U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 June 2008

CASE NO.: 2008-STA-00012

In the Matter of:

DANIEL M. SALATA,
Complainant

v.

CITY CONCRETE, LLC ,
Respondent

APPEARANCES:

James S. Gentile, Esq.
For the Complainant

James L. Blomstrom, Esq.
For the Respondent

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DENYING RELIEF

I. JURISDICTION

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 [hereinafter "the Act" or "STAA"], 49 U.S.C. § 31105 (formerly 49 U.S.C. app. § 2305), as amended**,** and the applicable regulations at 29 C.F.R. Part 1978.[1] The Act protects employees who report violations of

[1] On August 3, 2007, President George W. Bush signed into law various STAA amendments, which were included in the Implementing Recommendations of the 9/11 Commission Act of 2007. See Pub. L. No. 110-53, § 1536, 121 Stat. 266, 464-67 (Aug. 3, 2007). This new law has the purpose of minimizing security threats and of maximizing the abilities of public transportation systems to mitigate damage that may result from terrorist attacks. Section 1413 provides employee protection (or ―whistleblower) coverage for public transportation employees. The Act did not

commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

II. PROCEDURAL HISTORY[2]

Complainant, Mr. Daniel M. Salata (hereinafter "Salata"), filed a complaint of discrimination with the Department of Labor, under Section 405 of the Act, against City Concrete, LLC (hereinafter "City Concrete" or "City"), on or about August 10, 2007, alleging he was discharged by respondent, City Concrete, LLC, in retaliation for making safety complaints concerning City Concrete's operations and trucks. The complaint was investigated by the Department of Labor and found not to have merit. On October 2, 2007, the Secretary issued her Findings dismissing the complaint. By motion dated October 30, 2007, Salata objected to the Secretary's Findings and requested a hearing. I issued Notices of Hearing, on November 9, 2007 and December 20, 2007. The matter was tried on March 19-20, 2008, in Canfield, Ohio. In their pre-hearing submissions, both the complainant and respondent joined the issue of whether Mr. Salata was discharged in violation of the STAA. Post-hearing briefs were filed by City Concrete, LLC, and Salata on May 15, 2008 and May 22, 2008.

III. STIPULATIONS AND THE PARTIES' CONTENTIONS

A. Stipulations

The parties agreed to, and I accepted, the following stipulations of fact:

1. The respondent is a motor carrier engaged in commercial motor vehicle operations which maintains a place of business in Youngstown, Ohio.
2. The respondent's employees operate commercial motor vehicles, in the regular course of business, over interstate highways and connecting routes, principally to transport concrete.
3. The respondent is and was a "person," as defined in the STAA, 49 U.S.C. § 31101(3).
4. The complainant was hired as an employee of the respondent, on or about June 16, 2007.
5. The complainant worked as a driver of a commercial motor vehicle with a gross weight in excess of 10,000 pounds used on the highways to transport cargo.
6. The complainant was a "probationary" employee during the entire time of his employment.
7. The respondent operated under a collective bargaining agreement ("CBA") with Teamsters Local 377.
8. Art. 2, section 2.4, of the CBA, states, "A new employee shall work under the

include a specific provision for retroactivity.

[2] References in the text are as follows: "ALJX ___" refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judge; "CX ___" refers to complainant's exhibits; "RX ___" to respondent's exhibits; and "TR ___" to the transcript of proceedings page and testifying witness' name.

provisions of this agreement but shall be employed only on a ninety (90) day trial basis, during which period he may be discharged without further recourses; providing, however, that the Employer may not discharge or discipline for purpose of evading this agreement."

9. Between July 23 and August 3, 2007, the complainant operated a front-discharge cement truck, number 509.

10. On or about August 22, 2007, the complainant filed a complaint with Teamsters Local 377 regarding his discharge.

11. On or about August 10, 2007, the complainant filed a complaint with the Department of Labor, OSHA, under the provisions of the STAA.

12. The complaint was timely filed with the Department of Labor.

13. On or about September 11, 2007, the business representative, Teamsters Local 377, Mr. Ray Depasquale, wrote that since he had not completed his ninety day trial period, under art. 2, 2ection 2.4, of the CBA, the company was not required to have good cause to discharge him and that, it appeared he was discharge for several legitimate reasons having nothing to do with evading the CBA. thus, he found Mr. Salata's grievance without merit and would not pursue it further.

14. On or about October 2, 2007, the Area Director of the Occupational Safety and Health Administration ("OSHA") issued "Secretary's Findings" concluding Mr. Salata's complaint not established.

15. The complainant did not, before August 10, 2007, commence or cause to be commenced, a proceeding under the STAA, had not and was not about to testify in a proceeding under the STAA, had not or was not about to participate in any proceeding under the STAA.

16. The Office of Administrative Law Judges, U.S. Department of Labor properly exercises in personam and subject matter jurisdiction to hear this matter.

B. The Parties' Contentions:

1. *Complainant*:

The complainant argues that the daily vehicle inspection reports and verbal truck repair requests he provided City Concrete, LLC, during his work as a concrete truck driver, constituted ("internal") protected activity covered by the STAA. As a result of those protected activities and refusal to drive truck 509 until it was repaired, City Concrete, LLC, terminated him, on or about August 3, 2007. Salata contends that a driver engages in protected activity under the STAA when he files safety complaints. He denied having an accident in truck #425 or having ruined (i.e., "wet loads") concrete loads which the company raised as bases for discharge.

2. *Respondent*:

City Concrete, LLC, does not agree that the complainant engaged in protected activity or that he was discharged for an impermissible reason. It contends, as a "probationary" employee, under the Collective Bargaining Agreement ("CBA"), Salata could be discharged without further

recourse except for purposes of evading the CBA.[3] City Concrete, LLC, argues that complainant was terminated for ruining loads (i.e., "wet loads") of concrete, damaging a concrete truck (#425), and inability to operate a front-discharge concrete truck. City Concrete, LLC, contends that the termination of Mr. Salata is a matter which does not run afoul of the STAA. It argues that it discharged Salata for legitimate, non-discriminatory, reasons, before his "probationary" period ended. It avers it had a past incident where it was extremely difficult and took a long period of time to discharge an unsatisfactory employee who had served beyond the probationary period and did not wish to repeat that experience. Moreover, its drivers and mechanics had not found the problems Mr. Salata had with the truck #509. Finally, pointing out that Salata had not raised a "refusal to drive" issue either before or at the hearing, it appears he was only pursuing the STAA (internal) "complaint" clause.

IV. ISSUES[4]

A. Whether, under 49 U.S.C. § 31105(a)(1)(a), the respondent discharged, disciplined or discriminated against an employee, to wit the complainant, on or about August 8, 2007, regarding pay, terms or privileges of employment, because,

> He made or filed complaints, with his supervisors or others, related to violations of a commercial motor vehicle safety regulations, standard, or orders.

B. If the respondent so violated 49 U.S.C. § 31105(a)(1)(A), what are the appropriate sanctions or damages?

C. If the respondent so violated the Act, what reasonable costs and expenses is the complainant entitled to in bringing and litigating the case, including attorney's fees?

V. PRELIMINARY FACTS

The complainant was hired as an employee of the respondent commercial motor carrier, on or about June 16, 2007. The employer correctly believed that he had some limited experience operating a "front-discharge" concrete truck in addition to many years of driving a rear-discharge truck.. City hired Mr. Salata to drive its front discharge trucks. Complainant's first position with respondent was operating a rear-discharge truck., number 425. Thereafter, complainant continued to work as a driver of a commercial motor vehicle for City Concrete, LLC, until he was discharged, on or about August 8, 2007. Mr. Salata worked at City Concrete's, LLC, Youngstown, Ohio, facility, where it maintains its concrete production facility and an office.

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[3] This is an incorrect legal conclusion, for one may not be legally discharged in violation of the STAA.

[4] Salata alleged violations of both the complaint provision at 49 U.S.C.§ 31105(a)(1)(A), and the refusal to drive provisions at § 31105(a)(1)(B).

Concrete mixtures are loaded into concrete mixing trucks at City's facility. The company employs drivers to deliver and pour the concrete at various job sites. Front and rear discharge concrete trucks operate somewhat differently; the former have "automatic" drives and the latter "manual" drive with air throttles, as opposed to "linkage" throttles.

During his employment with City, as a concrete truck driver, Salata had a history of complaining about front-discharge truck number #509's lack of power and of writing-up defects in the trucks he drove. Although August 3, 2007 was his last work day, he was notified of his discharge from City Concrete, LLC, on or about August 8, 2007. The discharge was effective on or about August 8, 2007. Since his discharge, Salata quickly found comparable employment in the industry. He found new employment with Bessemer Cement, in August 2007, and worked for them at the time of the hearing. Admittedly, his concrete work is "seasonal."

Mr. Salata has twenty-four years experience driving trucks. He has a commercial driver's license ("CDL") with endorsements for transporting hazardous materials and driving tankers. He testified that he has a clean driving record with no points or accidents and tries to be safe. I found Mr. Salata to be sufficiently articulate and intelligent to comprehend the proceeding and the advice of his counsel.

There being adequate support in the record for the parties stipulations in Paragraph IV herein, those stipulations are hereby incorporated by reference into Paragraph VI as Findings of Fact and Conclusions of Law, as if fully set forth.

VI. DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact and Law

City Concrete, LLC, Youngstown, Ohio, is a small concrete business, founded in 1999, with about twenty-five employees. It has about $3.7 million in annual gross receipts. City Concrete's busiest delivery periods are during the spring, summer and fall. Mr. John Annichenni, is City's self-described "hands-on" part owner and president. At least 10-15 of City Concrete's employees began their jobs as probationary employees. Of the probationary employees only two to three had ever been let go during the probationary period. Mr. Annichenni testified that once past the probationary period the union has a "three-strikes" requirement for terminating an employee and that, in his experience, it was very difficult and overly time-consuming to discharge a union employee even with very good cause. Mr. Annichenni testified he was very safety conscious as he had suffered an industrial accident, in 1998, in which his arm had been severed. He has since then even given safety presentations.

The parties do not dispute the fact that occasionally City Concrete's trucks, like any other vehicles, had items which required repair and that Salata was reporting them. Drivers would occasionally report the front discharge trucks suffered a "lack of power" and the usual cause was duct clamps coming off.

City Concrete, which qualifies as a motor carrier engaged in commercial motor vehicle operations, had about two dozen full-time concrete delivery drivers. These drivers operated

commercial motor vehicles, in the regular course of business, over interstate highways and connecting routes, principally to transport concrete. City has a number of concrete trucks, each with an assigned number identification. Most are rear-discharge trucks. Six of the trucks are front-discharge trucks. Typically, each driver drives his one assigned truck, not rotating vehicles. The front discharge trucks differ somewhat from the others in that they have an automatic transmission and an "air" throttle. The air throttle differs from a "linkage" throttle somewhat and requires getting used too, according to Mr. Ken Horger, who drives them. The air throttle needs more "feathering" or easing and climbing a grade and backing down may diminish the air and affect power.

The drivers' daily duties included inspecting and writing-up defects, if any, for the trucks, accepting concrete mixtures at the plant, determining the appropriate water ratio, mixing the concrete, pouring it at job sites, having customers sign invoices and cleaning the trucks. The Daily Vehicle inspection Report ("DVIR") form, on which defects were noted, came with an original white and a yellow copy which was kept in the identified truck. Drivers turned in their DVIRs daily leaving them on the office counter. The white DVIR was then picked up by Mr. Edward Knebel, City's mechanic, who reviewed, signed and filed them. If he found a "safety" defect, the truck would not "go out" until repaired. If the truck had a "minor" or non-safety defect, management would decide when to have it repaired. The repair shop is located about a mile down the road from the main plant and office. Mr. Knebel testified that City was very busy during the summers.

Mr. Salata, the present complainant, was recruited and hired by Rick Flesher, in June 2007, to work as a concrete truck driver. Mr. Flesher had thirty-one years experience as a concrete truck driver and has been City's assistant manager for five to six years. He wanted Mr. Salata hired to operate a front-discharge truck. The latter had some limited experience driving them. Nevertheless, Mr. Flesher started Mr. Salata off in a rear discharge truck..

The record is filled with a number of Salata's specific complaints reflecting his efforts to establish that he was fired for making "safety" complaints. (RX C and D). Salata testified that he had complained about defects on various trucks, i.e., #425 (rear-discharge) and #509 (front-discharge). Most of his complaints are listed on the driver's daily vehicle inspection sheets.[5] (CX 4 & 12; RX C & D). Between June 19, 2007 and July 5,2007, he "wrote-up" the following defects for #425: drop axle, lights, flashers, signals, inside door handle, mirrors, windshield, passenger-side window not staying up, "slobber boot," pusher axle, running lights, suspension, shocks, site glass leaks, and back-up alarm." He nevertheless continued driving the truck. On July 5, 2007, he wrote, on his DVIR, that "all fixed." (CX 12). He noted no defects between July 6 and July 12, 2007. From July 7 through July 20, 2007, he noted: right-side marker light out on drop axle, side marker lights out and tail lights. He continued driving the truck.. On July 21 and July 23, 2007, the last day he drove #425, he noted no defects. Mr. Knebel testified that the repair invoices of 7/12/2007, 7/16/2007, and 7/19/2007 accurately reflect the repairs made to truck #425. (RX F). Lights were replaced, brakes adjusted, tire replaced, mud flaps replaced.

[5] 49 C.F.R. section 396.11 requires pre-trip correction of those reported defects which "would be likely to affect the safety of operation of the vehicle" by the motor carrier. Moreover, drivers must be satisfied that the vehicle is in safe operating condition before driving it. 49 C.F.R. section 396.13.

(RX F). There is no complaint that City "retaliated" against him, in any way, for his many write-ups of truck #425 on or before he was assigned truck #509.

Mr. Salata was given a brief orientation on front-discharge truck #509 by Messrs Jamrocik and Shipley. Mr. Richard Jamrocik, a driver for 24 years, drove front discharge trucks and was familiar with #509. It is a 1998 Mac truck City acquired three and one half to four years prior to the hearing. Mr. Salata began driving #509 exclusively on or about July 23, 2007. Between July 23, 2007 and August 1, 2007, Salata consistently "wrote-up" the following defect for #509: no engine power. On four of the eight reports, the DVIR reflects "no defects" for the "power unit" (or truck, rather than the mixer unit). Mr. Ed Knebel subsequently signed all the forms. Mr. Salata claimed he discontinued checking the "no defects" blocks to reemphasize the truck's lack of power.[6] Mr. Jamrocik had driven #509 shortly before Mr. Salata and had had no trouble with a lack of power.[7]

Mr. Knebel testified that, on July 26, 2007, his mechanics checked-out "extensively" and repaired #509, addressing Mr. Salata's complaints. The repair invoice accurately reflects the parts replaced and work done. He observed that filters are routinely replaced when "power" complaints are made. Yet, the very next day, July 27, 2007, Mr. Salata reported "engine no power." Salata testified that it took a long time to get to the job site at 35 mph on the interstate because the truck was underpowered. He admitted he nevertheless stayed on the interstate to get to the job. The August 1, 2007, repair invoice reflects the service to #509. Mr. Knebel had other front-discharge truck drivers test drive #509 with a "simulated" load of gravel. They found it drove no differently than the other front-discharge trucks. Mr. Knebel added the truck has not had any serious complaints from August 2007 through the present. (RX F). Mr. Salata had not driven any other of City's front-discharge trucks.

On August 3, 2007, several front-discharge concrete trucks and drivers were sent to the Parella job site, at Youngstown State University ("YSU"). Mr. Gregory Parella was the contractor on a job for the University, which included installing concrete sidewalks. Mr. Parella knows Mr. Annichenni and has seen Mr. Salata. The concrete job required City's trucks to climb a hill with a grade. Mr. Salata's truck would not make it up the hill either the first or second attempts. He made it on the third try, but rutted the project's base and destroying the grade due to the truck's weight. According to Mr. Salata, he explained the truck's power problem to an upset Mr. Parella and let City know of the latter's dissatisfaction. They, nevertheless, sent him back to the job because other front-discharge trucks were not available. Mr. Parella complained to City's dispatcher who sent another front-discharge truck which was able to climb the "non-severe" grade. Mr. Parella had seen Mr. Salata driving a Bessemer Cement front-discharge truck with no problems in the fall of 2007.

On one trip back to the Parella job site, Mr. Salata's truck broke down on the roadway. It apparently had either a broken or unfastened throttle linkage cable. Mr. Knebel was sent to

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[6] There was some dispute concerning a few of the DVIRs for truck #509. Mr. Salata claimed he had not checked some "no defect" blocks, yet the company-provided copies of the white originals showed the block checked. Mr. Knebel testified it was possible he had checked the block on the original form for 7/27/07 thinking that 509's power problem had been addressed.

[7] Mr. Jamrocik had filed a DVIR, on July 19, 2007, with no indication of insufficient power.

temporarily repair it. While Mr. Salata testified truck #509 lacked power to reach minimum interstate highway speed, he nevertheless drove it to get to the job. That allowed Mr. Salata to finish the job.

Mr. Horger testified he saw Salata's truck in some deeper ruts at the YSU job having a hard time getting the truck to go forward and back. He added if a truck can move it will go up the grade in low range. It was his opinion that Mr. Salata lacked the front-discharge truck experience he had claimed. Mr. Salata admitted that, at the end of his employment, Rick Flesher told him he did not know how to drive a truck with an air throttle.

On August 3, 2007, after delivering three loads to YSU, successfully delivering the concrete, and when the Parella YSU site work was done, Mr. Salata returned to City and testified he explained to Mr. Annichenni that #509 was "unsafe" and he would not drive it. He admitted that in his earlier deposition, he had not testified using the word "unsafe" but offered he had been on cold medications. Mr. Annichenni testified that Mr. Salata had not used the term either, but had told him about Mr. Parella and details of the truck's problem, i.e., lack of power. (TR 232). Mr. Annichenni had him take it to maintenance. Mr. Salata prepared a DVIR stating the truck should not be on the road until it was fixed. (RX D). However, that DVIR was never submitted to City and remained in Mr. Salata's possession until the hearing. Mr. Annichenni testified that he was skeptical of Mr. Salata's complaint.

In the interim, Mr. Annichenni visited City's office. There, he was informed (primarily by Mr. Flesher, the day-to-day manager) of an accident the complainant had in #425, in July 2007, "wet load" problems, and contractor job problems he had not previously been aware of. Mr. Annichenni testified he then began to consider "carelessness" issues and the fact the complainant was in his probationary period. But, he wanted to investigate and discuss the matter with his City partners. Specifically, he wanted to know, what if anything may have been wrong with truck #509. (TR 231). Later, Mr. Annichenni told Mr. Salata that he had gotten safety complaints about him and to go home. Mr. Annichenni testified that the mechanics changed the filters, etc., but found nothing major wrong with #509. The partners left the decision up to Mr. Annichenni.

Mr. Knebel testified that the most common reason for a power complaint on a front discharge truck was a result of duct clamps coming loose. Both Messrs. Shipley and Horger drove #509. Mr. Knebel testified that his mechanics repaired #509, on August 1, 2007. After the repairs, he had drivers, including Mr. Shipley, who is experienced with front discharge trucks, test drive it with a load. Mr. Shipley found it fine, although he noted an empty truck would handle differently than a full one. Mr. Knebel testified City has had no serious complaints about #509 from August 2007 through the trial date in 2008.

Although City has a "write-up" (disciplinary) procedure, Mr. Salata had never been written up.[8] Nor did management ever mention a minor accident he had had in truck #425 at the plant, in July 2007, until he was let go. While pulling out from receiving a load of concrete, Mr. Salata's truck had its rear-most wheels (drop axle) down causing it to clip a cement plant wall as

[8] Mr. Annichenni testified that he did not typically write-up employees during the probationary period. (TR 252).

he pulled away in a turn. The rear fender, tire and light were damaged. It was not severe enough for Mr. Annichenni to know if it was taken out of service or repaired. Mr. Lesko testified that he had observed Mr. Salata's accident from his vantage point at the plant. The driver had not raised the rear pick-up (or "drop") axle which struck a wall while making a left turn. While he did not examine the damage initially, he mentioned it to Mr. Salata whom he claimed did not acknowledge the accident. Later, he saw damage to the rear passenger-side fender on the drop axle. He reported the accident to Rick Flesher and his boss. Mr. Flesher testified when the truck pulled up "I seen where the fender on the back was damaged." Mr. Salata denied having such an accident and was never written-up for any accident.

The union shop stewart, Mr. Ken Horger, testified that Rick Flesher had (contemporaneously) informed him of the accident Mr. Salata had in truck #425. Mr. James Johnston testified that when he was hired to drive #425, Mr. Salata pointed out the fender was bent on the rear drop axle. A bracket was also bent. It was repaired shortly thereafter. Mr. Knebel testified that RX F has copies of three repair tickets for truck #425, dated July 12, July 16, and July 19, 2007. He examined #425 for rear drop axle fender damage in July 2007 and it was repaired. Oddly, the three repair tickets reflect identical parts and nearly identical repair work, involving lights, a bent bracket, replacing a damaged tire, repairing drop axle fenders, and replacing a mud flap.[9] From July 12 through July 20, 2007, Mr. Salata noted on the DVIRs: right-side marker and running light out on drop axle, side marker lights out and tail lights. So, it is established he drove #425 during that period. I observe that during that period, Mr. Salata did not report, on his DVIRs, any defect respecting: mud flaps, tires, fenders, or brackets. During the period the truck had been driven slightly less than 700 miles and presumably been out on multiple jobs. Mr. Flesher testified it is rare for the trucks to hit plant fixtures.

Mr. George Lesko, who had worked for City as a "batchman" since 1999, testified about the "wet load" matter. The batchman is responsible for mixing the concrete in proper proportions with proper ingredients before it is loaded into the mixer trucks. It is not unusual for drivers to report a wet load. He testified that Mr. Salata complained a load he received was too wet, i.e., had too much water. They tried to dry it twice, but it was still too wet. Larry Gage, another driver, on site who saw the truck's slump meter, reported that Mr. Salata must have accidentally left the water tank discharge valve on which caused it.[10] Mr. Gage informed Mr. Salata of the matter. He testified that Mr. Salata responded "shit happens." Mr. Gage testified that the problem was not likely Mr. Lesko's doing. Mr. Salata stated this scenario could not have occurred. Mr. Annichenni testified that this load could not go to the customer, it was dumped, thus it was to be expected the delivery ticket would not reflect a wet load.

The Complainant points out that CX 10, the delivery invoice for July 31, 2007 (#95589), which City provided as evidence of the wet load, actually shows the load had been accepted. City subsequently provided invoices for July 20 and July 27, 2007 (invoice #s 94664 (7/20) and 95025 (7/27)) as evidence of the wet loads. The 7/20/07 invoice has a handwritten notation by Mr. Salata which refers to a batch of concrete ruined when a workman, at the job site, left the

[9] Mr. Knebel pointed out that the 7/16 repair ticket states "again." (RX F). He recalled "this happened several times within a couple of days. It was several times that it happened, the same exact thing."
[10] The slump meter measures the mixture's water content.

truck water valve on. City argues this was nevertheless Mr. Salata's ultimate responsibility. The later (7/27) invoice has no mention of a wet load. Rick Flesher testified about the wet loads, one at the plant the batchman reported, another, on July 20, 2007, when he had spoken to the customer who complained about the wet load and one on July 31, 2007 (RX G)(which may be the one the batchman discussed).

Although he was aware Mr. Annichenni wanted to look into safety complaints, Mr. Salata essentially learned he had been fired through his fiancé's calls to Mr. Annichenni. Mr. Salata filed a grievance with his union concerning his termination, but the union declined to process it. Mr. Ray Depasquale, a union official, wrote that since he (Mr. Salata) had not completed his ninety day trial period, under art. 2, section 2.4, of the CBA, the company was not required to have good cause to discharge him and that, it appeared he was discharge for several legitimate reasons having nothing to do with evading the CBA. thus, he found Mr. Salata's grievance without merit and would not pursue it further.[11]

On or about August 27, 2007, Mr. Salata's fiancé' filed a complaint against City with the Ohio Public Utilities Commission ("OPUC"). Mr. Poindexter, OPUC, testified the state had found some maintenance issues, primarily related to record-keeping. Their findings did not relate to either Mr. Salata or any specific vehicle.

Mr. Salata was hired by Bessimer, with higher pay, within eight weeks of his termination. He does not wish to return to City. He admitted such concrete work is "seasonal" but observed he had work throughout the winter at Bessimer.

Mr. Annichenni testified that he was skeptical over Mr. Salata's "lack of power" complaints, because had they been true Salata would not have been able to pour the concrete for the Parella job. After the repair shop checked #509, changed the filters and parts and essentially found no major problems with #509, and drivers tested it, he decided to fire Mr. Salata after talking to his partners. (TR 231-232). He also considered the probationary period issue, the wet loads, the purported accident, and customer complaint matters. When asked if Mr. Salata was terminated for safety complaints, he testified "absolutely not."

I need not decide whether each of the alleged bases for the discharge were in fact true, but rather I must determine if they amounted to an illegitimate pretext. The accident, wet loads, and customer complaint all have a basis in fact. Mr. Annichenni did not personally investigate all the allegations, instead relying largely on what Mr. Flesher told him. The records and several employees showed the wet loads and the truck #425 accident. Mr. Annichenni was involved, to some degree, in the Parella incident and had been told about it. As a CDL-licensed driver himself, he did not believe Mr. Salata's complaints about the lack of power in truck #509. Mr. Salata's complaints about truck #509's lack of power had some basis in fact, as well, particularly, on August 3, 2007. Mr. Annichenni legitimately believed the repair shop had not found anything that was found to be wrong. Given Mr. Salata's history of repeatedly driving #509 despite his lack of power complaints, his change of testimony regarding what he told Mr. Annichenni concerning "safety", Mr. Annichenni's testimony about August 3, 2007, I do not

[11] While City might not have needed "good cause" it could not legally discharge a driver based on safety complaints.

find he told the latter he refused to drive #509 until it was fixed.

Mr. Annichenni testimony that he legitimately feared not handling this matter before the probationary period ended, given his past experience, is credible. So too is his testimony that City did not ordinarily write-up probationary employees.

In conclusion, although Salata had made innumerable "safety" complaints, that is, reports concerning necessary repairs to City Concrete's trucks, many of which were legitimate complaints, the reason he was terminated was solely because Mr. Annichenni foresaw problems based on the allegations he was advised of, that is the accident, wet loads, customer complaints, and his own skepticism about Mr. Salata's lack of power complaints related to #509. City Concrete had the normal defects one would expect with a fleet of vehicles, but, for the most part, had them regularly and timely inspected and repaired. City Concrete, as a small business, had previously let go three probationary employees before which is consistent with Mr. Annichenni's testimony about his concerns with the union. To accept Mr. Salata's position, I would have to disbelieve the testimony of nearly every other witness. Finding the other witnesses credible, I decline to do so.

B. STAA violations -- Overview

A complainant may recover under the Act under three circumstances:

First, by demonstrating that he was subject to an adverse employment action because he has filed a complaint alleging violations of safety regulations. 49 U.S.C. § 31105 (a)(1)(A). This provision of the Act provides specifically and in pertinent part:

> (a) Prohibitions. -- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
>
> > (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . .

The U.S. Department of Labor (DOL) interprets this provision to include internal complaints from an employee to an employer. DOL's interpretation that the statute includes internal complaints has been found "eminently reasonable." *Clean Harbors Environmental Services v. Herman,* 146 F.3d 12 (1st Cir. 1998)(case below 95-STA-34). The Circuit Court of Appeals has stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id.* A communication by an employee to a supervisor, albeit part of their job duties, that a truck has a mechanical defect that would inhibit safety if the vehicle is operated is a safety complaint subject to protection under the STAA. *See Schulman v. Clean Harbors Envtl. Servs., Inc.,* 1998-STA-24 (ARB Oct. 18, 1999) (Vehicle inspection reports filed by the complainant as part of his daily job duties constituted

protected activity under the complaint clause).

Second, by demonstrating that he was subject to an adverse employment action for refusing 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." 49 U.S.C. § 31105(a)(1)(B)(i). I have not found that the Complainant refused to drive truck #509

In such a case, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 1994-STA-55 (Sec'y Aug. 4, 1995). However, protection is not dependent upon actually proving a violation. *Yellow Freight System v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).

Third, by showing that he was subject to an adverse employment action for refusing to operate a motor vehicle "because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." 49 U.S.C.§ 31105(a)(1)(B)(ii). To qualify for protection under this provision, a complainant must also "have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C § 31105(a)(2).[12] This provision is applicable to the case *sub judice*.

The burdens of proof under the Act have been adopted from the model articulated by the Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993). *See Anderson v. Jonick & Co.*,1993-STA-6 (Sec'y, September 29, 1993).

In *Byrd v. Consolidated Motor Freight*, 97-STA-9 at 4-5 (ARB May 5, 1998), the Administrative Review Board ("ARB"), summarized the burdens of proof and production in STAA whistleblower cases:

> A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. at 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of Labor*, 64 F.3d 261, 277 (7th Cir. 1995).[13] A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a

[12] Under 49 U.S.C.A. § 31105(a)(1)(B)(ii) a complainant must prove by a preponderance of the evidence that his or her alleged reasonable apprehension of serious injury due to the vehicle's unsafe condition, was objectively reasonable. *Brame v. Consolidated Freightways*, 1990-STA-20 (Sec'y, June 17, 1992) slip op. at 3 and *Brunner v. Dunn's Tree Service,* 1994-STA-55 (Sec'y, Aug. 4, 1995).

[13] If other factors are present supporting discipline, then timing alone may not be sufficient to establish the necessary causal link. *Moon*, 836 F.2d at 229-230.

> legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

In a footnote to the above paragraph, the ARB provided further explanation on this last phase of the adjudication process:

> Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant, throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by the prima facie case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." *St. Mary's Honor Center,* 509 U.S. at 510-511. *See Carroll v. United States Dep't of Labor,* 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a prima facie case becomes irrelevant once the respondent has produced evidence of a legitimate nondiscriminatory reason for the adverse action).

Once the complainant satisfies these four elements, a rebuttable presumption of discrimination arises, and the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. The burden shifting to the employer at that point is only to articulate a legitimate, nondiscriminatory, reason for the adverse action. The employer's burden at this point is one of production, not of proof.

With only one exception, the burden always remains with the claimant to establish the elements of his case: (1) protected activity; (2) a causal nexus between the protected activity and the adverse action; and (3) in response to employer's evidence of an allegedly legitimate reason for its action, evidence of pretext.[14]

The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the proffered reason is not legitimate, and that the discharge was motivated at least in part by retaliation for protected activity, then the employer must establish by a preponderance of the evidence that it would have discharged the complainant independently of his protected activity. *Faust v. Chemical Leaman Tank Lines,* , 93-STA-15 (Sec'y, April 2, 1996); *Moravec v. HC & M Transportation*, 90-STA-44 (Sec'y, January 6, 1992), slip op. at 12, n. 7.

Salata alleged violations of both the complaint provision at 49 U.S.C.§ 31105(a)(1)(A), and the "refusal to drive" provisions at § 31105(a)(1)(B). I will examine the "complaint" provision first.

[14] In *Moon v. Transport Drivers*, 836 F.2d 226 (6th Cir. 1987), the court noted the addition of a fourth factor, i.e., that the employer knew of the plaintiff's protected activity.

C. The Complaint Provisions

Salata complained, either in writing or verbally, to company superiors, that City Concrete, LLC 's refusal to repair safety defects on the delivery trucks violated federal trucking regulations. Salata contends that he communicated his safety concerns to City Concrete through daily trip inspections and through verbal statements regarding truck maintenance requests. In addition to complaints related to mechanical problems, Salata's list of complaints includes things such as: a broken lights, lack of power, drop axle, lights, flashers, signals, inside door handle, mirrors, windshield, passenger-side window not staying up, "slobber boot," pusher axle, running lights, suspension, shocks, site glass leaks, and back-up alarms.

Under the STAA, an employee's complaint need only be "related" to a safety violation to be protected. Internal complaints to supervisory employees that are related to a violation of a commercial motor vehicle safety regulation are protected under the STAA. *Moravec v. HC & M Transportation, Inc.*, 1990-STA-44 (Sec'y July 11, 1991). Salata testified that he made the various communications to supervisors because he had a reasonable belief that such defects were a safety hazard. As such, Salata's written and verbal notifications to his supervisor of truck defects are eligible for protection under the STAA. Although it is a daily duty of every driver to inspect their truck, City is incorrect in the determination that such routine activity does not constitute a safety complaint. A communication by an employee to a supervisor, albeit part of their job duties, that a truck has a mechanical defect that would inhibit safety if the vehicle is operated is a safety complaint subject to protection under the STAA. *See Schulman v. Clean Harbors Envtl. Servs., Inc.*, 1998-STA-24 (ARB Oct. 18, 1999) (Vehicle inspection reports filed by the complainant as part of his daily job duties constituted protected activity under the complaint clause).

The complainant is not required to prove a reasonable apprehension of injury, an actual violation or that the complaint has merit. *Pittman v. Goggin Truck Line, Inc.*, 1996-STA-25 (ARB Sept. 23, 1997); *Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-31 (Sec'y Oct. 27, 1992); *Barr v. ACW Truck Lines, Inc.*, 1991-STA-42 (Sec'y Apr. 22, 1992); *Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992).

D. Refusal to Drive

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C.A. § 31105(a)(1)(B)(i), requires that a complainant "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive -- a mere good faith belief in a violation does not suffice." *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993).

The second refusal to drive provision focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he drove. 49 U.S.C.A. § 31105(a)(1)(B)(ii); *Cortes v. Lucky Stores, Inc.*, 1996-STA-30 (ARB Feb. 27, 1998).

An employee must actually refuse to operate a vehicle to be protected under the refusal to drive provision of the STAA. *Williams v. CMS Transportation Services, Inc.*, 1994-STA-5 (Sec'y Oct. 25, 1995). A refusal to drive must be accompanied by a safety basis for employee's refusal to drive. *See, e.g., Smith v. Specialized Transportation Services,* 1991-STA-22 (Sec'y Apr. 20, 1992)(Complainant's statement that she was "too stressed out" to drive during a conversation with her supervisor did not establish that she conveyed to the supervisor that her refusal to drive was because she was unable to do so safely or without danger of injury); *Mace v. Ona Delivery Systems, Inc.*, 1991-STA-10 (Sec'y Jan. 27, 1992) (The complainant could not prevail on his STAA complaint where the record established that his complaint to respondent centered on extra job assignments rather than on perceived safety violations. Because complainant failed to communicate safety defects as a basis for his refusal to work, respondent was not aware of any vehicle defect and was not motivated by such in discharging complainant).

Salata claimed he refused to drive #509, which lacked power, on August 3, 2007, until it was fixed. He never again drove for City. No other evidence corroborates that testimony and I have found it did not occur, as discussed above. Based on the foregoing evidence, although Complainant may have established that a genuine violation of a federal safety regulation would have occurred and that there existed a reasonable apprehension of serious injury if he drove it, he did not establish that he actually refused to drive the truck..

Thus, I find Mr. Salata has not established a violation of the Act under the refusal to drive provision.

E. Termination or Discharge

Salata testified that he had brought safety matters to City Concrete, LLC 's attention. The parties agree that Salata was terminated on or about August 8, 2007.

Whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer. *Pennypower Shopping News v. N.L.R.B.*, 726 F.2d 626, 629 (10th Cir. 1984). As the Court in *Pennypower* noted:

> The fact that there is no formal discharge is immaterial if the words or conduct of an employer would logically lead an employee to believe his tenure had been terminated. . . . [S]ince the company created the ambiguity which reasonably caused the employees to believe they were discharged, or at least to believe their employment status was questionable due to their strike activity, the burden of the ambiguity must fall on the company.

Pennypower Shopping News v. N.L.R.B., 726 F.2d at 630.

The complainant has the burden of proof to show that retaliation for protected activity was a reason for the termination. As part of this burden, the complainant must show that respondent had knowledge of complainant's protected activity at the time of employer's adverse action. *See Homen v. Nationwide Trucking, Inc.*, 1993-STA-45 (Sec'y Feb. 10, 1994); *Stiles v. J.B. Hunt Transportation, Inc.*, 1992-STA-34 (Sec'y Sept. 24, 1993). If the complainant meets

such burden, the respondent has the burden to prove a legitimate, nondiscriminatory reason for termination. A complainant may show that the employer's reason for termination is pretext by evidence that the employer's proffered reasons have no basis in fact, that the proffered reasons did not actually motivate his discharge, or that the reasons were insufficient to motivate the discharge. *Manzer v. Diamond Shamrock Chemical Company*, 29 F.3d 1978 (6th Cir. 1994).

In establishing his prima facie case, Salata need only raise the inference that his engaging in protected activities caused his termination. The proximity in time between protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of a prima facie case. *See, e.g., Stiles v. J.B. Hunt Transportation, Inc.*, 1992-STA-34 (Sec'y Sept. 24, 1993)(Complainant discharged within one week of raising safety concerns sufficient for inference of causation); *Toland v. Werner Enterprises*, 1993-STA-22 (Sec'y Nov. 16, 1993)(Where complainant was discharged the same day he raised safety complaints, the secretary found that complainant raised the inference that he was terminated because he engaged in protected activity); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989)(Temporal proximity is sufficient as a matter of law to establish the final element in a prima facie case of retaliatory discharge); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987)(Temporal proximity alone did not support an inference of causation where there was compelling evidence that the employer encouraged safety complaints).

I find that Salata established the inference that his engaging in protected activity caused his termination. Salata complained about safety defects in trucks 425 and 509. Thus, Salata established his prima facie case. He engaged in protected activity under the complaint provision of the STAA. He was terminated. The proximity in time between his complaint and termination raised the inference of a causal link between his protected activity and the adverse action of the employer. Mr. Annichenni was one of the supervisors that Salata complained to regarding the truck's lack of power. Mr. Annichenni was also the person to terminate Salata. Thus, it is clear that Mr. Annichenni had knowledge of Salata's protected activity at the time he terminated him. As such, City Concrete had the burden to prove a legitimate, nondiscriminatory reason for Salata's termination.

Respondent asserts that Salata was terminated for: the truck #425 accident; wet loads; customer complaints, i.e., Mr. Parella's; and, lack of belief in his complaints about truck #509's power. Just as importantly, Mr. Annichenni felt he needed to fire this probationary employee before the probationary period ended to avoid the ordeal he had gone through trying to terminate a non-probationary employee for which there were solid grounds for termination.

Summers are the busy season for concrete companies and for City Concrete, LLC. A company with so few drivers would be hard pressed to terminate a driver in one of the busiest times of the year.

In analyzing whether the articulated reasons for the discharge are credible, I find there is evidence demonstrating that Salata was a probationary employee of concern. I find no discriminatory intent in Salata's termination. Salata was terminated for legitimate, nondiscriminatory reasons, namely the reasons given by Mr. Annichenni, i.e., the accident, wet loads, and, Mr. Annichenni's belief that his complaints about truck #509 were largely

unfounded. It is the employer's subjective perception of the circumstances which is the critical focus of the inquiry. *Allen v. Revco D.S., Inc.***,** 91-INA-9 (Sec'y Sept. 24, 1991). Thus, the prima facie analysis drops out of the case and the complaint has the burden of establishing his case.

In order to establish that the employer has acted with the belief that the employee had engaged in misconduct, it is necessary for the "circumstances to provide substantial indication that the employee is not innocent before the employer's belief can be credited." *NLRB v. Charles Batchelder, Co., Inc.*, 646 F.2d 33, 42 n.1 (2d Cir. 1981)(Newman, J., Concurring). *Ertel v. Giroux Brothers Transportation, Inc.***,** 88-STA-24 (Sec'y Feb. 16, 1989)(Not an honest, but mistaken belief by employer) citing *Batchelder*. Here, although each incident is not proven beyond a "reasonable doubt," there is substantial indication that the events upon which the termination were based did occur. In any case, Mr. Annichenni believed they had occurred.

When there are both legitimate and discriminatory reasons for an adverse action, the dual motive analysis applies. *Spearman v. Roadway Express*, 1992-STA-1 (Sec'y Jun 30, 1993) *and Yellow Freight System v. Reich*, 27 F.3d 1133, 1140 (6th Cir.1994). Under the dual motive analysis, the burden shifts to the respondent to show that it would have taken the same action against the complainant even in the absence of protected activities. *Asst. Sec. and Chapman v. T. O. Haas Tire Co.*, 1994-STA-2 (Sec'y Aug. 3, 1994), *appeal dismissed*, No. 94-3334 (8th Cir. Nov. 1, 1994). "[W]here a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is not unnecessary to rely on a 'dual motive.' analysis.." *Mitchell v. Link Trucking, Inc.*, ARB 01-059, ALJ No. 2000-STA-39 (ARB Sept. 28, 2001). Where the evidence of record clearly does not support a finding of any unlawful motive on the part of a respondent, the "dual motive" analysis is inappropriate. *Schulman v. Clean Harbors Environmental Services, Inc.*, ARB No. 99-015, ALJ No. 1998-STA-24 (ARB Oct. 18, 1999). Here, I have concluded that the adverse action is not motivated in any way by an unlawful motive, thus the dual motive analysis is inapplicable.[15]

It is clear that even if each of the asserted bases for discharge were not proven beyond any doubt by the employer, Salata would have been terminated because Mr. Annichenni believed they were true and portended future and potentially difficult and protracted efforts to fire Mr. Salata once past his probationary period. As the Sixth Circuit has observed, "The relevant inquiry is the employer's perception of his justification for the firing." *Moon v. Transport Drivers*, 836 F.2d 226, 230 (6th Cir.1987). I find that City Concrete, LLC, has established that absent any protected safety complaints or protected refusals to drive on Salata's part, the company legitimately would have fired him. In this case, City Concrete, LLC, provided a credible explanation for discharging Salata. I find that Salata did not establish by a preponderance of the evidence that the reasons given for his discharge were pretextual.

[15] Even had protected activity constituted a basis for the discharge, it is established Mr. Annichenni would have terminated Mr. Salata before the probationary period ended, based on legitimate reasons, previously described.

VII. CONCLUSIONS

Mr. Salata's complaints to his supervisors at City Concrete, LLC, related to necessary truck repairs, constituted protected activity. I find his allegation of a final refusal to drive #509 until it was fixed was not established. However, City Concrete, LLC, neither disciplined Salata nor discharged him because of his safety complaints or any final refusal to drive #509. City Concrete, LLC terminated Salata for legitimate, nondiscriminatory reasons.

Mr. Salata was given notice of discharge on or about August 8, 2007. The discharge was not based on his complaints or refusal to drive and City Concrete, LLC, successfully established that it would have discharged Salata even in the absence of his protected activities. Salata's termination was not causally related to any protected activity under the STAA, and, thus, City Concrete's adverse actions against Complainant do not constitute a violation of § 405 of the STAA. Moreover, Salata failed to establish that City Concrete's reasons for his termination were a pretext to discriminate against him.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Complainant's relief requested is hereby DENIED. It is hereby recommended that the complaint filed by DANIEL M. SALATA be dismissed.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file will be forwarded for review to the Administrative Review Board, United States Department of Labor, Room S-5220, Frances Perkins Building, 200 Constitution Ave., Washington D.C. 20210. See 29 C.F.R. § 1978.109 (a); 61 Fed. Reg. 19978 and 19982 (1996).