



**In the Matter of:**

**GENE K. CHAPMAN,**

**ARB CASE NO. 02-030**

**COMPLAINANT,**

**ALJ CASE NO. 2001-STA-35**

**v.**

**DATE: September 9, 2003**

**HEARTLAND EXPRESS OF IOWA, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**ERRATA**

On August 28, 2003, the Administrative Review Board issued a Final Decision and Order in this case. The Final Decision and Order provided that the ALJ's Recommended Decision and Order was incorporated and attached, however, the Board's Decision, when issued, did not include the attached Recommended Decision and Order. Accordingly, we are reissuing the decision with the attached Recommended Decision and Order. In all other respects the Board's Final Decision and Order remains the same.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**JUDITH S. BOGGS**  
**Administrative Appeals Judge**



**In the Matter of:**

**GENE K. CHAPMAN,**

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**v.**

**DATE: August 28, 2003**

**HEARTLAND EXPRESS OF IOWA, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Paul O. Taylor, Esq., *Truckers Justice Center, Eagan, Minnesota***

*For the Respondent:*

**Douglas R. Richmond, Esq., and Michael L. Matula, Esq., *Armstrong Teasdale LLP, Kansas City, Missouri***

### **FINAL DECISION AND ORDER**

Gene K. Chapman, an employee driver of Heartland Express of Iowa, Inc. (Heartland), filed a complaint alleging that he engaged in activities protected under the Surface Transportation Assistance Act (STAA),<sup>1</sup> and that, in retaliation, Heartland terminated his employment. Following a hearing on Chapman's complaint, a Department of Labor Administrative Law Judge (ALJ) found that Chapman had engaged in protected activity, but that Heartland's Executive Vice-President, Richard Meehan, who made the termination decision, had no knowledge of that activity. The ALJ held that Meehan based his decision solely on information that Chapman shared with him during a meeting they had on August 28, 2000.

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<sup>1</sup> 49 U.S.C.A. § 31105 (West 1997) is the employee protection section of the STAA.

The ALJ found that Meehan's testimony regarding the information that Chapman shared with him was credible and gave it determinative weight over Chapman's testimony. Specifically, the ALJ determined that Chapman's general comments about safety regulations during the meeting did not constitute specific complaints relating to violations of a commercial motor vehicle safety regulation, standard, or order. Therefore the ALJ found that these comments were not protected.<sup>2</sup> In addition, the ALJ found that Chapman's specific complaints about his fatigue could not be considered protected activity under the Act because they were not discussed in the context of any alleged violation of Department of Transportation hours of service or other regulation.<sup>3</sup> Ultimately, the ALJ determined that Meehan's decision to terminate Chapman was based solely on Meehan's perception that Chapman could not safely operate a truck.<sup>4</sup>

Thus, the ALJ concluded that Heartland did not discriminate in violation of the STAA. His Recommended Decision and Order of January 8, 2002 denying Chapman's complaint automatically comes to us for review.<sup>5</sup> We are bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.<sup>6</sup> We review the ALJ's conclusions of law de novo.<sup>7</sup>

The R. D. & O. thoroughly and fairly recites the relevant facts underlying this dispute. In addition, since we did not have the benefit of witnessing the testimony of Meehan and Chapman, we defer to the ALJ's demeanor-based observations about their credibility.<sup>8</sup> We have reviewed

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<sup>2</sup> Recommended Decision and Order (R. D. & O.) at 12.

<sup>3</sup> *Id.* at 12-13.

<sup>4</sup> *Id.* at 14.

<sup>5</sup> See 29 C.F.R. § 1978.109(a) (2002). The Secretary of Labor's authority to decide this case has been delegated to the Administrative Review Board. See 49 U.S.C.A. § 31105(b)(2)(C) and Secretary's Order 1-2002, 67 Fed Reg. 64272 (Oct. 17, 2002).

<sup>6</sup> 29 C.F.R. § 1978.109(c)(3); *BSP Trans., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

<sup>7</sup> See *Roadway Express v. Dole*, 929 F. 2d 1060, 1066 (5th Cir. 1991).

<sup>8</sup> In weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the

Continued . . .

the entire record and find substantial evidence supports the ALJ's findings of fact.<sup>9</sup> And although the ALJ unnecessarily concluded that Chapman "did not make a prima facie case,"<sup>10</sup> we affirm the recommended decision because the record clearly demonstrates that on August 28, 2000, Meehan's decision to terminate Chapman was not based on any protected activity. Transcript at 31-55. Thus, the ALJ correctly concluded that Heartland did not violate the STAA because Chapman did not prove by a preponderance of evidence the necessary causality element of a STAA whistleblower claim.<sup>11</sup> Therefore, we attach and incorporate the R. D. & O.

Accordingly, we **ADOPT** the ALJ's Recommended Decision and Order and **DENY** Chapman's complaint.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**JUDITH S. BOGGS**  
**Administrative Appeals Judge**

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subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1489 (E.D. Mo. 1990); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 775 (S.D. Ohio 1988); *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The ARB defers to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses." *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 99-STA-2, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983).

<sup>9</sup> We note that the ALJ found that Chapman's comments regarding his fatigue were not protected because they did not relate to a violation of federal regulations. The STAA protects complaints relating to violations of a commercial motor vehicle safety regulation, standard, or order. Thus its protection extends beyond just complaints relating to federal motor vehicle safety regulations. However, Chapman's comments did not relate to any violation of a motor vehicle regulation, standard, or order. Thus the ALJ's finding that none of Chapman's conversation with Meehan constituted protected activity was correct.

<sup>10</sup> R. D. & O. at 15. See *Williams v. Baltimore City Public Schools System*, ARB No. 01-021, ALJ No. 00-CAA-15, n.7 (ARB May 30, 2003). See also *Costa v. Desert Palace, Inc.*, 299 F. 3d 838, 855-856 (9th Cir. 2002).

<sup>11</sup> See *Moon v. Transport Drivers, Inc.*, 836 F. 2d 226, 229 (6th Cir. 1987).

**U.S. Department of Labor**

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Issue date: 08Jan2002

**Case No.: 2001-STA-35**

**In the Matter of**

**GENE K. CHAPMAN,  
Complainant**

**against**

**HEARTLAND EXPRESS OF IOWA, INC.,  
Respondent.**

**APPEARANCES**

**DOUGLAS R. RICHMOND, ESQ.  
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2345 Grand Blvd., Ste. 2000  
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On Behalf of the Respondent

**PAUL O. TAYLOR, ESQ.**  
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4260 Heine Strasse  
Eagan, MN 55122  
On Behalf of the Complainant

**BEFORE: RICHARD D. MILLS  
Administrative Law Judge**

**RECOMMENDED ORDER OF DISMISSAL**

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C. §31105 (herein the STAA or Act) and the implementing regulations thereunder at 29 C.F.R. Part 24.

This claim is brought by Gene K. Chapman, Complainant, against his former employer, Heartland Express of Iowa, Respondent. Complainant was let go from his employment with Respondent on or about August 28, 2000. He claims that he was discharged due to several occasions where he expressed safety concerns regarding his driving, exceeding his hours of service, and being forced to drive while fatigued. Complainant filed a complaint under the employee protection (whistleblower) provision of the Act against Respondent on September 13, 2000. This matter was referred to the Office of Administrative Law Judges for a formal hearing. On August 14 and 15, 2001, both parties were given the opportunity to offer testimony, documentary evidence, and give oral arguments. The following exhibits were received into evidence:<sup>1</sup>

1) Complainant's Exhibits Nos. 1-14;

2) Employer/Respondent's Exhibits No. 1-3; 5-8; 9, 13,15,16, 20, 22, 24, 26,32, 34, 42, 44, 50-52

Upon conclusion of the hearing, the record was kept open for the parties to submit post-hearing briefs.<sup>2</sup> After giving full consideration to the entire record, evidence introduced, and arguments presented, this Court makes the following Findings of Fact, Conclusions of Law, and Recommended Order.

### **STIPULATIONS<sup>3</sup>**

After an evaluation of the entire record, the Court finds sufficient evidence to support the following stipulations:

- (1) Complainant is an individual residing in Clinton, Texas. From July 21, 2000 to August 28, 2000, Complainant was an "employee" of Respondent as defined in 49 U.S.C. §31101

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<sup>1</sup> The following abbreviations will be used in citations to the record: JTX - Court's Exhibit, CX - Complainant's Exhibit, RX-Respondent's Exhibit, and TR - Transcript of the Proceedings.

<sup>2</sup>On December 10, 2001, Respondent filed a Motion to Strike with respect to certain portions of Complainant's post-hearing brief, alleging that said brief contained new evidence not presented at the hearing. This Court agrees and will not consider the portions of Complainant's argument relying on new evidence, specifically the Notice of Proposed Rulemaking cited on pages 15-19 of Complainant's brief.

<sup>3</sup>JTX-1.

- (2) Respondent is engaged in interstate trucking operations and is an employer subject to the STAA;
- (3) Respondent employed Complainant to operate commercial vehicles having a gross vehicle rating of 10,001 pounds or more in interstate commerce;
- (4) Complainant's income with Respondent was \$4,347.51. His average weekly wage was \$762.72;
- (5) On or about September 13, 2000, Complainant filed a complaint with the Secretary of Labor alleging that Respondent had discriminated against him and discharged him in violation of the STAA. The complaint was timely filed; and
- (6) On March 6, 2001, the Secretary of Labor served findings and an order. On March 13, 2000, by his attorney, filed objections to the Secretary's Findings and Order. Complainant's objections were timely filed.

## **ISSUES**

The unresolved issues in this proceeding are:

- 1) Whether Claimant engaged in protected activity under the Act; and
- 2) Whether Respondent took adverse employment action against Complainant due to this protected activity.

## **SUMMARY OF THE EVIDENCE<sup>4</sup>**

At the formal hearing, this Court received testimony from Richard Meehan, Gene Chapman (Complainant), Todd Alan Trimble, Scott Wenner, Scott Cochran, Dennis Wilkinson, and Gary King.

### **Background**

Complainant testified that he learned to drive a truck in 1994 and holds a commercial driver's license with endorsements to transport double and triple trailers as well as liquids. In July, 2000, he was

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<sup>4</sup>Both parties presented documentary evidence including company records, Qualcomm communications, letters, and litigation/discovery forms. This evidence has been considered by the Court and will be discussed, to the extent relevant, in the body of this opinion.

hired to work for Respondent on as a truck driver. In this position, he used a Qualcomm System to communicate with his supervisor while on runs. TR. 56-60.

Complainant described himself as a professional driver, an individual who is concerned with the safety of truck drivers while on the road and making improvements in the industry. He has written several letters and corresponded with various individuals on this issue protesting his discharge. TR. 188-200; RX-9; RX-22; RX-24.

Complainant testified that he is currently employed as the Safety Transportation and Marketing Manager for El Paso Valley Farms. CX-14. His responsibilities include farm labor, light construction, and commercial driving. TR. 186. He stated that he is a “stickler for details.” TR. 50-60.

### **August 12, 2000 Olive Branch MS to Houston TX Dispatch**

Complainant stated that on August 12, 2000, he was asked to “do a favor” for Respondent and take a load, a pre plan, from Olive Branch, MS to Houston, Texas. He testified that he thought that the schedule would violate Respondent’s policy on speed. He articulated this policy as the 50 mile rule, which is Respondent’s own goal, not a federal regulation. Complainant was also tired and wanted to spend the night in Memphis, so he declined the pre-plan. However, after reconsidering, he contacted the dispatcher about these concerns, and committed to the dispatch contingent on the load being ready at 7:30p.m. TR. 72-88.

Due to customer delays, the load in Memphis was not ready until 9p.m. Additionally, Complainant discovered that both air lines for the brake system were defective. Complainant testified that he called the dispatch and spoke with “Scott,” who instructed him to bring the truck to a repair stop in West Memphis. This “Scott” was later determined to be with Scott Wenner. Mr. Wenner testified that he works for Respondent and handles the breakdown of Respondent’s equipment, including trailer problems. On August 12, 2000, he had a conversation with Complainant regarding the Sears run to Houston. Complainant stated the load would be late because he did not have enough hours to do it. Complainant called in later, indicating that he had an air leak on his trailer. Mr. Wenner said that there was no discussion about taping the brake lines or forcing the driver to go without brakes. He testified that Complainant merely indicated to him that he could get the truck to the shop instead of having a mechanic come out. Mr. Wenner added that Complainant would not have been disciplined for a late load simply because of an air leak. TR. 89-95, 313-332.

Scott Cochran, the weekend supervisor of operations stated that he was contacted by Complainant through the Qualcomm system around this time period. Through the system, he was made aware of a mechanical problem with Complainant’s truck on August 13, 2000. He informed Sears that the load would be late, but was not able to give a new estimated time of arrival, because the leak was not fixed.

Complainant testified that he got the truck to the shop but was unable to get much sleep while his truck was being repaired. This was due to noisy activity in repair shop and concerns about meeting the deadline. Additionally, he was beeped by the Qualcomm system at 6a.m. on August 13, 2000, which interrupted his sleep. After the truck was repaired, Complainant called in to Mr. Cochran on the Qualcomm, stated that he was going to sleep, and gave an estimated time of arrival of 8:30 p.m. for the same day. At the hearing, Mr. Cochran stated that Complainant had not done anything up to that point warranting any type of discipline. Complainant testified that during the Qualcomm conversation with the dispatcher, he was told that he must deliver the load on August 13, 2000 although he expressed concerns about fatigue. TR. 95-102.

Complainant delivered the load in Houston, Texas on August 13, 2000, approximately an hour later than the original loading time. According to Scott Cochran, this was about 3 hours earlier than the revised estimated time of arrival with the truck repairs. Complainant conceded that on this particular run, he lied in his hourly log book by entering that he got eight hours of sleep when he only got 2.5 hours of sleep. TR. 100-125.

Upon contacting Respondent in Houston, he spoke to someone named "Todd," whom he informed of the truck repair and lack of sleep. This individual was later identified as Todd Alan Trimble, Respondent's Director of Operations. As Director of Operations, Mr. Trimble follows up on all loads and accounts, including ones which are delivered late or have problems. He focuses on the bigger clients, who demand immediate communication and direct follow up on the progress of their orders and deliveries. Mr. Trimble recalled speaking to Complainant on this occasion with reference to a load delivered for Sears. Mr. Trimble spoke to Complainant because he was following up on a truck breakdown, which resulted in a delayed delivery for Sears. He discussed the delay with Complainant and received a new estimated time of arrival for the load. Mr. Trimble, however, testified that Complainant did not complain to him about being fatigued, having to drive with only 2.5 hours of sleep, or being forced to drive with brake line leaks. Therefore, as the conversation stood, there was no need for him to follow up any more after the initial conversation. Mr. Trimble said that he took his safety responsibilities very seriously and would not want any of his dispatchers or fleet managers making drivers drive while fatigued. TR. 280-300.

After he spoke with Mr. Trimble, Complainant was dispatched from Houston to Oklahoma. While en route, he testified that he stopped to speak with an officer about Respondent's directive to deliver on time despite lack of sleep and the Qualcomm's incessant beeping during the night. He then delivered the trailer to a drop yard in Texas and went home. Complainant said that when he complained to Mr. Trimble regarding his safety concerns, he was ignored, but Complainant conceded that he didn't tell Mr. Wilkinson about these ignored safety complaints in his faxed memorandum. TR. 100-125, 250-280.

### **August 15, 2000 Communications with Dennis Wilkinson**

Complainant testified that on August 15, 2000, he faxed a letter to Dennis Wilkinson, the Vice President of Operations for Heartland. This memo contained complaints about the lack of information available to a driver before committing to a dispatch. He testified that he also mentioned driver fatigue and the possibility of fatalities involving drivers if industry-wide changes were not made. TR. 122-125; CX-2; RX-6. Mr. Wilkinson contacted Complainant by telephone on August 16, 2000 after reading his letter. Complainant testified that Dennis Wilkinson told him that he agreed with his complaints. He stated that he also informed Mr. Wilkinson about his discussions with the Texas DOT officer regarding Respondent. TR. 123-124.

Mr. Wilkinson testified at the hearing that he did speak to Complainant about several issues in his memorandum, including his complaints about the rude dispatchers, and the need for the night dispatchers to obtain accurate hours of service from drivers. He stated that he attempted to address Complainant's concerns and agreed with the importance of the issues that were discussed. In that conversation, however, he stated that Complainant never mentioned that he was "forced" to take a load from Olive Branch to Houston. Mr. Wilkinson testified that Complainant did mention the breakdown, which was treated as a mechanical delay. Therefore no discipline was required for the late load. In this conversation, he testified that Complainant mentioned the Qualcomm beeping and the conversation with a Texas trooper, but he indicated that those issues had been resolved. TR. 357-390.

### **August 25, 2000 Communications regarding pre plan dispatches**

Complainant testified that on August 23, 2000, he initially received a pre-planned dispatch to Rhode Island. He did not commit to this dispatch, because he wanted to check if he had enough legal driving time to complete it. He stated that he sent a Qualcomm message complaining that he was being "run too often at night." He sent the dispatcher another message, stating that his body tires between certain times and that he would not be able to predict how his body would react the next day. Complainant stated that he could not commit to running the Rhode Island load safely. However, he refused to either commit or decline the plan until hours later. After checking his hours, Complainant sent another message stating that his legal driving hours were up, and he could not do the run anyway. TR. 140-151.

Complainant received another pre planned dispatch at 9:15 a.m. the morning of August 25, 2000. He sent another message back indicating that he needed to be sent out the morning of August 26, 2000. CX-3, p. 26.

Scott Cochran, dispatcher, testified that around August 23, 2000, he planned these two routes for Complainant, which were not accepted. He estimated that at the time, he believed that Complainant could legally log both of the loads assigned to him. At the hearing, Mr. Cochran stated that it was important for drivers to accept earlier in the day so that they would have a dispatch for the following day. After Complainant did not accept either load, Mr. Cochran went to Mr. Wilkinson. He told Mr. Wilkinson that

they were trying to prepare a route for Complainant out of Columbia, Maryland and he wasn't committing to the loads. Mr. Cochran told Mr. Wilkinson that he could not figure out why Complainant would not commit to the loads. Complainant was subsequently instructed to call Mr. Wilkinson. TR. 332-356; CX-3.

Complainant contacted Mr. Wilkinson and testified that he was confronted as to why he backed out of two pre-planned dispatches. However, Mr. Wilkinson testified that he was merely trying to figure out what was happening with the hours of service and the declined pre plans. Complainant added that he informed Mr. Wilkinson that he was pushing his seventy-hour rule regarding his hours of service and repeated that he wanted to see how much sleep he could get before committing to pre-plans. Complainant denied at the hearing that he declined the dispatches and refused to drive at night. TR. 170-175, 357-360.

Mr. Wilkinson stated that Complainant told him that he did not want to drive at night. He added that Complainant also told him he could not drive from 1:00 a.m. to 4:00 a.m. He stated that Complainant never told him that he was actually fatigued and could not do the load safely, only that he would be prone to fatigue at those times. Mr. Wilkinson testified that at no time during this conversation did he feel like they were talking about safety issues. He stated that he was not told about the trooper conversation in Texas at this time, because it had no correlation with arranging the pre-plan route out of Columbia. His understanding of the trooper conversation was that it regarded the Qualcomm beeping and had been resolved. Ultimately, his impression from the conversation was that Complainant did not want to drive at night anymore. TR. 357-400.

Complainant testified that although he generally preferred to drive during the daylight hours, it was not a requirement. He added that when he explained his sleep issues with Dennis Wilkinson during this discussion about pre-plans, he was asked if he was going to follow the instructions of the Texas Department of Transportation officer. Complainant added that at that point in the conversation, he suspected that there was going to be some retribution. TR. 160-173; CX-3, p. 30.

Mr. Wilkinson testified that after speaking with Complainant, he told Scott Cochran to put someone else on the load. He then attempted to find a route that would get Complainant to a terminal. Mr. Wilkinson testified that since there seemed to be an unresolved issue with the pre plans and night driving, he wanted someone to talk with Complainant face-to-face. He added that his conclusion from their conversation was that he did not think Complainant was a fit with the company. Mr. Wilkinson testified that he did not know that Mr. Meehan, his supervisor, would be at the Atlanta terminal when he routed him there. After he found out Mr. Meehan would be at the terminal, he informed him of his concerns – that Complainant would not take loads and would not drive at night. He testified that the decision to route Complainant in to a terminal was only related to the pre-plan and night driving issue. As a general matter, Mr. Wilkinson stated that drivers should manage their hours so that they get adequate sleep. TR. 357-400.

### **August 28, 2000 Meeting and Subsequent Discharge**

Complainant testified that he was fired on August 28, 2000 after a meeting with Richard Meehan, Heartland's Executive Vice-President. He stated that on August 26, 2000, after his conversation with Dennis Wilkinson, he was dispatched from Baltimore, Maryland to Atlanta, Georgia. He received a message prior to his delivery that he was to meet with Richard Meehan. Complainant testified that he expected to receive some disciplinary action at the point. Mr. Meehan informed Complainant that he had been called in for counseling. At the hearing, Mr. Meehan stated that the only reason that Complainant was sent to meet with him, as opposed to the terminal manager, was that he happened to be in the area for management training at the terminal. He testified that in his conversations with Dennis Wilkinson he was informed only that Complainant needed to meet with him due to concerns involving Complainant safely protecting his cargo. Mr. Meehan stated that he was not told about any safety complaints Complainant made regarding Respondent. TR. 175-181.

Complainant testified that he informed Richard Meehan about violations of the Hours of Service regulations and circadian sleep rhythms, which allows someone to predict when he would have sleep problems. Complainant stated that he would pull over and sleep if he became tired while driving. Mr. Meehan testified that Complainant only talked about safety regulations in general regarding the trucking industry and the need for an association to protect truckers. He added that Complainant's main concern and focus during this conversation was his own sleep problems. Mr. Meehan testified that his impression during the conversation was that Complainant could not control falling asleep and would not be able to know when he was tired enough. While Complainant testified that he clearly explained his tendency to tire at certain hours, Mr. Meehan testified that that Complainant never specified at which time this would happen for him. After the conversation with Complainant ended, Mr. Meehan made the decision to terminate Complainant. He said the decision was based solely on what Complainant told him during their conversation. TR. 33-38.

Mr. Meehan testified that Complainant was not terminated for turning down pre-plans or dispatches. He stated that Respondent's goal is to keep drivers if at all possible, because it costs too much for the company to replace them. However, he testified that he viewed Complainant as a safety hazard. Mr. Meehan stated that he made it clear to Complainant at the time of the dismissal that his record would not reflect that he was fired from Respondent. He stated that based on Complainant's inability to control the onset of fatigue that any reinstatement would be impossible from a safety standpoint. TR. 40-41.

Gary King testified that he is currently the safety director for Respondent. He stated that Complainant would not be suitable for reinstatement at Respondent's facility primarily because he has been contentious with some of the senior managers and written letters perceived as threatening to Respondent and its employees. See RX-42. He stated that Respondent does have a safety program in place to protect its drivers. First, Respondent tries to hire safe drivers initially. Second, Respondent enforces the hours of service. They make an effort not to dispatch people in violation of those hours of service. Finally, the safety director and staff monitors the drivers off of the Qualcomm system to make sure the drivers travel with

proper rest as related to their mileage. He said that Respondent pays bonuses to drivers who operate safely. He stated that all of Respondent's senior managers are responsible for safety, including Rich Meehan. TR. 413-424.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The following findings of fact and conclusions of law are based upon the Court's observations of the appearance and demeanor of the witnesses at the hearing and upon an analysis of the entire record, applicable regulations, statutes, case law, and arguments of the parties. Fradley v. Tennessee Valley Authority, Case No. 92-ERA-19, (Sec'y, Oct. 23, 1995) (Slip Op. at 4). As the trier of fact, this Court may accept or reject all or any part of the evidence and rely on its own judgment to resolve factual disputes or conflicts in the evidence. Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7<sup>th</sup> Cir. 1971). To the extent that credibility determinations must be made, this Court has based its credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of the witnesses.

To prevail on an STAA whistleblower complaint, a complainant must establish that the respondent took adverse employment action against him because he engaged in an activity protected under Section 31105. A complainant initially must show that he engaged in a protected activity. Next, he must prove that it was likely that the adverse action was motivated by this activity. Roadway Exp., Inc. v. Brock, 830 F.2d 179, 181 (11<sup>th</sup> Cir. 1987). The respondent may rebut such a showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action. St. Mary's Honor Center v. Hicks, 125 L.Ed. 407, 416 (1993); Moyer v. Yellow Freight System, Inc., 89 STA 7 (Sec'y, Oct. 21, 1993). Remedies available to prevailing STAA complainants include affirmative action to abate the violation, reinstatement to the former position with the same pay and terms and privileges of employment, compensatory damages including back pay, and reasonably incurred attorneys fees and costs. 49 U.S.C. §31105(b)(3).

### **I. PROTECTED ACTIVITIES**

Complainant must initially establish that he engaged in a "protected activity." A protected activity is established by proof that:

(A) the employee...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 –
- (1) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
  - (2) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. 49 U.S.C. §31105.

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

Complainant alleges several instances of "protected" activity under the Act. These instances fall into three time frames and will be discussed accordingly. As an initial matter, this Court does find that Complainant's testimony, taken in light of other, relevant evidence, contains several inconsistencies with respect to his alleged safety complaints. Therefore, this Court will discuss those credibility issues as they arise.

#### **August 12, 2000 Olive Branch MS to Houston TX Dispatch**

Complainant alleges that he complained several times about being excessively fatigued during this dispatch, a fact confirmed by Scott Wenner's, the dispatcher's, testimony. *See* TR. 89-95. This Court finds that these complaints are related to 49 C.F.R. §392.3 (Federal Motor Carrier Safety Regulations or "Regulations"), which prohibits fatigued drivers from operating a commercial vehicle. During this period, Complainant also alleges that he complained about unsafe equipment, the air leak, on his truck. *See* TR. 95-99. Complaints regarding defective equipment are directly related to 49 C.F.R. §392.7 of the Regulations, which prohibit operating a commercial vehicle with certain types of defective equipment. While Complainant's claims of being "forced" to drive with the air leak are not credible, given Scott Wenner's testimony, his general complaints and progress reports regarding the air leak are uncontested by Respondent. Therefore, Complainant's actions regarding the defective equipment constituted protected activity.

Complainant also stated that during this route, he spoke with a Department Of Transportation officer regarding his excessive fatigue and his annoyance with his Qualcomm unit. *See* TR. 118-120. Under the current law, speaking with a government official about violations of the Federal Motor Carriers Safety Regulations is a protected activity. Gagnier v. Steinmann Transportation, Inc., 91-STA-46 (Sec'y July 29, 1992). Therefore, while Complainant's testimony with the D.O.T. officer is not independently substantiated, he has consistently relayed the general substance of this conversation in subsequent documents written to both Respondent's management and for litigation. *See* RX-6; RX-50. This Court will consider Complainant's version of these complaints as credible. Therefore, his communications with the D.O.T. officer constituted protected activity.

### **August 15, 2000 Communications with Dennis Wilkinson**

The record reflects that on August 15, 2000, Complainant sent Dennis Wilkinson a memorandum and engaged in a subsequent conversation regarding several issues of concern. Some of these issues were fatigue-related and others were statements about the industry in general. There is a point at which an employee's comments and concerns are too general and informal to give an employer sufficient notice of a complaint or protected activity. *See Clear Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 22 (1<sup>st</sup> Cir. 1998). As such, Complainant's general concerns about trucking safety and improvement suggestions, while admirable, will not be considered as "protected" by this Court. However, in both his memorandum and his conversation with Mr. Wilkinson, he did discuss the excess fatigue that he actually incurred on the route to Houston on August 12 and 13, 2000. *See* CX-2; RX-6; TR. 123-128. The contents of Complainant's memorandum and conversation with Mr. Wilkinson about his fatigue are sufficiently documented both in testimony from Mr. Wilkinson and in the documents produced at the hearing. Therefore, these communications were related to a possible violation of the Regulations and constituted protected activity under §31105(A).

### **August 25, 2000 Communications regarding pre plan dispatches**

Complainant alleges that on August 25 and 26, 2000 he complained to both the dispatcher and Dennis Wilkinson that he was being asked to commit on dispatches in excess of his hours of service. *See* TR. 140-151; CX-3. Scott Cochran, the dispatcher planning the routes, testified that after rechecking the preplans prior to hearing, Complainant would have been driving in violation of his hours of service for at least one of the loads. *See* TR. 332-356. Since Complainant would not commit to taking either pre-plan, this Court finds that his actions constitute a refusal to drive. Therefore, Complainant's refusal to drive due to a possible hours violation on August 25, 2000 are protected under subsection (B) of the Act. His conversation with Mr. Wilkinson on August 26, 2000, as it related to the hours of service violations, are protected under subsection (A) of the Act.

### **August 28, 2000 Meeting**

On August 28, 2000, Complainant was called in to meet with Mr. Richard Meehan. Mr. Meehan credibly testified that this meeting was merely to determine what was happening with Complainant's refusal to commit to a pre plan and his wish not to drive at night. *See* 175-181. He stated that he had received no information related to any safety complaints made by Complainant from Mr. Wilkinson. *See* Id. Additionally, Mr. Wilkinson confirmed that the only information he relayed to Richard Meehan prior to the meeting was his concern about what he perceived to be a driver's refusal to drive at night and refusal to commit to a preplan. *See* TR. 357-400. He stated that there would have been no reason to mention the memorandum regarding Complainant's trip to Texas or his conversation with the D.O.T. officer to Mr. Meehan, because Complainant had indicated that these issues were resolved. *See* TR. 357-400. This

Court finds that Mr. Wilkinson's testimony, as corroborated by Richard Meehan, is credible. Additionally, the request for a meeting would not be unusual given that refusing to drive at night without a clear reason would be valid concerns for a trucking company that does most of its routing during the night hours.

Complainant's and Richard Meehan's testimony regarding the actual contents of this meeting do contain some similarities. However, in weighing the evidence, this Court assigns Mr. Meehan's version of the meeting determinative weight. Throughout the discovery process in this hearing as well as his OSHA complaint, Complainant was asked to provide all instances of alleged "protected activity." He did not list his meeting with Mr. Meehan in any of these documents or allege that he made safety complaints during said meeting. *See* RX-50; RX-51. Even in the proceedings before this Court, Complainant did not originally allege that protected activity occurred during this meeting. This allegation was not included in Complainant's case until Mr. Meehan testified that he was responsible for letting Complainant go. While, filing an amended complaint, in itself, is not suspicious, this Court finds that Complainant's last minute allegation, when he had ample opportunity to document it in discovery and prior proceedings, greatly diminishes the credibility of his version of the conversation. Complainant's justification that Mr. Meehan's testimony suddenly "jarred his memory" is insufficient to allay this Court's suspicion, especially since Complainant reiterated during his testimony that he was a "stickler for details" in recounting his version of events. *See* TR. 50-60.

Complainant testified that during this meeting, he informed Richard Meehan of all of his concerns regarding fatigue, his problems with the Qualcomm, the pre plans, his discussions with Mr. Wilkinson, conversations with the Department of Transportation officer, and what he perceived as problems in the trucking industry. *See* TR. 175-181. While Mr. Meehan does not deny that Complainant did speak generally of problems plaguing truck drivers and his wish to improve the industry, he testified that Complainant focused mainly on his fatigue and dissatisfaction with the preplan system. *See* TR. 33-38. He stated that Complainant did not mention his conversation with the Department of Transportation officer at all. *See* Id.

Using Mr. Meehan's version of the conversation as determinative, this Court finds insufficient evidence to find that this meeting was covered under the Act. First, Complainant's general comments about safety regulations, do not constitute specific complaints directed towards Respondent. Therefore, his general comments a desire for the industry or federal regulations to accommodate the sleep rhythms of other drivers or himself would not trigger the application of subsection (A) of the Act. Additionally, Complainant's specific complaints about being fatigued cannot be considered protected activity under the Act. According to Mr. Meehan, these complaints of fatigue related to Complainant's inability to control when he would become tired. *See* TR. 33-41. Complainant attempted to explain this issue by discussing his circadian sleep rhythms, a concept which Mr. Meehan admits only vaguely understanding. However, the testimonial evidence shows that this issue was not discussed in the context of hours of service regulations or any other federal regulation. The only remote connection was Complainant's wish that the

trucking industry would recognize the concept of circadian sleep rhythms. *See* TR. 30-41. As discussed previously, the fact that Complainant would like for the trucking industry and Respondent to accommodate a driver's sleep rhythms is not enough to convert this conversation into a protected activity.

Based on Mr. Meehan's version of the meeting, Complainant indicated that he did not wish to drive at night and could not predict his fatigue due to uncontrollable circadian sleep rhythms. Any connection between these assertions of fatigue and any alleged violations of federal regulations is simply too attenuated to consider this conversation a protected activity. Therefore, the complaints made during the August meeting are not protected under subsection (a) of the Act.

## **II. ADVERSE ACTION AND CAUSATION**

A prima facie STAA retaliation case also requires both that the employer be aware of this protected activity and that the adverse action taken against the employee be due to the protected activity. B.S.P. Transp., Inc. v. U.S. DOL, 160 F.3d 38, 45 (1<sup>st</sup> Cir. 1998).

In this case, Mr. Meehan had the sole authority to terminate Complainant. He testified that he made the decision to "sever" Respondent's relationship with Complainant after his meeting with Complainant. *See* TR. 30-45. This Court finds that "severing" the relationship is identical to terminating employment and constitutes adverse action. Therefore, Complainant has presented sufficient evidence that adverse action was taken against him subsequent to the meeting on August 28, 2000.

Complainant also must prove that Respondent severed its relationship with him because of the protected activities found in this case. This Court notes that there was a short period of time between the occurrence of Complainant's protected activities and his termination. Under some circumstances, this could be evidence of a causative link between Complainant's protected activities and his termination. However, after considering the testimony and evidence presented, this Court finds that the circumstances surrounding his termination were not related to any of these protected activities.

Under the current law, the employer must be aware of the protected activities. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993). While this Court found that Complainant engaged in several protected activities while employed by Respondent, there is no evidence that Mr. Meehan, the individual who terminated him, even knew about them. Mr. Wilkinson testified that he did not inform Mr. Meehan about the events occurring on August 12 and 13, 2000, because he thought both the fatigue and mechanical issues expressed during that period of time had been resolved. *See* TR. 357-400. In any event, the testimony from Respondent's management is unanimous in that Complainant would not have been terminated or disciplined for a late delivery due to mechanical problems or stopping to rest. *See* TR. 357-390; 280-300; 413-424. Additionally, Mr. Wilkinson testified that he believed that Complainant had resolved his issues regarding the conversation with the D.O.T. officer, so he did not mention the conversation to anyone else. *See* 357-390. Therefore,

Complainant has produced no evidence that Richard Meehan, the only individual in this case with termination authority, knew about the specific instances of protected activity occurring during August 12-15, 2000.

Additionally, Mr. Wilkinson testified that when he contacted Mr. Meehan regarding his concerns from the August 25 and 26, 2000 communication from Complainant, he relayed only his general concerns regarding the pre plan dispatches and Complainant's inability to safely operate a truck. *See* TR. 357-400. This general communication between Mr. Wilkinson and Mr. Meehan is insufficient to prove that Mr. Meehan had prior knowledge of these protected activities prior to his meeting with Complainant. Complainant's mere suspicion that Dennis Wilkinson was going to take action against him and "lure him into a meeting" after the conversation on August 25, 2000 is insufficient, by itself, to establish that Mr. Meehan had prior knowledge of Complainant's protected activities.

Even if Mr. Meehan knew about these activities, Respondent has presented sufficient evidence to rebut any inference that these activities caused Complainant's termination. Mr. Meehan testified that he based his decision to terminate Complainant solely based on the information discussed during the meeting on August 28, 2000. *See* 40-41. After examining the evidence presented on the contents of this conversation, this Court finds that his decision to terminate Complainant was in fact based on his perception that Complainant could not safely operate a truck for Respondent. Specifically, this safety concern was due to the perception that Complainant's fatigue during driving was caused by uncontrollable circadian sleep rhythms, and had nothing to do with actual or potential violations of federal regulations.

Additionally, Respondent presented persuasive evidence that it is in its best interest to put the safety of its drivers at a high priority. Gary King testified that all management, including Mr. Meehan, should be concerned with monitoring drivers to ensure the safe operation of the trucks. *See* TR. 413-424. The safety bonuses for the drivers also exhibit the importance that safety plays in Respondent's operations. *See* RX-5. While this is merely persuasive for this Court, it does directly contradict Complainant's assertions that Respondent terminated him for incurring mechanical truck problems, expressing concerns about fatigue, and running drivers "into the ground." *See* CX-3. Whether Mr. Meehan's decision was the correct one is not for this Court to decide. Based on the evidence before this Court, however, it was a reasonable given the contents of the conversation that he had with Complainant. Therefore, Complainant has failed to prove that Mr. Meehan either knew about the occurrence of any protected activities or terminated him because he engaged in these protected activities.

### **III. CONCLUSION AND RECOMMENDED ORDER**

Complainant did prove that he engaged in several instances of protected activity during his brief employment with Respondent. Additionally, he proved that adverse action was taken against him by Respondent, which resulted in his unemployment. However, he failed to prove that he was terminated because he engaged in these protected activities. As such, Complainant did not make a prima facie case for retaliatory discharge under the Act, and is not entitled to any remedy from this Court.

Accordingly, this Court recommends that Complainant's claim be **DISMISSED**.

**So ORDERED.**

A  
**RICHARD D. MILLS**  
Administrative Law Judge

**NOTICE:** This Recommended Decision and/or 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, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. See 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978 (1996).

RDM/sls