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Issue Date: 13 September 2006

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Joseph Muzyk
Complainant Case No. 2005 STA 00060

v.

Carlsward Transportation
Respondent
…….

Before: Stuart A. Levin
Administrative Law Judge

For Complainant: Joseph Muzyk, *pro se*

For Respondnets: Tim Carlsward, *pro se*

Decision and Order

This proceeding arises under the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105, *et. seq*. and the regulations promulgated and published at 29 CFR Part 1978.100 to implement the Act pursuant to a complaint filed by Joseph Muzyk, a bus driver formerly employed by Carlsward Transportation Company of Orlando, Florida. Muzyk alleged that he was the target of retaliation and discriminatory personnel action when he was fired on August 19, 2004, by Tim Carlsward for engaging in safety-related activities protected by the Act.

Respondent Carlsward Transportation denies these allegations. It insists that it declined to re-employ Complainant following a period of lay-off because he became a problem employee who posed a risk to the security of Respondent's vehicles, obtained company repair records while he was laid off, and made derogatory comments about Carlsward to a co-worker. Following an investigation by OSHA, the Regional Administrator determined that "complainant's alleged

protected activity was a bad faith complaint," and she dismissed it. RX 1. Thereafter, Complainant requested a hearing which convened on February 15, 2006.

At the hearing, both Complainant and the corporate Respondent appeared, *pro se,* despite a recommendation that both seek the advice of counsel. *See*, Order dated January 18, 2006.[1] The parties were afforded an opportunity to file briefs, post-hearing, and both declined to comment further. Tr. 112-13. Accordingly, the findings which follow are based upon a careful consideration of evidence entered into the record at the hearing, the arguments presented by the parties, and the applicable case law.

Background

The record shows that Joseph Muzyk was hired as a minibus driver by Carlsward on June 6, 2003. Prior to the incidents which precipitated the instant complaint, Muzyk enjoyed a clean work record and was regarded as a good worker. Tr. 57-58. Generally, Muzyk drove local routes to and from homes, hotels, and businesses around Orlando to the Orlando airport and to cruise ship terminals in Port Canaveral, Florida. Physically, Complainant has a pre-existing lung condition and his employer was aware of it. Tr. 42.

Respondent, Carlsward Transportation, is a business which operates a shuttle service using minibuses capable of carrying 23 passengers in and around the Orlando area. Tr. 95. Carlsward has fewer than four employees. Tim Carlsward is the owner and Chief Executive Officer of Carlsward Transportation. Respondent's business tends to be seasonal, with the months of July, August, and September the slowest period when Respondent customarily reduces its staff to two primary drivers. Tr. 42-3. During this period in 2004, Complainant was in lay off status, but Carlsward had every intention of hiring him back in October when the busy season started up. Tr. 59; CX5, 5A.

Carlsward testified that in the first week of August, 2004, while he was on a church outing to Texas, he was advised that bus #6 was being towed to Heinzleman's Ford Truck Center for repairs. When the repairs were completed, he contacted Muzyk from Texas and asked him to pick up the bus and return it to the

[1] The January 18, 2006, Order also advised the parties of the purpose of the hearing and outlined the respective burdens each party must satisfy in proceedings of this type in accordance with Dale v. Step 1 Stairworks, Inc., 2002-STA-30 (ARB, March 31, 2005). *See also*, Tr. 5-9.

yard. Tr. 59. Carlsward paid for the repairs by phone and was advised by Heinzleman's at that time about an exhaust leak. Tr. 60. According to Carlsward, the manager and the mechanic at Heinzleman's both advised him that the leak needed to be repaired but that it did not involve a safety issue. Tr. 61. As such, Carlsward testified that he wanted to wait until he returned from Texas to look at the situation, because he was advised that it was not serious enough to require immediate repairs. Tr. 61-62.

The record shows that on August 7, 2004, Muzyk was requested by Respondent, who was still in Texas, to return to work temporarily and drive bus #6 to pick up passengers at Port Canaveral and return them to the Orlando Airport. Tr. 62-63. Muzyk testified that, during the trip, he was "overcome" by exhaust fumes and pulled off the rode where he advised the passengers that he needed to check the rear hatch. Exiting the vehicle, Muzyk walked around the bus to "get some fresh air" then returned to the driver's seat and completed the trip. Tr. 43.

Complainant testified that he had experienced similar problems driving bus #6 in the past. On one prior occasion, he detected smoke emanating from the tire well and noticed a fuel leak. Tr. 96-97. He advised Tim Carlsward who, according to Complainant, told him to continue operating the vehicle because the diesel fuel is unlikely to catch fire. Tr. 52; 96-97. Complainant testified that he continued to operate the vehicle on that occasion because he had no driver's vehicle inspection log to document his observation. Tr. 96-97; *see also*, CX 1, violations report at pg.5; and Cx 2. On August 10, 2004, he decided to advise the Department of Transportation about his safety concerns. Tr. 44.

Carlsward testified that he received no communication either from Muzyk or the passengers on August 7th that there was any problem at all with the bus or the charter. Tr. 63. On August 10, 2004, Muzyk wrote to DOT about the fuel leak, a sharp door hinge, the exhaust leak on bus #6, and a faulty turn signal on bus #10. CX 4. The record does not show that Respondent saw a copy of this letter prior to the hearing.

After he returned from Texas, Carlsward testified that he received a call from Muzyk asking if he had workers' compensation. Tr. 63. Because he had fewer than four employees, Carlsward advised he did not have it, and asked Muzyk what was wrong. At that point, on August 17, 2004, Muzyk first told him about the alleged incident with the exhaust fumes on the August 7th charter. Tr. 64.

Muzyk testified that he contacted an attorney about his exposure to the exhaust fumes, and advised Carlsward that he wanted his expenses covered to visit his physician for an evaluation of whether the exposure to fumes aggravated his pre-existing lung condition. Carlsward, however, declined his request on the ground, allegedly, that the leak had only been in existence for a week and could not have caused the lung condition. Tr. 47.

Although Complainant was again back on lay off, he saw that bus #6 was back in service on August 17, 2004, and he was suspicious that the repairs he thought were needed had not actually been performed. Tr. 45.

Although the record is conflicting in respect to whether Muzyk posed as an officer of Respondent or advised the repair facility that he was a bus driver for Carlsward, Muzyk requested and received a copy of the repair order from Hienzleman's, and allegedly spoke with the mechanic, Bernie Torres, who worked on bus #6. Tr. 45; 55; CX 3. Muzyk denied that he represented himself as the president of Carlsward Transportation. Tr. 55. Neither Torres nor anyone representing Heinzleman's was called to testify as a witness in this proceeding.

Muzyk testified that Torres advised him that bus #6 had a severe exhaust leak on both sides of the engine where the manifold attached to the turbo charger located on the top of the engine caused by an improper clamp attached by the previous mechanic who installed the unit. According to Muzyk, this allegedly resulted in exhaust fumes venting to the top of the engine compartment and through the "dog house," or engine cover, and the air conditioning unit into the driver and passenger compartment. Tr. 45-46. Muzyk testified that Torres advised him that he told Carlsward: "that the passengers were being exposed to the exhaust." Tr. 46; 56. According to Carlsward, Torres told him that: "fumes would not have gone inside the bus and did not pose a safety problem." Tr 62.[2] Muzyk

[2] The OSHA investigator contacted Torres and reported: "Credible testimony from Torres contradicted Complainant's account of the conversation. Torres actually told Complainant the fumes would not have gone inside the bus and did not pose a safety problem. Torres did not feel the problem was serious and the bus did not need to be placed 'out of service.' Torres conducted a road test on bus #6 and experienced no fumes inside the bus." RX 1. The January 18, 2006, Order in this matter specifically advised the parties that each was responsible for ensuring the presence of any witnesses they intended to rely upon at the hearing, and Torres was not called to testify. As a result, the reference to his "credibility" in the OSHA report represents a subjective assessment of an investigative source by the OSHA investigator.

As discussed at the hearing, however, such matters as witness credibility are reserved for the trier of fact upon observation of a witness during testimony. *see*, Tr.108-09. In this instance, for example, on this record, the portion of Torres' account of his conversation with Muzyk as described in OSHA's report stating that: "Torres did not feel the problem was serious;" may conflict with the description provided by the repair shop where Torres worked which indicated that the exhaust leak was "severe." CX 3. It may be that a "severe" exhaust leak in a bus of this type poses no "serious problem" or risk of exhaust fumes permeating the passenger compartment as a function

testified that he also asked Torres about a leak in the fuel line that, according to Muzyk, allowed fuel to leak onto the brakes when the bus made a hard right turn. Tr. 46.

Muzyk also contacted Gary Bolton, another bus driver at Carlsward, and advised him "not to operate bus # 6 … and that Mr. Carlsward …was not properly maintaining the vehicle, and that there is potential risk of accident or death." Tr. 47. According to Muzyk, Bolton questioned his motives and suggested that he was on a "vendetta" against Carlsward, which Muzyk denied. Tr. 47-48. On August 18, 2004, Bolton advised Carlsward that Muzyk complained to him about the maintenance on bus #6, and about a comment, that Muzyk found offensive, Carlsward allegedly made about Muzyk's ability to get another job. Carlsward denied making the adverse comment.

Muzyk also testified that Bolton told Carlsward that Muzyk had written a letter to DOT. Tr. 48. According to Carlsward, Bolton did not tell him about the DOT letter, but did tell him that Muzyk had threatened "…to get [him]." Tr. 66. Neither party called Bolton to testify in this proceeding. Tr. 104.

Gary Johnson, a retired police officer and a bus driver for Carslward Transportation, was a co-worker of Muzyk, and he testified at the hearing. He confirmed that, like Gary Bolton, he also received a telephone call from Complainant advising him that his life was in danger from carbon monoxide poisoning, and that Muzyk stated that he felt a humanitarian obligation to advise Johnson of the danger. Tr. 89-90.

The record shows that on August 19, 2004, Muzyk drove to Carlsward's bus depot on Trade Port Drive where Carlsward parked his vehicles. Muzyk intended to take pictures of the minibus, the fuel inlet and tires. Tr. 96. Carlsward, at the time, was also driving to his office. Tr. 66. He had, by then, taken bus #6 out of service. Tr. 66.

The record shows that while driving to the depot, Muzyk spotted Carlsward in his van at a traffic light. Muzyk slowed up in the hope that the light would turn green and Carlsward would proceed without noticing him. When the light turned green, Carslward turned toward a complex of hotels and Muzyk followed him to see whether he was making a pick-up, because he did not want Carlsward to see

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of the design of the "dog house;" but in the absence of some further explanation or clarification, the credibility of Torres' account as recounted by OSHA has not been confirmed on this record.

him taking pictures of his vehicles. Tr. 51. Muzyk lost sight of Carlsward, however, and assumed he turned into one of the hotels. Tr. 51. Muzyk then proceeded to the depot. Tr. 51. Muzyk testified that Carlsward may have thought he was acting unusually, and decided to follow him. Muzyk conceded that he was playing: "… a little cat and mouse game, because he didn't want to disclose that [he] was taking a picture of his bus…" Tr. 52.

As Carlsward drove by the parking lot where his busses were parked, he spotted Muzyk. Tr. 67. Muzyk had a camera and testified that he was there with the intention of taking pictures of the vehicles in preparation for a visit with an attorney the next day. Tr. 49. Carlsward, drove up, and, according to Muzyk, he was upset about Muzyk's presence on his lot with a camera, and he asked what Muzyk was doing. Tr. 49; 67. Admitting that he lied to Carlsward at the time, Muzyk testified that he told Carlsward that he was just taking pictures of the trees knocked down a few days before by Hurricane Charlie. Tr. 49-50; 68. Carlsward did not believe him and testified that: "when he lied to me…it just clicked that I can't trust him to be around the vehicles because I'm fearful that he may try to sabotage something…." Tr. 102.

Carlsward testified that, at that point, he had a real concern about what Complainant was actually doing, and the thought crossed his mind that Muzyk might sabotage the vehicles. Tr. 68. He testified that Muzyk was not an employee at that time, but in a lay off status, and he asked him to return the keys to the vehicles and his office and not to return to the lot unescorted. Tr. 68. According to Muzyk, Carlsward asked for the keys and stated that "he didn't like liars." Tr. 98. At the hearing, Muzyk admitted that he lied to Carlsward about his reason for visiting the depot. Tr. 99.

According to Muzyk, Carlsward also advised him that Bolton had told him about the letter Muzyk had written to DOT, and, after mentioning the DOT letter, asked him to return the keys to the vehicles and warned Muzyk not return to the property or risk arrest for trespassing. Tr. 50; 98-99. Carlsward denied that Bolton mentioned DOT at that time, and testified that Muzyk told him about his complaint to DOT in the parking lot on August 19th after he surrendered the keys. Tr. 80; 102-4. Muzyk testified that Carlsward did not specifically fire him, but Muzyk construed the demand for the keys and Carlsward's warning of arrest as a termination as of August 20, 2004, Tr. 54, and Muzyk contacted OSHA and advised that he had been subjected to a punitive action. Tr 50.

Carlsward testified that he did not fire Muzyk on August 19 or 20, Tr. 100-101. He testified that, as a result of Muzyk's pattern of behavior, he: "… didn't know what the man was capable of," and he lost confidence in Muzyk's ability to safely and responsibly operate as a bus driver for his company. Consequently, he decided not to re-hire him after the lay-off. Tr. 77-78; 101; RX2. Carlsward specifically denied taking any adverse action against Complainant for complaining to DOT. Tr. 100.

Carlsward testified that after the incident with Muzyk in the parking lot, he purchased a carbon monoxide detector and installed in various places on bus #6 around the engine compartment, driver's seat, and passenger compartment and tested for carbon monoxide without an alarm. Tr. 69-70; 82. To then test the detector, he placed it by the tailpipe and the alarm sounded. Tr. 70; *see also*, RX7.

Carlsward confirmed that after Muzyk complained to DOT, he was investigated on September 15, 2004, and thirteen minor violations were cited, but overall he received "Satisfactory" safety rating. Tr. 72-73; CX 1. He was also contacted by the State of Florida regarding his workers' compensation coverage and by OSHA regarding Complainant's whistleblower complaint, but neither of the latter agencies found any violations. Tr. 73. Thereafter, Carlsward testified that he was contacted by the office staff of a state representative who advised him that Muzyk was alleging that DOT and Carlsward were engaged in corrupt activity.

In October, 2004, the Post Office began forwarding Respondent's business mail to an address in Pheonix, Arizona. Tr. 74. Carlsward had not requested a change of address, and the Post Office advised him that someone had filed a forwarding card and forged his signature. Tr. 76; RX 4b. Carlsward filed a complaint with the Post Office and listed Muzyk as a suspect. Tr. 76; RX 4; 4a; 4c. Carlsward also testified that Muzyk contacted Respondent's insurance company and requested money, but the request was denied following an investigation. Tr. 77.

Gary Johnson testified that, while on brake during a charter prior to the 2004 lay off, he and Muzyk discussed a book Muzyk had purchased entitled "A Thousand Ways to Get Revenge." Johnson recalled that one of the methods of vengeance Muzyk mentioned was sending someone's mail to Phoenix, Arizona. Tr. 86. When Johnson asked Muzyk why he would want such a book, he testified that Muzyk "just laughed." Tr. 86, 88.

Complainant found alternative employment about thirty to sixty days after he was not re-hired by Carlsward, and he does not recall being out of work for very long. Tr. 106.

Discussion

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

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because
> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; 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.
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.
> See, Fountain v. P&T Container Services, 1999 STAA 9 (ARB, Nov. 30, 1999).

Muzyk alleges that, as a consequence of his protected activity, Carlsward Transportation fired him. Carlsward disputes Complainant's contention that he engaged in protected activity, and emphasizes that OSHA determined that he lodged a "bad faith" complaint.

Protected Activities

Complainant's motives for pursuing the safety complaints he voiced are hotly contested. Carlsward insists Muzyk embarked on a misanthropic mission of vindictive vendetta, while Muzyk mused that he was impelled to act out of humanitarian concern for his co-workers and Carlsward's passengers. His motives aside, however, the fact remains that Muzyk engaged in protected activities under the Act.

His communications directly to Carlsward about the fuel and the exhaust leak on bus #6, and his letter to DOT expressing his safety concerns about busses #6 and #10 clearly constituted protected activity.[3] Whether or not all of the concerns he expressed constituted actual safety hazards, and the record is mixed on this issue; the evidence indicates that Muzyk acted prudently in the reasonable belief that the fuel and exhaust leaks on bus #6 could pose a safety risk to the passengers and operator of the vehicle. On this record, then, it would be difficult to conclude that his complaints were either unfounded or lodged in "bad faith." Consequently, even though Muzyk was not wholly motivated by altruistic concerns, his communications were protected under the Act. Accordingly, his "reasonable apprehension of injury" triggers the protections afforded by Subsection (B)(ii)of the Act. Hadley v. Southeast Cooperative Services Co., 86 STA 24 (Sec. June 28, 1991); Duff Truck Line, Inc. v. Brock, No. 87- 3324 (6th Cir. 1988), aff'g Robinson v. Duff Truck Line, Inc., Case No. 86-STA3, Sec. Final Dec. and Order, Mar. 6, 1987; LeBlanc v. Fogleman Truck Lines, Inc., Case No. 89-STA-8, (Sec. Dec. 20, 1989), aff'd, No. 90-4114 (5th Cir. Apr. 17, 1991); Gohman v. Polar Express, Inc., 88 STA 14 (Sec. Nov. 14, 1988).

Awareness of Protected Activity

Under these circumstances, applicable decisions of the Administrative Review Board indicate that it would not be particularly useful at this point to analyze whether Complainant Muzyk has established a *prima facie* case. *See*, Frechin v. Yellow Freight Systems, 96 STA 24 (ARB, Jan. 13, 1998); Andreae v. Dry Ice, Inc., 95 STA 24 (ARB, July 17, 1997); Etchason v. Carry Companies of

[3] At the hearing, Muzyk also complained that Carlsward failed to provide him driver vehicle inspection log. Although DOT later cited the failure to provide a log as a violation, the evidence in this record fails to reflect that Muzyk ever raised the log issue with Carlsward while employed by Respondent, and no such complaint was expressed in Muzyk's August 10, 2004 letter to DOT.

Illinios, Inc. 92 STA 12 (Sec., March 20, 1995). Moreover, whether Carlsward learned about Muzyk's complaint to DOT from Bolton prior to the incident in the parking lot on August 19, 2004, or subsequent to his request that Muzyk return his keys and not return to the depot, it is clear that Carlsward was aware of Muzyk's internal safety complaints before August 19, 2004. In fact, Carlsward acknowledged that Muzyk complained about the exhaust leak during a telephone conversation on August 17, 2004, and he did not deny that Muzyk had previously advised him of the fuel leak he detected while driving bus #6. Consequently, under circumstances in which protected activity takes the form of internal complaints to management level officials who subsequently implement the personnel actions that adversely impact the whistleblower, awareness of the protected activity is not really in issue.

Adverse Action

Respondent next suggests that no adverse action was taken because Muzyk was not actually fired but rather was simply not re-hired following a lay off. Assuming, as Carlsward contends, that his demand that Muzyk return his keys and his order that Muzyk not return to the depot unescorted did not amount to a constructive termination, the record shows, nevertheless, that when Carlsward placed Muzyk on lay off status in July, 2004, he had every intention of re-hiring in October when business picked up; and, in fact, told him he would be "first in line for rehire." Further, Carlsward admitted that his decision on August 19, 2004, not to re-hire Muzyk was predicated upon a pattern of behavior which included the protected activities outlined above, but which culminated with Muzyk's effort to deceive him about his reasons for hanging around the busses.

As a result, this situation is distinguishable from cases involving routine lay offs of, for example, employees in the nuclear industry who are not re-hired following maintenance outages or cyclical economic dislocations. *See, e.g.* Hasan *v.* System Energy Resources, Inc., 89 ERA-36 (Aug. 2, 1989), aff'd., (Sec. Sept. 23, 1992), aff'd., 1 F.3d 1236 (5th Cir. 1993). Unlike Hasan, the Employer here intended to re-hire the whistleblower, and the decision not re-employ him was an adverse job action against an employee on temporary lay off.

Temporal Proximity

The record further shows that the adverse personnel action, taken within days of Muzyk's protected activities, was sufficiently close temporally to give rise to an inference of causation. Ertel v. Giroux Brothers Transportation, Inc., 88 STA

24 (Sec. Feb. 15, 1989), at 15; Stone & Webster Engineering, Inc. v. Herman, 115 F.3d 1568 (11th Cir. 1997); Mandreger v. Detroit Edison Co., 88 ERA 17 (Sec. March 30, 1994); Crosier v. Portland General Electric Co. 91 ERA 2 (Sec. 1994); Samodov v. General Physics Corp., 89 ERA 20 (Sec. 1993). Furthermore, behavior problems preceding or subsequent to protected activity does not axiomatically sever the causal link since legitimate reasons, alone, are not sufficient to end the inquiry if, despite the reasons alleged, the whistleblower would not have been terminated "but for" the protected activity. *See*, Consolidated Edison Co. v. Donovan**,** 673 F.2d 61 (2d Cir. 1982); Mount Healthy City School Dist. Bd. of Educ. v. Doyle*,* 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977); Passaic Valley Sewage Commissioners v. Department of Labor, 992 F.2d 474 (3rd Cir. 1993). Accordingly, the critical inquiry is whether retaliatory animus motivated the adverse action. Frechin v. Yellow Freight, *supra*.

Dual Motives

Although Carlsward denied that protected activity specifically influenced his decision not to re-hire Muzyk, he also conceded that Muzyk's pattern of behavior, which included his protected activities, motivated his actions. Under such circumstances, the dual motive test is invoked when a complainant engages in protected activity and there is evidence of both legitimate and improper motives for the adverse action. *See,* Henry v. Pullman Power, 1986-ERA-13 (Sec. June 3, 1987); Lopez v. West Texas Utilities, 86-ERA-25 (Sec. July 26, 1988). Upon consideration of the record as a whole, the evidence confirms Respondent's dual motives.[4]

I am mindful that Respondent testified that his motives were wholly legitimate, while Complainant contended that Respondent's reasons were mere pretexts designed to mask the adverse personnel action imposed in retaliation for his protected activities. As in most instances involving complex personnel matters, the events and interactions of the actors are not nearly as crystal clear as the advocates would have us believe.

[4] The Board has held that: "…when a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." (emphasis added). *See*, Mitchell v. Link Trucking Co. Inc., 2000-STA-39, aff'd (ARB Sept. 28, 2001),*See*, *e.g.*, Schulman v. Clean Harbors Envtl. Servs., Inc., 1998-STA-24 (ARB Oct. 18, 1999); Carroll v. Dept. of Labor, 1991-ERA-46 (8th Cir. Mar. 5, 1996); Zinn v. University of Missouri, 1993-ERA-34 and 36 (Sec'y Jan. 18, 1996); Bausemer v. TU Electric, 1991-ERA-20 (Sec'y Oct. 31, 1995).

Turning first to Carlsward's contention that his motives were entirely benign and that he decided, in effect, to terminate Complainant by not re-hiring him following the lay off; it appears that Muzyk's protected activities and the manner in which he engaged in them were factors in Carlsward's decision to sever the employment relationship with him. Indeed, Carlsward's argument to the contrary requires him to contradict the very pattern of behavior he relied upon in support of his defense which included, at least in part, the calls and communications to him and to DOT that Carlsward considered an aspect of the vendetta he believed Muzyk was mounting to harass him. To be sure, Muzyk's actions on August 19, 2004, brought suspicion upon himself and gave Carlsward ample justification for his security concerns and his loss of confidence and trust in Muzyk, but Carlsward's testimony also indicates that he was displeased about Muzyk's protected activities and these, at least in part, motivated Carlsward's decision not to re-employ Muzyk.

Under such circumstances, it is not Complainant's obligation to separate Respondent's motivations. Respondent must do that. Indeed, it is well established in the rulings of several Appellate Courts, and by the Board as well, that Respondent incurs the risk if legal and illegal motives for the termination action merge and become inseparable. Passaic Valley Sewerage Commissioners, *supra* at 476, 478. If they are intertwined inextricably, Carlsward cannot prevail. Passaic Valley, *supra;* Dale v. Step 1 Stairworks, Inc., 2002-STA-30 (ARB March 31, 2005) at 3**;** Mandregger v. The Detroit Edison Co., 88 ERA 17 (Sec. 1994); Hoch v. Clark County Health District, Case No. 1998-CAA- 12at 31; *Cf.* Pogue v. United States Dept. of Labor, 940 F.2d 1287, 1289-90 (9th Cir. 1991); Mackowiak v. University Nuclear Sys., Inc.*,* 735 F.2d 1159, 1164 (9th Cir. 1984). In cases such as this, Respondent "bears the risk that 'the influence of legal and illegal motives cannot be separated . . . .'" Mackowiak, 735 F.2d at 1164, *quoting* NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983); Sprague v. American Nuclear Resources, Inc., 92-ERA-37 (Sec'y Dec. 1, 1994).

Yet, the existence of dual motives does not end the inquiry in a whistleblower proceeding. As the applicable case law teaches, dual motive situations can lead to the proper discharge of a protected worker in some instances and unlawful, discriminatory terminations in other cases; however, Muzyk is entitled to relief unless Respondent can demonstrate that it did not discriminate against him for engaging in protected activity, but would have imposed the same adverse personnel action in the absence of any protected behavior. Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct.

1775 (1989); Trimmer, 174 F.3d at 1102; Martin v. Department of the Army, 93-SDW-1 (Sec'y July 13, 1995); Landers v. Commonwealth-Lord Joint Venture, 83-ERA-5 (Sec'y Sept. 9, 1983); Dartey v. Zack Co. of Chicago, 82-ERA-2 (Sec'y Apr. 25, 1983). Once the employee shows that illegal motive played some part in the discharge, the employer must prove that it would have discharged the employee even if he or she had not engaged in protected conduct. Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Scope of Whistleblower Protection

Now it is not a function of these proceedings to second-guess the established rules a business may adopt to govern its workforce. *See* O'Brien v. Stone and Webster Engineering, 84 ERA 31 (ALJ Feb. 28, 1985 at pgs. 19-20). As the tribunal in Stewart v. Henderson, 207 F.3d 374, 378 (7th Cir. 2000), observed, the courts do not "sit as a superpersonnel department that reexamines an entity's business decision and reviews the propriety of the decision," but are only concerned with "whether the legitimate reason provided by the employer is in fact the true one."

The protected employee is thus accorded no special treatment and is accorded no immunity from discipline. To the contrary, the rational set forth in Daniel v. Timco Aviation, 2002 AIR 26 (ALJ June 11, 2003), is equally applicable here:

> [The Act] renders whistleblowers no less accountable than others for their infractions or oversights. It ensures only that they are held to no greater accountability and disciplined evenhandedly. Consequently, no personnel policies or standards need be watered-down in the interest of shielding otherwise protected activity or accommodating the policies promoted by the Act. Timco Aviation at 17-18.

Under the whistleblower protection statutes, the protected worker's performance and behavior must, therefore, satisfy the same standards both before and after the whistle is blown. *See,* LaTorre v. Coriell Institute for Medical Research, 97 ERA 46 (ALJ Dec. 3, 1997) at 30-31.

Discrimination

Since Muzyk has established that a discriminatory intent played a role in his removal, Carlsward may avoid liability for the adverse action by demonstrating that he would have terminated Complainant anyway solely for legitimate reasons. Mt. Healthy Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Zinn v. Univ. of Missouri, 93 ERA 34, 36 (Sec. 1996).

The record shows that Muzyk's co-worker, Gary Bolton, advised Carlsward that Muzyk made derogatory comments about Carlsward to Bolton and told Bolton that he was "going to get" Carlsward. Aside from his protected activities, then, Muzyk's remarks, as reported by Bolton, tended not only to impact his relationship with Carlsward, adversely, but his subsequent attempt blatantly to deceive Carlsward on August 19, 2004, regarding the reason for his presence at the depot reasonably raised Carlsward's suspicions that Muzyk was not there simply to take pictures of fallen trees. At the hearing, Muzyk admitted that he lied to Carlsward about his reason for visiting the depot while he was laid off, but Muzyk apparently was acting so strangely that Carlsward knew he was lying at the time. Carlsward testified credibly that Muzyk's unusual actions left him questioning whether Muzyk was actually there to sabotage the busses and whether Muzyk was sufficiently reliable and responsible to work for Carlsward as the driver of a passenger bus.

Such circumstances are reminiscent of Smalls v. Carolina Electric & Gas, 2000-ERA-27 (ARB Feb. 24, 2004), a case which demonstrates that even well-meaning whistleblowers can, at times, overstep the boundaries of acceptable workplace behavior in ways that trigger justifiable reactions and concern in those they confront, cause unnecessary disruptions within an organization, and prompt a legitimate personnel response. Thus, Muzyk's attempt to deceive his employer while hanging around the busses during a time when he had no business at the depot cast a cloud of mistrust over his relationship with Carlsward that Muzyk alone triggered by lying under very suspicious circumstances. In light of Bolton's report that Muzyk wanted to "get him," and Muzyk's deception, Carlsward's concern for the security of his vehicles was entirely reasonable and his loss of confidence in Muzyk as a driver he wanted to employ was justifiable. Muzyk, in fact, earned his employer's mistrust. Under these circumstances, I find that Carlsward terminated Muzyk's employment relationship with his firm for

legitimate, nondiscriminatory, and justifiable cause. *See also*, Thomas v. Hall Express, 2000 STA 43 (ARB, Nov. 15, 2000); Durham, *supra*.

Conclusion

For all of the foregoing reasons, I conclude that Respondent has demonstrated that the adverse personnel action reflected in this record, although the outgrowth of a dual motive situation, would have, nevertheless, been imposed absent Muzyk's protected activities. While violators of whistleblower protection laws frequently search for plausible ploys for terminating those they regard as meddlesome whistleblowers, the explanations underlying Carlsward's personnel actions here at issue were no mere pretexts for otherwise prohibited retaliation.

The record establishes that the decision not re-employ Complainant following the lay off was, itself, a spontaneous reaction to Muzyk's prevarications under suspicious circumstances which raised legitimate security issues for his employer, and the evidence supports the conclusion that Carlsward would have terminated the employment relationship with Muzyk absent any protected activity. Palmer v. Western Truck Manpower, 85-STA-6 (January 11, 1987); Logan v. United Parcel Services, *supra*; Olson v. Missoula Ready Mix, 95 STA 21 (Sec. 1996); Clifton v. United Parcel Services, 94 STA 16 (Sec. 1995). For all of the foregoing reasons, I conclude that Carlsward Transportation did not retaliate or otherwise discriminate against Joseph Muzyk within the meaning of the Act, *See,* Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984); DeFord v. Secretary of Labor, 700 F.2d 281 (6th Cir. 1983), and accordingly, the complaint must be dismissed.[5] Therefore;

ORDER

IT IS ORDERED that the complaint filed in this matter by Joseph Muzyk be, and it hereby is, dismissed.

A

Stuart A. Levin
Administrative Law Judge

[5] Consideration of after-acquired evidence involving the misdirection of Respondent's mail and Complainant's interests in books about ways to extract vengeance, which coincidently outlined a scheme to misdirect a target's mail, need not be considered further under McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, (1995) in view of the above disposition of this matter.