he can have problems with time. He is paid for the hours it takes him to return from making a delivery. He explained that he will typically return after a delivery even when he's "pushing [his] legal…limit". Tr. at 144. As an example, he pointed to Syracuse, which takes between five and one-half and six hours to make each way. On those trips, Mr. Basrudin risks going over his hours when he returns home. The company makes deliveries to Syracuse four times a week.

He has never been threatened with termination if he doesn't make deliveries on time, but he said that he "just wants to keep [his] job". Tr. at 145. Mr. Basrudin testified that he was

taking chances by manipulating books, because an officer with a good sense of geography would know that he could not make certain round trips within the allowed hours. At times he asked for approval to stay at a hotel or slept in his truck rather than return, but those occasions are rare.

Mr. Basrudin observed that the GPX system on Respondents' trucks needed to be readjusted a couple of times a day. He did not think it was a reliable source to show when drivers left or reached a locations. Mr. Basrudin believed that Mr. Cohen was aware of the log books.

Anthony Marcano (Tr. at 154 - 173)

Mr. Marcano drove mostly smaller trucks, and was paid a salary. He worked five or six days a week, and was not familiar with DOT rules regarding hours. Complainant explained a lot of the rules about driving time. Mr. Marcano was paid extra for working extra time and was willing to do so. At times he felt obliged to take a job because every other driver had an assignment, but since he was paid extra, he was willing to take on the work. He recalled having an accident that resulted in a police report. He went to court for the accident, but he was not disciplined by Mr. Cohen in any manner. He did not have to pay for any damages.

Mr. Marcano recalled one instance where he had to pick up freight at the airport and waited for five or six hours for the freight that he was then expected to deliver to Erie, Pennsylvania. He called dispatch and expressed his concerns about time and was told that he had to deliver it because there was no one else who could be assigned the work. Mr. Marcano testified: "that was a problem a lot when [Complainant] used to work there. It's not so much a problem now". Tr. at 161. Respondents now have more vehicles and more drivers. Mr. Marcano stated that he stopped to rest when he was tired, but if a customer pressed for delivery by a certain time, he did his best to please the customer. On the Erie trip, he arrived at his destination at night, and the customer's business was closed. He slept in the truck because no one answered his call to Arrow to get approval for a hotel room. He did not call Mr. Cohen personally because he had never been approved to stay at a hotel:

But what I understood, I never got to stay over the road, it was only like a few times, a handful of times, like three or four times maybe, I spent the night—I had to spend the night in the truck. [Mr. Cohen] use to tell me, I'm going to give you the money on your check instead of giving it to the hotel. So,--But, I thought that by [Mr. Cohen] saying that, when I see my check the following week, I would see that money, the hotel money, on my check.

Tr. at 169.

Mr. Marcano reiterated that he was not forced to drive long hours, but felt forced in circumstances where a dispatcher told him that no one else could do the work.

Matthew Cohen (Tr. at 19 - 23; 176 - 225)

Mr. Cohen stated that his company is in the delivery business and employs 11 or 12 employees. His staff changes with season and need. Three of the employees work in the office: two dispatchers and an accounting employee. He does work that he characterized as sales. The rest of the employees are drivers, a few of whom are part-time employees. When the business first started, Mr. Cohen relied upon outside consultants to help them. Mr. Cohen testified that the company has a low accident rate and a very good safety rating, as evidenced by decreases in insurance premiums.

Drivers are paid a combination of salary and commission. A few over the road drivers do not live in New York and are mileage based and paid hourly. There is no one manner of payment that benefits drivers, because the work varies. Every vehicle except two has a sleeper for drivers to use, and hotel bills are not reimbursed. Mr. Cohen stated that he paid Complainant for 3,500 [dollars] of reimbursable expenses in one year, including 33 hotel stays. He did not need to ask permission to use a hotel, and was reimbursed for using them.

Respondents retain a DOT consultant, who communicates with his two dispatchers. Those dispatchers have direct oversight over drivers' log books. Mr. Cohen is not involved in the daily operational control of the company, and is primarily responsible for generating sales and negotiating contracts with clients.

Mr. Cohen described Complainant as "a constant problem" in that he made himself unavailable to do work. Mr. Cohen testified:

> He would constantly have issues, and let's use the example of the—the case in point he brought up about the delivery to Massachusetts, where he would try to show that he didn't have the hours, or couldn't do something to benefit himself to come home. He would use excuses constantly. I'm suppose to pick up my wife today. I'm suppose to do this. I'm suppose to do that. And, he would make himself unavailable for things.

Tr. at 182. Mr. Cohen stated that Respondents tried to accommodate driver's personal needs, and would not give them an assignment that conflicted with a personal situation if the driver advised them of the problem.

Mr. Cohen asserted that Respondents did not force drivers to exceed DOT regulations about hours, pointing out employees could stay in sleepers or hotels. He maintained that when Complainant drove more hours than he should have, it was to convenience himself. Mr. Cohen disputed Complainant's description of the trip to Rochester that was one of the bases for Complainant's probation. Mr. Cohen testified that he only discovered Complainant's hours through the investigation triggered by his whistleblower complaint. Mr. Cohen stated that DOT did not institute an investigation, but conducted an audit that found them in compliance. He was unable to initiate a pay plan that would incentivize the drivers to comply with DOT rules. Mr. Cohen stated:

> I've put them on salary. If they're on salary, they don't have to be back. That doesn't work. When on commission, then they want to go ahead and do their own thing and stay out there all day…There's nothing I can do. I'm not in the vehicle with the driver. The drivers come and go as they need to, as they please. The vehicles are, a lot of times, staged. The deliveries are for the next morning. I can't be in the vehicle, or hire somebody to be with them to sit down and say, it's 11 hours, you have to stop. But I will pay them for the hotel. I will---I have $3,500 worth of reimbursements. Food that we pay for them on the road, so that they will stay out, so that it's not an out-of pocket expense…

Tr. at 186. Mr. Cohen further explained that drivers have the choice to say how they want to be paid. During his employment, Complainant was paid on a salary basis, on an hourly basis, and with commission. Mr. Cohen's perception was that Complainant seemed to have a problem with any manner of payment. Salaried people get docked a day if they stay out of work for a personal matter.

Mr. Cohen testified that he first learned that his drivers were probably not complying with DOT hours when Respondents hired a DOT compliance officer in October or November 2006. Mr. Cohen denied that Complainant complained about working excess hours, and explained that he believed Complainant wanted "to go out and do only work that would have him go out at a certain time and come back at a certain time". Tr. at 188. Respondents could not accommodate that approach to the job because the work was not uniform. Mr. Cohen observed that "whatever delivery came up, one would suit Mr. Jackson, he had [no] problem going on it. One would not suit Mr. Jackson, he had a very big issue going about it." Tr. at 189.

Mr. Cohen testified that Complainant was encouraged to do his job legally and was told to check into a hotel or use a sleeper berth. He stated that Complainant was told that if he ran out of hours, he should let them know that he couldn't deliver his load "in a straight shot". Id. Mr. Cohen admitted that there were times when labor was tight, and when delivery times were missed. He said that it was a frequent occurrence, and Arrow would not risk liability by flouting rules, and instead would reschedule the delivery. He pointed to the company policy of reimbursing hotels and not financially punishing drivers for late deliveries in support of his contention.

Mr. Cohen testified that DOT conducted an audit on February 14, 2007. The company had not been audited before, but the audit occurred within one year of acquiring the type of license that would trigger an audit for new companies. He did not think it was related to a complaint, and did not know of Complainant's complaint to DOT until after he was discharged. Respondents expected such an audit, and hired a DOT consultant. Arrow was given a satisfactory rating, but deficiencies were noted for which penalties were assessed. Three fines related to recordkeeping infractions were imposed. As a result of the audit, Arrow tightened some practices and issued memos about practices. The DOT compliance people were consulted more regularly. Mr. Cohen observed that a satisfactory rating is the best that can be achieved.

Mr. Cohen addressed the memorandum of March 5, 2007, in which Complainant was advised that he was being placed on probation. With respect to the accident of February 23, 2007, Mr. Cohen testified that he learned of it when he received a call on his cell phone from an individual who was involved in the accident. Mr. Cohen was upset that he learned of the accident this way, noting that Complainant could have called his cell phone or the dispatchers on their cell phones to tell them about the accident. The dispatcher "Mitch" told Mr. Cohen that Mr. Jackson did not report the accident by phone. Mr. Cohen considered Complainant's conduct showed that he had no regard for company procedure. He also was concerned that this represented Complainant's third accident.

The second grounds for probation was Mr. Cohen's perception about Complainant's conduct on the trip to Rochester. He concluded that Complainant incurred damage to a vehicle, incurred additional tolls and gas by traveling "out of route", violated his DOT hours, and still did not make the delivery. Tr. at 207. The memorandum noted that Mr. Jackson went home, and Mr. Cohen explained how he reached this conclusion:

I held the following colloquy with Mr. Cohen:

Q: Explain to me [how you know that] Mr. Jackson went home. I mean, I understand that the freight was loaded about 3:35 in the afternoon, and from what I've heard the testimony, after waiting for it to be loaded at the airport, I guess, Newark –

A Okay.

Q -- for a number of hours.

A Okay.

Q Whenever they arrived. So, they were there for six hours, four hours, whatever it was. I guess I don't see in here -- I really don't understand what you're saying.

A He's suppose to go -- The freight was loaded at 15:35, that's --

Q 3:35 p.m.

A -- 3:35. Right. He's supposed to deliver the next morning in Rochester.

Q Okay.

A Okay? What he did was, he decided to bring the vehicle back after hours, go home, do whatever it is that Alvin does, leave out again in the morning for a trip then where he ended up breaking his DOT violations, or hours of service rules. And, in the context of that, incurring more gas, more tolls and damaging the vehicle, and not making the delivery. So, I explained, you're not a local delivery agent. You don't go out of route to go home, to convenience yourself. You incurred extra time, extra tolls, extra gas, and subsequently, the vehicle was damaged, and you got a ticket, which probably -- I can't say definitively, wouldn't have happened. But, probably, didn't happen between going the 60 miles from where he delivered to where he ended up getting a ticket. But, when he went all the way back to New York and then back out again. So --

Q Okay. And, you could tell that from what?

A He was showing you on his -- He was making the argument on his DOT log book, how could I make this delivery if I went to -- to Great Neck and I unloaded in Great Neck and, then, I left out at 4:00 a.m. in the morning. All of that is not what he's supposed to be doing. So, he's making the argument, himself, that he's doing exactly what he's not supposed to do.

Q So, this trip to Rochester is a different trip from the one I heard testimony. I heard Mr. Jackson talk about being stuck at the airport and, then, going up --

A Yes. It's different.

Q -- he was there with Mr. Marcano. Those are two different trips.

A Completely different.

Tr. at 207 - 209.

Mr. Cohen also based Complainant's probation on Mr. Jackson's attitude regarding a maintenance issue. Complainant was given a citation for driving without a license plate, and instead of arranging for the repair, Mr. Jackson argued that all he had to do was note the maintenance problem in the DOT pre-inspection book. Mr. Cohen was upset that Complainant was unwilling to take responsibility to keep his vehicle road worthy. He explained that the problem went unresolved for two weeks because Complainant was the only person using the truck in question, and was the only person with access to the inspection book. Mr. Cohen stated that the company's policy was for drivers to take initiative to get needed repairs completed.

Mr. Cohen did not intend to terminate Complainant's employment when he asked the dispatcher to review the letter with Mr. Jackson. Complainant was fired for his reaction to the letter. When Mr. Cohen spoke with Mr. Jackson about the concerns noted on the letter, he concluded that Complainant was "not willing to take any responsibility" for his conduct. Tr. at 206. Mr. Cohen stated: "If he had shown an interest in making an improvement, and if he had genuinely said, I see the points that you're making. I understand the need for improvement. I understand the cooperation that needs to transpire between the dispatch and the driver. He would be gainfully employed with us today." Tr. at 212.

Mr. Cohen discussed the memorandum with Complainant on the morning after Complainant received it. Complainant and he argued about Mr. Cohen's expectations, and Cohen fired him. In addition to Complainant's reaction to the memo, Mr. Cohen's decision was influenced by Complainant's past conduct, including the credit card incident, which Complainant admitted to using according to Mr. Cohen. Complainant agreed to repay the credit card charges through payroll deductions, which were taken for 52 weeks. A subsequent inquiry from the New York DOL established that the payroll garnishment was not legal, but at the time, Mr. Cohen believed it a fair way to resolve the issue, short of discharging Mr. Jackson. Complainant's three accidents also factored into Mr. Cohen's decision to discharge him.

2. **Documentary and Other Evidence**

Complainant's evidence

CX 1 Complaints made by Complainant to DOT, dated December 27, 2006 and March 12, 2007

CX 2 Respondents' memorandum to Complainant dated March 5, 2007 that describes performance lapses and places him on probation until June 30, 2007

CX 3 Letters from Complainant to DOT

CX 4 Correspondence regarding Complainant's complaints to New York State's Department of Labor

CX 5 Sample "punch reports"

CX 6 Samples of Complainant's drivers' logs

CX 7 Summary of Complainant's earnings

CX 8 Samples of Complainant's earnings statements

CX 9 Respondents' memorandum to all drivers regarding delay in pay for the week October 22 through October 27

CX 10 Statement of Complainant's claim for compensatory damages following his termination

CX 11 Demonstrative Chart constructed by Complainant that includes a sample of vehicle inspection report log; and samples of driver's logs. Complainant uses this chart to support his arguments regarding undocumented and unpaid hours exceeding eleven in a day.

Respondents' Evidence

EX 1 Complainant's application for employment with qualifications and certifications

EX 2 Documents related to Complainant's March 27, 2007 complaint to OSHA
(a) Whistleblower application
(b) April 4, 2007 acknowledgment of complaint addressed to Complainant
(c) April 4, 2007 notice of complaint addressed to Respondents

EX 3 Respondents' response to OSHA's correspondence of April 4, 2007

EX 4 Probation Letter of March 5, 2007

EX 5 (Excluded) Hearsay statements of individuals

EX 6 Duplicate of Respondents' response to OSHA's notice letter; duplicate of probation letter

EX 7 Respondents' May 21, 2007 statement by Matthew Cohen to OSHA investigator

EX 8 Proof of timely distribution of suspension memorandum to Complainant

EX 9 Accident Report of 2/22/07

EX 10 (Excluded) Documents related to alleged misappropriation of funds (post termination)

EX 11 Driver Handbook

EX 12 Log Book reconstruction and reports

EX 13 Respondents' Safety rating and Insurance information

EX 14 Correspondence related to complaint to New York State Department of Labor

EX 15 OSHA's findings

EX 16 OSHA's final investigative report

EX 17 Information about Arrow

EX 18 Documents relating to gasoline usage by Complainant

EX 19 Hours of Service Rule

EX 20 Statement of Respondents' president to DOT regarding pre-employment drug testing

EX 21 Copies of hotel and expenses paid to Complainant by Arrow for period from December 1, 2005 through December 26, 2006

B. Statement of the Law

The STAA, 49 U.S.C.A. § 31105(a)(1), provides that an employer may not "discharge", "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. Section 405 of the STAA was enacted to encourage employees in the transportation industry to report employers' noncompliance with safety regulations governing commercial motor vehicles and to protect these "whistle-blowers" by forbidding the employer to discharge, or to take other adverse employment action, in retaliation for their safety complaints. Brock v. Roadway Express, Inc., 481 U.S. 250, 258, 262 (1987); 49 U.S.C. app. § 2305(a),(b). The STAA does not, however, prohibit an employer from discharging a whistleblower where the discharge is not motivated by retaliatory animus. See, e.g., Newkirk v. Cypress Trucking Lines, Inc., 88-STA-17 (Sec'y Feb. 13, 1989), slip op. at 9.

The Act prohibits discriminating against an employee who "has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order…" 49 U.S.C. § 31105(a)(1)(A). STAA section 405(b) protects an employee who refuses to operate a commercial motor vehicle when such operation would violate a federal

motor vehicle standard. § 31105(a)(1)(B)(i). A communication about the violation to a supervisor is considered protected activity. Harrison v. Roadway Express, Inc., ARB No. 00-048, ALJ No. 1999 STA 37 (ARB Dec. 31, 2002); Goggin v. Administrative Review Board, No. 97-4340 (6th Cir. Jan. 15, 1999)(unpublished) (available at 1999 WL 68694) (case below 1996-STA-25) (Internal complaints to management are protected activity under the whistleblower provision of the STAA).

The United States DOT, through its agency the Federal Motor Carrier Safety Administration ("FMCSA"), has promulgated regulations that apply to all employers, employees, and commercial motor vehicles which transport property or passengers in interstate commerce, set forth at 49 C.F.R. part 390, Subpart B. Motor carriers must adhere to all licensing and other requirements set forth for drivers in part 325 of subchapter A and any subchapter of Part 390 of the Federal Motor Carrier Safety Regulations ("FMCSR"). 49 C.F.R. § 390.11 49 C.F.R. § 395.3(a)(1) provides that "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 more than 11 cumulative hours following 10 consecutive hours off duty". In addition, drivers are prohibited from driving more than 60 hours in a 7 day period if the carrier does not operate every day of the week, or 70 hours if the carrier operates every day of the week. 49 C.F.R. § 395.3(b)(1) and (2).

To prevail under the STAA, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. Schwartz v. Young's Commercial Transfer, Inc., ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); Assistant Sac's v. Minnesota Corn Processors, Inc., ABR No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003). The burdens of proof that apply to allegations of discrimination under Title VII of the Civil Rights Act of 1964 have been adapted to the determination of whether violations of the whistleblower protections of the STAA have occurred. McDonnell Douglas Corp. v. Green, 411 .S. 792 (1973).

Under the McDonnell-Douglas framework, the complainant has the initial burden of establishing a prima facie case of retaliation. The prima facie case is established where complainant has shown an inference that protected activity was the likely reason for the adverse employment action. The burden of production then shifts to Respondents to articulate a legitimate, nondiscriminatory reason for its employment decision. Mc-Donnell Douglas Corp. v. Green, supra. The respondent need only articulate a legitimate reason for its action. St. Mary's Honor Center v. Hicks, 509 I.S. 502 (1993). If Respondents' reason rebuts the inference of retaliation, then Complainant must demonstrate by a preponderance of the evidence that the stated legitimate reasons for the adverse action were a pretext. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, supra. at 2752-56. In addition to discounting the employer's explanation, "the fact finder must believe the [complainant's] explanation of intentional discrimination." Id. The complainant must show that

the reason for the adverse action was his protected safety complaints. Pike v. Public Storage Companies Inc., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). "When a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." Mitchell v. Link Trucking, Inc., ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

By establishing a prima facie case, a complainant creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, supra. In instances where a full hearing has been held, there is no need to determine whether the employee presented a *prima facie* case and whether the employer rebutted that showing. United States Postal Service Board of Governors v. Aikens, 460 U.S. 709, 713-14 (1983); Pike v. Public Storage Companies, Inc., 98-STA-35 (ARB July 8, 1998). The focus of inquiry should be whether the respondent establishes a nondiscriminatory justification for the adverse employment action. Carroll v. J.B. Hunt Transportation, 91- STA-17 (Sec'y June 23, 1992). However, where Complainant at hearing fails to demonstrate protected activity or adverse action, then he has failed to establish a prima facie case and dismissal is appropriate. Smith v. Sysco Foods of Baltimore, ARB No. 03-134, ALJ No. 2003-STA-32 (ARB Oct. 19, 2004).

Although a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the complainant must still carry the burden of proving the necessary elements of retaliation. Flener v. H.K. Cupp, Inc., 90-STA-42 (Sec'y Oct. 10, 1991).

C. Discussion and Analysis

1. **Coverage Under the Act**

The STAA provides protection from retaliation for "an employee-operator of a commercial motor vehicle" who has engaged in protected activity. § 31105(a)(1)(A). A "commercial motor vehicle" includes "any self-propelled…vehicle used on the highways in commerce principally to transport passengers or cargo" with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. app. § 2301(1).

Although Respondents did not dispute coverage under the Act, nor allege that Complainant was not an employee within the scope of the Act, I find it appropriate to address coverage. See, Minne v. Star Air, Inc. ARB No. 05-005, ALJ No. 2004-STA-00026 (ARB Oct. 31, 2007). Complainant used highways to haul large loads of cargo for Arrow's customers in commercial tractor trailers that are within the weight requirement for coverage under the STAA. The record reflects that Complainant was assigned work by Respondents, to be completed within hours established by Respondents. Complainant completed an employment application and was paid wages by Respondents, as evidenced by documents admitted to the record. EX 1; CX 8. I find that Complainant was an employee.

I find that Complainant and Respondents are covered under the Act.

2. **Protected Activity**

a. Refusal to Operate

Complainant described a trip to Boston where he stated that he refused to drive more than his allowed hours. Tr. at 33-34. Complainant maintained that he was thereafter suspended for three days. Complainant did not provide the actual date of this occurrence, but testified that it happened in late November, 2006. Shortly thereafter, he filed his complaint with DOT. STAA section 405(b) protects an employee who refuses to operate a commercial motor vehicle when such operation would violate a federal motor vehicle standard. The Appellate Review Board ("ARB") determined that a complainant need only show that he refused to drive in violation of a Federal safety rule in order to establish protected activity. Gohman v. Polar Express, Inc., 88-STA-14 (Sec'y Nov. 14, 1988). Accordingly, it appears as though Complainant's refusal on that trip constitutes protected activity. A suspension from work represents an adverse action.

Pursuant to 29 C.F.R. § 2305, "any employee who believes he has [suffered an adverse action]…in violation of [the Act] may, within one hundred and eighty days after such alleged violation occurs file…a complaint with the Secretary of Labor alleging such…" 29 C.F.R. § 2305(c)(1). The time within which the complaint must be filed begins to run "at the time of the challenged conduct and its notification, rather than the time its painful consequences are ultimately felt…" English v. Whitfield, 858 F. 2d 957, 961 (4th Cir. 1988). It is clear that Complainant could have timely raised this incident as a separate complaint of adverse action when he filed his complaint with OSHA. A thorough reading of OSHA's findings and documents related to Complainant's complaint failed to disclose any reference to the circumstances involving the suspension that Complainant described. EX 2. I therefore conclude that Complainant did not raise this issue as an instance of protected activity followed by adverse action. I note that Complainant filed a complaint with DOT shortly after this incident; however, he failed to allege the protected activity or adverse action in his complaint to OSHA. Therefore, OSHA did not have the opportunity to investigate this incident, and I shall not consider it in this adjudication.

There was no other instance in which Complainant alleged that he refused to operate his truck. Rather, the gravamen of his allegations is that he was made to repeatedly violate the hours of service regulations.

b. Complaints with DOT

In his correspondence, pleadings and testimony, Complainant has asserted that he filed complaints with DOT that raised concerns about his hours of service. Documentary evidence corroborates Complainant's assertions that he made complaints on December 27, 2006 and March 12, 2007. CX 3. The STAA whistleblower protection extends beyond just complaints relating to federal motor vehicle safety regulations, and includes any relevant motor vehicle regulation, standard or order. See, Chapman v. Heartland Express of Iowa, ARB No. 02 030, ALJ No. 2001 STA 35 (ARB Aug. 28, 2003) (as reissued under Sept. 9, 2003 errata). I find that these complaints constitute protected activity under the Act.

c. Direct reports to management about hours

Absent unusual circumstances, the reason for a work refusal should be communicated to an employer to gain protection under the STAA. See Osborn v. Cavalier Homes of Alabama, Inc., 89-STA-10 (Sec'y July 17, 1991), slip op. at 3-4; Boone v. TFE, Inc., 90-STA-7 (Sec'y July 17, 1991), slip op. at 3-4. Internal complaints are protected under the Act. See, Davis v. H.R. Hill, Inc., 86 –STA-18 (Sec'y March 18, 1987) slip op. at 3-4; Reed v. National Minerals Corp., 91-STA-34 (Sec'y July 24, 1992).

Complainant testified that he did not overtly complain about his hours to management, but on one occasion told Mr. Cohen that he would "stop violating". Tr. at 39. Complainant's testimony that he did not record his actual hours of work was corroborated by the testimony of his co-workers. As samples of his log books[4] demonstrate, he started to record actual hours beginning in late November, 2006. The log books were given to management, which is responsible for assuring compliance with DOT regulations. Accordingly, the knowledge that Complainant drove more than his allowed hours on occasion is imputed to Respondents. It is therefore conceivable to find that Complainant's log book entries constitute protected activity that Arrow knew about.

Complainant acknowledged that no one in management directed him to report fewer hours than he drove. Tr. at 37. However, Complainant and his co-workers testified that they felt under pressure to drive, so that they could make more money, and to satisfy their employer. Respondents' business was growing, and resources were at time stretched. I find it difficult to believe that management was not aware of the pressure on drivers that resulted in violations of hours. In fact, Respondents' president acknowledged that his DOT compliance specialist made him aware in the fall of 2006 that drivers were not documenting hours properly. However, I find little support to find that Respondents required Complainant to drive more hours than allowed by DOT regulation[5].

The evidence demonstrates that Complainant was authorized to stay at hotels, or in the alternative, to drive a sleeper truck so that he could avoid violating the DOT prohibition on driving hours. On many occasions, Complainant stayed at hotels at Arrow's expense, and was reimbursed the costs of those stays. EX 21. I note my colloquy with Mr. Cohen about the incentive for drivers to violate the hours of service rules so that they could increase their loads, and thereby earn more money. I recognize that the drivers felt coerced to meet delivery schedules and willingly violated hours of service rules to do so. However, the record does not establish that they would have been retaliated against for complying with the rules. I accord full credibility to Mr. Cohen's testimony about giving drivers autonomy to plot their routes and conduct deliveries within the regulatory timeframes. I also credit Mr. Cohen's explanation that it would not be in the interest of the company to assign a driver a long haul if it was known that the

[4] I acknowledge that there is no way to corroborate Complainant's documented hours, but I accept them as valid on their face, in consideration of the corroborative testimony of other drivers.

[5] The record shows that on most trips for Respondents, the drivers made deliveries and returned in empty trucks. I note that the DOT regulation prohibits a driver to drive "a property-carrying commercial motor vehicle" for more than 11 cumulative hours following 10 consecutive hours off-duty. I need not consider whether Complainant actually violated this regulation, as my findings are based on other grounds.

driver had personal business that might interfere with the job. Moreover, Arrow reimbursed drivers for hotel and related expenses when the hours of service rules were invoked.

I find that the preponderance of the evidence establishes that Complainant voluntarily violated rules regarding hours of service. Complainant frequently used hotels that Arrow paid for without any apparent punitive action from Respondents. Although I give credence to the drivers' belief that the pressure was placed on them to finish a job, they were not directed to violate service hours, nor were they punished for adhering to the rules. Although the STAA protects the rights of individuals to complain, it should not be used to permit individuals to repeatedly violate the hours of service rules and use that infraction in a claim for protection against adverse action. See, Blackann v. Roadway Express, Inc. 2005 WL 3448280 at *3 (6th Cir. 2005). I find that Complainant's repeated willful violation does not constitute protected activity under the Act.

d. Complaints to New York State Department of Labor

Filing a complaint with a state department of transportation or other authority constitutes protected activity under the STAA. See, Ass't Sec'y & Dougherty v. Bjarne Skjetne, Jr. d/b/a Bud's Bus Service, 94-STA-17 (Sec'y Mar. 16, 1995). Complainant filed a complaint with New York State's DOL about deductions taken from his pay. His complaint did not concern safety issues and does not constitute protected activity under the STAA. cf., Nix v. Nehi-RC Bottling Co., Inc**.,** 84-STA-1 (Sec'y July 13, 1984).

e. Summary

I find that Complainant has failed to produce evidence sufficient to establish that his refusal to drive in November, 2006, his complaint to the New York State DOL, or his continual willful violation of service hours constitute protected activity. Accordingly, Complainant has failed to establish a prima facie case regarding these matters and I recommend that they be dismissed. See, Smith v. Sysco Foods of Baltimore, ARB No. 03-134, ALJ No. 2003-STA-32 (ARB Oct. 19, 2004).

Complainant's complaints to DOT constitute protected activity.

3. **Adverse Action**

Under the STAA, discrimination "regarding pay, terms or privileges of employment" constitutes a prohibited adverse action. Section 31106(a)(1)(A). It has been determined that an adverse action occurs when complainant has shown that he suffered a "tangible job consequence". Shelton v. Oak Ridge Nat'l Labs, ARB No. 980100, ALJ No. 980CAA-19, slip op. at 8. (ARB March. 30, 2001), citing Oest v. Illinois Dep't of Corrections, 240 F.3d605, 612-613 (7th Cir. 2001).

It is uncontroverted that Respondents' president, Matthew Cohen terminated Complainant's employment on the day after he was placed on probation. I find that the imposition of probation and later discharge constitute adverse employment actions within the meaning of the STAA.

4. Respondents' Knowledge of Protected Activity

Complainant must prove by a preponderance of the evidence that those responsible for the adverse action were aware of the alleged protected activity. Mace v. Ona Delivery Systems, Inc., 91 STA-10 (Sec'y Jan. 27, 1992). I have found that Complainant's complaints to DOT represent protected activity. However, there is no evidence that Complainant told anyone at Arrow about his complaint to DOT. Complainant originally filed the first complaint anonymously and testified that he did not tell anyone that he had filed the complaint. Matthew Cohen credibly testified that he was unaware that Complainant had filed a DOT complaint until the information was disclosed during the course of OSHA's investigation into Complainant's STAA complaint. I accord weight to his testimony that he expected DOT to conduct an audit because Arrow was a recently established motor carrier business. The second complaint was filed the day that Complainant received notice of his probationary status. There is no evidence that he told anyone at Arrow about that complaint the day after it was filed, which is the day he was discharged.

I find no evidence to contradict Mr. Cohen's contention that he was unaware that Complainant filed complaints with DOT. Complainant has failed to establish that the official who decided to impose probation and then terminate his employment knew that he had filed the complaints with DOT.

5. Whether Complainant's Probation and Termination Are Related Protected Activity

It has been held that close proximity between protected activity and adverse action may raise an inference that the protected activity was the likely reason for the action. Koras v. Morin Transport Inc., 92-STA-41 (Sec'y Oct. 1, 1993). Complainant had made a complaint to DOT in December, 2006. DOT conducted its investigation of Arrow on February 14, 2007. I note that the DOT investigation resulted in a satisfactory rating for Respondents, but also yielded citations with penalties. I have found that the only adverse actions under consideration are Complainant's probation and discharge on March 13, 2007. I find that there is sufficient evidence of a temporal relationship between these events to establish nexus. However, I am unable to fully credit Complainant's contention that he was fired because he refused to drive in excess of the DOT hours of service regulations. I fully credit Mr. Cohen's stated rationale for terminating Complainant's employment.

Mr. Cohen found it appropriate to place Complainant on probation when he learned that Complainant had not timely reported an accident in which he was involved. He also cited an instance where Complainant did not leave for a delivery in an expeditious manner, which resulted in a violation of service hours and additional costs to complete the trip. In addition, the probation letter cited Complainant's failure to assure that a necessary maintenance issue was

resolved. Mr. Cohen explained that Complainant had received a citation for driving without a license plate, and did not do anything to assure that the plate was replaced for weeks. Company policy required the primary driver on a truck to ascertain that needed repairs were completed. Mr. Cohen was dissatisfied with Complainant's reaction to the probation notice. Mr. Cohen testified that he expected Complainant to acknowledge his errors and agree to strive to improve his performance. Instead, Complainant was angry and argumentative. Mr. Cohen credibly testified that he found Complainant's reaction unacceptable. Mr. Cohen considered Complainant's unwillingness to cooperate the "culmination" of many concerns that Mr. Cohen had about Complainant's employment.

Mr. Cohen testified that his decision to fire Complainant was influenced by Complainant's misuse of a credit card. Although Complainant denied misusing the card, the record establishes that he was subjected to payroll deductions to reimburse Arrow. Complainant filed a complaint with New York State's DOL in early February, 2007 regarding those deductions. CX 4. It is not clear that Respondents were aware of that complaint at the time of Complainant's discharge on March 13, 2007. Documents related to the complaint reflect that on May 25, 2007, a letter was sent to Complainant from DOL stating that the complaint was docketed on February 13, 2007, and would be forwarded for field investigation. CX 5. Mr. Cohen was under the impression that the complaint was filed after Complainant was fired. Tr. at 217-218. I remarked that the alleged credit card misuse could not have been too great a factor in Cohen's opinion regarding Complainant's employment, considering that he remained on the job for a long time after the theft was imputed to him. Tr. at 214-215. Mr. Cohen testified that he wanted to give Complainant a second chance and make amends for a mistake. Tr. at 218. Mr. Cohen also considered Complainant's driving record as a strike against his continued employment.

In consideration of all of the evidence, I find no connection between Complainant's protected activity and his probation and subsequent dismissal from employment. Cohen was aware that drivers did not properly record hours, and took steps to remedy that issue. Respondents reimbursed employees for lodging and meals when employees needed to stop driving because of DOT regulations. Complainant himself received thousands of dollars in such reimbursement. Arrow also provided trucks with sleeping quarters to allow drivers to comply with hours of service rules. I fully credit Respondents' explanations for Complainant's discharge. I find that Complainant has failed to establish the necessary nexus between his protected activity and his probation and termination.

V. CONCLUSION

In consideration of all of the evidence, I find that Complainant has failed to establish that his probation and termination were related to his protected activity. I recommend that his complaint be dismissed.

RECOMMENDED ORDER

It is hereby recommended that the complaint filed herein by ALVIN B. JACKSON be dismissed.

A

Janice K. Bullard
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.