

U.S. Department of Labor

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Issue Date: 03 June 2005

Case No.: 2005-STA-00005

In the Matter of

ROBERT J. BAUGHMAN
Complainant

v.

J.P. DONMOYER, INC.
Respondent

Appearances:

Thomas L. Wenger, Esq.
For Complainant

Adam R. Long, Esq.
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.

Mr. Baughman ("Complainant") filed his complaint on September 19, 2003, and on October 5, 2004, OSHA issued its decision in favor of J.P. Donmoyer, Inc. ("Respondent"). Complainant appealed OSHA's decision and requested a formal hearing. This case was assigned to me on October 28, 2004. After a continuance at the joint request of the parties, the hearing was held before me on February 16 and February 17, 2005 in Harrisburg, Pennsylvania,¹ at which time both parties were given the opportunity to present testimony and other evidence.² On

¹ The transcript of the hearing consists of 232 pages and will be cited as "Tr. at --."

² Complainant submitted 16 exhibits which were accepted into evidence and will be cited as "CX-1" through "CX-16." Respondent had pre-marked Exhibits 1 through 12 but did not offer Exhibit 7 into evidence. The remaining 11 exhibits were received into evidence and will be cited as "RX-1" through "RX-12," as previously marked.

April 25, 2005, Complainant filed a motion to submit additional evidence, which I granted *infra*. The deadline for filing post-hearing briefs was extended until May 16, 2005.

THE LAW

49 U.S.C. § 31105. Employee protections

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

Complainant is a commercial truck driver who argues that Respondent violated the Act by terminating his employment immediately after Complainant refused to take a load, which he alleges that he did not take because he lacked sufficient hours to do so under federal regulations. Respondent argues (1) Complainant was discharged because he was involved in 3 accidents in a 30 day period, (2) Complainant never communicated that he was refusing the load because he lacked sufficient hours, (3) and in any event, the Safety Committee, which made the decision to terminate Complainant, was not previously aware that he had refused the load.

SUMMARY OF THE EVIDENCE

Complainant testified on his own behalf at the formal hearing. Respondent offered the testimony of three of its employees, Stephen Copp, Greg Myers and Joyce Houser. Respondent also offered the deposition testimony of Stephen Fields (RX-11), who is also an employee.

Complainant offered an accident report describing the incident that occurred on March 20, 2003 (CX-1), his log records of March 20 and March 21 (CX-2) and a cellular phone bill showing phone calls made to Respondent's terminal on March 20 (CX-3). Additional logs, dated February 27 (CX-11), March 7 (CX-12) and March 17, 2003 (CX-14) were submitted into evidence by Complainant, along with an accident report of March 17, 2003 (CX-13). Complainant also offered into evidence a pay stub for the pay period ending March 23, 2003 (CX-6), a letter from Respondent's attorney to Complainant regarding that pay (CX-8), an Order

granting Complainant's request for unemployment compensation benefits (CX-7), medical bills (CX-9), average weekly wage calculations (CX-10) and an August 27, 2003 letter from the Borough of Newport denying his application for employment (CX-15).

Respondent submitted into evidence a packet detailing Complainant's log violations between June of 2002 and March of 2003 (RX-1). Respondent also submitted evidence that Complainant received the Employee Handbook (RX-2), its policy relating to hours of work (RX-4) and the job description for the position of commercial truck driver (RX-5). The phone log used by the dispatcher to record all contact made with drivers from the morning of March 21, 2003 (RX-3) is also in evidence. In addition, Respondent submitted pictures from Complainant's February 27, 2003 accident (RX-12) and his March 20, 2003 accident (RX-8) into evidence. Respondent also offered "Driver Comment/Action Forms" regarding other employees whose employment was terminated by Respondent in the year 2003. (RX-9).

Two exhibits were submitted by both Complainant and Respondent. The first is the "Employee Notice and Record" form that was used during the meeting in which Complainant was notified that his employment was terminated (CX-4; RX-10). The second is the "Company Policy for Accidents and Incidents" (CX-5; RX-6).

Following the hearing, Complainant motioned to submit additional evidence, namely a document that had been pre-marked as RX-13 but never submitted into evidence by Respondent. That document consists of correspondence between Respondent and Atlantic Risk Management regarding Complainant's March 17, 2003 accident. It was admitted into evidence as CX-16.

FINDINGS OF FACT

Testimony of Complainant

Complainant testified that he has been working as a truck driver since he was 21 years old. (Tr. at 16). He worked for Respondent for approximately 1 year and 3 months before being fired. (Tr. at 17). On cross-examination, Complainant admitted that he was discharged from another trucking company in 1995 for jackknifing a tractor trailer in the snow. (Tr. at 60). In addition, his employment was terminated by an additional company because he failed a drug test. (Tr. at 120).

According to Complainant's testimony, he had taken a delivery to the Northeast region on March 20, 2003 and was headed back to Pennsylvania on that date, but had to stop off in Connecticut to rest. (Tr. at 18). Upon arriving back in Pennsylvania, he was dispatched to the Hanover Quarry and left the terminal at approximately 7:00 or 7:30 a.m. to pick up a load from the quarry, tarp it and bring it back to the terminal. (Tr. at 19-20). It took him only 1 hour to get to Hanover, but he had to wait around for the load until 3 or 4 p.m. (Tr. at 20). As Complainant was pulling out of the quarry, he noticed a loose strap through his mirror and felt it to be unsafe. (Tr. at 21). He began to pull off the road, going about 4 or 5 miles per hour, according to his testimony, when the road "gave way." (Tr. at 22). One side of the tractor and part of the trailer went into a ditch. (Tr. at 23).

He contacted Chris Eckman, the daytime dispatcher at approximately 4:30 p.m. to notify him of the incident. (Tr. at 24). At Mr. Eckman's direction, Complainant called the police and set up road flares and signals. (Tr. at 24-25). The police arrived approximately 5 to 10 minutes after they were called and a tow truck arrived thereafter. (Tr. at 24-25). The first tow truck was unsuccessful in pulling the tractor trailer out of the ditch and needed the assistance of a second tow truck. (Tr. at 25-26). The police required the truck to be inspected by a mechanic before it left the scene, which was done between 12:00 and 12:30 a.m. (Tr. at 27). Complainant was not issued a citation. (Tr. at 31).

Complainant testified that he stayed in contact with Respondent throughout the ordeal, with the last contact being at approximately 10:30 p.m. (Tr. at 25, 28). He also testified that he filed an accident report with Employer on March 24, the date that he was fired. (Tr. at 28).³

According to Complainant, it was about 2 a.m. when he returned to Respondent's terminal on March 21 and the night dispatcher, Steve Copp was there. (Tr. at 31). Complainant checked his mailbox and retrieved a dispatch for a 3-stop run to Brooklyn, New York. (Tr. at 32). Complainant, according to his own testimony, told Mr. Copp at approximately 2 a.m. that he could not take the trip to New York because he was tired and did not have the hours. (Tr. at 33). At 2:13 a.m., Complainant called Mr. Copp and told him that he was taking off sick. (Tr. at 33).

Complainant arrived at Respondent's office the following Monday, March 24, at approximately 8:30 a.m. (Tr. at 35). According to Complainant's testimony, Mr. Fields motioned him into the office of Gregg Myers, where he was told that it was in his own and the company's best interest for his employment to be terminated. (Tr. at 35-36). Complainant stated under oath that when he asked why, Mr. Field's informed him that it was because he refused the load. (Tr. at 36). In addition, Complainant testified that after Mr. Fields left the office, Gregg Myers asked why he refused the load, to which Complainant responded that it was because his logbook showed that he had worked several hours and also because he was not feeling well. (Tr. at 36-37). Complainant also testified that he received no written documentation and that no reference was made to any prior traffic accident during that meeting. (TR. at 37-38).

Complainant testified that while he had never been suspended by Respondent, he had been disciplined in the form of being removed from the driver training program as a result of a complaint that was filed by someone who he was training. (Tr. at 38). On cross-examination, he admitted that he had been warned about his daily logs. (Tr. at 60-61). He also admitted to having 2 other traffic incidents. As to the first accident, which occurred in Worchester, Connecticut, on February 27, 2003, Complainant testified that snow banks were approximately 15 feet high and that he hit a utility truck as a result of the snow banks interfering with his view. (Tr. at 39). Complainant stated that he filed an incident report with Respondent but was not warned or disciplined regarding that incident. (Tr. at 40). The second accident occurred on March 17, 2003, when according to Complainant's account, he was cut off by a car after going

³ This conflicts with the testimony that he gave when called as a rebuttal witness, which indicated that he turned in the accident report when he returned to the terminal following the accident, in the early morning hours of March 21.

through a toll booth and the car struck the right front wheel of Respondent's vehicle. There were no injuries and although the police came, no citation was issued. (Tr. at 42). Complainant again testified that he filed an accident report with Respondent but was not warned or disciplined. (Tr. at 42).

Finally, Complainant testified to a history of harassment by his superior, Mr. Fields. According to Complainant, Mr. Fields would not give him time off for the birth of his son. (Tr. at 54-55). In addition, Complainant testified that Mr. Fields told him that he would terminate his job if he applied to switch over to Respondent's tanker division. (Tr. at 53).

Testimony of Stephen Copp

Stephen Copp, who has worked for Respondent for 8 years, was the night dispatcher on March 21, 2003. (Tr. at 125). According to Mr. Copp, he typically works from midnight until 9 or 10 a.m. (Tr. at 125). He does not handle any of the scheduling, which is done by the daytime dispatcher. (Tr. at 126).

Mr. Copp testified that on March 21, 2003, Complainant told him that he was not in the mood to take the assigned load and did not mention being sick or lacking hours. (Tr. at 127). Complainant told Mr. Copp that he was going to call in from his truck and he did call and inquire as to whether Mr. Copp had recorded their conversation in the phone log. (Tr. at 127-28). Mr. Copp testified that at no point did Complainant state that he lacked sufficient hours to take the assigned load, and furthermore, that it is not uncommon for a driver to report that he lacks sufficient hours to take a load, and when a driver does so, the dispatcher finds someone else to take the load. (Tr. at 1130-132). Mr. Copp also testified that when he spoke to Complainant on March 21, he did not know of the accident or how many hours Complainant had been on duty, and if he had known that Complainant lacked sufficient hours, he would not have permitted him to take the load. (Tr. at 132-33).

Testimony of Gregory Myers

Gregory Myers began working for Respondent in 1999 and served as the Driver Relations Manager in March of 2003. (Tr. at 136). In that role, Mr. Myers was responsible for recruiting and hiring qualified drivers, interacting with the drivers on various issues, administering the orientation program and serving on the Safety Committee. (Tr. at 137). According to Mr. Myers, all new drivers receive the Employee Handbook ("handbook") and a copy of the Driver Performance and Safety Incentive Program ("safety program") during orientation. (Tr. at 137).

Mr. Myers testified that Respondent's policy regarding hours of work can be found in the handbook, which also states that drivers are to keep track of their own hours and must adhere to Department of Transportation (DOT) regulations. (Tr. at 139-40).

Mr. Myers also testified that the Safety Committee is responsible for enforcing Respondent's policy for accidents and incidents and admitted that it is not strictly enforced. (Tr. at 141-42). Instead, according to Mr. Myers, the Safety Committee considers the individual

involved, his services to the company and the specific incident or accident that has occurred. (Tr. at 142). According to Mr. Myers, each incident is reviewed on a case-by-case basis and the written policy may or may not be applied. (Tr. at 188). He admitted that Complainant was not suspended nor fined regarding his February 27 or March 17 accidents, as provided for by the policy. (Tr. at 187). However, Mr. Myers testified that Complainant was warned by Ms. Houser regarding the February 27 accident and was likely warned again following the March 17 accident.⁴ (Tr. at 192-94).

Mr. Myers participated in the decision to discharge Complainant, as did Frank Costanza, Jim Kretz, Mike Eggbert and Joyce Houser. (Tr. at 142). Mr. Fields did not participate in the decision. (Tr. at 142). The Safety Committee met to discuss Complainant's March 20, 2003 accident on Friday, March 21, according to Mr. Myers' testimony. (Tr. at 143). Mr. Myers did not call the meeting, but the meeting was called for the purpose of discussing Complainant's accident. (Tr. at 176). According to Mr. Myers, no minutes of the Safety Committee meetings are kept. (Tr. at 184).

Mr. Myers testified that Complainant was discharged due to the 3 accidents on his record within a 30 day period, namely those that occurred on February 27, March 17 and March 20, 2003. (Tr. at 144-45, 167).⁵ When the Safety Committee met on March 21, they had the verbal explanation of Complainant's March 20 accident and pictures that were sent to Respondent from its customer, where Complainant had secured the load just prior to the accident. (Tr. at 145). Respondent incurred towing costs in excess of \$2,100 in relation to the March 20 accident, according to Mr. Myers. (Tr. at 145-46). Mr. Myers first testified that Respondent was aware, at the March 21 meeting of the Safety Committee, that the insurance company had investigated and determined that Respondent must pay for the damage caused in the March 17 accident. However, upon my further questioning, Mr. Myers admitted that it was unlikely that the insurance company had made such an investigation within 7 days. (Tr. at 208-10).

Mr. Myers testified that he personally informed Complainant that he was terminated and Mr. Fields was also present due to a company policy that a third person be present. (Tr. at 155-56). Complainant was advised that due to his safety record, it was in his own and Respondent's best interest that he be terminated, according to the testimony of Mr. Myers. (Tr. at 157). Complainant then asked Mr. Myers if he was being fired because he refused a load, to which Mr. Myers responded that he had no knowledge that Complainant had done so. (Tr. at 157-58). According to Mr. Myers, that issue was not raised at the Safety Committee meeting on March 21. (Tr. at 158). Mr. Myers testified that Mr. Fields did not tell Complainant that he was being discharged for refusing a load and he only recalled Mr. Fields speaking to Complainant to wish him good luck. (Tr. at 158).

⁴ Upon further questioning by me, the witness admitted that he assumed these warnings had been given based on company policy, although he had no actual knowledge that they had been given. (Tr. at 207).

⁵ Mr. Myers admitted on cross-examination that the damage from Complainant's February 27 accident was less than \$250. Regarding the March 17 accident, Mr. Myers testified that Respondent was required to pay for the damage caused, although it was unclear as to whether that decision was based on fault or economics.

Mr. Myers also testified that it is not rare for a driver to refuse a scheduled trip due to a lack of sufficient hours and no driver has ever been fired or otherwise disciplined for doing so. (Tr. at 159). In fact, according to Mr. Myers, Respondent would not permit a driver to take a load if he lacked sufficient hours to do so under the DOT regulations. (Tr. at 158). However, on cross-examination, Mr. Myers did testify that Respondent has no responsibility to ensure that its drivers do not exceed the hours prescribed by the DOT regulations. (Tr. at 168, 198-99).

Instead, Mr. Myers testified that regardless of the fact that Complainant's refusal to take the assigned load coincided with his third accident, the third accident simply happened to be the straw that broke the camel's back because more damage was incurred as a result of that accident than as a result of Complainant's other 2 accidents in the 30 day period. (Tr. at 210-11).

Mr. Myers clarified that Complainant was removed from the driver training program because a trainee complained that Complainant was sleeping while the trainee was driving and Complainant was driving with the Jake brake on to set off car alarms and running over curbs. (Tr. at 148-49). Furthermore, Mr. Myers testified that Complainant had no comment after being removed from the program. (Tr. at 149).

Mr. Myers testified that Complainant never voiced any concerns to him regarding Mr. Fields or Mr. Fields' threats to fire Complainant. (Tr. at 143). He testified that it is common for a driver to request to switch from flat beds to tankers and that the request is not always granted, but instead, Respondent looks at the need within the division and the safety background of the individual. (Tr. at 144). In addition, according to Mr. Myers, the usual procedure for a driver to request time off would be to request it through the dispatcher, who is the driver's immediate supervisor. (Tr. at 159).

Finally, Mr. Myers testified that Respondent did not contest Complainant's claim for Unemployment Compensation. (Tr. at 159).

Testimony of Joyce Houser

Joyce Houser has been employed by Respondent for 17 years and served as the Safety Administrator at the time of Complainant's discharge. (Tr. at 215). In that role, she was responsible for ensuring compliance with the DOT and state regulations, administering the safety program, investigating accidents and incidents and counseling drivers when necessary. (Tr. at 215).

Ms. Houser was a member of the Safety Committee in March of 2003. (Tr. at 215). She testified that the Safety Committee decided to terminate Complainant's employment as a result of the third accident that he had in a 30 day period. (Tr. at 216). She does not recall anyone mentioning at that meeting that Complainant had refused a load. (Tr. at 219).

She recalls having a discussion with Complainant in March of 2003 to discuss an accident that he had and previous accidents that he had in a 30-day period. (Tr. at 216). She testified that Complainant was warned by her for each of his prior accidents. (Tr. at 218-19). According to her testimony, when Complainant turned in his accident report, on March 21, she

spoke to him regarding the March 20 incident and told him that he may lose his safety bonus and also that this incident would reflect on his employment with Respondent. (Tr. at 217, 222). However, on cross-examination, Ms. Houser admitted that she was not at the terminal at approximately 2 a.m. on March 21, while Complainant was there. She also admitted that she was not sure whether it was on March 21 that she met with him but still insisted that she remembered meeting with him regarding this accident. (Tr. at 222).⁶

Complainant's Rebuttal Testimony

After Ms. Houser testified, Complainant was recalled as a rebuttal witness and he testified that when he returned to the yard at 2 a.m. on March 21, Mr. Copp was there but Ms. Houser was not there. (Tr. at 227). Further, he testified that he did not return to the yard at all after that on March 21, as he went home for the rest of the weekend. He handed his accident report in with his logs at approximately 2 a.m. on March 21. (Tr. at 229). On Monday, March 24, he arrived at the yard between 8 and 9 a.m. and saw Mr. Fields and Mr. Myers. (Tr. at 228). He did not meet with Ms. Houser on March 24 either, according to his testimony. (Tr. at 228).

Deposition Testimony of Stephen Fields

Stephen Fields testified by deposition on February 7, 2005. (RX-11). He began working for Respondent in 1985 and served as Operations Manager in March, 2003. In that position, he oversaw the day-to-day operations of the company relating to dispatch and was responsible for customer service. (RX-11 at 4). The dispatcher is the drivers' supervisor and Mr. Fields, as Operations Manager, is the supervisor of the dispatchers. (RX-11 at 4-5). His normal hours of work are 7:30 a.m. to 5:00 or 5:30 p.m. and he worked these hours on March 19 through 21. (Tr. at 16-17). In addition, he was the on-call dispatcher on March 20 between the hours of approximately 5 and 9 p.m., which is the lag between the time that the day dispatcher leaves for the day and when the night dispatcher reports for duty. (RX-11 at 40-42). However, Mr. Fields testified that he does not know Complainant's exact movements over this 3 day period, and although dispatch records kept by Respondent would indicate Complainant's assignments, they would not indicate his exact location at any given time. (RX-11 at 17-20).

Mr. Fields testified that Chris Eckman is the day dispatcher and he would have been the one to dispatch Complainant to Hanover on March 20. (RX-11 at 20). Mr. Fields recalls an incident in which Complainant's truck went into the ditch but does not recall the time of day when he first learned of such. He does remember talking to Complainant by phone but does not remember the substance of that conversation. Mr. Fields denies having told Complainant to drive the truck without having been inspected, contrary to police orders. (RX-11 at 5). He knows that Complainant returned to the terminal at approximately 1 a.m. on March 21, and is now aware that he was dispatched to go to New York, however, he was not aware of the assignment when Complainant received it. (RX-11 at 21-24). That assignment, according to Mr. Fields, would have been made before 5 p.m. on March 20. (RX-1 at 29).

⁶ Additionally, Ms. Houser testified that she had talked to Complainant by phone on March 20 while the incident was ongoing. (Tr. at 216).

Mr. Fields admits that the decision to fire Complainant following the accident on March 20 would have come after he refused to take the load. (RX-11 at 24). A driver in March of 2002 was permitted to be on duty 15 hours per day but could drive for no longer than 10 hours, according to Mr. Fields. (RX-11 at 27). If Complainant had been on duty for more than 15 hours or driving more than 10, he had a responsibility to advise the dispatcher that he was not available for duty and there would not be consequences, as “it’s a federal law,” according to Mr. Fields’ testimony. (RX-11 at 27).

Mr. Fields was present at the March 24, 2003 meeting between Complainant and Mr. Myers, during which Mr. Myers told Complainant that he was discharged. (RX-11 at 6). He served as a third party witness at the meeting and played no role in the decision to discharge Complainant and according to his testimony, never recommended that Complainant be fired. (RX-11 at 6). Mr. Myers informed Complainant that he was being fired due to his involvement in numerous accidents in a short period of time, according to Mr. Fields’ testimony. (RX-11 at 6-7). Mr. Fields does not recall whether Complainant said “much of anything” at the meeting. (RX-11 at 7). Mr. Fields testified that he did not tell Complainant that he was being fired due to his refusal of the load and did not speak during the meeting at all except to wish Complainant good luck. (RX-11 at 7).

Mr. Fields testified that he never threatened to fire Complainant and that he had no authority to do so. (RX-11 at 8). That authority rested with the Safety Committee, of which Mr. Fields was not a part. (RX-11 at 9). Mr. Fields testified that he did not threaten to fire any driver in 2003 and did not tell Complainant that he would fire him if he applied to switch from driving a flatbed to driving a tanker. (RX-11 at 10). Regarding transfers, Mr. Fields testified, “if an individual wants to stay employed with J.P. Donmoyer, far be it from us not to allow him to stay employed.” (RX-1 at 10-11). Mr. Fields also testified that if a driver requests time off, he does so through his dispatcher and that he never threatened to fire Complainant if he took time off for the birth of his child. (RX-11 at 11). In fact, Mr. Fields testified that he had no personal difficulties with Complainant, did not deny him leave, never took any disciplinary action against him or issued any warnings to him. (RX-11 at 30-31).

Complainant’s Documentary Evidence

CX-1 is the accident report from Complainant’s March 20, 2003 accident. The report states that Complainant attempted to pull onto the shoulder because he noticed an unsafe condition, when his truck went into a ditch. (CX-1).

CX-2 consists of Complainant’s log records from March 20 and March 21, 2003. They show that Complainant spent 6 hours driving and 15 hours on duty, but not driving, on March 20. This left him with only 7.25 hours available for March 21, and before returning to the terminal, he had already spent 1 hour on-duty, but not driving, and 1 hour driving. (CX-2).

CX-3 is a cellular telephone bill showing that Complainant made several calls to Respondent’s terminal on March 20 after his vehicle went into the ditch. (CX-3). These calls were in addition to the calls made through Respondent’s dispatch system. (Tr. at 30-31). In addition, a call was made at 2:13 a.m. on March 21 from Complainant’s cellular phone to

Respondent's terminal. Complainant testified that this was the call he made in which he informed Mr. Copp that he was calling out sick for the day, and he testified further that he did this to "cover his own butt." (Tr. at 33).

CX-13 is the accident report dated March 17, 2003, issued by the New York State Thruway Authority, showing that Complainant was involved in an accident sometime before 7 a.m. on that date. The description of the accident is vague but the accident was classified as a sideswipe type accident. The officer who wrote the report opined that the estimated costs of repairs were not so great that the accident was required to be reported.

CX-16 is a letter from Atlantic Risk Management to Respondent dated June 20, 2003. The letter acknowledged the receipt and handling of the claim related to Complainant's March 17, 2003 accident and stressed the importance of representatives from Atlantic and Respondent discussing the incident.⁷

Respondent's Documentary Evidence

RX-1 is a list of Complainant's log violations committed between June 3, 2002 and March 13, 2003. According to the testimony of Mr. Myers, these are referred to as log scan reports and they are automatically generated by a computer program when the data from a driver's log is put into the computer. (Tr. at 150). Mr. Myers testified that a driver is counseled regarding each log violation. (Tr. at 150). However, these violations played no part in the decision to discharge Complainant, but instead were introduced to show that he had received an explanation of his safety violations and warnings regarding such violations. (Tr. at 206). This exhibit shows numerous violations between June of 2002 and March of 2003, with no less than two violations in any one month and as many as 16 violations, occurring in August of 2002. Many of these violations were for exceeding the maximum hours allowed by the DOT, and prior to Complainant's termination, that violation had been committed as recently as March 13, 2003. (RX-1).

RX-2 is labeled "Understanding by Employee" and was signed by Complainant on January 24, 2002, indicating that he had received a copy of the handbook, understood his responsibility to become aware of the contents and to ask any questions regarding the contents and pledged to abide by Respondent's policies.

⁷I find CX-6 (Complainant's paycheck for the pay period ending March 2, 2003), CX-7 (a document showing that Complainant was paid unemployment compensation benefits after being discharged by Respondent), CX-8 (a letter from Respondent's attorney to Complainant, dated May 12, 2003, regarding the paycheck), CX-9 (medical bills), CX-10 (the calculation of Complainant's average weekly wage) and CX-15 (a letter from the Borough of Newport, dated August 27, 2003, informing Complainant that a job that he applied for had been filled) are relevant only as to the issue of damages, which I do not reach. Likewise, I find Complainant's logs, marked as CX-11, CX-12 and CX-14 unhelpful in the resolution of this case.

RX-3 is the phone log from March 21, 2003. The first entry was recorded at 00:01 and reads,

D REINER CALLED. CANNOT DO HIS MCADOO FOR TODAY. NOT ENOUGH HOURS. TRIED TO CALL AROUND BUT GOT NO ANSWER. CALLED C KNOBLAUCH, HE WILL DO 1 LOAD TO MCADOO.

The very next entry was recorded at 01:45 and reads,

R BAUGHMAN AT WINDOW. HE SAID HE IS REPORTING OFF TODAY BECAUSE HE IS NOT IN THE MOOD. I TOLD HIM HE WAS DISPATCHED ON A LOAD. HE SAID OK. HE WILL JUST GET IN THE TRUCK AND CALL OFF SICK FROM THE TRUCK. NO ONE TO COVER HIS LOAD.

The following entry, recorded at 02:14 reads,

R BAUGHMAN CALLED FROM HIS CELL PHONE ENROUTE HOME. JUST WANTED TO MAKE SURE THAT I RECORDED HIS REPORTING OFF ON THE PHONE LOG. I ASSURED HIM I DID.

(RX-3).

According to the testimony of Mr. Copp, Mr. Reiner still works for Respondent despite the fact that he refused that load for lack of sufficient hours in the early morning hours of March 21, 2003. (Tr. at 132).

RX-4 is labeled "Hours of Work." It states that drivers are required to adhere to the DOT regulations and are required to keep track of their available hours. It also states that the company operates on a 70-hour, 8-day week.

RX-5 is Respondent's job description for commercial truck drivers. Under "Job Summary," this document states that the driver is responsible for the day-to-day safe operations of dispatched loads, maintaining the equipment and following the company and DOT safety regulations. Under "Major Duties and Responsibilities," it states, *inter alia*, that drivers are to ensure that the trailer is secured and the customer's product is properly distributed and safe for transportation and ensure cargo is properly secured and safe for transportation. It also states that the driver is to follow all federal, state and local regulations and the driver must be a responsible, productive employee who can work in all types of weather. Under "Work Accuracy," this document specifies that the driver must possess the ability to drive in a safe and courteous manner.

RX-8 consists of the photographs from the March 20, 2003 accident, which were sent to Respondent from its customer. (Tr. at 217). It appears from these photographs that adjacent to the roadway there was a cement strip, akin to a shoulder, and beside that there was a grassy area that sloped downward and was filled with muddy water. It appears that when Complainant pulled his trailer off the roadway, he was unable to keep it on the cement strip and instead his vehicle entered the grass and went down that slope. It is unclear to me whether that slope was

there or if it was caused by the tractor trailer, as it appears from the pictures to be part of the landscape but Complainant's testimony, that the road "gave way," seemed to indicate otherwise.

RX-9 is the "Driver Comment/Action Forms" relating to other employees⁸ who were discharged by Respondent for the drivers' involvement in single or multiple accidents. This information is recorded by Ms. Houser each time a driver is involved in an accident. (Tr. at 219). Driver 1 was discharged on February 5, 2003 after being involved in accidents on January 8, January 13 and February 2, 2003. Driver 2 was involved in an accident on May 21, 2003 and two accidents on June 6. Although the document does not indicate when or that he in fact was discharged, Ms. Houser testified that each of these drivers was discharged as a result of their involvement in accidents. (Tr. at 221). Driver 3 was discharged on August 7, 2003 after having an accident on that date. Driver 4 was fired on September 4, 2003 after having an accident on August 21 and another on September 3. Driver 5 was fired on April 4, 2003 after having one accident on February 12 and another on April 1. For Driver 6, there is no date of firing listed although the document details incidents on January 14, January 24, February 24, February 27, March 5, April 8, March 11, March 24, March 25, May 26, July 17 and August 28. Finally, Driver 7 was discharged on June 6, 2003 after incidents that occurred on February 3, March 18, May 9 and June 6, 2003. This exhibit is consistent with Mr. Myers' testimony to the effect that other drivers have been fired for having 3 accidents in a 30 day period although that is not a specific consequence noted in Respondent's written policy on accidents and incidents. (Tr. at 152).

Photographs from the February 27, 2003 incident were introduced into evidence as RX-12. It is noticeable from the picture that a manhole rescue pole, stored on the driver's side of a parked truck, was damaged. One photograph shows dark spots on the road, which appear to be ice. There are snow banks on the side of the road, which do not appear to be any larger than 4 feet high, opposed to Complainant's testimony regarding snow banks that were 15 to 16 feet high, which obstructed his view. (Tr. at 39).

Joint Documentary Evidence

CX-4, which is also RX-10, is the Employee Warning and Notice Record, which is the document that was used in discharging Complainant on March 24, 2003. According to Mr. Myers, this form is used each time a driver's employment is terminated and it was prepared on Monday, March 24, before he met with Complainant. (Tr. at 157). He admitted on cross-examination that Complainant was not provided with a copy of this document. (Tr. at 196). According to this document, the adverse employment action was due to carelessness, which was further described as Complainant being involved in an accident that caused damage in excess of \$250, which was also his third accident in 30 days. This form states that Complainant received a verbal warning on February 27, 2003 and another on March 7, 2003,⁹ and that he was being

⁸ Rather than identify each of these drivers, I will refer to them as "Driver 1" through "Driver 7."

⁹ The record shows that Complainant's three accidents occurred on February 27, March 17 and March 20. I am assuming that the warning that was supposedly issued on March 7 was actually issued on March 17, although it is possible that another incident could have occurred on March 7, as Complainant introduced his logs from that date into evidence.

terminated on March 24, 2003. The attachment to this document is a Driver Comment/Action form, prepared by Ms. Houser. (RX-11 at 14). The attachment notes that (1) Respondent received a complaint on April 23, 2002 that Complainant was tailgating, (2) an expense of \$53.19 was incurred in relation to Complainant on December 2, 2002, (3) Complainant had many hours violations in 2002 and (4) Complainant was involved in three separate accidents on February 27, March 17¹⁰ and March 20.

CX-5, which is also RX-6, is the Company Policy for Accidents and Incidents. It describes an accident as a collision between Respondent's vehicle and any object causing damage in excess of \$250 or as any collision between Respondent's vehicle and a stationary or moving vehicle, regardless of cost. As for the disciplinary policy, this document states that for any accident where the damage is less than \$250, the driver will be suspended for 1 day and will receive a \$25 fine. For any accident where the damage is in excess of \$250, the driver is to be suspended for 2 days and receive a \$25 fine. If a driver has 2 or more accidents in a 6 month period, he is to be suspended for 4 days. The policy also states that if Respondent deems an accident to be caused by a driver's extreme negligence, it has the discretion to determine the appropriate discipline, which could include termination. (CX-5). According to Mr. Myers, this document is attached to the explanation of the Driver Safety Performance Bonus Program and is received by a driver and discussed during orientation. (Tr. at 141).

ANALYSIS

At the time that Complainant was employed by Respondent, 49 C.F.R. Part 395 provided that a driver could not be "on duty" in excess of 15 hours after an 8 hour period of rest and could drive no more than 10 of those "on duty" hours. 49 C.F.R. § 395.3(a). It is clear from the evidence that Complainant lacked sufficient hours under this regulation to take the load assigned to him in the early morning hours of March 21, 2003.

However, 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). However, when a case is tried fully on the merits, the proper inquiry is whether the adverse action was motivated by a discriminatory or a legitimate, non-discriminatory purpose, and there is no need to determine whether the employee has established a *prima facie* case.¹¹ *U.S. Postal Service Board*

¹⁰ Again, the attachment listed the date of Complainant's accident as March 7, 2003, but I assume that this is actually a reference to the March 17 accident.

¹¹ In any event, Complainant did not establish a *prima facie* case. An internal complaint made to any level of management is considered a complaint under the Act. *Zurenda v. J & K Plumbing & Heating Co. Inc.*, 97-STA-16 (ARB June 12, 1998); *Doyle v. Rich Transport, Inc.*, 93-STA-17

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).

Here, Respondent has shown by clear and convincing evidence that it had a legitimate, non-discriminatory purpose for discharging Complainant, and further, that its decision was in no way motivated by Complainant's refusal to violate a DOT regulation.

I find that Complainant never indicated that he would be in violation of the regulations had he taken the load, but instead refused the load because he was "not in the mood." Further, it is clear that the Safety Committee, which made the decision to terminate Complainant's employment, had no knowledge that Complainant failed to complete the Brooklyn assignment for whatever reason, and therefore, their decision to fire Complainant could not have been motivated by the refusal of the load.

Perhaps most importantly, Mr. Reiner, who did refuse a load due to a lack of sufficient hours under the regulations, on the very day that Complainant refused to complete his assignment to Brooklyn, is still employed by Respondent. I also note that Complainant had accepted assignments from Respondent on numerous occasions despite the fact that the assignment required him to be on duty in excess of the maximum amount of hours permitted by the DOT.¹²

(Sec'y Apr. 1, 1984). Therefore, if Complainant had proven that he informed his dispatcher, who was his immediate supervisor, that he was not taking the load to Brooklyn because to do so would violate the DOT regulations, then he engaged in protected activity. However, considering the dispatcher's phone log, I must conclude otherwise. The log entry immediately preceding the one that relates to Complainant clearly shows that another employee called the terminal to report that he lacked sufficient hours to take an assigned load. I therefore infer that when an employee informed Mr. Copp that he lacked sufficient hours to complete an assignment, that Mr. Copp recorded that information. However, Mr. Copp's very next entry states that Complainant refused to take his assigned load not because he lacked the hours but because he was not in the mood. I therefore must conclude that Complainant never articulated to Mr. Copp that he did not have enough available on duty hours to take the load, and therefore did not engage in protected activity.

¹² Respondent's lack of interest in whether its drivers abide by the DOT regulations is troublesome to say the least. The record clearly shows that Respondent has placed the responsibility to ensure compliance solely with its drivers, and further, that Complainant had violated the regulations several times and faced no real consequences for doing so, despite Respondent's admitted knowledge of such violations. Although it has no bearing on the outcome of the instant claim, I note that Respondent too has violated the regulations, each time that Complainant lacked sufficient hours to drive but did so anyway, as the regulations apply not only to drivers but also to motor carriers who allow drivers to operate a commercial vehicle under such circumstances.

The fact that seven other employees were discharged by Respondent in 2003 for their involvement in single or multiple accidents confirms Respondent's contention that Complainant was fired for that reason. Complainant does not dispute that he was involved in 3 "incidents" in a 30 day period and Respondent showed that each of these incidents qualified as an accident under its policy. I note further that the last 2 of these accidents occurred within 3 days of each other.

Although Respondent is prone to litigation due to its lack of adherence to its own accident policy, lack of records regarding warnings that are issued to its drivers and its arbitrary manner of determining the number and nature of accidents that will lead to discharge, Respondent did have a legitimate reason for discharging Complainant. Respondent's employees are made aware during orientation that Respondent disfavors accidents. Respondent's job description for truck drivers and its accident policy, for example, clearly indicate that Respondent values safety and should have served as notice to Complainant that he could be discharged if he did not execute his duties in a safe manner.

Complainant's third accident, which was the immediate cause of his discharge, occurred because he failed to execute a duty listed in the job description, namely ensuring that the customer's cargo was properly secured and safe for transportation, before entering the roadway. Complainant's failure to do so led to his need to take corrective steps, such as pulling off the roadway, which eventually led to Respondent incurring the expense of the two tow trucks that were needed to pull the rig from the ditch.

Furthermore, I find that Complainant did have notice that Respondent was likely to take adverse action against him, as indicated by his use of a personal cellular phone. His own testimony indicated that he made calls to the terminal from this phone, in addition to communications made through Respondent's dispatch system, because he felt the need to make a record for himself.

In sum, although Respondent does not have a specific policy that states that 3 accidents in 30 days will lead to termination, I find that this was its legitimate, non-discriminatory reason for terminating Complainant's employment.

RECOMMENDED ORDER

It is ORDERED that the complaint of Robert J. Baughman is dismissed.

A

RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey

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).