U.S. Department of Labor

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Issue Date: 04 December 2007

Case No.: 2007-STA-00027

In the Matter of:

ROCCO TESTA
Complainant

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
Respondent

Appearances:

Arthur Z. Schwartz, Esquire
For Complainant

Paul Limmiatis, Esquire
For Respondent

Before: RALPH A. ROMANO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act ("the Act"), 49 U.S.C. § 31105, which prohibits covered employers from discharging or otherwise discriminating against an employee who has engaged in certain protected activities. The implementing regulations are set forth at 29 C.F.R. Part 1978.

PROCEDURAL HISTORY

On July 7, 2006, Rocco Testa ("Complainant") filed a complaint with the United States Department of Labor's Occupational Health and Safety Administration ("OSHA"), alleging that Consolidated Edison Company of New York, Inc. ("Respondent") had unlawfully discharged him in violation of employee protection provisions of the Act. On February 15, 2007, after an investigation of the complaint, the Area Director for OSHA issued a determination that the investigation disclosed no violation of the Act's protection provisions. Complainant objected to the findings on March 12, 2007 and requested an administrative hearing.

The case was referred to the Office of Administrative Law Judges ("OALJ") on February 21, 2007 and was assigned to me on March 19, 2007. On March 19, 2007, I issued a Notice of Hearing scheduling trial for April 9, 2007 in New York, New York. After a continuance at the

joint request of the parties, the formal hearing was held before me on June 26-27, 2007 and July 17-18, 2007 in New York, New York.[1] At that time, the parties were given the opportunity to examine witnesses and submit other evidence.[2]

Following the formal hearing, the record was left open for sixty days for the submission of briefs.[3] The deadline for submitting closing briefs was extended until October 15, 2007. Respondent's brief was filed on October 15, 2007 and a brief for the Complainant was filed on October 22, 2007.[4]

This decision is rendered after careful consideration of the record as a whole, the arguments of the parties, and the applicable law.

ISSUES

The issues presented for resolution include:

1. Whether Complainant is an employee subject to the Act.

2. Whether Complainant engaged in activity protected under the Act.

3. Whether Respondent took adverse action against Complainant because of the protected activity.

SUMMARY OF THE EVIDENCE

A. Background

Complainant testified that he has been employed by Respondent for thirty-one and one-half years as an auto mechanic in the transportation department of Central Field Services ("CFS"). (CX26; Tr. at 17, 20-21). An auto mechanic A, Complainant's current position, performs mechanical repairs on any type of vehicle or equipment including a jagger pump, water pump, light generator, and one hundred foot cranes. (Tr. at 18). Complainant explained that he

[1] The transcript of the hearing consists of 789 pages and will be cited as "Tr. at --."

[2] I received eight ALJ exhibits as "ALJX1-ALJX8." (Tr. at 14-15). Complainant submitted forty-five exhibits which I marked and received as "CX1-CX10," "CX12-CX28," "CX30-CX45," rejecting exhibits 11 and 29. (Tr. at 19-20, 25, 52, 54-56, 59, 60, 62, 73, 75, 77, 92, 102, 113, 116, 121, 123, 128-129, 133, 135, 142, 143, 147, 151, 153-154, 156, 158, 160, 162, 164, 300, 313, 341, 378, 391, 478-479, 481, 642, 673, 785-786, 787). Respondent submitted thirty-seven exhibits which I marked and received as "RX1-RX12" and "RX14-RX37," rejecting exhibit 13. (Tr. at 213, 220, 230, 266, 267, 277, 364, 367, 370-371, 571, 572, 586, 591, 598, 600, 605, 607, 608, 613, 622, 625, 629, 706, 709, 712, 714, 715, 716-717, 718, 719, 749, 753). Following the hearing in this matter, Respondent submitted three exhibits, which I marked and received as "RX38-RX40."

[3] (Tr. at 788).

[4] Complainant's brief will be cited as "CB at --." Respondent's brief will be cited as "RB at --."

has gone through extensive training, including automotive vocational school, first hand apprenticeship at RPS Demolition, state inspections work at Chacko Piles, and automotive ASE certifications. (CX1; Tr. at 18). Prior to July 28, 2005, Complainant had not received any disciplinary action since July 15, 1997. (CX26; Tr. at 153-154, 180).

Complainant has been active in the local union for approximately twenty-nine years, at one time acting as co-chairman of the transportation department for the whole division. (Tr. at 20). In addition, Complainant occasionally sits on safety committees with union management. (Tr. at 21). Complainant is a vocal activist for safety, pioneering Respondent's compliance with environmental issues. (CX2; Tr. at 22, 172). Complainant also played a role in having a safety ombudsman appointed to address safety issues. (CX2; Tr. at 22, 213-216). In addition, Respondent has implemented some safety measures due to Complainant's advocacy. (Tr. at 180-181).

John Mucci, the former head of CFS transportation, encouraged employees to bring safety concerns and issues to management or the ombudsman. (CX3; Tr. at 51). Respondent provides various avenues for reporting safety complaints including: an ombudsman; an independent monitor; the environmental, health and safety office; and an ethics hotline. (CX5; RX3; Tr. at 218, 220). Complainant has made several safety complaints, for many of which he has received thank you letters, plaques, and awards commending him for addressing these issues. (CX2; CX33; Tr. at 23-50, 189).

Complainant was provided with Respondent's Code of Ethics many times, which requires "its employees . . . to act in accordance with all applicable laws, rules, and regulations." (CX5; RX3; Tr. at 55, 219). In addition, the code provides the means for an employee to report violations of the code and illegal, fraudulent, or unethical activities. (CX5; RX3). Employees may be subject to termination of employment for violating law or regulations, providing false information or knowingly preparing misleading or inaccurate Company records or reports, concealing information or otherwise obstructing any investigation, or violating any part of the Code of Ethics. (CX5; RX3).

B. The Dispute over Truck 60644

The July 28, 2005 Inspection

Respondent supplies electric, gas, and steam in a public utility capacity. Its vehicles are typically used to bring material and employees to job sites however it is not in the transportation industry. (Tr. at 759). Truck 60644 is a boom truck with a hydraulic crane that is 56,000 pounds, 25 feet long, and fifteen feet wide and requires a crane operator's license to drive. Complainant has worked on this truck before July 28, 2005. (Tr. at 80).

Complainant presently works at the 110th St. garage. (Tr. at 26-27). On July 28, 2005, Truck 60644 was turned into the 110th St. garage by the driver, Ronnie Sykes. (Tr. at 81). Rudy Cunningham has been the Operating Supervisor for the transportation department of CFS at the 110th Street garage since April of 2005 and had requested the truck be brought in for preventive maintenance. (Tr. at 397-398, 499). Mr. Cunningham instructed Complainant, with the

assistance of Frank Lawson, to repair the tires and perform a B, C, D, and F inspection, which were due by July 31, 2005. (Tr. at 79, 82-84, 414-416).

Complainant explained that the truck had one flat tire with one or two cuts in it. Before repairing the tire, Complainant asked for a DOT sheet,[5] but the driver did not provide one. He then proceeded to repair the tire. (Tr. at 81-82). Mr. Cunningham asked Complainant to stay late and approved two hours of overtime to finish the tire repair. (Tr. at 86, 481-482).

After repairing the tire, Complainant proceeded with the inspections. (Tr. at 83-84). The B inspection requires a regular oil change, changing the fuel filters, and checking the belts. (Tr. at 84, 408). The C inspection includes checking the brakes, tires, wipers, horn, lights, seatbelts, and airbelts. (Tr. at 84, 409). The D inspection requires checking emissions by calibrating the smoke machine and testing for carbon dioxide. (Tr. at 85, 409). The F inspection is simply a visual inspection to check for damage. (Tr. at 85). While checking the tires, Complainant noticed that the left rear tire's emergency brake was not holding a section of the wheel firm, thus it was defective. (Tr. at 88).

Complainant explained that the Federal Motor Carrier Safety Regulations require that the brakes must "be capable of operating" at all times. (CX8; Tr. at 70-71). Thus, Complainant immediately stopped the inspection and went to the EZ VMS system, which is the maintenance computer system, hit "fail" under the C inspection, and entered comments regarding what happened. (Tr. at 89-90). Complainant testified that he consults the safety instruction guidelines for heavy equipment online on a regular basis. (CX6; Tr. at 56). The guidelines are based on federal regulations and instruct a mechanic to "correct all defects before placing the vehicle in service." (CX6; Tr. at 57).

Mr. Cunningham called the garage that evening and Mr. Lawson informed him that Complainant was still there and truck 60644 needed brakes. Mr. Cunningham instructed him to leave a note so that he could follow up in the morning. (Tr. at 417). Mr. Lawson left an out of service sign on the vehicle and a note for Mr. Cunningham to follow up regarding the rear brakes on truck 60644. (CX13; Tr. at 90, 92, 418).

The July 29, 2005 Dispute

Mr. Cunningham arrived around 6:50 a.m. on July 29, 2005 and found Mr. Lawson's note on the windshield. (Tr. at 418-419). He instructed Clive Johnson to assist him in checking the brakes. (Tr. at 420-421). Mr. Cunningham is certified to do NY state inspections and has done over one hundred inspections on trucks with similar brake systems as truck 60644. (Tr. at 489-491, 494).

Mr. Cunningham and Mr. Johnson proceeded to check the brakes and concluded they were fine. But Mr. Cunningham noticed that the slack adjuster was not complete on the fourth wheel so he manually adjusted it. (Tr. at 421, 423-424, 426, 431). Truck 60644 had eight tires in

[5] The DOT sheet is a daily inspection sheet that should be filled out before the vehicle is taken out and when it returns from service. (Tr. at 82).

the back and each tire has a slack adjuster. (Tr. at 498-499). Mr. Cunningham informed Mr. Johnson that the brakes had more than one-quarter inch lining in compliance with the guidelines. (CX16; Tr. at 432, 514). The guidelines do not require an inspector to pull the wheels off the truck to check the brakes. (Tr. at 456).

Bill Slocum, manager of the gas department, called CFS to see if his department could use the truck to deliver some material. (Tr. at 435). Mr. Cunningham did not anticipate that the gas department would make such a request. (Tr. at 449). However, he allowed Mr. Sykes to take the truck to deliver one plate[6] on the way to drop the truck off at the vendor, Spring Tech, for repairs. (Tr. at 99, 428, 434). The guard's log for July 29, 2007 shows that the truck left the garage at 8:30 a.m. (RX6; Tr. at 271). Mr. Cunningham is aware that the guidelines discourage manually adjusting slack adjusters, but he explained that when all of the service brakes are working, it is acceptable to allow a truck to drive a short distance to a vendor for repairs as long as the slack adjuster is faulty on less than two wheels. The trip to Spring Tech would be eleven miles roundtrip. In addition, Mr. Cunningham had confidence in Mr. Sykes ability as a driver. (Tr. at 441, 513). Mr. Cunningham also explained that the truck was not actually put back in service when he sent it out because it was on its way for repairs. (Tr. at 513, 523).

Complainant testified that he arrived at the garage at 7:00 a.m. on July 29, 2007 and discovered that the truck had left approximately ten to fifteen minutes before he arrived. (Tr. at 92, 271, 441). Complainant then called Bobby Zahn, a union shop steward, to inform him about an oil spill and the faulty brakes on truck 60644. (Tr. at 94, 324-325). Mr. Zahn has been employed by Respondent for nineteen years and was an auto mechanic at the time. (Tr. at 322-323). Complainant informed Mr. Zahn that he felt the truck should be out of service due to faulty brakes but that Mr. Cunningham had overridden him and sent the truck out on a delivery. (Tr. at 326). Mr. Zahn arrived at the 110th Street garage at 8:25 a.m. (RX6; Tr. at 354).

Complainant and Mr. Zahn went to Mr. Cunningham to discuss the truck and an oil spill that had not been reported. (Tr. at 93, 97, 300, 325, 327, 347, 352, 441, 536). Mr. Cunningham explained that the oil spill was from a vehicle that was parked at the garage for nearly four months and he did not report it because he did not see any dripping or running oil on the ground. (Tr. at 442, 444-445). Daniel O'Keefe, the manager of the transportation department of CFS testified that Mr. Cunningham called him that day to inform him of the oil spill; however it ended up just being an old stain. (Tr. at 773). Mr. O'Keefe explained that he was very unhappy about the unreported oil spill and it annoyed him because "those things get reported to the DEC." (Tr. at 783).

Complainant asked Mr. Cunningham why he sent the truck out with unsafe brakes. (Tr. at 447). Mr. Cunningham informed Complainant that he had Clive Johnson, another mechanic, check the brakes. (Tr. at 93). Complainant explained that this concerned him because Mr. Johnson had stopped performing state inspections due to his poor eyesight. (Tr. at 95, 289-290). In addition, Mr. Zahn testified that it was very clear that Mr. Johnson had vision problems. (Tr. at 352). Mr. Cunningham testified that Mr. Johnson was only restricted from driving company

[6] Mr. Cunningham testified that he later discovered that Mr. Sykes did not deliver a plate, but instead delivered PVC pipe. (Tr. at 430).

vehicles out on the road and that his eyesight was good enough to do the job of a mechanic. (Tr. at 411-412, 507-509).

Mr. Zahn believed that the truck should have been towed. (Tr. at 447). Dave Perez, the Evironmental, Health, and Safety ("EH&S") administrator was on the premises and informed Mr. Cunningham that if the truck was unsafe then it should have been towed to the repair shop. (Tr. at 301, 303, 327-328, 452, 496). Mr. Cunningham agreed to call and have the truck sent back to be towed. (Tr. at 99, 275, 303, 452). Fifteen minutes after the truck left the 110th Street garage, Mr. Cunningham called Lucille in the gas department to have the truck returned; however Mr. Sykes was almost to Spring Tech at that point, so he did not return truck 60644 to the garage. (Tr. at 359, 438, 453-454, 772).

A supervisor has the authority to overrule a mechanic when there is a dispute. (Tr. at 495, 750). However, Respondent implemented a procedure that allows employees to call a "time out" when there is a dispute regarding safety issues. (RX5; Tr. at 236). When an employee uses a time out, the work stops until an EH&S person comes out to look at the problem. (RX37; Tr. at 237, 771). Mr. Zahn explained that he did not see a need to call a time out because Mr. Perez was already present. (Tr. at 360).

The vendor order release is a form that a supervisor fills out when the vehicle is sent out for repair to the vendor. Truck 60644 was released to the vendor, Spring Tech, on July 29, 2005. (CX14; Tr. at 100). The vendor order release for truck 60644 was signed by Mr. Cunningham and informed the vendor that the rear left rear slack adjuster would not hold and requested that all rear brakes be checked. (CX14; Tr. at 102, 104, 540).

Complainant testified that truck 60644 was returned from Spring Tech on August 1, 2005. (Tr. at 105). Mr. Cunningham explained that although there was only a problem with the slack adjuster, he had Spring Tech repair all four brakes in the rear because it is customary to do so if it will be another year before its next inspection. (Tr. at 514, 519). The vendor tested the service brakes and found that they were fine, but replaced all of the brake shoes, drums, and slack adjusters. (Tr. at 757).

Complainant performed the state inspection again on August 2, 2005. (Tr. at 105, 107). He explained that he checked the front brakes because they had not been repaired and he performed the D inspection. Complainant testified that he inspected the rear brakes according to New York state guidelines, which state that it is acceptable to remove the rear backing plates to observe the brakes. (Tr. at 107). Complainant filled out paperwork, attached a new inspection sticker to the truck, and filled in the state inspection log. (Tr. at 110-111). That was the last Complainant saw of the truck. (Tr. at 111). The scheduled service report shows that the scheduled work for truck 60644 was complete by August 2, 2005. (Tr. at 393). Mr. Cunningham approved the repair job on the vender order release on August 5, 2005. (CX14; Tr. at 104). The job labor jacket for truck 60644 shows that the job was closed in the system on August 24, 2005, but no work was performed on that day. (CX37; Tr. at 390-392).

C. The EZ VMS Computer System Entries

Juan Acevedo has been a senior specialist in the automotive engineering department at Respondent for five years. (Tr. at 375). Mr. Acevedo provides technical support to the garages regarding their various computer systems. (Tr. at 375). He explained that EZ VMS is the front end to the Vehicle Maintenance System. (Tr. at 376). The EZ VMS allows mechanics to go into the system to make entries and generate reports regarding all of the repair work they perform throughout the day. (Tr. at 377).

In 2005, an employee was unable to go into the EZ VMS system and enter information about a vehicle unless he was working on that vehicle that day because the system requires that the mechanic enter the labor by code. (Tr. at 105-106, 388). In addition, a mechanic is unable to delete entries or add anything at a later date; however, a supervisor has the ability to edit comments at a later date. (Tr. at 140, 146, 388-389). Mr. Acevedo also explained that it was possible to make comments in the system by entering another employee's number. (Tr. at 396-397, 476).

The vehicle labor report from EZ VMS for truck 60644 dated November 27, 2006 shows that Complainant entered work for that vehicle on July 28, 2005, July 30, 2005, and August 2, 2005. (CX20; CX21; Tr. at 130-138). In addition, a report dated April 19, 2006 showing Complainant's work, has two entries on July 30, 2005. (CX22; Tr. at 140, 142). However, Complainant was not at work on July 30, 2005 and did not make the entry for that day. (Tr. at 138, 142). Mr. Cunningham also testified that the garage was not open that day, but that all of the mechanics have keys to the garage and access to the EZ VMS system. (Tr. at 469, 475).

A printout of the comment screen from EZ VMS showed a comment entered by Complainant on July 28, 2005 at 6:07 p.m. that stated "needs rear brakes and 4 tires." (CX23; Tr. at 144). In addition, it shows that Complainant entered a comment on August 1, 2005 stating: "needs rear brake and slack adjuster left rr brake not working not to be driven." (CX23; CX24; Tr. at 144-145). Complainant explained that he could not enter comments on August 1, 2005 because he did not work on the truck that day. (Tr. at 145). Mr. Cunningham testified that he checked the EZ VMS system on July 29, 2005 and the only comment from Complainant on July 28, 2005 was regarding the tire repair. (Tr. at 502). Mr. Cunningham explained that he did not delete Complainant comments from July 28, 2005 and reenter them on August 1, 2005. (Tr. at 516).

D. The Safety Complaint and Investigations

The Safety Complaint

Mr. Zahn made the initial complaint about the release of the truck to a Mr. Conway on the morning of July 29, 2005 at approximately 10:30 a.m. (CX15; Tr. at 99-100, 114-115, 282, 329). However, Complainant made a follow up call to Mr. Conway later that afternoon. (Tr. at 100, 114-115, 282). Ed Conway is the Deputy Ombudsman, which is an in-house position created to addresses safety complaints made by various employees. (Tr. at 181, 182, 563). The office of ombudsman files formal written reports each year and maintains a log of confidential

safety calls. (Tr. at 183). Mr. Conway determined that the complaint would officially be considered Mr. Zahn's although it was understood Complainant was also involved. (Tr. at 329).

The Initial Investigation

Mr. Conway contacted Joseph Moyik, the EH&S manager for CFS, and assigned him to investigate the complaint. (CX15; CX41 at 6; Tr. at 115, 192, 330). Mr. Moyik reports to the Vice President of CFS. (CX41 at 7, 8). Mr. Moyik has a master's degree in environmental management from the New York Institute of Technology. (CX41 at 12). Mr. Conway recommended that Mr. Moyik speak to Complainant, Mr. Zahn, Mr. Perez, Mr. Lawson, Mr. Johnson, and Mr. Cunningham. (CX15; CX41 at 15-16).

Mr. Moyik went to the 110th Street garage and interviewed Complainant, Mr. Zahn, Mr. Johnson, Mr. Lawson, Mr. Cunningham, and Mr. Sykes. (CX41 at 18; Tr. at 115). John Shipman, Respondent's chief automotive engineer, informed Mr. Moyik that the out of service criteria for brakes required a one quarter-inch lining or else the vehicle should be put out of service. (CX41 at 27). In addition, he explained to Mr. Moyik that the slack adjuster had to do with the parking brake and if it was malfunctioning the vehicle could still operate. (CX41 at 28).

Mr. Cunningham learned of the investigation a few weeks later when Mr. Moyik came to interview him. (CX41 at 19; Tr. at 455). Mr. Cunningham informed Mr. Moyik that he had Mr. Johnson check the brakes and they found that there was more than one quarter-inch of lining but the slack adjuster needed to be adjusted. (CX41 at 19-20, 37). Mr. Cunningham gave Mr. Moyik a copy of the August 1, 2005 invoice for repair. (CX16; Tr. at 118, 458). Mr. Cunningham had written some notes on his copy of the bill which stated: "service brake working fine and only left front rear auto slack adjuster was out of adjustment. However, adjustment can be done by driving vehicle. There was more than one quarter-inch of pad remaining on brake shoe." (CX16; Tr at 118, 458). Mr. Cunningham explained that the notes contained information regarding the conversation he had with "Robert" at Spring Tech. (Tr. at 461-462).

Mr. Moyik prepared a report regarding his investigation on November 7, 2005. (CX16). Mr. Moyik concluded that vehicle was not in violation of the regulations as it had sufficient brake lining, thus the vehicle was safe to drive when Mr. Cunningham sent truck 60644 out on July 29, 2005. (CX16; CX41 at 30; Tr. at 117, 194, 332). Mr. Moyik relied on the summary of the DOT Regulations provided in Exxon-Mobil guidelines in forming his conclusion. (CX41 at 40; Tr. at 332). Complainant was not given a copy of the report, but was verbally informed of the results. (CX41 at 32; Tr. at 116).

Complainant testified that he believed Mr. Moyik's investigation was pursued in such a way as to show no wrong-doing by the company. (Tr. at 195). Mr. Zahn reviewed Mr. Moyik's report and thought it was unusual to have handwritten notes on the invoice. (Tr. at 119, 333). Mr. Moyik assumed they were notes from the vendor. (CX41 at 29; Tr. at 119). Mr. Zahn obtained a copy of the original invoice from Pete Moore who works in billing for the transportation department. (CX17; Tr. at 120, 334). T he original invoice was the same as the copy provided by Mr. Cunningham except the handwritten notes were excluded and Mr. Cunningham's signature appeared to be slightly different. (CX17; Tr. at 120-121, 334-335). Mr.

Zahn, believing Mr. Cunningham's copy of the invoice to be a forgery, complained to Mr. Conway and requested that an independent person follow up with the investigation as he didn't think that Mr. Moyik could do a fair investigation. (CX41 at 33; Tr. at 120-121, 204, 334). Mr. Cunningham explained that the documents had two different signatures because he made two copies, signed one and sent it to Mr. Moore as the original, and then he signed the other copy, made some notes on it, and filed it for his personal records. (CX16; CX17; Tr. at 459-460, 516). Mr. Moyik testified that this state of affairs did not change his conclusion. (CX41 at 34).

The Final Investigation

William Connor from the auditing department was assigned the new investigation on December 22, 2005. (CX41 at 34; RX14; Tr. at 122, 337, 569-570). The corporate auditing department reports to the ombudsman's office. (Tr. at 204). Once auditing is finished with an investigation, the auditor provides a formal report to the general auditor and then it is sent to the Vice President of the department at issue. (Tr. at 564).

Mr. Connor began his investigation in early January of 2006 by interviewing Mr. Moyik to get a background on the nature of his previous investigation and findings. (CX41 at 35; RX15; Tr. at 570-573, 631). Mr. Connor discovered some deficiencies in Mr. Moyik's investigation, including his determination that the handwritten comments on the vendor order release were made by the vendor instead of Mr. Cunningham, and his incorrect determination that the slack adjuster affects the service brakes. (Tr. at 575-575, 637). Mr. Connor concluded that he could not base his own findings on Mr. Moyik's report due to those errors and Mr. Zahn and Complainant's objections. (Tr. at 576). Therefore, Mr. Connor proceeded to complete the investigation from scratch. (Tr. at 576).

Mr. Connor next interviewed Mary Adamo, the General Manager of transportation at the time, on January 26, 2006 to obtain further background information. Ms. Adamo informed Mr. Connor that Complainant had voiced his objections with a supervisor at the 110th Street garage on previous occasions, but those objections were never followed up. (RX16; Tr. at 585, 633, 681). However, Mr. Connor explained that this interview did not affect his investigation in a significant manner. (Tr. at 585).

Throughout his investigation Mr. Connor interviewed Complainant three times. (RX17; RX24; RX25; Tr. at 123). The first interview occurred on January 20, 2006 and Complainant informed him that the rear, rear service brakes and slack adjuster were not working. (RX17; Tr. at 587-588). Complainant testified that Mr. Connor asked him about the comments in the EZ VMS system. (Tr. at 126). Complainant informed Mr. Connor that he had entered most of the comments on July 28, 2005 when he failed the truck for inspection, except for the sticker inspection comment, which was entered on August 2, 2005. (RX17; Tr. at 127, 588).

Mr. Connor received an email from Keith Bryan of the transportation department that explained that he was unable to confirm whether Complainant put truck 60644 out of service in the computer system. (RX18; Tr. at 589-590). In addition, after their first interview Complainant sent Mr. Connor an email providing him a copy of the federal regulations. (CX18; Tr. at 124-

125). Mr. Connor replied informing Complainant where to go online to view the company's out of service criteria. (CX18).

Mr. Connor then interviewed Mr. Perez who explained that if the vehicle was unsafe then it shouldn't have been driven, but he was not a mechanic. (Tr. at 596). Mr. Connor also interviewed Mr. Lawson who informed him that he believed the truck had failed inspection until Mr. Cunningham checked on July 29, 2005 and determined that all of the service brakes were working and only one of the parking brakes was not functioning. (CX19; Tr. at 597, 649). Mr. Lawson further explained that one faulty parking brake was no reason to fail an inspection. (RX19; Tr. at 597).

Mr. Connor interviewed Mr. Johnson next and was told that Mr. Cunningham had asked him to check the brakes on July 29, 2005. (RX20; Tr. at 598, 599). Mr. Johnson informed Mr. Connor that there was more than one quarter-inch of lining on the brake shoe, which is the minimum required for the truck to drive safely to the repair shop. (RX20; Tr. at 598, 599). He also told the investigator that the service brakes were working. (RX20; Tr. at 598, 652). Mr. Connor interviewed Mr. Sykes on January 20, 2006 as well and he confirmed Complainant's version of events regarding the rear service brake spinning. (RX40; Tr. at 640-641). But he informed Mr. Connor that he believed the brakes were working properly and the truck was safe to drive or else he would not have driven it. (RX40; Tr. at 665). Mr. Connor explained that he did not use Mr. Sykes statements in forming his conclusions because Mr. Sykes is not a mechanic. (Tr. at 665).

Mr. Connor obtained the original vendor invoice from the 28th Street Office. (Tr. at 594). Mr. Connor determined that Mr. Zahn's allegation of falsification of the document had no merit as the original invoice did not have Mr. Cunningham's handwritten notes on it. (Tr. at 594). In addition, he accepted Mr. Cunningham's explanation that the copy of the invoice with his handwritten notes was for his personal file. (Tr. at 604).

Mr. Connor also interviewed Mr. Cunningham on January 20, 2006. (RX21; Tr. at 601). Mr. Cunningham informed Mr. Connor that he checked the brakes with Mr. Johnson on July 29, 2005 and discovered that the brakes were working, but there was a problem with the slack adjuster. (RX21; Tr. at 603). Mr. Connor indicated that Mr. Cunningham was not trained in the out-of-service criteria, but Mr. Cunningham explained that he used the booklet instead of the website to learn the criteria. (Tr. at 534-535, 552, 654). In addition, Mr. Connor noted that Mr. Cunningham stated that the slack adjuster on the front rear driver's side was faulty and not the rear, rear side as Complainant claimed. (RX22; RX23; Tr. at 605-606).

Mr. Connor interviewed Complainant a second time on February 1, 2006. (RX24; Tr. at 607). The purpose of this interview was to clear up some of the inconsistencies. (Tr. at 608). Complainant told Mr. Connor that he discussed the brakes with Mr. Cunningham on July 29, 2005, and that Mr. Johnson had agreed that the truck should be towed. (RX24; Tr. at 609). Complainant did not mention Mr. Johnson's eyesight to the investigator. (Tr. at 610). Complainant testified that Mr. Connor never discussed the inspections of truck 60644 with him. He stated that Mr. Conner simply asked whether Complainant pulled off the wheels to inspect the brakes after it came back from the vendor. (Tr. at 125). Complainant informed Mr. Connor

that he should have checked the brakes when the truck returned from the vendor, but that he was confident that the vendor did a good job. (Tr. at 611).

Mr. Connor interviewed Complainant a third and final time on March 14, 2006. (RX25; Tr. at 613). The purpose of the third interview was to discuss the time entry discrepancy in EZ VMS. (Tr. at 614). Mr. Connor informed Complainant that his comments were entered on August 1, 2005, but Complainant denied entering the comments on that date. (CX24; RX25; Tr. at 127). Complainant insisted that me made the entry on July 28, 2005 and then explained that EZ VMS was a corrupt system and the supervisors could change things. (RX25; Tr. at 127, 616). Complainant informed him that he did not call a timeout on July 29, 2006 because the truck had already been sent out. (RX25; Tr. at 614).

Mr. Connor interviewed Robert Schwimmer, the manager at Spring Tech, who informed him that all of the service brakes were working but the parking brake was not working when it was brought in for repair. (RX26; Tr. at 623-625, 668). In addition, John Shipman, Respondent's chief automotive engineer, explained that in order for a vehicle to pass inspection, the service brakes must be working, but the parking brake does not have to be. (RX27; Tr. at 626)

Mr. Connor completed his investigation in March or April of 2006 and provided his report to James O'Brien, the Vice President and General Auditor, who approved its release on May 3, 2006. (CX19; Tr. at 204, 627-628). Mr. Connor concluded that truck 60644 was safe to drive and the allegation that Mr. Cunningham altered repair records to cover it up had no merit. (CX19). Furthermore, Mr. Connor concluded that Complainant entered the comment that truck 60644 was not to be driven on August 1, 2005 and not on July 28, 2005, falsifying company records to support an argument that the vehicle was unsafe. (CX9; Tr. at 128-130, 617-618, 670). In addition, he concluded that Complainant lied to Mr. Connor about when he entered the computer entry, and that Complainant failed to do a proper inspection of the truck before applying a new inspection sticker. (CX9; Tr. at 128-130). Mr. Connor explained that his notes are not part of the final report and only the final report was released to the transportation department. (Tr. at 629).

Complainant testified that Mr. Connor was out to get him fired during his investigation. (Tr. at 195). However, Mr. Connor testified that he was never asked to achieve a particular result during his investigation. (Tr. at 564). In addition, Mr. Connor explained that if he had been asked to be dishonest or overlook certain facts during his investigation, he would report that to his supervisor immediately. (Tr. at 565).

E. Complainant's Termination

Mary Adamo has worked for Respondent for over twenty-three years and was the General Manager of transportation[7] at the time she received Mr. Connor's report. (Tr. at 675). Her duties as General Manager included supervising management of the garages and automotive engineering in Manhattan. (Tr. at 676). Mr. O'Keefe reports to her. (Tr. at 677).

[7] Ms. Adamo has since been promoted to Vice President of CFS. (Tr. at 674).

Ms. Adamo went over Mr. Connor's report with Mr. O'Keefe and her boss to determine what action should be taken. (Tr. at 207, 683, 740-741). Ms. Adamo solely made the ultimate decision to terminate Complainant for three reasons: the report established Complainant falsified company records when he attempted to backdate the entry of August 1, 2005 to July 28, 2005 in the EZ VMS system, he was uncooperative during the investigation when he lied about the date he entered the comment into EZ VMS, and he failed to do a proper inspection. (Tr. at 683, 687, 694, 699). Ms. Adamo explained that Complainant's lying about the date he entered something in the system is troubling because it appeared that he entered the comment to support his argument, and was "going after [his] supervisor." (Tr. at 685, 691).

Mr. Cunningham testified that he believed Complainant was "out to get him" because other mechanics had informed him that Complainant had been complaining about him since he became his supervisor. (Tr. at 400-406, 497). Mr. Cunningham reported this information to Mr. O'Keefe. (Tr. at 400, 498, 543, 766). Mr. O'Keefe testified that he would receive telephone calls from the Complainant complaining about Mr. Cunningham all of the time. (Tr. at 766).

Ms. Adamo chose to discipline Complainant in such a harsh manner because these were serious infractions that were reflective of Complainant's lack of integrity and violated the code of conduct. (Tr. at 683). The factors that Ms. Adamo considered when she determined the appropriate level of discipline included the history of the department, the Complainant's overall records, the Complainant's length of service, and human resources' look at company-wide action for similar infractions. (Tr. at 684). Ms. Adamo based her decision on Mr. Connor's report and did not rely on his backup file or notes. (Tr. at 687-688).

Ms. Adamo testified that she was aware of Complainant length of service with Respondent and his disciplinary history. (Tr. at 696). She explained that because of this she did not take the decision lightly. (Tr. at 697). Ms. Adamo testified that other employees within CFS have falsified records and been dishonest. (Tr. at 684).

Once Ms. Adamo decided to terminate Complainant, she made the recommendation to human resources for approval. (Tr. at 684). If human resources determined that the action was reasonable then it would approve the termination. (Tr. at 684). Loretta Vanacore has been the Director of Employee and Labor Relations for Respondent since April of 2004 and was responsible for determining whether the decision to terminate Complainant was within the range of reasonableness. (Tr. at 701-702). In order to make this determination, Ms. Vanacore looked at the nature of the violations, mitigating factors, length of service, and Complainant's record. (Tr. at 726). In addition, she compared other cases with similarities to see if the discipline in the present case fell within the same range. (Tr. at 702). Ms. Vanacore obtained this information from the human resources service center's record keeping automated system. (Tr. at 702).

In order to decide whether falsification warrants a termination or suspension, Ms. Vanacore looked at the facts of the case, the amount of infractions, consequences to the company, and personal gain of the Complainant. (Tr. at 704). Since 1982, the company terminated one hundred fifty employees for violations of the code of conduct, falsification, and failure to cooperate with an investigation. (RX28; Tr. at 704). In addition, CFS alone terminated nine employees since 2002 for the same infractions. (RX29; Tr. at 709). Ms. Vanacore

explained that Respondent publishes case studies[8] and distributes these to the entire company monthly to communicate discipline of serious infractions and the ramifications of such. (CX30; Tr. at 710).

Ms. Vanacore explained that honesty is one of Respondent's critical corporate values and lying to an investigator is a serious ethical violation regardless of whether the underlying issue is significant or not. (Tr. at 713). In addition, she explained that the date that Complainant entered his comment into the system was not significant and there was other evidence to corroborate his safety complaint. (Tr. at 723). However, she explained that his entering the comment on August 1, 2005 and lying about it to the investigator was significant because it appeared he was setting up his supervisor to show that he ignored a safety hazard by the release of truck 60644. (Tr. at 723, 724, 733). After reviewing Ms. Adamo's recommendation to terminate Complainant, Ms. Vanacore determined that it fell within the range of reasonableness and approved the ultimate termination document. (Tr. at 703, 731).

Ms. Adamo testified that she did not consider Complainant's safety complaints when she made her decision and she encourages the employees to bring up safety concerns. (Tr. at 686). Mr. Cunningham had no involvement in the decision to terminate Complainant. (Tr. at 498). In addition, the investigator, Mr. Connor, had no involvement in any discipline resulting from his investigation. (Tr. at 564, 629).

Mr. Zahn heard of the results of Mr. Connor's investigation from Mr. Conway. (Tr. at 343). Mr. Conway, Mr. O'Keefe, and the manager of Manhattan met with Mr. Zahn and informed him that Complainant was going to be terminated because he had orchestrated a plot to "get Mr. Cunningham." (Tr. at 344). Mr. Zahn was not allowed to view Mr. Connor's report although he was the complainant for purposes of investigation. (Tr. at 344). Mr. Conway informed him that he was only allowed to show him a condensed, redacted version of the report. (Tr. at 345). Mr. Zahn argued on behalf of Complainant, pleading to allow Complainant to tell his version of events. (Tr. at 345-346).

Complainant was terminated on July 6, 2006. (Tr. at 150). Complainant underwent an employment interview with Robert Russo, the Shop Steward, Mr. O'Keefe, and Brunette Troy, a Human Resources Specialist. (CX25; Tr. at 150-151). Complainant testified that he was not given an opportunity to respond to the allegations from Mr. Connor's report. (Tr. at 151, 209). But Mr. O'Keefe claimed that Complainant was given a chance to tell his side of the story and Complainant simply quoted the regulations that the brakes must be operative and insisted that the safety complaint and thus the resultant investigation was all Mr. Zahn's doing. (Tr. at 736, 740, 782-783). Complainant also stated that he did perform a full inspection on the brakes after truck 60644 returned from Spring Tech. (Tr. at 738, 740). Furthermore, Complainant explained that he believes Mr. O'Keefe was out to fire him during his employee interview because he relied on Mr. Connor's report without ensuring that it was accurate. (Tr. at 207).

[8] Ms. Vanacore provided five case studies that were similar to Complainant's because the employee was terminated for failing to cooperate with an investigation, lying to an investigator, and/or falsifying company records. (RX31; RX32; RX33; RX34; RX35; Tr. at 714-719, 728-730).

Complainant testified that many of the complaints that he made around the time he was terminated contributed to his being fired.[9] (CX2; Tr. at 200). Complainant explained that he believes Respondent "got tired of being punched in the face. They saw a crack in the door and a light on the other side, and they saw an opportunity to get rid of me and that's what they did." (Tr. at 206-207). Complainant further explained that the "light on the other side" referred to Mr. Connor's report that Complainant was dishonest. (Tr. at 207).

F. Grievance and Arbitration

Complainant filed a grievance with the union, which resulted in a hearing before an arbitrator. (CX30; Tr. at 159). As a result, Complainant's termination was changed to a ninety day suspension and he was reinstated without back pay for that time. (CX30; Tr. at 160-161).

Complainant testified that he was out of work for one month and two weeks. (Tr. at 150). During the time that he was out of work he made no effort to obtain temporary employment as he expected to get his job back after the arbitration. (Tr. at 292).

ANALYSIS

Section 49 U.S.C. §31105 of the Surface Transportation Assistance Act of 1982, as amended, provides, in part:

> (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…

In order to assert a claim under the Act, an individual must be a covered "employee" under the Act. More specifically, the Act provides that "[an] 'employee' means…a mechanic…who…directly affects commercial vehicle safety in the course of employment by a commercial motor carrier." 49 U.S.C. § 31101(2)(A).

I. Covered Employment

Respondent argues that Complainant is not a covered employee under the Act because Respondent is not a commercial motor carrier. (RB at 42-43). The term "commercial motor carrier" is not defined in the subchapter but has been interpreted to include "motor carriers" and "motor private carriers" described at 49 U.S.C. § 10102(13), (14), (15), and (16). *See* 29 C.F.R. § 1978.101(e). However, the definitions were re-codified in 1995 and are set forth at 49 U.S.C § 13102 (14) and (15). *See* Pub. L. 104-88 (Dec. 29, 1995).

[9] Some of the complaints Complainant made during that time include vendor oversight, oil spills, guard training issues, fuel spills. (CX2; Tr. at 200-201).

A "motor carrier" is defined as "a person providing commercial motor vehicle (as defined in section 31132) transportation for compensation. 49 U.S.C. § 13102 (14). Furthermore, a commercial motor vehicle is defined as a "self-propelled…vehicle used on the highways in interstate commerce to transport passengers or property…" 49 U.S.C. § 31132 (1). Respondent does not provide transportation for compensation, therefore it does not meet the definition of "motor carrier"

A "motor private carrier" is defined as "a person, other than a motor carrier, transporting property by commercial motor vehicle . . . when (A) the transportation is as provided in section 13501 of this title; (B) the person is the owner . . . of the property being transported; and (C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise. 49 U.S.C. § 13102 (15)(A)-(C). Section 13501 requires that the transportation of passengers or property cross state lines or international borders. 49 U.S.C. § 13501 (1).

In *Arnold v. Associated Sand and Gravel Co., Inc.*, 92-STA-19 (Sec'y Aug. 31, 1992), the respondent was engaged in the intrastate sale and delivery of cement. Its drivers transported cement over major state and interstate highways. It also manufactured concrete pipe which it sold wholesale and delivered intrastate for use in commercial projects. On rare occasions, the respondent traveled out-of-state to pick up products. The Secretary found that the respondent was a private carrier engaged in truck transport of cement and concrete pipe which it manufactures, transports by commercial motor vehicle, and sells, and therefore reasonably constituted a commercial motor carrier covered under section 405(a) of the Act

The test is not whether a state line is crossed but whether the vehicle is driven on a highway, directly affecting motor vehicle safety. *Howe v. Domino's Pizza Distribution Corp.*, 89-STA-11 (Sec'y Jan. 25, 1990). *See Brennan v. Keyser*, 507 F.2d 472, 474- 475 (9th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975) (operators performing work on highways serving as interstate connections engaged in commerce for purposes of FLSA coverage). *See also Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652 (9th Cir. 1971), *cert. denied*, 402 U.S. 995 (1971).

The Respondent in the instant case is engaged in providing public utility services. Its drivers transport materials and employees to sites throughout the state of New York. While, it only rarely travels across state lines, it is engaged in transporting materials on highways. Thus, I find that Respondent is a "motor private carrier," thus constituting a "commercial motor carrier" under the Act. Therefore, I conclude that Complainant meets the definition of a covered employee under the Act.

To prevail under the Act, Complainant must prove by a preponderance of the evidence 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. 1, 2003); *Assistant Sac's v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003). If the employee is able to establish a *prima facie* case, he is entitled to a presumption that the protected activity was the reason for the adverse action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Once a complainant

meets his initial burden of establishing a *prima facie* case, the burden then shifts to the employer to articulate that it took adverse action for a legitimate, non-discriminatory reason.

However, when a case is tried fully on the merits, the proper inquiry is not whether the Complainant has made a *prima facie* showing, but rather whether the complainant has proved by a preponderance of the evidence that the respondent took adverse action against the complainant because of protected activity. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16; *Pike v. Public Storage Companies, Inc.*, 98-STA-35 (ARB Aug. 10, 1999); *Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia*, 97-STA-30 (ARB July 8, 1998).

II. Protected Activity

The Act protects employees who have filed a complaint or begun a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order," or who have testified or will testify in such a proceeding. 49 U.S.C. § 31105(a)(1)(A). Protection is afforded to activities ranging from voicing of concerns to one's employer to the filing of formal complaints related to commercial motor vehicle safety. *Brink's, Inc. v. Herman,* 148 F.3d 175, 179 n.6 (2nd Cir. 1998). The complainant must be acting on a reasonable belief regarding the existence of a violation. *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 02-STA-5, slip op. at 3 (ARB July 31, 2003). Thus, an "internal complaint to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the [Act]." *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 99-STA-37, slip op. at 5. (ARB Dec. 31, 2002).

Respondent urges that Complainant's actions were not protected because the only complaint regarding truck 60644 was made by Mr. Zahn and not the Complainant. (RB at 39). In this case, the evidence clearly establishes that Complainant played a role in the complaint made by Mr. Zahn. Several witnesses testified that Complainant vocally expressed his safety concerns regarding truck 60644 to his supervisor, Mr. Cunningham, on July 29, 2005. In addition, Mr. Zahn credibly explained that although the safety ombudsman, Mr. Conway, determined the complaint would officially be considered Mr. Zahn's, it was understood that Complainant was also involved. In addition, both the investigators indicated in their reports that Complainant voiced safety concerns regarding the brakes on truck 60644 and was one of the employees that initiated the investigations. In addition, Ms. Adamo, who made the decision to terminate Complainant, was aware of the investigation and believed that Complainant had initiated the complaint.

Respondent also argues that Complainant's safety complaint was made in bad faith because his claims regarding the faulty brakes were not credible as other employees corroborated the fact that the brakes on truck 60644 were working. (RB at 40-41). However, I find Complainant's testimony that allowing the truck to be driven would be unsafe and in violation of the regulations to be credible. Complainant testified that he consults the safety guidelines on a regular basis and was following the federal regulations to correct all defects. I find that Complainant reasonably believed that the brakes on truck 60644 were faulty and the truck should not have been driven. Thus, I conclude that Complainant has established by a preponderance of

the evidence that he engaged in protected activity when he voiced his safety concerns regarding truck 60644 and the brake defects to his supervisor, the safety ombudsman, and the investigators.

III. Knowledge of the Protected Activity

Knowledge of a complainant's protected activity on the part of the alleged discriminatory official is an essential element of a complainant's case. *Martin v. Akzo Nobel Chemicals, Inc.*, ALJ No. 2001-CAA-00016 (ALJ December 20, 2001), aff'd, ARB 02-031 (July 31, 2003), citing *Bartlick v. TVA*, Case No. 88-ERA-15, Sec. Ord., Dec. 6, 1991, slip op. at 7 n.7 and Sec. Ord. Apr. 7, 1993, slip op. at 4 n.1, aff'd, 73 F.3d 100 (6th Cir. 1996). Complainant must show that respondent had actual or constructive knowledge of his alleged protected activity at the time he terminated him. *Moseley v. Carolina Power & Light*, 94-ERA-23 (ARB Aug. 23, 1996); *Ford v. Northwest Airlines, Inc.*, ALJ No. 2002-AIR-21 (ALJ May 15, 2003). The evidence must show that an employee of the respondent with the authority to take the action complained about had knowledge of the protected activity. *Id.*

On this issue, I find that Complainant has established that Respondent knew about Complainant's safety complaint regarding truck 60644. I find that the testimony of Respondent's employees credibly demonstrates that Respondent, and in particular, Ms. Adamo, had knowledge of Complainant's protected activity. The record establishes that Ms. Adamo had the sole responsibility to determine whether to terminate complainant. In addition, Ms. Adamo testified credibly that she reviewed a copy of Mr. Connor's report and was thus aware of the issues surrounding truck 60644 when she made the decision to terminate Complainant.

Therefore, I find that Respondent had knowledge of Complainant's protected activity when the decision to terminate his employment was made.

IV. Adverse Employment Action

To establish an adverse employment action, there must be a tangible employment action, for example "a significant change in employment status, such as…firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Material adverse actions include discharge, demotion, loss of benefits and compensation, stripping an employee of job duties, or altering the quality of an employee's duties, if they have tangible effects. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

The adverse action taken by Respondent is Complainant's termination on July 6, 2006. It is undisputed that Respondent terminated Complainant's employment and reinstated his position after a ninety day suspension without back pay. Therefore, I find that Complainant has established that Respondent took an adverse employment action against him.

V. Adverse Action because of the Protected Activity

Complainant is a long time, superior-rated employee with a long history of making safety complaints, many of which resulted in corrective measures against Respondent. He was fired by

Ms. Adamo with the concurrence of Ms. Vanacore for three reasons: (1) he lied to the company investigator, Mr. Connor, and was uncooperative in this investigation; (2) he "falsified" data he entered into the company's computer system; and (3) he failed to perform his duty, i.e., he failed to fully inspect a company truck after the truck was returned to the company by the brake repair vendor.

If respondent articulates a legitimate, non-discriminatory purpose, the complainant may then prove that the legitimate reasons the employer proferred were not the true reasons for its actions, but instead were a pretext for discrimination. *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 04-STA-18, slip op. at 14 (ARB May 27, 2007). To establish pretext, it is not sufficient for a complainant to show that the action taken was not "just, or fair, or sensible . . . rather he must show that the explanation is a phony reason." *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 9 (ARB July 31, 2002).

The first two reasons above involve Complainant's entry in the EZ VMS system that truck 60644 was "not to be placed into service." Complainant is said to have made this entry on August 1, 2005, but told the investigator that he entered this on July 28, 2005. That he did this is meaningless unless one accepts the Respondent's explanation that Complainant by this means supported and strengthened his claim that he did not want this truck to be driven out of the yard after July 28, 2005, but towed for brake service instead. But Complainant *gained nothing* by making this entry in the computer irrespective of when he made the entry. There is ample corroborative testimony that on July 28, 2005 and July 29, 2005, Complainant again and again expressed his position that he wanted this truck off the road and only towed to the brake service vendor. Several witnesses heard him say this on both days. Therefore, I find that Complainant's statement to the investigator that he made the entry on July 28, 2005, when, in fact, the computer system shows he made an entry on August 1, 2005 is in no way insidious or designed to mislead the investigator. This would-be backdating attempt simply could not have been used to further his cause of "going after" or setting up his supervisor!

The third reason for Complainant's termination is unacceptable because I believe Complainant's testimony that he did inspect the brakes prior to putting on the "pass" inspection sticker, by looking at the brakes without the backing plates on after the truck was returned from Spring Tech. Critically, Complainant's boss, Rudy Cunningham, agrees that such a look-see at the brakes is sufficient. Furthermore, the alleged initial denial by Complainant that he failed to inspect the brakes is not reflected in the record. It is not detailed in Mr. Connor's report or in the documentation of Complainant's termination interview. On this issue, I find that the investigator, Mr. Connor, either misunderstood Complainant during the investigation interview or is simply not believable on this score in light of my finding that Complainant is credible regarding this issue. As Ms. Adamo relied exclusively on Mr. Connor's conclusions as contained in his report to make her decision to terminate Complainant I find she seems to be struggling to support her termination with this reason. In addition, I find Ms. Vanacor's concurrence to terminate Complainant even less supportive as she agreed that Complainant should be fired based only upon the computer entry variance.

While Ms. Adamo did not mention this as one of her reasons Complainant was terminated, since it appears in Mr. Connor's report and she adopts this report as the basis for her decision to

fire him, I am compelled to discuss the matter of the billing invoice. Mr. Connor's report suggests that the photocopy of the vendor invoice with Mr. Cunningham's handwritten notation that was given to the original investigator, Mr. Moyik, by Mr. Cunningham is alleged to imply that Mr. Cunningham was passing this handwritten portion off as authored by Spring Tech instead of as his own note, in order to support Mr. Cunningham's position that the brakes were safe for the truck to be driven. Mr. Connor's report, in effect, states that this was an attempt by Complainant to mislead the investigator about Mr. Cunningham's honesty and to further Complainant's attempt to "get Rudy."

But, first, Complainant did not make the allegation that Mr. Cunningham attempted to alter the invoice and is, thus, dishonest. Complainant's co-worker, Mr. Zahn, put forward this allegation. Secondly, since everyone agrees that it is *obvious* that this was Mr. Cunningham's writing, I fail to see how this allegation may be deemed to be an attempt to place Mr. Cunningham in a bad light.

I find that this patently poorly thought-out termination of this otherwise stellar, but often safety conscious employee, suggests pretext. Furthermore, I find that Complainant was terminated because he was a long time employee who made life difficult for his manager, Mr. O'Keefe, by his constant complaining about safety issues. Mr. O'Keefe admitted how frustrated he was with Complainant's complaints when he explained how the report regarding the "old stain" had annoyed him. (Tr. at 441-442, 775, 783-784). This circumstantial evidence suggests pretext in terminating Complainant and that the actual reason for his termination was management's frustration with a safety complaining employee.

Although Respondent attempts to articulate legitimate, non-discriminatory explanations for the termination, I find that Complainant established by a preponderance of the evidence that Respondent's reasons for his termination were pretextual. Therefore, I find that Complainant has established that Respondent terminated him in retaliation for engaging in protected activity. Thus, I find that Consolidated Edison Company of New York, Inc. violated the Act when it terminated Rocco Testa on July 6, 2006.

VI. Damages

Complainant failed to establish at trial, the amount of damages claimed, i.e., back pay/lost wages. Directed to show cause why this record should be re-opened for the purpose of submission of evidence on this issue, Complainant failed to show good cause therefor, but merely set forth a written statement, by counsel, relative to the amount of back pay allegedly lost.

Claims for damages should be raised *and litigated* by a complainant at trial. *Pettit v. American Concrete Products, Inc.* ARB No. 00-053, ALJ No. 1999-STA-47 (ARB Aug. 27, 2002). *See also Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-34, slip op. at 7 (ARB Dec. 29, 2000).

Accordingly, no damages may be awarded herein.

ATTORNEY'S FEES

Complainant has requested attorney's fees and costs. Under the Act, a prevailing complainant is entitled to litigation expenses including attorney fees and costs. *See, e.g., Jackson v. Butler & Co.,* ARB Nos. 03-116 and 03-114, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004); *Eash v. Roadway Express, Inc.,* ARB Nos. 02-008 and 02-064, ALJ No. 2000-STA-47 (ARB Mar. 9, 2004). Fifteen (15) days will thus be allowed to Complainant's counsel for the submission of a petition for attorney fees and costs. Respondent's counsel will be allowed fifteen (15) days thereafter to file any objections thereto.

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RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey

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

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