U.S. Department of Labor

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Issue Date: 19 November 2008

CASE NO. 2008-STA-0010

In the Matter of:

PHILLIP FABRE,
Complainant,

vs.

WERNER ENTERPRISES, INC.,
Respondent.

Appearances:

Phillip Fabre, *pro se*
For the Complainant

John Kreutzer, Esq.
For the Respondent

BEFORE: ANNE BEYTIN TORKINGTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This claim arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA"), as amended and recodified, 49 U.S.C.A. § 31105 (2007), and its implementing regulations, 29 C.F.R. Part 1978 (2008). These provisions protect employees from discrimination because the employee has engaged in protected activity while employed by an entity which is engaged in interstate commerce. Phillip Fabre ("Complainant") filed a complaint alleging that Werner Enterprises, Inc. ("Respondent") violated the STAA by suspending and terminating him in violation of 49 U.S.C.A. § 31105(a)(1).

Complainant filed a complaint with the Secretary of Labor on June 22, 2007. The Occupational Safety and Health Administration ("OSHA") conducted an investigation on behalf of the Secretary of Labor, and on September 13, 2007, concluded that the complaint lacked merit. On October 19, 2007, Complainant filed an objection to the Secretary's findings and requested a hearing before an administrative law judge. The first pre-trial notice was sent to the parties on November 1, 2007 for a trial date of November 28, 2007 in Portland, Oregon. On November 14, 2007, Respondent requested a change of venue to Omaha, Nebraska, or to Kansas City, Missouri. On November 27, 2007, I denied the motion for a change of venue and

continued the case to December 13, 2007. On December 6, 2007, Complainant requested a continuance of the trial date to which Respondent objected. On December 10, 2007, I continued the trial to a date to be determined in February or March of 2008. On December 28, 2007, I issued a pre-trial notice to the parties for a trial date of February 21, 2008, in Portland, Oregon. On January 23, 2008, Complainant requested a continuance of the trial date which I denied on January 29, 2008.

A formal hearing was held in Portland, Oregon on February 21, 2008. Both parties were present. Complainant appeared in *pro se*, and Respondent was represented by counsel. Complainant's exhibits ("CX") 1 through 13 and 15 through 31 and Respondent's exhibits ("RX") 1 through 9 were admitted into evidence.[1] Tr. 28, 38, 105. The parties' pre-trial statements were also admitted as ALJX 1 (Complainant's) and ALJX 2 (Respondent's). Tr. 78. The final investigation report from OSHA was admitted as ALJX 3. Tr. 78. Complainant's post-trial brief is admitted as ALJX 4.[2]

ISSUE FOR DETERMINATION

The issue presented is whether Respondent retaliated against Complainant for engaging in activity protected by the STAA. Tr. 31-32.

STIPULATIONS

The parties stipulate, and I accept that:

(1) Respondent, Drivers Management LLC, is a subsidiary of Werner Enterprises, U.S. DOT Number 53467, a large trucking business with 10,618 units that specializes in the interstate transportation of freight for customers throughout the United States. The company operates one over-the-road operation from Omaha, Nebraska. Total employees are 12,651 over-the-road drivers, full-time, without union affiliation. Respondent is a private sector employer and meets all jurisdictional requirements.

(2) Respondent is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105. It is also a commercial motor carrier within the meaning of 49 U.S.C. § 31101. Respondent is engaged in transporting freight on the highways and maintains a place of business in Omaha, Nebraska.

[1] At trial, Respondent objected to the admission of Exhibits 30 and 31 because they were not part of the pre-trial exchange of exhibits between the parties, as required by my pre-trial order. Tr. 30. I admitted the exhibits and offered Respondent the opportunity to rebut those exhibits after the close of the hearing. Tr. 105. By letter dated February 28, 2008, Respondent indicated that it had no objection to the admission of Exhibits 30 and 31.

[2] I did not order the parties to submit post-trial briefs. Complainant nevertheless submitted one. Respondent did not. As Complainant's brief was served upon Respondent and Respondent did not object, I hereby admit Complainant's post-trial brief.

(3) Respondent hired Complainant as a driver of commercial motor vehicles, to wit, a truck with a gross weight rating of 10,001 pounds or more.

(4) Complainant was employed by a commercial motor carrier and drove Respondent's trucks over highways in commerce to haul cargo.

(5) In the course of his employment, Complainant directly affected commercial motor vehicle safety.

(6) Complainant was terminated on March 26, 2007.

(7) On or about June 22, 2007, Complainant filed a complaint with the Occupational Safety and Health Administration alleging that Respondent discriminated against him, in violation of 49 U.S.C. § 31105.

(8) Complainant alleges that Respondent suspended and terminated his employment on March 26, 2007, because he complained to Respondent about the faulty recording of his Qualcomm satellite unit that affected hours of service that he submitted on Vehicle Number 46400.

(9) Complainant stated that he believed that the vehicle's recording device was incorrect.

(10) Complainant also stated that he did not recognize the government, U.S. Department of Transportation regulations, as a governing body at the time he worked at Werner Enterprises. Tr. 6-15.

SUMMARY OF DECISION

After reviewing and considering all of the evidence, I find that Complainant did not prove, by a preponderance of the evidence that he has been discriminated against in violation of the STAA. While Complainant did show that he was the subject of an adverse personnel action, he did not establish that he engaged in an activity protected by the STAA, that Respondent was aware of his alleged protected activity, or that there was a causal connection between the alleged protected activity and Respondent's adverse employment actions against Complainant.

SUMMARY OF THE EVIDENCE

Complainant was employed as a truck driver by Respondent. STIP 4. Respondent terminated his employment on March 26, 2007. STIP 6, 8. Complainant argues that he was suspended, and then terminated, on March 26, 2007 because he complained to Respondent about the faulty operation of the Qualcomm satellite communication device in his truck which drivers used to record their service hours and to communicate with Respondent's dispatchers. STIP 8, *see also* CX 4, CX 18, RX 3. Respondent argues that it suspended

Complainant because he violated U.S. Department of Transportation ("DOT") regulations regarding driving hours. ALJX 2, p.2. It then terminated his employment because he declined to recognize the authority of the DOT regulations over the operation of his truck and because he stated that he would not abide by Respondent's requirements that he operate the Qualcomm device and manually record hours of service if it failed. ALJX 2, pp. 2-3.

Respondent's drivers must comply with DOT Hours of Service Rules. RX 4, p.1. Drivers may be on duty no more than 14 hours following 10 hours off-duty. *Id.* Of those 14 hours, they may actually drive for no more than 11 hours. *Id.* The 70-Hour Rule prohibits a driver from driving after being on duty for 70 hours in any period of 8 consecutive days. *Id*. An exception to the 11-Hour Rule allows a driver to exceed the 11 hour limitation by no more than 2 hours if adverse driving conditions, such as snow, sleet, fog, make it necessary to exceed the limitation to reach a place of safety and security for the driver and the cargo. *Id*.

DOT regulations require that drivers record their hours of service in logbooks. *See* CX 26, p.2, RX 3, p.1, *see also* 49 C.F.R. § 395.8. DOT, however, has granted Respondent an exception to the rule requiring manual logging of driving hours. RX 3, p.1, *see also* Notice of Exemption to Allow Werner Enterprises, Inc. to Use Global Positioning System Technology to Monitor and Record Drivers' Hours of Service (2006 Notice of Exemption), 71 Fed. Reg. 172, p.52846 (Sep. 7, 2006).[3] This exception allows Respondent's drivers to record their driving hours electronically using the Qualcomm device installed in Respondent's trucks. *See* RX 3, p.1, *see also* 2006 Notice of Exemption, 71 Fed. Reg. 172, p.52846 (Sep. 7, 2006). The Qualcomm device is a message communication terminal that allows drivers to communicate with Respondent through a satellite-based communication system. CX 18, p.1. In the event that a driver suspects the Qualcomm device is not operating properly, Respondent's policies requires a driver to contact the Log Department which will instruct the driver to keep a paper logbook if the device is indeed malfunctioning. RX 3.

According to Complainant, on March 20, 2007, Complainant encountered difficulties negotiating the roads around New York City on his way to pick up a load in Freeport, New York. CX 16, pp. 2-4. As a result, he apparently exceeded an hours of service rule. Complainant describes that after picking up his load in Freeport, he checked his Qualcomm device to determine his "hours for legal drive time" and found the return message scrambled. *Id*. at p.5. Complainant explains that he attempted to send a message that the device had "gone one-line screwy again" but that message was cut off. *Id*. Complainant then decided to continue to the "loads destination" because he had been told by employees of the shipper in Freeport that it was unsafe to remain there. *Id*. Complainant explains that, "I was almost positive at this time that I was out of legal driving hours, but from what I knew, my Qualcomm was not going to provide me with that information." *Id.*

According to Respondent, "when the Complainant had accumulated five hours of service violations he was routed to a terminal on or about March 25, 2007, and was informed by Safety

[3] Claimant's Exhibits include a similar Exemption issued in 2004. CX 26, *see also* Notice of Exemption to Allow Werner Enterprises, Inc. to Use Global Positioning System Technology to Monitor and Record Drivers' Hours of Service, 69 Fed. Reg. 182, p.56474 (Sep. 21, 2004). This Exemption, however, expired on September 21, 2006, and was not in force at the time of the events that are the subject of Complainant's claim. *Id.*

personnel that he would be suspended for 72 hours because of his repeated safety violations." ALJX 2, p.1. After being informed of the suspension, according to Respondent, Complainant became belligerent and stated loudly that he was not governed by the DOT and that DOT had no authority over him. ALJX 2, p.1.

Respondent continues that Complainant returned to the Safety Department on March 26, 2007 and began arguing about his suspension. ALJX 2. He asserted to Log Department manager Ms. Jaime Maus that he did not recognize the DOT as a governing authority over him and stated that he would not follow the agency's regulations. ALJX 2, p.2. According to Respondent, Complainant became so disruptive that Ms. Maus called John Elliott from the Safety Department who then met with Complainant in Mr. Elliott's office. *Id*. At that time, according to Respondent, Complainant informed Mr. Elliott that he did not recognize the DOT as a governing authority over him, and stated that he would not comply with DOT regulations. *Id*. Mr. Elliott then determined that Complainant was unwilling to comply with DOT hours of service regulations, made the decision to terminate Complainant's employment, and informed Complainant of the termination. *Id*.

Complainant's version of the events leading up to his termination differs from Respondent's. He describes no events occurring on March 25, 2007. Complainant explains that he was at Respondent's headquarters in Omaha, Nebraska on March 26, 2007, when he was directed by his Qualcomm device to proceed to the Safety/Logs office. CX 16, p.5. Once there, he was informed by an employee that he was suspended for three days due to his actions on March 20, 2007. *Id*. Complainant asserts that he "explained the situation with the faulty Qualcomm unit," but that the employee explained that she had no authority over punishments. *Id*. Complainant explains that he then spoke to the employee's supervisor, Ms. Jaime L. Maus, who stated that there was no problem with the Qualcomm and that she would not be investigating further. *Id*. Complainant states that, "I refused to recognize the DOT hours of service regulations as having any authority over me as long as my computer system [the Qualcomm unit] was not working properly. . . ." *Id*.

Complainant states that Mr. John Elliott then joined the conversation. CX 16, p.5. Complainant then explained his "situation with the Qualcomm again" and then accompanied Mr. Elliott to his office. *Id*. at pp.5-6. Complainant describes that they discussed "the issue in greater depth" and that he was then given a coupon for a free breakfast at the company store and was told to return after breakfast. *Id*. at p.6.

After breakfast, Complainant states, he was directed to "do review tests on DOT hours of service questions." CX 16, p.6. He then inquired with Ms. Maus "about any possible investigation which could have been underway." *Id*. According to Complainant, Ms. Maus then suggested that he would not have to undergo his suspension if the Qualcomm device was diagnosed as faulty. *Id*. Complainant asserts that "Mr. Andy K. diagnosed my Qualcomm unit. He concurred with my opinion and observations regarding the unit, and swapped the unit with a working one." *Id*. According to Respondent, however, this mechanic has no recollection of Complainant and no memory of replacing Complainant's Qualcomm device. CX 30, p. 9. Complainant explains that he returned to speak to Ms. Maus "but had some trouble relating my story again" and "became the center of a lot of unwanted attention." CX 16, p.6. According to

Complainant, Mr. Elliott again appeared and told Complainant "you are not being punished, go to your truck." CX 16, p.6.

Complainant explains that he did this, received new load information, did some trip planning, and then drove to the guard shack to pick up a new trailer. CX 16, p.7. At the guard shack he was directed to return to the Safety/Logs Department. *Id*. Once there, Complainant describes, he was directed to Mr. Elliott's office, where he met with Mr. Elliott and Mr. Mark Thaler and Mr. Mark Dougherty. *Id*. After Complainant answered a few questions, Mr. Elliott then notified Complainant that his employment with Respondent was terminated. *Id*. The official reason for Complainant's termination, as recorded on a "Status Worksheet" signed by Mr. Elliott, was "violation of Werner policies." RX 5, p.1.

Respondent asserts that at no time during Complainant's conversations with Respondent's personnel on March 25-26, 2007 did Complainant indicate that his Qualcomm device failed to record his driving or hours or that such a malfunction caused him to erroneously appear to violate hours of service restrictions. ALJX 2, p.2. Respondent further asserts that when Mr. Elliott terminated Complainant's employment, he had no knowledge that Complainant had ever indicated that his Qualcomm device had malfunctioned. CX 2, p.2. Additionally, Respondent states, Respondent's Log Department has no record of the Complainant ever notifying Log Department personnel that the Qualcomm device was not operating properly. *Id*. Complainant's exhibits, however, contain the text of message traffic between Respondent and Complainant's truck including a number of messages that appear to indicate a malfunction in the Qualcomm device. CX 31, pp. 5, 14, 22, 25, 43.[4]

Testimony of Mr. Phillip Fabre

Because Mr. Fabre is a *pro se* complainant, I did not enforce the normal rule precluding the presentation of evidence in Complainant's opening statement. Tr. 32. *Pro se* complainants often do not understand the difference between "evidence" and "argument." I swore in Complainant prior to his opening statement and indicated to Respondent's counsel that he would be permitted to cross-examine Complainant regarding any evidence that might be presented in Complainant's opening statement. Tr. 33.

Complainant's testimony proceeded exhibit by exhibit. Complainant made several allegations of wrongdoing by Respondent. He claimed that the OSHA Final Investigative Report "details. . . quite profoundly, the level of misnomer [sic] I've had to endure. . ." Tr. 41; *see* CX 4. He also asserted that statements made by Respondent's personnel to the OSHA investigator prove "that literally everyone, including the inspector himself, is guilty of some form of provable misconduct in this case. . . ." Tr. 51; *see* CX 7.

Complainant acknowledged that Respondent's policy does "specify that I would be instructed at some time to keep a paper log, and that never occurred." Tr. 47-48. Complainant also asserted that Complainant's Exhibit 8 shows that he worked 13.5 hours on March 20, 2007 which would preclude a 14-hour violation. Tr. 52. Complainant also disputed Respondent's characterization that he became belligerent when informed of his suspension. Tr. 64-65. In so

[4] This exhibit was submitted without pagination. I have added page numbers to each page of the exhibit.

doing he stated, "I was obviously performing a task beforehand and for a long time under the DOT, that I paid for my way into this industry, and that I knew about these—regulations beforehand." Tr. 64.

Referring to Complainant's Exhibit 22, Complainant explained that he had received a load assignment from his fleet manager who, Complainant asserts, was unaware of his termination. Tr. 70. He explained further that he had specifically asked that his fleet manager join his conversation with Ms. Maus. *Id.* This request, Complainant testified, was denied. *Id.* Complainant concluded that his fleet manager was not aware of the termination until Complainant informed him of it. Tr. 70-71.

On cross-examination, Complainant was asked to clarify whether he had acknowledged that he was competent in maintaining a paper log of his hours and service. Tr. 78. Complainant replied that he was "as competent as any individual can be in this industry." Tr. 79. He further testified that he "may or may not have known" that he was required to carry a paper log book with him, but acknowledged that he did have one with him. *Id.* When asked if he knew that he could record his hours of service in the paper log when the Qualcomm device was not working, Complainant stated that "I don't believe I had much of any knowledge of how I should be reporting hours of service at all. . . from March 20th, and possibly previously, until now, quite honestly." *Id.* Complainant then agreed that he knew that he was responsible for recording his hours of service. *Id.* When asked to clarify that he had stipulated[5] to stating, while at the terminal, that the Department of Transportation was not a governing body over him, Complainant replied, "I don't believe that's the exact statement I made." *Id.*

Testimony of Ms. Jaime Maus

Ms. Maus testified that she is Manager of Log Compliance and that she held that position on March 26, 2007. Tr. 82. She testified that on that date she heard someone raising his voice through "the driver window, where drivers can come up and talk to the log team. . . ." *Id.* She testified that what she heard was Complainant saying "that he did not recognize the DOT regulations as a governing body, and that Werner's paperless logging system went against his belief." Tr. 82-83. Ms. Maus added that Complainant also said that he was being suspended for a 14-hour violation and that "another violation would occur because he didn't recognize the federal regulations." Tr 83. After telling Complainant that the suspension would stand, she called Mr. John Elliott, who was in charge of the building in which she was located, when Complainant refused to leave the window. Tr. 83. Ms. Maus testified that when Mr. Elliott arrived, he introduced himself and "removed. . . [Complainant] from the window." *Id.*

Ms. Maus further testified that she was not involved in the decision to terminate Complainant's employment, and that prior to becoming aware of Complainant's termination she was not aware that he had made any complaints regarding his Qualcomm device not operating properly. Tr. 83. Rather, she stated, she first became aware that Complainant had made an allegation regarding his Qualcomm device when she testified at his unemployment hearing, which took place after the termination. Tr. 83-84.

[5] See Stipulation 10, p.3., *supra*.

On cross-examination, Ms. Maus testified that her conversation with Complainant on March 26, 2007 was brief and that it was the only conversation that she had with him. Tr. 86.

Testimony of Mr. John Elliott

Mr. Elliott is currently Manager of Field Safety with Werner; however, at the time of Complainant's termination he was Manager of Corporate Training Center. Tr. 90. He testified that his responsibility was to ensure a professional work environment for office employees and drivers. Tr. 91. On the day of Complainant's dismissal, he received a telephone call from Ms. Maus regarding difficulty with a driver in the log department. Tr. 91. He went to the log department and was briefed by a log technician that "they were having a great deal of difficulty explaining the process and convincing a particular driver that the driver was currently under log suspension for a period of three days." *Id*. Mr. Elliott testified that he asked Complainant if he had received an explanation as to why he was being suspended for three days. *Id*. Complainant responded in the affirmative, but indicated that he did not agree with the suspension. *Id*. Mr. Elliott testified that in response to his additional questions Complainant acknowledged that a log supervisor and a log manager also offered Complainant explanations as to why he was suspended. Tr. 91-92.

At that point, Mr. Elliott testified, he asked Complainant to leave the log area so that other drivers could transact their business. Tr. 92. Instead, Complainant continued to debate the suspension. *Id*. Mr. Elliott further testified that Claimant

> did not acknowledge, would not acknowledge, either DOT—and we'll say Department of Transportation—as a governing or ruling body over him, nor did he acknowledge the Werner paperless log system or Werner's policy in regards to logs and regulatory compliance in the workplace. *Id.*

Mr. Elliott testified that he then asked Complainant what he meant by his statement. Mr. Elliott testified, "he said he simply did not recognize . . . [DOT] as a governing body over him, nor did he recognize or acknowledge" the paperless log system or Werner's policies with respect to them. *Id*. Mr. Elliott testified that he again asked Complainant if he would "acknowledge that DOT is in fact a governing body for log regulatory compliance in the workplace" and "acknowledge and support and operate under the paperless log system and Werner policy?" *Id*. When Complainant again declined to do so, Mr. Elliott testified, he made the decision to terminate Complainant's employment, explaining that Complainant's "ideas, . . beliefs, and. . . intentions were no longer compatible as a driver in Werner Enterprises." Tr. 94.

Mr. Elliott also testified that, prior to deciding to terminate Complainant's employment, he was unaware that Complainant had ever complained that his Qualcomm device was not working properly. Tr. 94. He further testified that he did not learn that Complainant made a statement regarding his Qualcomm device until an "unemployment hearing" which took place after the termination. Tr. 94-95.

On cross-examination, Mr. Elliott testified to the brevity of his conversation with Complainant on March 26, 2007, and that it was the only conversation he had with Complainant "in regards to that event, and the decision to terminate, at that point in time, that morning. . . ." Tr. 96. After denying that he was in charge of security for Werner, he explained that he would contact security if he was "unsuccessful in getting. . . [an] employee to execute my requirements. . . ." *Id*.

Mr. Elliott testified that he had had no conversations with Ms. Jaime Maus prior to the events that gave rise to Complainant's termination on March 26, 2007. Tr. 96-97. He further testified that all of his conversations with Ms. Maus took place while Mr. Elliott was in the log department on that date and were associated with his decision to terminate Complainant's employment. Tr. 96-97. Mr. Elliott testified that after Complainant was terminated, Werner provided Complainant with a meal and a bus ticket home. Tr. 97.

Testimony of Mr. Mark Thaler

Mr. Thaler is a Safety Specialist with Werner. Tr. 99. He testified that he witnessed Mr. Elliott's termination of Complainant. Tr. 100. Mr. Thaler testified that he did not witness Complainant make any statements about his Qualcomm, but that he understood from Mr. Elliott's explanation to Complainant that the reason for the termination was that Complainant "did not recognize the Qualcomm as our official logging [method]." Tr. 100.

ANALYSIS

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in activities protected by the Act. 49 U.S.C.A. § 31105(a). These protected activities fall into two categories. The first is when the employee files a complaint or begins a proceeding related to violation of a safety regulation, standard or order, or has testified or will testify in such a proceeding. 49 U.S.C.A. § 31105(a)(1)(A). The second is when an employee refuses to operate a vehicle because the operation would violate a regulation related to commercial motor vehicle safety or health, or because the employee has a reasonable apprehension of injury because of the vehicle's unsafe condition. 49 U.S.C.A. § 31105(a)(1)(B).

To prevail on a STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that he was the subject of an adverse action through discharge, discipline, or discrimination, and that there was a causal connection between the protected activity and the adverse action.[6] *Regan v. National Welders Supply,* ARB No. 03-117, ALJ No. 03-STA-14

[6] STAA cases are frequently analyzed using the framework of shifting burdens of proof developed for pretext analysis under Title VII of the Civil Rights Act of 1964 and other anti-discrimination laws, such as the Age Discrimination in Employment Act. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Densieski v. La Corte Farm*

(ARB Sept. 30, 2004); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33 (ARB Oct. 31, 2003). While a *pro se* complainant may be held to a lesser standard than legal counsel in procedural matters, the burden of proving the elements necessary to sustain a claim of discrimination is no less. *See Flener v. H.K. Cupp, Inc.*, 90 STA-42 (Sec'y Oct. 10, 1991).

Complainant has clearly suffered an adverse action. As the ARB has explained, "the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity." *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008); *see also Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Suspension and termination would clearly dissuade a reasonable worker from engaging in protected activity. *See* STIP 6. Thus, to prevail, Complainant must prove that his complaint about the malfunctioning Qualcomm device is activity protected by the STAA, that Respondent was aware of the complaint, and that there was a causal connection between the complaint and Complainant's suspension or his termination.

1. Complainant's Protected Activity

The record is not precise on whether Complainant's claim is grounded in the complaint/proceeding provisions of 49 U.S.C. § 31105 (a)(1)(A) or the refusal to operate provisions of 49 U.S.C. 31105 (a)(1)(B). The complaint/proceeding provisions protect an employee who files a complaint or commences a proceeding related to "a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding." 49 U.S.C. § 31105(a)(1)(A). The refusal to operate provisions protect an employee who refuses "to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health" or because "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.A. § 31105(a)(1)(B)(i-ii). Both OSHA and Complainant describe the basis for the complaint inconsistently.

Equipment, ARB No. 03-145, ALJ No. 2003-STA-30 (ARB Oct. 20, 2004); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35 (ARB June 28, 2002). This requires the complainant to first establish a prima facie case, by showing that: (1) the complainant engaged in protected activity; (2) the employer was aware of such activity; (3) the complainant suffered adverse employment action; and (4) there was a causal connection between the protected activity and the adverse action. *Densieski*, (ARB Oct. 20, 2004). The burden then shifts to the respondent to produce evidence that it took the adverse action for a legitimate, non-discriminatory reason. *Id.* If the respondent carries this burden, the complainant must then prove by a preponderance of the evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination. *Id.; Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7 (ARB Nov. 27, 2002). The ARB, however, has said that a case tried on the merits should be analyzed by focusing on the complainant's ultimate burden of proof, rather than using the shifting burdens approach. *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA 33 (ARB Aug. 28, 2003); *Chapman v. Heartland Express of Iowa*, ARB No. 02-030, ALJ No. 2001-STA-3 (ARB Aug. 26, 2003); *Leach v. Baskin Western, Inc.*, ARB No. 02-089, ALJ NO. 2002-STA-5 (ARB July 31, 2003); *Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01-021, ALJ No. 99-CAA-15 (ARB May 20, 2003). Thus, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of whether protected activity was the reason for the adverse action.

The Final Investigative Report prepared by OSHA states Complainant's allegation as "that he was terminated. . . after reporting a faulty Qualcomm satellite unit. . . while under load dispatch." ALJX 3, p.2. As this report says nothing of a refusal to operate, mentions the report was made while under load dispatch, and notes a report of a faulty Qualcomm device, it suggests that the basis for the complaint was the complaint/proceeding provisions in 49 U.S.C. § 31105 (a)(1)(A).

The OSHA letter to Complainant detailing the Secretary's findings, however, quotes 49 U.S.C. § 31105 (a)(1)(B), the refusal to operate provision, and states that the Secretary determined that Respondent did not violate that provision. ALJX 3, p.4. Yet, it also states that Complainant "alleged that Respondent suspended and terminated your employment. . . because you complained to Respondent about the faulty recording of your QUALCOMM [sic] satellite unit. . . ." *Id.* Thus, while citing the refusal to operate provision, the letter neither indicates that Complainant alleged that he refused to operate nor conveys a determination by the Secretary as to whether such a refusal to operate took place. In fact, it is silent on an essential element of a claim under 49 U.S.C. § 31105 (a)(1)(B), namely the refusal to operate.

Complainant's Pre-Trial and Post-Trial Briefs quote both the complaint/proceeding and refusal to operate provisions. ALJX 1, p.2; ALJX 4, p.1. In the Post-Trial Brief, Complainant states that "49 U.S.C. 31105(a)(1)(B)(i), will also be reasserted to show my bold refusal to operate a commercial motor vehicle. . . ." ALJX 4, p. 1. I find no evidence in the record, though, to indicate that such a refusal took place. To the contrary, Mr. Fabre has stated that, just prior to being directed back to the terminal for what turned out to be his termination, he drove to the guard shack to pick up a new trailer. CX 16, p.7. If there was a refusal prior to Complainant being directed back to the terminal, it is not mentioned in any of Complainant's pleadings, or anywhere else in the record, except for the sole assertion previously noted. I therefore, conclude that the relevant provisions are the complaint/proceeding provisions of 49 U.S.C. § 31105 (a)(1)(A). Complainant has not asserted, nor does the record indicate, that he would testify in a proceeding related to violation of a safety regulation, standard, or order. *See* 49 U.S.C. 31105(a)(1)(A). Thus, whether Complainant engaged in a protected activity will depend on whether he filed a complaint or commenced a proceeding related to violation of a safety regulation, standard, or order. *See id.*

Complainant argues that he was suspended and terminated for notifying Respondent that the Qualcomm device was not operating properly. For Complainant to demonstrate that he engaged in a protected activity, then, he must first prove that he did indeed notify Respondent that the Qualcomm device malfunctioned. Secondly, such notification to his employer must fall within the statute's definition of filing a complaint or beginning a proceeding. *See* 49 U.S.C. 31105(a)(1)(A). Third, the notification must have been related to violation of a safety regulation, standard, or order. *See id.*

A. Notification of Qualcomm Malfunction

Respondent asserts that Mr. Elliott had no knowledge of Complainant's reports of malfunctions. Respondent also asserts that its log department has no record of Complainant notification of malfunction.[7] CX 2, p.2. Both Ms. Maus and Mr. Elliott testified that the first time they heard of Complainant's statement about the Qualcomm device was at Complainant's state unemployment compensation hearing, which took place after Complainant's termination. Tr. 83-84, 94-95.

Complainant's exhibits, however, indicate the Complainant did send several messages on his Qualcomm device reporting that the device was malfunctioning. *See* CX 31. Claimant's Exhibit 31, provided by Respondent to Complainant in response to a discovery request, contains the text of messages sent from "Tractor 46400" to Respondent. These include messages indicating apparent malfunction of the Qualcomm device on February 11, February 27, March 7, March 9, and March 20, all in 2007. CX 31, pp. 5, 14, 22, 25, 43.[8] I note that the message sent on March 20, 2007 coincides with the events in New York that gave rise to Complainant's suspension. The parties have stipulated that Complainant drove Tractor 46400. STIP 8. Because Respondent acknowledged that Tractor 46400 was driven by Complainant, and because Respondent itself disclosed the messages to Complainant, one can infer that those messages were received by Respondent. *See* CX 31, p.1; STIP 8. I find, therefore, that Complainant did notify Respondent that his Qualcomm device was malfunctioning.[9]

B. Whether Complainant's Notification Constitutes the Filing of a Complaint or Beginning of a Proceeding Within the Meaning of 49 U.S.C. § 31105(a)(1)(A).

A complaint need not be made to a government agency; it may be made internally. *Zurenda v. J & K Plumbing & Heating Co., Inc.*, 1997-STA-16 (ARB June 12, 1998); *see also, Yellow Freight System, Inc. v. Martin*, 954 F. 2d 353, 356-57 (6th Cir. 1992). The Administrative Review Board has held that "[T]he 'filed a complaint' language of STAA § 31105 (a)(1)(A) protects from discrimination an employee who communicates a violation of a commercial motor vehicle regulation, standard or order *to any supervisory personnel*."[10] *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-00037 (ARB Dec. 31, 2002). Internal complaints may be oral, informal, or unofficial. *Envtl. Servs., Inc. v. Herman*,

[7] Complainant asserts that a "Mr. Andy K." concurred that the Qualcomm device was not functioning properly and "swapped the unit with a working one." CX 16, p.6. I find no other evidence in the record to indicate that such a swap took place. In a letter to the OSHA investigator, Respondent asserted that the mechanic identified by Complainant has no recollection of Complainant and no recollection of replacing the unit. CX 30, p.9. Ultimately, whether the device functioned properly or was replaced is irrelevant. The relevant inquiry is whether Complainant reported a malfunction and whether that report was the cause of Respondent's adverse action.

[8] This exhibit was submitted without pagination. I have added page numbers to each exhibit.

[9] This finding is limited only to the issue of whether Complainant actually notified Respondent that his Qualcomm device was not operating properly. It has no bearing on the issue of knowledge and causation, which will be discussed below.

[10] Emphasis added.

146 F.3d 12 (1st Cir. 1998), *citing Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 228-29 (6th Cir. 1987).

Here, the record indicates that Complainant's messages, sent using the Qualcomm device, were to supervisory personnel. While the positions of the persons receiving and responding to the messages are not specified, the content of the messages indicates that the recipients were supervising Complainant. Respondent's personnel who sent messages to Complainant directed Complainant's activities in areas including the entering of data into his Qualcomm device, assigning tractors to trailers, the delivery of cargo, and calling the "Canada briefing line." CX 31, pp.12, 19, 32, 33, 35. They also notified Complainant of an hour of service violation and directed him to see the safety department. CX 31, pp. 44, 55. I find, therefore, that Complainant did make a complaint within the meaning of the term under Section 31105(a)(1)(A) of the STA.

C. Whether the Complaint made by Complainant Related to Violation of a Safety Regulation, Standard, or Order

To be protected, a complainant need not prove that a safety regulation, standard, or order was violated, nor must he even explicitly mention a commercial motor vehicle safety standard. *Yellow Freight System, Inc. v. Martin*, 954. F.2d 353 (6th Cir. 1992); *see also Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-31 (Sec'y Oct. 27, 1992); *Nix v. Nehi-RC Bottling Co., Inc.*, 84-STA-00001 (Sec'y July 13, 1984), slip. Op at 8-9. A complainant need only raise a safety concern arising from violation of a commercial motor vehicle safety regulation, standard, or order. *Nix*, 84-STA-1 (Sec'y July 13, 1984). The complainant's belief that there has been a violation must, however, be reasonable. *See Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002).

I find that Complainant's complaint does not relate to violation of a safety regulation, standard, or order. Complainant's claim for whistleblower protection is not based on an allegation of, or is it related to, violation of the 11, 14, or 70 Hours Rules enumerated at 49 C.F.R. § 395.3. Thus, his report that his Qualcomm device malfunctioned can only relate to a violation of the provisions at 49 C.F.R. § 395.8 requiring drivers to log their hours of service, or the Department of Transportation Exemption authorizing Respondent's drivers to use the Qualcomm device to record their hours of service. *See* 2006 Notice of Exemption, 71 Fed. Reg. 172, p.52846 (Sep. 7, 2006). The regulation specifies both the requirement to record hours of service and the information that must be recorded. 49 C.F.R. § 395.8. The Exemption, which all drivers are required to carry, provides that in the event the computer system fails, drivers are to note the failure immediately and to begin preparing hard-copy logs. 2006 Notice of Exemption, 71 Fed. Reg. 172, p.52847 (Sep. 7, 2006). The ARB has held that falsification of a driver's log is related to a safety regulation, standard, or order. *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-14 (ARB Sep. 30, 2004); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 1996-STA-35 (ARB June 28, 2002). Complainant neither raises an hour of service violation, nor does he allege falsification of a driver's log. Instead, his complaint only relates to a malfunction in the primary method of recording hours of service. The Exemption, however, contemplates the possibility that the Qualcomm device might malfunction and requires notice of the malfunction and the preparation of a paper log. 2006 Notice of Exemption, 71 Fed. Reg. 172, p.52847 (Sep. 7, 2006). Complainant's notification that his Qualcomm device was

malfunctioning, therefore, was not notification of a violation, but rather was an integral part of compliance with the Exemption, and by extension, with the recording requirement of 49 C.F.R. § 395.8.

I further find that it was not reasonable for Claimant to conclude that the malfunction of the Qualcomm device violated a safety regulation, standard, or order. In his testimony, Complainant testified that the portion of the Driver's Handbook entitled "Paperless Electronic Logging Exemption" "does specify that I would be instructed at some time to keep a paper log, and that never occurred."[11] TR. 47-48, *see also* CX 5, p.3.[12] The Driver's Handbook makes clear that the necessary precursor to being instructed to keep a paper log is for the driver to notify Respondent that the Qualcomm device is malfunctioning. *See* CX 5, p.3. This instruction is consistent with the requirement in the 2006 Notice of Exemption that Respondent "must require each driver to note immediately any failure of the GPS technology or complementary safety management computer systems, and to immediately begin preparing hard-copy driver logs during the period that the technology is inoperative." 2006 Notice of Exemption, 71 Fed. Reg. 172, p.52847 (Sep. 7, 2006). The Exemption explicitly states that Respondent's failure to produce, on two hours notice, hours of service documentation for affected drivers constitutes a violation of the Exemption and 49 C.F.R. § 395.8(a). *Id.* I can find no reading of Respondent's instruction to drivers, of 49 C.F.R. § 395.8 which requires the logging of hours of service, or of the Exemption, which can reasonably be interpreted as stating that the malfunction of the Qualcomm device is a safety violation.

Although Claimant later testified, under cross-examination that he did not have "much of any knowledge of how I should be reporting hours of service at all. . . from March 20th, and possibly previously, until now. . .," his testimony discussed above, and his actions in reporting the malfunctioning Qualcomm device indicate otherwise. *See* Tr. 79. Given Claimant's familiarity with the alternate method of reporting hours of service, it was not reasonable for him to conclude that the malfunction of the primary method for reporting such hours constitutes a safety violation. Thus, although Complainant did file a complaint with Respondent, because that complaint did not relate to a safety regulation, standard, or order, I conclude that Complainant did not engage in a protected activity.

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[11] This portion of the Driver's Handbook states, in relevant part,

> If you suspect or notice that your Qualcomm unit is not working properly, you must contact your Fleet Manager and the Log Department immediately. If the Qualcomm unit is not tracking you properly, or not sending and receiving messages like it should, you will be instructed to keep a paper logbook. You are required to keep a blank logbook in your truck.

CX 5, p.3.

[12] Neither Claimant's testimony nor his exhibit identifies that the exhibit to which Claimant was referring when testifying was an excerpt from the Driver's Handbook. However, Claimant's Exhibit 5, p.3., to which Claimant referred in his testimony, is identical to Respondent's Exhibit 3, which is identified as such. *See* Tr. 47-48.

2. Respondent's Awareness of Complainant's Alleged Protected Activity

Assuming *arguendo* that Complainant established that he engaged in protected activity, he must also show that Respondent was aware of this protected activity in order to show that Respondent engaged in unlawful reprisal. Complainant must prove by a preponderance of the evidence that the *person responsible for the adverse action* knew about Complainant's alleged protected activity.[13] *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-00005 (ARB Sep. 28, 2007); *Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-00039 (ARB June 29, 2007). I find that Complainant is unable to do so. He is unable to show that Respondent had the necessary awareness of protected activity when it suspended and terminated him.

A. Respondent's Awareness of Complainant's Suspension

The record does not indicate who imposed the suspension. Respondent states "safety personnel" informed Complainant of his suspension for log violations. ALJX 2, p.1. Complainant says a woman informed him of his suspension.[14] CX 16, p.5. According to Complainant, this woman claimed she had no authority over suspensions. *Id.* Additionally, Complainant reported the Qualcomm malfunction to her. CX 16, p.5. Even if this woman did impose the suspension, Complainant's account does not demonstrate that she was aware of Complainant's report of the Qualcomm malfunction when the suspension was imposed. Thus, I find that Complainant has not shown, by a preponderance of the evidence, that the person who imposed the suspension was aware of Complainant's alleged protected activity.

B. Respondent's Awareness of Complainant's Termination

Although I have determined that Respondent received messages from Complainant indicating malfunction of the Qualcomm device, this does not mean that they were known to the person responsible for the adverse action. *See* CX 31, pp. 5, 14, 22, 25, 43. Respondent's employee Mr. Elliott, who terminated Complainant's employment, testified that the first time he heard of any statement by Complainant regarding the Qualcomm device was after his termination at a state unemployment compensation hearing. Tr. 94-95. Additionally, Ms. Maus, with whom Mr. Elliott conferred prior to his first meeting with Complainant, also testified that she first heard of a report regarding a malfunctioning Qualcomm device at Complainant's state unemployment compensation hearing. Tr. 83-84. Complainant has offered no evidence or testimony to rebut Mr. Elliott's and Ms. Maus's versions of events. Complainant is unable to show by preponderant evidence that the person who terminated him knew about Complainant's alleged protected activity.

3. Causal Connection Between Alleged Protected Activity and Adverse Actions

Assuming that Complainant was able to establish that he engaged in a protected activity and that Respondent was aware of that protected activity, he would also need to

[13] Emphasis added.

[14] Complainant states that this woman may have been someone named Jennifer Dutchman. CX 16, p.5.

demonstrate, by a preponderance of the evidence, that the adverse action he suffered was motivated by retaliation for the protected activity. *See Clement v. Milwaukee Transport Services, Inc.*, ARB No. 02 025, ALJ No. 2001-STA-6 (ARB Aug. 29, 2003). A complainant must present some evidence, beyond a respondent's mere knowledge of the protected activity, which raises an inference that protected activity was the likely reason for the adverse action. *Clay v. Castle Coal and Oil Co.*, Inc., Case No. 90-STA-37 (Secy. Nov. 12, 1991). When, however, as here, an employer does not have knowledge of the employee's protected conduct, it cannot be causally established that the employer's decision to take adverse action was motivated by the employee's protected activity. *Stout v. Yellow Freight Systems, Inc.*, ARB No. 00-017, ALJ No. 1999-STA-00042 (ALJ Dec. 3, 1999); *Perez v. Guthmiller Trucking Co.*, 87-STA-13 (Sec'y Dec. 7, 1988).

Furthermore, even if Respondent did have knowledge of protected activity by Complainant, the record does not show a causal connection between the report about the Qualcomm device and either the suspension or the termination.

Respondent represents that it suspended Complainant for violating hours of service regulations.[15] ALJX 2, p.1. Complainant has offered testimony and evidence attacking the propriety of the suspension.[16] *See* Tr. 64-65, CX 8. However, even if the suspension was improper, that would not establish a causal relationship between the complaint regarding the Qualcomm device and the suspension.

Respondent also asserts that it terminated Complainant's employment because of his "refusal to acknowledge and comply with DOT hours of service regulations." ALJX 2, p.4. Testimony by Mr. Elliott and Mr. Thaler and a "Status Worksheet" prepared by Mr. Elliott is consistent with this explanation.[17] Tr. 94, 100; RX 5, p.1.

Evidence that a Complainant was treated differently from other similarly situated employees may serve as evidence of discrimination. *See Calmat Co. v. USDOL*, No. 02-73199 (9th Cir. Apr. 19, 2004) (case below ARB No. 99-114, ALJ No. 1999-STA-15). Complainant has offered evidence that between January 3 and July 24, 2007, Respondent fired close to 200 employees for violation of its policies. CX 6. Rather than showing that Complainant was subject to disparate treatment, this evidence indicates that Complainant was treated the same as many of his fellow employees.

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[15] Respondent's Driver's Handbook provides that the corrective action for a driver's fifth hours of service violation is a 72 hour suspension. RX 4, p.2. It also provides that after a sixth violation a driver may be suspended for up to seven days or terminated. *Id.*

[16] Claimant testified that CX 8 proves that he was on duty for 13.5 hours on March 20, 2007, which does not violate the 14 Hour Rule. Tr. 64-65. This exhibit presents the "Log Record for Driver 380303." CX 8, p.1. On page 3, an entry of total hours for March 20, 2007 lists "3=10" and "4=3.5" which do total up to 13.5. CX 8, p. 3. Nothing in Complainant's testimony or exhibits, however, explains what the codes mean. As analyzed above, though, even if this document was fully explained, it would not change the conclusion I reach.

[17] The Status Worksheet states that the reason for Complainant's termination was "violation of Werner policies," explaining further that Complainant "[r]efused to acknowledge or comply with DOT regulations." RX 5, p.1.

An employer's failure to follow its own policies may also serve as evidence of discrimination. *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995); *Settle v. BWD Trucking Co., Inc.*, 92-STA-16 (Sec'y May 18, 1994); *Hornbuckle v. Yellow Freight System, Inc.*, 92-STA-9 (Sec'y Dec. 23, 1992). The record is unclear on how many times Complainant violated hours of service rules. OSHA found that Complainant's violation on March 20-21, 2007 was his sixth, even though he was disciplined for a fifth violation. CX 4, pp.2-3. Even if the OSHA finding is correct, it indicates only that Respondent had trouble keeping track of Complainant's violations. It does not show that Respondent's explanation for the termination was false. Thus, it does not show that Complainant was illegally retaliated against.

CONCLUSION

After reviewing and considering all of the evidence, I find that Complainant did not meet his burden to demonstrate, by a preponderance of the evidence, that his termination was the product of discrimination prohibited by the STAA. Complainant did establish that he was the subject of adverse employment actions. He did not, however, establish that he engaged in a protected activity, that Respondent was aware of the alleged protected activity, or that there was a causal connection between the protected activity and the adverse actions.

RECOMMENDED ORDER

Based upon the foregoing Analysis, and upon the entire record, I recommend the following Order:

Complainant shall be awarded nothing.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, United States Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. See 29 C.F.R. Part 1978.109(a); 61 Fed. Reg. 19978 (1996).

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