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Issue Date: 21 July 2005

CASE NO.: 2005-STA-6

IN THE MATTER OF

MARK MONTGOMERY,
Complainant

v.

JACK IN THE BOX,
Respondent

APPEARANCES:

John Schulman, Esq.,
Margaret Schulman, Esq.
On behalf of Complainant

Michael Colpoys, Esq.
On behalf of Respondent

BEFORE: C. RICHARD AVERY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

Background

This claim arises under Section 405 of the Surface Transportation Act (the Act), 49 U.S.C. 31104. The Act protects employees from discharge, discipline, or discrimination for filing a complaint about commercial motor vehicle safety and/or

for refusing to operate a vehicle when such operation constitutes a violation of federal motor safety regulations or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

Procedural History

The Complainant filed a complaint with the Secretary of Labor alleging that he was discriminatorily terminated in violation of the Act. Following an investigation of this matter, the Secretary of Labor, acting through her agent, the Regional Administrator, issued findings on September 24, 2004, that the complaint had no merit. ALJ 1. The Complainant requested a formal hearing, and on February 15, 2005, a hearing was held in Dallas, Texas, at which time all parties were given an opportunity to present evidence and arguments. This decision is based on the record made at the de novo hearing which included testimony of witnesses, Administrative Law Judge Exhibits 1-3, Complainant's Exhibits 1-71 and 77-79, and Respondent's Exhibits 1-38. The parties were also granted until June 17, 2005 to file post-hearing briefs, which both parties did.[1]

Issues

The parties agreed they are subject to the Act and issues for my determination are:

1. Did Complainant engage in activity which is protected within the meaning of the Act;
2. Did Respondent have knowledge of such activity; and
3. Whether any adverse action taken against Complainant was due to his engaging in protected activity.

Stipulations

At the commencement of the formal hearing, the parties announced the following stipulations:

1. Respondent Jack in the Box is a "person" within the meaning of 49 U.S.C. § 31105(1);

[1] The following abbreviations will be used throughout this decision when citing evidence of record: Hearing Transcript: "Tr. __;" Administrative Law Judge Exhibit: "ALJX __, p. __;" Complainant's Exhibit: "CX __, p. __;" and Respondent's Exhibit: "RX __, p. __."

2. Complainant is an employee within the meaning of 49 U.S.C. § 31105(1);
3. Complainant was employed as a truck driver by Respondent from April 12, 1999 until November 8, 2003;
4. Respondent's Dallas Distribution Center is located at 4721 Mountain Creek Parkway, Dallas, Texas;
5. Complainant's employment with Respondent was terminated on November 8, 2003;
6. On November 8, 2003, Respondent did not have a specific, written policy defining the term "accident;"
7. The tractor/trailer driven by Complainant on October 19, 2003 was not damaged by Complainant;
8. On October 23, 2003, Respondent's transportation supervisors Joe Angel and Jason Whitfield performed an employee performance appraisal on Complainant and assigned a total score of 22, placing him on thirty days probation; and
9. Complainant made his formal complaint to the Department of Labor on April 30, 2004. Tr. 5-7.

Findings of Fact

1. When hired as a Driver by Respondent, Complainant was provided with a company policy handbook. Complainant was aware that a policy which required reporting accidents was in effect during his employ. Tr. 166-167; CX 58.
2. Complainant was based at Respondent's Dallas Distribution Center, which utilized an additional handbook. The 2002 version of the handbook states, in relevant part:

   "Immediately report to your supervisor all unsafe conditions, accidents and injuries, even if they seem minor. Failure to do so could result in disciplinary action." RX 4, p. 128.

   "All Jack in the Box truck Drivers must comply with the Motor Carrier Safety Regulations of the Department of Transportation (DOT), as well as all other laws and traffic regulations. Each Driver is personally responsible for knowing and understanding these laws and regulations." RX 4, p. 130.

"All injuries and accidents must be reported to management as soon as possible." RX 4, p. 130.

3. The Distribution Center handbook also contained a section entitled "Rules of Conduct," which indicated that "…infractions of the following will result in disciplinary action, up to and including termination" dishonesty, falsifying time cards or work records, and "violation of rules communicated to you by your supervisor." RX 4, p. 139.
4. The Distribution Center handbook section entitled "General Driving Rules" states, in relevant part: "Jack in the Box requires that any violation of company policy, traffic laws regulations, or accidents be reported to your supervisor as soon as possible (no later than completion of the day's activities.) Failure to follow this requirement may result in disciplinary action, up to and including termination." RX 4, p. 139. Further, the Vehicle Accident Policy instructed employees that they were "responsible for reporting all vehicle accidents no later than completion of the day's activities," and that "failure to do so will result in disciplinary action up to and including termination." RX 4, pp. 140-41.
5. Respondent conducted routine Employee Performance Appraisals on its workers. The evaluation of Complainant dated May 23, 2001 reflected that Complainant scored either "fully competent" or "outstanding" in all appraisal areas, including job skills/knowledge, safety, productivity, customer service, quality control/cleanliness, teamwork, appearance/personal cleanliness, and attendance/punctuality. CX 15.
6. On September 25, 2002, Complainant met with Isidro Galicia, Respondent's Transportation Manager, for purpose of discussing Complainant's allegation that another employee had sabotaged his load. On September 24, Complainant called Mr. Galicia on his two-way radio and stated that an employee had intentionally written two store numbers on the delivery pallet to confuse him. Mr. Galicia noted that the employee accused of wrongdoing was not at work the day the incident occurred. Further, Mr. Galicia indicated that Complainant failed to check the products he delivered to one restaurant and as a result left a delivery at the wrong store. Complainant explained that he did not check the delivery because he did not have time to do so. Mr. Galicia took Complainant off the

route and stated that other drivers did not have problems meeting scheduled times on the route. CX 24, CX 25.

7. Complainant was re-evaluated on September 26, 2002, where his performance was downgraded to "improvement needed" in productivity, customer service, teamwork, and appearance/personal cleanliness. Mr. Angel, the supervisor who conducted the evaluation, commented that overall, Complainant was a good employee but needed to address some areas of his job. Complainant indicated that he believed his productivity score was decreased due to illegal routing, his teamwork score was decreased because of problem employees, and his customer service score was decreased due to stores failing or refusing to follow delivery procedures. CX 16.

8. Also on September 26, 2002, Complainant was issued a written disciplinary warning based on the complaint of one of Respondent's store managers. The manager called the Distribution Center on September 25, alleging that Complainant "hit the back door of the store" and instructed the manager how to do his job. Complainant disagreed with the disciplinary report, denying hitting the door and commenting that the "employees were untrained and did not want to check the product." CX 24. Complainant also received a verbal disciplinary warning on September 26 for failure to follow procedure. The report indicates that Complainant ran one and a half hours late and failed to notify management of late deliveries. Complainant stated that he did call while in transit, before being late due to road construction and driving a new route. RX 28.

9. On October 24, 2002, Complainant placed his first call to Respondent's Ethics Hotline, established for employees to raise "any concern, complaint, problem or issue" or to receive "guidance on making the best decision." CX 58, p. 108. Complainant made an anonymous complaint regarding the recent employee performance appraisals. The record of the call indicated that the employee (Complainant) was concerned about retaliation, that the management "hated" employees at the Dallas distribution center, and that the new method of reviewing employees was not the same standard of the past. He also complained that employees had a right to a copy of their evaluations but management would not release copies. Mr. Gary Hunter of Respondent's Corporate Human Resources department contacted Frank Luna regarding the complaint from the Ethics Hotline on October 30. Mr. Luna told Mr. Hunter he would meet with supervisors and managers to review evaluation policies. He noted that

employees were not furnished with copies of their evaluations, and Mr. Luna said he would provide copies to all employees. CX 19.

10. Complainant was "re-reviewed" on November 22, 2002, where it was noted that he had been "working on being a team player," and his scores increased to all "fully competent" or "excellent" results. CX 3.
11. On February 5 and February 10, 2003, Mr. Luna received complaints from store managers regarding Complainant's behavior while making deliveries to stores, including blocking other deliveries, refusing to place food pallets inside. There were documented previous complaints about Complainant's attitude and descriptions of him being "rude" to employees at restaurants. RX 26; RX 29; RX 30.
12. Complainant placed another call to the Ethics Hotline on March 4, 2003, which focused on complaints regarding the management at the Dallas distribution center. The report of the call indicates that Complainant stated ten or eleven months prior, an employee was driving an eighteen-wheeler when "some of the tires flew off," and Complainant felt that management did something to cause the tires to fall off. Complainant said the truck he was driving at the time had no heater or defroster in it, which he said was against the law. He felt Mr. Luna, Mr. Galicia and Mr. Whitefield were retaliating against him, but he did not know why. He said there were false documents in his personnel file stating Complainant had done things which he had not. Complainant called the Ethics Hotline again on March 7, stating that when he got to work there was an offensive note in his in-box, similar to one he received on January 9, which he believed to have come from Mr. Luna. Complainant stated Mr. Luna was "out to get" him.
13. On March 10, 2003, Complainant sent a certified letter to Mr. Hunter in human resources, reflecting the telephone conversation they had the day before. The conversation regarded several incidents where Complainant damaged equipment. The incidents were reported to the accident committee but did not result in written disciplinary action. Complainant's understood from the conversation with Mr. Hunter that he had no chargeable accidents on his safety/accident record. CX 21.
14. On March 11, 2003, Complainant left a voice mail message at the Call Center. He called from his route and stated that he had injured his back as a result of the tractor-trailer that Mr. Luna and Mr. Galicia assigned to him. He complained that the heater was out and that he had contacted Mr. Luna about the problem. CX 26.

15. On March 14, 2003, Mr. Hunter sent a letter to Complainant indicating he had begun to investigate Complainant's allegations of wrongdoing at the Dallas distribution center. He noted that Complainant had reported schedules as a problem but then told Mr. Hunter that it was no longer a problem. The letter reflected Complainant's other concerns regarding Mr. Luna and Mr. Galicia sabotaging tractor-trailers, but Mr. Hunter determined that neither of them were involved in the assignment of vehicles. He stated that Complainant previously expressed concerns about being forced to drive illegally, but later "called back and rescinded" the complaint. CX 23.
16. On May 23, 2003, Complainant was issued a disciplinary action for failing to follow state and company guidelines, namely, failing to notify management of numerous violations of the federal seventy-hour rule.[2] Complainant had incurred forty-six violations from January to May 22, 2003, and was "continuously running routes without appropriate hours of service." Complainant was given time off to bring his work hours below seventy hours in eight days. Complainant disagreed with the disciplinary action, stating he had previously notified management of numerous violations of the hours-of-service rule. Complainant was suspended without pay from May 30, 2003 to June 6, 2003.
17. On June 6, 2003, Complainant received a memo from Jason Whitefield stating it was Complainant's "final warning." Complainant was instructed in the future to address any complaints to management or other appropriate contacts, refrain from pestering co-workers with complaints, to follow recommended driving schedules at all times, to notify management if he was unable to complete a route without exceeding allotted hours, and warned not to start a new route if he did not have enough hours remaining to complete it. The memo concluded: "You were already told once any additional issues will lead to your termination, but we are giving you one last chance to straighten things out. Please understand that any additional problems will lead to your termination." CX 30.
18. On August 26, 2003, Complainant was issued a disciplinary action for working unauthorized overtime hours. CX 9.
19. On August 28, 2003, a disciplinary action was issued for "substandard work," based on Complainant's failure to detect and report side

[2] Drivers are only allowed to work seventy hours in an eight-day period.

bracket damage on his vehicle during his pre and post-trip inspections. Complainant was warned that continued violations of that nature would result in disciplinary action up to and including termination. CX 29.

20. On October 19, 2003, Complainant had driven a regularly scheduled route and had finished making deliveries in the Dallas area when he felt "fatigued," and he said he believed his driving ability had become significantly impaired so that he needed to stop and rest.
21. Complainant drove approximately one-sixteenth of a mile from the location of his last delivery to a Mobil service station he remembered could accommodate 18-wheelers, in an attempt to take a break in the station's parking lot. Complainant noticed construction being performed in the front of the store, so he pulled into an adjacent driveway, where he began to make a left turn, which he realized would be difficult to complete. Complainant set his brakes and did a "walk-around" inspection of his vehicle, then determined that the best course of action was to back the vehicle. In attempting to do so, he said he backed the rear tires carefully and successfully over a median. He again inspected the vehicle and attempted to resume backing but realized the drive wheels were slipping and the vehicle was in a position where the drive wheels were no longer capable of contacting the ground to propel the vehicle.
22. Complainant, saying he continued to feel fatigued, became frustrated and decided to take a break. He entered the service station where he asked for the Yellow Pages, called a wrecking service "on a whim," and was told by the dispatcher that a driver was in the area. Soon thereafter, the wrecker arrived flashing its lights, which Complainant asked him to turn off. Complainant told the wrecker to exercise a great deal of caution.
23. Complainant maintained he did not need a pull; rather, he was fatigued and did not want to damage the vehicle or equipment. The wrecker attached a winch to Complainant's vehicle's bumper and pulled the truck until the entire vehicle rested on the concrete.
24. Complainant used his personal credit card to pay $150.00 for the wrecker service. He did not submit a request for reimbursement to Respondent. Complainant listed the time of the incident as "off duty" on his time card.
25. Complainant did not report the incident to Respondent until November 8, 2003. However, pursuant to the stipulations, prior to that time, on October 23, 2003, Complainant received a low score of

22 on his performance evaluation and was placed on thirty days' probation. Tr. 6.[3]

26. On November 8, 2003, Complainant went to work and was told the management wished to see him. Complainant met with Mr. Galicia and Mr. Angel, during which meeting he was handed a completed and signed notice of separation.
27. Complainant's employ with Respondent was terminated on November 8, 2003 for failing to report an accident to management, specifically, the incident of October 19, 2003.
28. Complainant secured employment elsewhere as a truck driver in June or July 2004. He no longer has regularly assigned routes, does not have health care benefits, and earns less than he did with Respondent. Complainant no longer has a retirement account with his current employer and liquidated the 401(k) account he had with Respondent after he was terminated.
29. Complainant seeks reinstatement, back pay, and consequential damages.

Peter Romanuck

Mr. Romanuck worked as a driver for Respondent from September 1973 until March 24, 2004, when he was terminated for exceeding hours. He currently drives for another company. Tr. 25-26. Mr. Romanuck did not recall management defining an "accident" as including where no collision had occurred but the vehicle needed to be towed. He did not know of any driver aside from Complainant who was terminated for getting a "short pull." In fact, Mr. Romanuck said he previously received a short pull in Houston; however, he said he informed his supervisor. Tr. 27.

Mr. Romanuck did not believe that the incident Complainant was involved in was an accident in the way Respondent uses the word. Before Mr. Romanuck was terminated, he spoke to managers regarding the Dallas to Danville route which could not be accomplished legally. He was terminated for completing the route Respondent refused to change, because he took too long to complete it. Tr. 30. Mr. Romanuck claimed that Ms. Pam Kingston told him to change his log books, for example, he would indicate that he worked 72 hours, and the log would return to him with a note stating that was too many hours. He recalled this occurring over ten times. Tr. 32. Mr. Romanuck described Complainant as "kind of picky" about

[3] The employee performance evaluation does not contain the word "probation," however, it does indicate that Complainant was required to have "a separate review done within 30 days from [October 23, 2003] to improve his score to 24 or above to continue employment." RX 21.

his equipment, and wanted everything to be "just right." Tr. 33. Mr. Romanuck did not think maintenance was timely performed on equipment when it was requested.

Mr. Romanuck opined that when a vehicle is "high-centered" it constitutes an accident. A vehicle becomes high-centered when something is run over, such as a curb or a ditch, which raises the tractor-trailer up and renders the drive wheels unable to move the vehicle under its own power. Regarding his own termination, Mr. Romanuck explained that he called in but could not reach anyone, and he made the decision to exceed his hours. He stated he was not instructed to do so, because "they don't tell you like that." Tr. 38.

Jason Whitefield

Mr. Whitefield is employed as a transportation supervisor for Respondent, where his job duties include assigning equipment and schedules, and setting up deliveries to restaurants. Joe Angel is the other supervisor, and they both report to Isidro Galicia, the transportation manager. Tr. 40. Frank Luna was Mr. Galicia's supervisor, but he left Respondent's employ in December 2003.

Mr. Whitefield said that another employee of Respondent was terminated when he injured himself and did not report the incident. He acknowledged that in the past Complainant had reported to Mr. Whitefield what Complainant believed to be safety violations. Tr. 44. Mr. Whitefield did not make any written record of Complainant's reports. Tr. 45. He recalled Complainant often complaining to anyone who would listen that he was being asked to falsify log books and drive excessive hours. Tr. 59. Mr. Whitefield conceded that Complainant was probably more conscious of DOT rules than the average driver. Tr. 60.

Mr. Whitefield conducted Complainant's performance evaluation in 2001 and recalled that at that time, Complainant was performing his job very well. Tr. 63. However, by 2003, when Mr. Whitefield completed another evaluation, Complainant's performance was downgraded in areas of job skills and productivity. On May 23, 2003, Mr. Whitefield authored a disciplinary report regarding Complainant's violation of the seventy-hour rule. He said a review of driver logs was conducted before the report was issued, and other drivers were disciplined as a result of the review. Mr. Whitefield acknowledged that a DOT audit conducted in April 2004 revealed widespread evidence of drivers falsifying records of duty status. He further acknowledged that DOT referred to a lack of oversight by local management and Respondent acknowledged the lack of local oversight. Tr. 69-70.

Mr. Whitefield agreed that Complainant's Exhibit 72 is a memo he wrote to Mr. Galicia after speaking with Complainant, who alleged that his bid package was illegal, asked for his route to be changed, and requested additional equipment. The memo concludes with Mr. Whitefield's observation that he had heard of Complainant's confrontational attitude in the past, but this was the first instance it was directed at Mr. Whitefield, and he believed "something has to be done about this employee." CX 72; Tr. 72. Mr. Whitefield was not involved in the decision to terminate Complainant. He explained that it is the individual driver's responsibility to make certain he stays within his allowable hours. Tr. 76. Mr. Whitefield denied ever asking Complainant to falsify his log book, and said he never took adverse action against Complainant for refusing to do so. Tr. 78. Mr. Whitefield opined that getting a vehicle stuck does not constitute an accident, but where a tow is necessary because the vehicle is stuck does constitute an accident. Tr. 79.

Jose Angel

Mr. Angel was a transportation supervisor for Respondent for approximately six years. Mr. Angel signed Complainant's separation notice, and explained that though he heard Complainant was going to be terminated immediately before the termination occurred, he did not participate in any conversations regarding Complainant's termination nor did he recommend it. Tr. 91-92. Mr. Angel's understanding was that the recommendation of termination came from Human Resources in California.

Mr. Angel recalled Complainant's complaint that an unknown company driver had driven someone off the road. He acknowledged giving Complainant written instructions to change a multi-page accident report by removing six pages. Tr. 95. He asked Complainant to remove the portion of the report containing Complainant's opinions on the routes in existence at the time, and asked him to only include facts so the report could be sent to the accident committee. Tr. 96.

Mr. Angel explained that Respondent changed the delivery procedure from "drop and go" to a system where drivers were required to stop and check their deliveries, and agreed that more time can be required when checking orders on large deliveries. Complainant requested for routes to be changed to allow more time after the requirement of checking orders was implemented. Tr. 99. Mr. Angel recalled that Complainant believed a route was illegal as scheduled, and believed he told Complainant that there were no illegal routes at the distribution center. Tr. 100.

Mr. Angel agreed that Respondent did not have a specific written policy defining an accident. He was told that Complainant's vehicle was not damaged in the incident of October 19, 2003. Tr. 101. He agreed that under Respondent's policy, if the need for roadside assistance arises, it does not automatically mean an accident occurred, however, he said that if a vehicle runs into a stationary or moving object, damages landscape or another piece of equipment, an accident has occurred. Tr. 103. Mr. Angel recalled that Mr. Luna informed him that the landscape was damaged in Complainant's incident. Mr. Angel did not believe that at the time of his termination Complainant's ability to drive an 18-wheeler had deteriorated. He acknowledged that Complainant tried to be a safe driver at all times. Tr. 107.

Wade Richard Skiles

Mr. Skiles worked for Respondent for twenty-four years until he was injured on the job and damaged his knee so he could no longer drive. He stated that some of the routes in the Houston area exceeded legal limits. Tr. 115. He was not aware of any company policy which forbade a driver to call for his own tow or pull. Mr. Skiles had done so himself, for example, when the clutch on his vehicle went out and when he became stuck in a snowbank. When his vehicle became stuck in a snowbank, he did not report the incident as an accident, but he did send the bill for towing to Respondent and reported that his truck had become stuck. He agreed that since the truck could not move under its own power, he needed to report the incident to his supervisor. Tr. 119.

Isidro Galicia

Mr. Galicia recalled that Complainant "made comments that everything we did was illegal." Tr. 121. He did not recall which runs Complainant alleged were illegal, and said he checked the runs against CADEC, the onboard computer system, and determined them to be legal. Mr. Galicia opined that Complainant spent too much time at the restaurants. He had another driver perform Complainant's route, and that driver said the route could be performed in the allotted time. Tr. 124.

Mr. Galicia signed Complainant's notice of termination. He said he saw the invoice from the wrecking company containing Complainant's signature, spoke to Mr. Luna, and determined that there was an accident which was not reported. He said Mr. Luna was the one who told him Complainant was involved in an unreported accident, and recalled that Human Resources was contacted and it was that department, not Mr. Luna or Mr. Galicia, that suggested that there was a

failure to report an accident. Tr. 128. Mr. Galicia said that excessive complaining was not the reason for Complainant's termination.

Mr. Galicia had previously disciplined Complainant for unauthorized overtime where Complainant was inspecting equipment. Part of Complainant's duties that day were to inspect equipment, but Mr. Galicia said that he was also supposed to move equipment, which he did not do, and Mr. Galicia wrote Complainant up for exceeding an eight-hour work day. Tr. 132.

Mr. Galicia agreed that the incident in which Complainant was involved on October 19, 2003, was not an accident pursuant to the DOT regulations. Tr. 134. However, he said Respondent's policy, though perhaps "a little bit harsh," required every accident to be reported, even if it is only an incident. Tr. 137. Mr. Galicia agreed that a 1999 memo regarding "progressive discipline" was removed from the 2002 company handbook, but said the handbook indicates that any accident must be reported to management by the end of the work day, and failure to do so may result in discipline up to termination. Tr. 138. Mr. Galicia had "no doubt" in his mind that Complainant was involved in an accident.

Frank Luna

Mr. Luna worked for Respondent for nearly thirty years until he left the company in 2004. Mr. Luna was the general manager of the Dallas Distribution Center for nearly four years. He recalled a history of Complainant raising the issue of illegal routes to him on occasion. Mr. Luna was aware that Complainant made an ethical complaint but did not know the subject of the complaint. Tr. 142.

Mr. Luna recalled Human Resources becoming involved in Complainant's case when Complainant was attempting to speak to other employees about illegal practices at Respondent's business. Mr. Luna believed that Complainant was ultimately suspended in May 2003 for such behavior. Tr. 144.

Regarding Complainant's termination, Mr. Luna recalled that he spoke to Mr. Hunter in Human Resources regarding some information which had come to his attention, namely that Complainant had a truck pulled out of a median. Tr. 147. He said that in safety meetings on several occasions, drivers had been informed that any accident, any damage to equipment, hitting anything, etcetera, was to be immediately reported to management and failure to do so could cause termination. In Mr. Luna's opinion, becoming stuck on a median is considered an accident. Tr. 150.

Mr. Luna learned of Complainant's October 19, 2003 incident when he received a call from one of Respondent's restaurants regarding a late delivery. The caller had noticed the Complainant's stuck truck and opined that it was the cause of the late delivery. Tr. 152. Mr. Luna called the service station that the caller specified and then called local wrecking companies until he located the one that had towed Complainant's truck. He received a copy of the report by fax and then proceeded to determine which vehicles were in route that day. He looked at Complainant's driver's log and driver's trip sheet, neither of which indicated that Complainant received a tow that day. Complainant did not report the incident on the day it occurred, nor did he report it before he was terminated. Tr. 159.

Mark Montgomery

Complainant testified that when he was hired he was instructed that the proper rules and regulations to follow as a driver were the Federal Motor Carrier Safety Regulations. He was also given an employee handbook, which was reissued in 2002, which he was told controlled at the time of his termination. Tr. 156-66. Complainant's personal understanding of the word "accident" was if he collided with another object and it caused material damage. Tr. 168. Complainant understood that Respondent deliberately chose not to define the word.

Complainant agreed that there were occasions where the vehicles he drove sustained minor damage or to some extent, he caused minor damage to another object. Complainant recalled reporting each of those instances. Tr. 169. Complainant said the definition of accident was never addressed in any safety meeting he attended. Tr. 172.

Complainant explained the meaning of the terms "breakdown" and "pull." He said that a breakdown occurs when his vehicle will not run in some way, usually caused by a mechanical failure of the vehicle to some extent. Examples included a flat tire or the starter going out. Complainant explained that a "pull" is called for when the vehicle becomes stuck or has lost traction, but there is no damage to the equipment of the vehicle, and it will continue to operate without a problem. Tr. 174. Complainant said he was not attempting to hide anything when he did not submit the wrecker bill to Respondent for reimbursement. Tr. 175.

Complainant testified that the wrecker driver said Complainant did not need a pull. Complainant agreed but explained that he was fatigued and wanted a pull because he did not want to damage the equipment. Tr. 185. During the period in which the vehicle was pulled, between 6:45 and 7:45 p.m., Complainant indicated on his driver's log that he was "off-duty," explaining that it was a personal break.

He did not note that he became stuck anywhere on his trip sheet because, he explained, there was not requirement to do so. Tr. 193. Complainant said he had received other pulls while in Respondent's employ, and he did not file oral reports, accident reports, or request reimbursement.

Regarding his alleged protected activity, Complainant recalled that he frequently found violations during his pre and post-trip inspections which indicated that repairs needed to be made to equipment. He said there were instances where he was instructed to drive with equipment which was in violation. Regarding the disciplinary report Complainant received on August 29, 2003 for working unauthorized overtime, Complainant recalled that he was never able to perform his yard duties within the eight hours allotted. He explained it was "impossible" to complete his regular duties, let alone the inspection of two tractor-trailers required of him. Tr. 201.

Complainant said he made an increasing number of reports regarding service hour violations as time went on, explaining he was more motivated to report in 2003 when he was assigned and instructed to drive routes which involved violations of service hours. Tr. 205. He recalled informing Mr. Angel and Mr. Galicia of problems he had with the routes and attempting to meet scheduled times, but said that they would not change the schedule. Tr. 208. He recalled telling Mr. Angel that he had "reached the fifteen-hour rule"[4] on July 4, 2003, and also informed Mr. Luna on July 5. Tr. 209. Complainant recalled being told to continue working despite violating the fifteen-hour rule by David Cox who was on duty in the Distribution Center office. Complainant informed Mr. Luna, who he said instructed him to complete the last delivery he had to make. Complainant detailed the events in a letter to Mr. Luna but never received a specific response. Tr. 215, CX 50.

Complainant explained he missed the delivery times of a specific route because he went as fast as he could, but the appointment times did not meet the hours regulations.[5] Tr. 217. Complainant said he observed the service hour rules which caused him to miss the appointment, because if he made the appointment in Danville he would not have been able to get his required eight hour break. Complainant said no other route he drove specifically presented service hour violations. Tr. 218.

[4] When a driver reaches fifteen hours on duty he must take an eight-hour break. A driver can drive a maximum of ten hours, and can work seventy hours in eight days.
[5] This route is known as the "Danville route," from Dallas, Texas to Danville, Illinois.

Complainant discussed the calls he made to Respondent's Ethics Hotline. He said that in the first call, made on October 24, 2002, he expressed his concerns about the activities of management, including the recent employee performance appraisals, and the belief that his was based on "bogus data." Tr. 227. He said after he made the call, John Watt, the Vice President of Distribution, appeared at the Dallas Distribution Center. He held a driver's meeting on November 10, 2002 and explained that management had not received training on conducting evaluations but would receive it. Tr. 230. Claimant subsequently received a higher score on reevaluation.

Complainant called the Ethics Hotline again in March 2003 where he complained about a broken seat in one of his vehicles, misconduct by management, and illegal routes. Complainant was supposed to forward supporting documentation to Mr. Hunter in Human Resources but explained he could not do so because it would have been "impossible" for him to comply with Mr. Hunter's request under his working situation. He said Mr. Hunter closed the investigation before Complainant could send him documentation in his personal time. Tr. 239. Complainant met with Mr. Hunter and Mr. Kanold on March 17, 2003 where he was told the investigation was closed. Complainant recalled asking what was being done about drivers not getting required breaks, and said that Mr. Hunter refused to respond and Mr. Kanold "rebuffed" and at some point told Complainant he was delusional regarding complaints and gave him a business card for a psychological counseling service offered by Respondent. Complainant was not disciplined at this meeting but was told to refrain from calling Mr. Luna certain negative names. Tr. 241.

Gary R. Hunter

Mr. Hunter is an Area Coach for Respondent, which gives him the responsibility for nine stores in Southern California. Prior to becoming an Area Coach, Mr. Hunter was a Human Resources and Training Manager for distribution and the convenience store line, a position he held for approximately three years. Tr. 288. Mr. Hunter's duties in Human Resources included the Dallas Distribution Center. He was involved in the decision to terminate Complainant's employment. Tr. 289.

Mr. Hunter received a call from the Dallas Distribution Center indicating there was reason to believe that Complainant had an accident and had the vehicle towed but did not report it. He was told that Dallas management was awaiting documentation to prove that the incident happened. He was called again and the decision was made to terminate Complainant. Mr. Hunter explained that there is a

written policy which requires the company to terminate employees who fail to report an accident involving a company vehicle. Tr. 290.

Mr. Hunter agreed that he assumed that the information he received in the phone call was an accurate description of the events that had occurred. He agreed he never saw documentation regarding Complainant's truck being pulled before the decision to terminate Complainant was made. He was not told by management that the wrecker driver marked out the word "tow" in a couple places on the work order. Tr. 292.

Discussion and Conclusion of Law

This proceeding is brought under the employee complaint provision of the Act, which states, in pertinent part:

> A person may not discharge any 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…
> >
> > 49 U.S.C. § 31105(a)(1)(A).

In this instance, the parties stipulated, and I find that, Complainant is an employee within the meaning of 49 U.S.C. Section 31105(1) and Respondent is a "person" within the meaning of 49 U.S.C. Section 31105(1). As a result, the Act is applicable to this case.

To prevail on a whistleblower complaint under the Act, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that there is a causal connection between the protected activity and the adverse action. *BSP Transport, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Systems, Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v.*

Young's Commercial Transfer, Inc., ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

A respondent may rebut the complainant's *prima facie* case by demonstrating that the adverse action was motivated by legitimate, nondiscriminatory reasons. An employer attempting to rebut a *prima facie* case of discrimination must produce evidence that the adverse action was taken for a legitimate, nondiscriminatory reason, but "need not persuade the court that it was actually motivated by the proffered reasons." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The burden then shifts back to the complainant to establish that the proffered reason was pretextual and the protected activity was the true basis for the adverse action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 402, 406-08. The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Center*, 509 U.S. at 502; *Poll v. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5 (Jun. 28, 2002).

The Administrative Review Board has instructed that when a case has been fully tried on the merits, it is unnecessary to determine whether the complainant presented a *prima facie* case of discrimination and whether the respondent rebutted that case. Rather, once the respondent produces evidence attempting to demonstrate that Complainant was subjected to an adverse employment action for legitimate, nondiscriminatory reasons, it no longer serves any analytical purpose to determine whether Complainant has presented a *prima facie* case. *Ciotti v. Sysco Foods of Philadelphia*, 1997-STA-30, at p. 4 (ARB July 8, 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). The relevant inquiry is whether Complainant has prevailed by a preponderance of the evidence on the ultimate question of liability. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (Mar. 29, 2000).

Protected Activity

Under subsection (A) of the Act, protected activity may be the result of complaints or actions filed with agencies of federal or state governments, or the result of purely internal complaints to management, relating to a violation of a commercial motor safety vehicle rule, regulation, or standard. *Reed v. National Minerals Corp.*, 91-STA-34 (Sec'y July 24, 1992).

In this instance, it is undisputed that Complainant made complaints and expressed concerns to management regarding what he believed to be illegal routes which violated the hours-of service rule. Complainant also reported problems with several of his vehicles, including a broken heater and broken seat. Complainant made a series of calls to the Ethics Hotline where he expressed concerns regarding routes, management's treatment of employees, and other safety concerns. Protection under the complaint provision of the Act is not dependent upon actually proving a violation of a commercial motor safety regulation; rather, the complainant need only relate to such a violation. *Schulman v. Clean Harbors Environmental Services, Inc.*, 98-STA-24, p. 6. (ARB Oct. 18, 1999). It is clear that Complainant engaged in activities protected under the Act.

Adverse Employment Action

It is undisputed that Complainant was terminated on November 8, 2003. Clearly, he suffered an adverse action regarding the terms of his employment.

Cause of the Adverse Action

The burden then shifts to Respondent to demonstrate that it terminated Complainant's employment for legitimate, non-discriminatory reasons. Again, the burden of proof at this point requires only that Respondent adduce probative evidence. I find that Respondent has proffered legitimate, nondiscriminatory reasons for its adverse employment actions against Complainant. Respondent contends that Complainant was terminated because he failed to report an accident contrary to company policy and falsified his logs to prevent discovery of the accident. This proffered explanation is sufficient to meet Respondent's burden. The burden then shifts to Complainant to show that Respondent's proffered motive was pretext, and that the adverse action was the result of discriminatory motives.

Complainant asserts that Respondent's proffered justification for his termination is pretexual. He argues that he was not accused of any misconduct other than failing to report receiving a "pull" as an accident, which he did not report as an accident because it did not constitute an accident. Complainant's Brief, p. 70. Complainant asserts that advisory opinions issued by the Federal Motor Carrier Safety Administration and the Texas Department of Public Safety indicate that circumstances like those encountered by Complainant on October 19, 2003 do not constitute an accident. Further, Complainant notes that other employees who received pulls were not terminated, nor did they report pulls as accidents. *Id.* At 70-71.

Complainant argues that Respondent did not investigate the alleged accident scene, nor was a memo issued to drivers regarding pulls and tows following Complainant's termination. In addition, Complainant points to the fact that Respondent never produced a single document indicating that a pull or tow constituted an accident, nor did it have a written definition of the word accident. Complainant asserts that he never falsified documents during his employ. In sum, Complainant avers that he made "constant internal safety reports" throughout his employ, and his termination was in retaliation for doing so. *Id.* at 72.

In the instant case, it is evident that Complainant engaged in protected activity by expressing concerns regarding routes, equipment and hours-of-service. However, it is equally clear that Complainant had violated company policy on several occasions and had been reprimanded for doing so. Complainant's personnel record contains several disciplinary reports. On September 26, 2002, he was disciplined due to a manager complaint, and was also reprimanded for failing to call in a late delivery, which was Respondent's procedure. CX 24; CX 28. On May 23, 2003, a disciplinary report was issued because Complainant incurred forty-six violations of the hours-of-service rule in five months.

On June 6, 2003, Complainant was disciplined for "annoying other drivers," and was suspended for a week without pay. The explanation for this disciplinary action indicates that Complainant had been told repeatedly to express his concerns to management and not co-workers. Complainant was told it was "perfectly appropriate" to discuss issues with co-workers but several employees, per written statements, had indicated to management that it had become problematic. The June 6 write-up expressly states "This is your final warning" and that Complainant was being given one last chance to "straighten things out." Further, the letter concluded that "any additional problems" would lead to Complainant's termination. Complainant's signature appears to be on the document, indicating he was aware of its contents. CX 30, p. 196. On August 26, 2003, Complainant was issued a disciplinary report for working unauthorized overtime hours. CX 9. Complainant was disciplined again on August 28, 2003, for failing to detect and report side bracket damage on his vehicle in his pre and post-trip inspections on August 16 and August 3. A written warning was issued and, again, Complainant was warned that further violations would result in disciplinary action up to and including termination. CX 29. Also, four days after his truck was pulled, and before management learned of the incident, Complainant received a poor appraisal score and was told if an improvement did not occur within thirty days he would be terminated. Before that time elapsed, however, his unreported accident came to

light, and that event was obviously the straw that broke the proverbial camel's back.

In other words, it is clear from the evidence that Complainant was given more than one last chance. Complainant asserts that no other employee was terminated for receiving a pull, but the evidence does not indicate whether any other employees had as many previous disciplinary actions taken against them, and in each of those instances the drivers reported the event. Complainant cannot argue that his circumstances are similar to those of his witnesses who received pulls. Mr. Romanuck informed his supervisor he received a pull. Tr. 27. When Mr. Skiles' vehicle became stuck in a snowbank, he sent the bill for towing to Respondent and reported that his truck had become stuck, and Mr. Skiles agreed that since the truck could not move under its own power, he needed to report the incident to his supervisor. Tr. 119.

Complainant asserts that his pull was not an "accident," and relies on the fact that Respondent did not have at the time a written definition of the word. The fact that the policy was not written does not negate its existence, however, especially considering testimony of other drivers, such as Mr. Romanuck and Mr. Sikes, who were aware that they needed to inform management when they were involved in situations similar to Complainant's, and testimony of management who stated they considered Complainant's mishap to constitute an accident which necessitated reporting. *See Frechin v. Yellow Freight Systems, Inc.*, 96-STA-34 (ARB Jan. 13, 1998) (noting the complainant and other drivers were aware of the existence of an unwritten policy).

I do not find that Complainant has established that his accident was not the true reason for his termination, and therefore he has not established causation. While Complainant made safety complaints, the record is replete with instances where the concerns expressed by Complainant to management were investigated and/or remedied. For example, when Complainant called the Ethics Hotline, reports were generated of the calls and the status of investigations of complaints. The reports indicated that one of Complainant's concerns, that employees were not receiving copies of their performance evaluations, was remedied by discussing the issue with management. CX 26, p. 182. On March 24, 2003, Mr. Hunter described his investigation of Complainant's complaint, and stated that he interviewed several other drivers and could not confirm Complainant's accusations. Complainant submitted a letter from Mr. Bill Walker, another driver, who stated that he had expressed concerns about the legality of a route to his supervisor and the problem was resolved after reporting it to management. CX 4.

Mr. Galicia testified that he responded to Complainant's concerns by having another driver take over Complainant's route which did not result in any problems.

In sum, I find that Respondent did not terminate Complainant because of his engagement in protected activity. Rather, the evidence supports a finding that Complainant was terminated for multiple incidents which resulted in disciplinary actions and several "final chances." Though Complainant did engage in protected activity, Respondent addressed his concerns and did not terminate him because of it. Accordingly, because Complainant failed to meet his burden of establishing that Respondent discriminated against him because he engaged in protected activity, he has failed to establish causation, an essential element in his case. Consequently, the relief he requests is hereby **DENIED**.

ORDER

Based upon the foregoing findings of fact, conclusions of law, and upon the entire record, Complainant's claim is hereby **DISMISSED.**

So ORDERED this 21st day of July, 2005, at Metairie, Louisiana

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd

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