U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 February 2007

Case No: 2006STA00023

IN THE MATTER OF:

DAVID BETHEA,
Complainant,

v.

WALLACE TRUCKING CO.,
Respondent.

APPEARANCES:

David Bethea, *pro se*
Complainant

Charles Wallace, *pro se*
President, Wallace Trucking Company
For the Respondent

BEFORE: Daniel A. Sarno, Jr.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

On January 9, 2006, David Bethea ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that Wallace Trucking Company ("Respondent") had violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA" or "Act"), as amended and recodified, 49 U.S.C.A. § 31105 (2000), and its implementing regulations, 29 C.F.R. Part 1978 (2006) when Respondent fired Complainant on August 10, 2005.[1] On March 31, 2006, the Secretary of

[1] Complainant has also asserted that Respondent discriminated against him by forcing him to take unnecessary layovers during his runs and work on March 25, 2005, Good Friday, while all of Respondent's other employees were given the day off. (TR 38:7-12, 39:2-41:14.) Yet, with regard to the unnecessary layovers, Complainant has stated that they occurred because he complained to Respondent about not being reimbursed for a hose he purchased for a truck. (TR 41:20-24.) Accordingly, the alleged discrimination was not motivated by Complainant's alleged protected activity under the Act. Moreover, Complainant has not identified any specific occasions on which he was forced to take such a layover and there is no evidence that Complainant raised this allegation of discrimination in his initial complaint. With regard to Complainant's allegation that he had to work on March 25, 2005, the Presiding

Labor, acting through her agent, the Regional Administrator of OSHA, Region IV, found that Complainant's claim had no merit. By facsimile dated April 12, 2006, Complainant filed his objections to the Secretary's findings and the matter was transferred to this office for de novo review.

On September 6, 2006, a hearing was held in Florence, South Carolina. At the hearing, Complainant represented himself and Respondent was represented by its president, Charles Wallace. Both Complainant and Mr. Wallace testified and offered exhibits. Eight exhibits offered by Complainant were admitted into the record as CX-1 through CX-8, and five exhibits offered by Mr. Wallace on behalf of Respondent were admitted into the record as RX-1 through RX-5.[2] (TR 9:8-26:25, 213:1-21.) At the hearing, Claimant raised a new allegation not previously raised in his complaint.[3] Accordingly, the Presiding Judge left the record open so that the parties could submit additional evidence as proposed exhibits for the Presiding Judge to consider after the hearing. The Presiding Judge also held open the record to allow the parties to submit position statements by October 20, 2006. After the hearing, the parties attempted to settle, but were unable to reach an agreement.[4]

On October 20, 2006, Complainant submitted his position statement and on October 23, 2006, Complainant submitted additional evidence, which the Presiding Judge has labeled CX-8 through CX-15. After receiving the evidence the Presiding Judge returned CX-9, which was a cassette tape, to Complainant and directed Complainant to have the tape transcribed and resubmit it to the court if he wanted to have the information on the tape considered by the Presiding Judge. Post-hearing Order #1, dated December 19, 2006. On January 16, 2007, Complainant filed a transcript of the tape with the court. On December 11, 2006, Respondent filed its position

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Judge finds that Complainant's allegation is time barred. In order to fall within the statutory 180 day period, this discrete act of discrimination would have to have occurred on or after July 13, 2005. Accordingly, these allegations of discrimination are not properly before the Presiding Judge. Yet, notwithstanding the foregoing, the Presiding Judge notes that, had these allegations of discrimination been properly before the Presiding Judge to decide, he would have found, based on the evidence presented in this case, that the acts occurred as part of Respondent's normal business operations which are, to a large extent, controlled by the nature of the trucking industry and the fact that Respondent is a relatively small family owned company; i.e. Complainant was not singled out and discriminated against and Respondent's actions were not motivated by Complainant's alleged protected activity. (See, e.g., TR 41:20-43:25, 91:15-93:25, 98:14-106:21)

[2] In this Decision, the following abbreviations will be used: CX – Complainant's Exhibit, RX – Respondent's Exhibit, and TR – Trial Record

[3] Late in the hearing, Complainant testified that his complaint to Respondent regarding hours of service violations encompassed not only having to drive too many hours, but also being asked (or required) to falsify his logs. The Presiding Judge finds that Complainant's allegation is reasonably within the scope of Complainant's initial complaint and therefore will consider it herein. 29 C.F.R. § 18.5(e); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004). Moreover, the Presiding Judge notes that the issue was litigated at the hearing and the parties were permitted to submit additional evidence post-hearing. 29 C.F.R. § 18.5(e).

[4] At the hearing, the parties determined that Mr. Bethea had in fact worked for Respondent for over a year and therefore was entitled to vacation pay, notwithstanding the outcome of this proceeding. (TR 51:22-54:1.) Also at the hearing, Mr. Wallace offered to pay Mr. Bethea for a hose he claimed he had purchased for a truck, but had not been reimbursed for, if Mr. Bethea could find the receipt for the hose. (TR 82:8-84:1.) After the hearing, in good faith, Mr. Wallace paid Mr. Bethea $525.00 for his vacation pay. Mr. Wallace did not pay Mr. Bethea for the hose Mr. Bethea purchased because, after Mr. Wallace checked his records, he discovered that Mr. Wallace had already been reimbursed. Mr. Wallace submitted the receipts signed by Mr. Bethea to the court as evidence that Mr. Bethea had in fact already been paid.

statement and additional evidence with the court, which the Presiding Judge has labeled RX-6 through RX-8.

Stipulations

1. Respondent is a person within the meaning of 1 U.S.C. §1 and 49 U.S.C. § 31105. (TR 6:5-18.)
2. Complainant was hired on August 6, 2004 as a driver of a commercial motor vehicle, i.e. a truck with a gross vehicle weight rating of 10,001 pounds or more. (TR 6:19-7:4, 52:3-9.)
3. Complainant was employed by a commercial motor carrier and drove Respondent's trucks over highways in commerce to haul cargo. (TR 7:5-9.)
4. In the course of employment, Complainant directly affected commercial motor vehicle safety. (TR 7:10-15.)
5. Complainant worked for Respondent for over a year. (TR 52:3-5.)
6. Complainant's average weekly salary was approximately five hundred dollars ($500). (TR 52:13-21.)
7. Complainant was discharged on or about August 10, 2005. (TR 7:16-19.)
8. On or about January 9, 2006, Complainant timely filed a complaint with OSHA alleging that Respondent violated 49 U.S.C. § 31105. (TR 7:20-8:1.)

Parties' Position Statements

1. Complainant's Position Statement

In his position statement filed on October 20, 2006, Complainant argues that he engaged in protected activity by complaining about and refusing to violate motor safety carrier regulations and filing a workers' compensation claim with Respondent.[5] Complainant further

[5] Complainant's post-hearing position statement is the first time Complainant ever alleged that he engaged in protected activity under the Act by refusing to work. Even at the commencement of the hearing Complainant affirmed that he was alleging he was covered by the Act because he had filed complaints regarding violation of commercial motor vehicle safety or health laws. (TR 9:2-5.) Moreover, Complainant has never clearly articulated how exactly he refused to act. After reviewing the entire record, the Presiding Judge has only discovered two possible incidents in which Complainant could possibly allege that he refused to act: at the hearing, Complainant testified that he refused to falsify his driver's logs and testified that he refused to pick up the backhaul from Tennessee on July 22, 2005 because of a fuel leak. Yet, again, the Presiding Judge notes that, other than in his post-hearing position statement, Complainant never alleged that he engaged in protected activity by refusing to work.

Under the circumstances of this case, the Presiding Judge finds that Complainant's allegation that he refused to work is not reasonably within the scope of Complainant's original complaint: the Presiding Judge notes that Complainant's testimony at the hearing that he refused to falsify his logs, per Respondent's orders, came as a complete surprise and that, with regard to Complainant's testimony regarding the fuel leak, Complainant had always previously alleged that his protected activity with regard to that incident involved a complaint about the fuel leak, rather than refusing to pick up the backhaul. Accordingly, the Presiding Judge finds that the issue was not timely raised. *See* 29 C.F.R. § 18.5(e); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004); *Kelley v. Heartland Express, Inc. of Iowa*, 1999-STA-29 (ALJ Mar. 24, 2000).

Yet, notwithstanding the foregoing, the Presiding Judge notes that even if Complainant had timely raised this allegation, the Presiding Judge would still not find the activity to be protected under the Act. Notably, Complainant has presented no credible evidence that he in fact ever falsified his logs (the Presiding Judge does not find Complainant's testimony regarding the matter to be credible) and therefore has failed to prove by a

argues that Respondent's assertions that it fired Complainant because of his poor job performance and because he was untruthful about his injury and the fuel leak are a pretext for discrimination.

2. Respondent's Position Statement

In a letter dated December 8, 2006, Mr. Wallace asserted that Respondent did not violate any OSHA regulations during the time Complainant was employed with the company. Moreover, Mr. Wallace stated that Complainant "was supervised within all laws, federal and state and that he was not asked to break any regulation whatsoever." Mr. Wallace further asserted that Respondent acted well within its rights by firing Complainant who had been "a very poor employee based upon his job performance, "[i].e. damaged vehicles, taking days off at his discretion and claiming fuel leaks and workman's compensation injuries."

Summary of the Evidence

As a preliminary matter, the Presiding Judge notes that both parties in *this proceeding* are unrepresented by counsel. Accordingly, in this case, the Presiding Judge finds that *both parties* are entitled to some leeway with regard to procedural and evidentiary matters in instances where allowing less than strict compliance with the rules would not compromise the reliability of the evidence presented herein.[6] *See Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec'y Oct. 10, 1991).

Complainant's Evidence

1. Testimony of David Bethea

At the hearing, Mr. Bethea testified that he was hired by Respondent on or around August 6, 2004. (TR 32:2-25.) He further testified that there were no problems between himself and Respondent until approximately mid-January 2005 when he asked to take leave on Martin Luther King Junior Day of that year. (TR 32:2-25.) Specifically, Mr. Bethea testified that he had notified Respondent a week in advance that he planned to take the day off, but that when the day arrived, Respondent's general manager, Mr. Bud Baldwin, and dispatcher, Ms. Blossom Baldwin, became upset. (TR 33:3-10.) Mr. Bethea testified that Mr. Wallace, Respondent's president, then got involved and became so upset that he had to be restrained by Mr. Baldwin. Mr. Bethea stated that he thought Mr. Wallace was attempting to "intimidate [him] and threaten [him] into quitting." (TR 33:3-10.)

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preponderance of the evidence that he engaged in the alleged protected activity. With regard to Complainant's assertion that he refused to pick up the backhaul on July 22, 2005 because of a fuel leak, the Presiding Judge notes that Complainant has neither proven that picking up the backhaul would actually violate any applicable law or that his apprehension of serious injury to himself or others (smelling the fuel leak, which Complainant himself described as minor, for several hours) was reasonable. Moreover, the Presiding Judge further notes that based on Complainant's own testimony, it appears that it was Complainant, more so than Respondent, who did not want to have the fuel leak fixed while in Tennessee. (TR 46:24-47:12.)

[6] The Presiding Judge notes that the evidence summarized herein contains several out of court statements made by the parties or other individuals. Yet, the Presiding Judge further notes that these statements were either considered by the Presiding Judge for a purpose other than establishing the truth of the matters asserted or were otherwise non-hearsay or subject to a hearsay exception.

Mr. Bethea also testified that, around this same time, an issue arose involving whether he had been reimbursed $90 for a hose he had to have replaced in his truck. (TR 34:5-24.) The issue was apparently resolved, although Mr. Bethea stated that he did not know if he had actually been paid. (TR 34:5-24.) Mr. Bethea also stated that it was after this discussion that he "started getting unnecessary layovers" during his runs, which Mr. Bethea explained were occasions when he would be delivering a load "an hour from the garage," but because the company didn't want "drivers to pass the destination and then go back and deliver the next day," Mr. Bethea was required to layover rather than return to the yard before making his delivery. (TR 41:20-43:25.) Mr. Bethea stated that when he first began working for Respondent, there was a "yard man" who would deliver short loads so that Mr. Bethea would not have to layover on these occasions. (TR 43:16-24.) Mr. Bethea testified that he felt Respondent was deliberately making him take unnecessary layovers. (TR 43:16-24.) He testified that when he complained about the unnecessary layovers, Respondent responded by stating "that other drivers do it, why can't you do it[,]" and that when Mr. Bethea asked about the yard man who did the local runs, Respondent stated that "[the yard man was] doing something else." (TR 44:1-12.) Yet, later at the hearing, Mr. Bethea acknowledged that it was common for Respondent's truck drivers to have layovers. (TR 91:15-21.)

At the hearing, Mr. Bethea also provided testimony regarding his allegation of reporting hours of service violations to Respondent. Mr. Bethea stated that it was after he began getting the unnecessary layovers that the hours of service issue arose and that this is when he "started to complain about the hours of service." (TR 43:16-25.) At the hearing, Mr. Bethea testified that beginning in January 2005, Respondent's dispatcher began giving him handouts discussing safety regulations, including regulations regarding hours of service. (TR 35:11-36:2.) He testified at the hearing that he asked Respondent's general manager why he was receiving handouts discussing hours of service rules when Respondent expected him not to obey those rules. (TR 35:15-17.) Mr. Bethea stated that he believed he was receiving the handouts because Respondent had violated applicable rules and regulations and was therefore required by the Department of Labor to distribute the handouts to its employees. (TR 36:23-37:19.)

Much later in the hearing, Mr. Bethea stated that he had complained to Respondent regarding his hours of service because he was being required to drive more than seventy hours in an eight day period. (TR 186:4-19.) Thereafter, Mr. Bethea stated that "hours of service means that you're driving too many hours a day." (TR 192:12-14.) Then later in the hearing, Mr. Bethea testified that when he alleged Respondent had violated the hours of service rules, he meant that Respondent was instructing him to work extra hours and falsify his logs. (TR 189:5-217:13.) Specifically, Mr. Bethea testified that Respondent's dispatcher, Ms. Blossom Baldwin, told him to violate the hours of service rules. (TR 196:4-16.) Initially, Mr. Bethea stated at the hearing that he had never actually falsified his logs and testified that he had never received a citation for driving too many hours per day. (TR 189:21-24, 190:2-22.) Yet later at the hearing, Mr. Bethea testified that he had in fact falsified his logs at Respondent's direction. (TR 202:22-203-2.) Specifically, the issue arose at the hearing when, as an example of how Respondent required him to violate hours of service rules, Mr. Bethea stated that on July 22, 2005, he went on duty at 6 a.m., yet Respondent's dispatcher gave him a backhaul assignment at 3 p.m., which was located an hour away. (TR 201:3-12.) It was thereafter, when Mr. Wallace pointed out at

the hearing that Mr. Bethea's log stated that he went on duty at 10:00 a.m. that day, that Mr. Bethea stated that he falsified his logs at Respondent's direction. (TR 201:3-202:24.)

At the hearing, Mr. Bethea also testified that he did not tell Respondent that he was out of hours on occasions when he was close to home and it was near the end of the week in order to avoid picking up backhauls on his way back to the yard. (TR 94:1-11.) Mr. Bethea stated that Respondent's dispatcher was able to determine how many hours he had available each week. (TR 94:11-13.) He further stated that he began his work week on Sundays evenings, although he acknowledged that he asked for every first and third Sunday off beginning in January 2005, and would end his week on Friday nights or Saturday mornings. (TR 95:8-10, 96:15-18.)

Mr. Bethea also provided testimony at the hearing regarding his allegation that he complained to Respondent regarding a fuel leak and his alleged groin injury. Mr. Bethea stated that on July 21, 2005 he went on a run to Cheraw, South Carolina. (TR 44:16-25.) He testified that he had a problem lowering his landing gear on the trailer of his truck and that while lowering the landing gear with the assistance of another individual he was injured. (TR 44:21-45:8.) Mr. Bethea further testified that, at some time thereafter, he was dispatched to Etowah, where he sat for three to four hours. (TR 45:14-17.)

Mr. Bethea stated that he eventually asked the dispatcher "what's the problem" and was told that the load had fallen through and that the dispatcher had called Respondent with that information as soon as Mr. Bethea had arrived. (TR 45:18-21.) He testified that he then asked Mr. Baldwin why he had been left waiting in Etowah for several hours and that Mr. Baldwin responded by saying that he had been looking for a backhaul. (TR 45:22-46:2.)

Mr. Bethea further testified that while waiting in Etowah, another driver had informed him that he had a fuel leak.[7] (TR 46:8-13; 130:6-9.) Mr. Bethea stated that when he went to check his truck, he noted a right fuel leak. (TR 46:8-13.) Mr. Bethea stated that he called Respondent and told it about the fuel leak and that Respondent then told him that it had found a load for him in Chattanooga, Tennessee. (TR 46:8-13.)

Thereafter, Mr. Bethea testified that he spoke to C.H. Robinson and learned that the load was to be picked up between 4:00 p.m. and 10:00 p.m. (TR 46:14-16.) Mr. Bethea stated that he then called Respondent and informed it that "for [him] to go down to Tennessee and sit around five, six hours smelling the fuel leak, leaking on private property, that could cause a problem." (TR 46:16-19.) He testified that he told Mr. Baldwin that if he wanted him to pick up the load, the truck had to be fixed and that Mr. Baldwin then advised him to bring the truck back to the yard because it would be cheaper. (TR 46:20-23.) Mr. Bethea denied that he told Respondent's general manager that the leak was not bad enough to need to be repaired and stated that he had said he would pick up the backhaul if Respondent would have the truck fixed. (TR 124:14-25.) On the other hand, Mr. Bethea also testified the leak was minor. (TR 126:12-13.) Moreover, earlier at the hearing, Mr. Bethea testified that he told Respondent's dispatcher that it would not be possible to get the truck fixed, pick up the load in Chattanooga, Tennessee and get back to

[7] At one point in the hearing, Claimant stated that he learned of the fuel leak before he found out that his backhaul had fallen through, while later at the hearing, Claimant stated that the learned of the fuel leak after the backhaul had fallen through. (TR 46:8-13; 130:6-9.)

Respondent's yard that day and that the dispatcher told him that "if you have to take your time off on the road, then do it." (TR 46:24-47:6.) Mr. Bethea stated that he then called Mr. Baldwin and explained to him that he would have to take his thirty-six hours off on the road rather than after returning the truck to the yard and that Mr. Baldwin therefore told him to "bring the truck on in[.]" (TR 47:5-12.)

At the hearing, Mr. Bethea further stated that when he got back to the yard, on July 22, 2005, he parked the truck and went home. (TR 47:14-15.) He testified that he did not see the truck again until Tuesday, July 26, 2006. (TR 126:25.) With regard to Respondent's assertion that no fuel leak was found and that Mr. Bethea could not point out where the fuel leak was, Mr. Bethea testified that the reason he could not point out a fuel leak was because the truck had been washed and Respondent had fixed the fuel leak. (TR 126:24-127:3.)

At the hearing, Mr. Bethea also testified that on Monday, July 25, 2005, he went to the yard and told two employees in the personnel office that he strained his groin during his run on July 21, 2005. (TR 47:14-22.) Mr. Bethea stated that he began to feel pain on the morning of July 22, 2005 but did not mention his injury to Respondent at that time because he was on the road and decided to tell Respondent of his injury when the returned from his run. (TR 109:7-23.) Yet, at the hearing, Mr. Bethea had no explanation for why he didn't mention his injury to Respondent when he reported the fuel leak. (TR 109:24-110:8.) Mr. Bethea testified that after notifying Respondent of his injury, he was advised to visit the company doctor, Dr. Neal, which Mr. Bethea did. (TR 47:23-48:8.) Mr. Bethea said that the next day, July 26, 2005, he went to see his own doctor, Dr. Moses, who scheduled him for an x-ray and "some type of procedure." (TR 48:9-17.) Mr. Bethea testified that he called Mr. Wallace and told him he needed his workman's compensation number and that Mr. Wallace told him that at the time, Respondent was going to handle his injury through its regular insurance provider and would switch the claim later if necessary. (TR 48:12-17.) Mr. Bethea stated that he told Mr. Wallace he was scheduled to have surgery on August 1, 2005, which was performed on that date and that at some time thereafter, he told Mr. Wallace that he would be having a stent removed on the 9th of August and would be returning to work on the 10th of August. (TR 48:18-22.)

Mr. Bethea testified that on August 9, 2005, he went in and spoke to Mr. Wallace, who told him to speak with Respondent's dispatcher about possibly changing his work runs. (TR 49:2-13.) Thereafter, Mr. Bethea stated that the dispatcher told him to speak with Mr. Baldwin, which he did on August 10, 2005, and stated that Mr. Baldwin told him that he "had no more work at Wallace Trucking." (TR 49:14-18.) Mr. Bethea testified that during his entire year of employment, Respondent never gave him any warning regarding his job performance other than warning Complainant once that he was misusing his cell phone. (TR120:22-121:12.)

At the hearing, Mr. Bethea also provided testimony regarding damages. First, Mr. Bethea testified that, if he prevails in this case, he wants his position with Respondent to be reinstated. (TR 52:10-12.) Thereafter, both parties agreed that Mr. Bethea's average weekly wage was approximately $500.00. (TR 52:16-21.) Mr. Bethea testified that he collected approximately $3,500.00 in state unemployment benefits for between nine and thirteen weeks sometime between August 10, 2005 and January 2006. (TR 54:15-55:24.) Mr. Bethea further testified that for nine weeks, he was denied unemployment benefits (a loss of approximately $3,500.00)

because Respondent contested the award and the state found that he was terminated for cause. (TR 56:2-58:17.)

Mr. Bethea also testified that in January 2006, he worked for two weeks driving a truck for J.B. Hunt, for which he earned approximately $500.00 per week. (TR 54:12-14, 58:18-25, 59:19-21.) At the hearing, Mr. Bethea admitted that his employment with J.B. Hunt was terminated because he went "off route." (TR 59:1-6.) Mr. Bethea also testified that he worked for another trucking company, Wall Street, for approximately two days and that he quit working for the company because the truck he was assigned didn't work and the company had no other truck for him to drive. (TR 59:22-60:8, TR 60:20-61:24.) Mr. Bethea stated that he was not paid for the two days work. (TR 60:11-19.) Additionally, Mr. Bethea stated that since he was fired, he has been looking for other employment and has applied for several positions. (TR 62:11-64:5.) At the hearing, Mr. Bethea also testified that he paid between $2,500.00 and $3,000.00 for medical care for treatment of his alleged work-related injury. (TR 70:16-73:10.) Mr. Bethea also testified that he was not paid for his last return trip from Tennessee, which the parties stipulated would have amounted to $112.00, or provided detention pay for that trip, which the parties stipulated would have amounted to $200.00. (TR 78:20-81:20.)

2. Complainant's Exhibits

Complainant's Exhibit 1

Complainant's Exhibit 1 is an undated letter that was apparently addressed to Mr. Wallace. In the letter, Complainant referred to a handout he received on or about January 14, 2005, that discussed Department of Transportation regulations including regulations regarding hours of service. In the letter, Complainant requested that copies of the handout be given to Respondent's dispatchers and C.H. Robinson's dispatchers. Complainant also requested a raise and every first and third Sunday of each month off.

Complainant's Exhibit 2

Complainant's Exhibit 2 is an undated letter to Mr. Wallace in which Complainant requested an explanation for why he was scheduled to work on Good Friday while "Wallace Trucking was closed and all employees were off." As previously stated, *see* footnote 1 *supra*, Complainant's allegation that Respondent discriminated against him by making him work on Good Friday is time barred. Accordingly, this exhibit is not relevant and is not being considered by the Presiding Judge in adjudicating Complainant's STAA claim.

Complainant's Exhibit 3

Complainant's Exhibit 3 is a copy of an unsigned Driver's Vehicle Inspection Report dated July 22, 2005. On the third line of the report, Complainant wrote "fuel leak right tank." After comparing Complainant's Exhibit 3 to Respondent's Exhibit 1, which includes Complainant's original, *signed* Driver's Vehicle Inspection Report for July 22, 2005, the Presiding Judge finds that Complainant's Exhibit 3 is not an accurate copy of the report. Accordingly, Complainant's Exhibit 3 is not being considered in adjudicating this claim.

Complainant's Exhibit 4

Complainant's Exhibit 4 is a letter addressed to Mr. Wallace dated August 3, 2005, which Complainant apparently hand delivered. In that letter, Complainant stated that he was informed that he would not be paid for his return trip from Tennessee. Complainant further stated that he felt he was not being paid for the trip because he had had a discussion with the manager regarding a fuel leak and the Department of Transportation hours of service regulations and because Respondent's dispatcher was told by C.H. Robinson to pay Complainant for three hours detention time.

Complainant's Exhibit 5

Complainant's Exhibit 5 is a letter addressed to Mr. Wallace, in which Complainant stated that after he was fired, he requested his vacation pay and was told to speak with Mr. Wallace. Complainant requested that Mr. Wallace contact him to discuss Complainant's "pay shortage," phone bill for phone use, detention pay from C.H. Robinson, and Respondent's workers' compensation provider. The letter was originally dated August 18, 2005, but was re-dated August 9, 2005. Other dates mentioned in the letter were also changed.

Complainant's Exhibit 6

Complainant's Exhibit 6 is a letter to C.H. Robinson dated August 25, 2005. In this letter Complainant requested copies of the company's dispatcher policy and detention policy. After reviewing this letter and Complainant's testimony, the Presiding Judge finds that Complainant's Exhibit 7 has no relevance to any material issue of this case, i.e. it is not evidence probative of any of the four elements of Complainant's STAA claim or Complainant's damages. Accordingly, this exhibit is not being considered by the Presiding Judge in adjudicating Complainant's STAA claim.

Complainant's Exhibit 7

Complainant's Exhibit 7 is a letter dated January 10, 2006 addressed to the OSHA investigator. This letter refers to Complainant's complaint filed by phone on January 9, 2006. It also summarizes the documents Complainant sent to OSHA and states that the "main issues" were a "fuel leak[,] hours of service[,] 3.93.83[,] Appendix G[,] FMCSA's and D.O.T. log."[8]

Complainant's Exhibit 8

[8] The Presiding Judge notes that it is unclear exactly what Complainant is referring to when he wrote "3.93.83" and Appendix G. The Presiding Judge can only guess that "3.93.83" is a reference to 49 C.F.R. § 393.83 – Exhaust systems, although Complainant has made no allegation or presented any evidence demonstrating that he ever filed a complaint regarding exhaust systems. Moreover, with regard to Appendix G of the regulations of 49 C.F.R. Chapter III, Subchapter B – Minimum Periodic Inspection Standards, Complainant has not demonstrated how it is relevant to his claim.

Complainant's Exhibit 8 is Respondent's Company Safety Profile. As relevant to this case, the profile states that between January 1, 2004 and June 10, 2006, various drivers employed by Respondent were cited twenty three times for log violations, eleven times for violating the 10/15 hours of service rule, and six times for violating other hours or service rules. The profile defines a log violation as one where a driver does not have his log book, his log book is not current, or where the driver violated other general log violations. The profile has a separate category for violations involving falsification of log books. Respondent's Company Safety Profile discloses no such violations.

Post-hearing, on October 23, 2005, Complainant submitted additional evidence. The following exhibits were submitted by Complainant as proposed post-hearing exhibits:

Complainant's Exhibit 9

Complainant's Exhibit 9 is a transcript of Complainant's state unemployment appeal hearing. In that hearing, in relevant part, Mr. Bud Baldwin, manager of Wallace Trucking Company, provided testimony regarding the events leading to Complainant's dismissal. Mr. Baldwin stated that Complainant was fired because he refused to pick up a load that he was told to pick up on his return trip during his last run from Tennessee.

Mr. Baldwin testified that he personally told Complainant to pick up and bring back the load, but that Complainant told him he had a fuel leak. Mr. Baldwin further testified that he told Complainant that it didn't sound like he wanted to get the load and that Complainant replied by saying, "no, really, I don't." Mr. Baldwin stated that Complainant had told him he could make it home with the fuel leak and that he had told Complainant that "he could bring a load home with a fuel leak just as good as he could come home empty." In response, to this statement, Mr. Baldwin stated that Complainant "said he didn't want to go down and get [the load] for fear he might get tied up down there trying to get loaded up [for] two or three hours and he would have to smell the fuel leak." Mr. Baldwin stated that he did not tell Complainant that he would be fired if he failed to pick up the load and that at that time, he also did not tell Complainant that there would be disciplinary action for failing to pick up the load. Mr. Baldwin also testified that this had not happened before.

Mr. Baldwin further testified that although operating a vehicle with a fuel leak could be a violation of applicable regulations, depending on how bad the leak was, he was not the one who made that determination. Mr. Baldwin stated that when he asked Complainant how bad the fuel leak was and whether he could make it home with the truck, Complaint answered "yeah." Moreover, after the truck was returned, it was discovered that there was no fuel leak. Mr. Baldwin stated that neither he nor Respondent's head mechanic could find a fuel leak and that Complainant could not show him a fuel leak. When Complainant stated that he had told Mr. Baldwin that the truck had been washed down and that was the reason why Mr. Baldwin could not see the leak, Mr. Baldwin denied that Complainant had told him at that time that the truck had been washed down. Mr. Baldwin further stated that the truck had in fact not been washed down.

At the hearing, Mr. Baldwin also testified that there had been other problems involving Complainant. Specifically, Mr. Baldwin stated that Complainant had damaged his truck two or three times and that "it had just accumulated over time really that [Complainant] needed another profession."

Complainant's Exhibit 10

Complainant's Exhibit 10 is a copy of The Driver's Report, Volume 20, Number 1, dated January 2005 and published by J.J. Keller and Associates, Incorporated. This report outlines the hours of service rules applicable to truck drivers such as Complainant:

> The "current" HOS rules[9]
>
> Under current hours of service (HOS) rules you cannot begin or continue to drive after the 14th consecutive hour after coming on duty. You cannot drive again until you have 10 consecutive hours off duty. Lunch breaks or other off-duty time do not extend that 14 hour period. The 14 hours are consecutive from the time you start your tour of duty.
>
> 60/70 Hour limit – Under this requirement (which remained unchanged from the "old" rule), you cannot drive after having been on duty for 60 hours in any 7 consecutive days or 70 hours in any 8 consecutive days. Keep in mind that consecutive days does not mean a week (Sunday through Saturday) or a "work week," it means any 7- or 8- consecutive day period. You don't start over when counting total hours. The oldest day's hours drop out of consideration as each new day's hours are added.
>
> 34-Hour Restart – The regulations include an optional "restart" provision. This allows you to "restart" your 60 or 70 hour clock after having at least 34 consecutive hours off duty. You may not use the 34 hour restart if you have

[9] Maximum driving time for property-carrying vehicles

Subject to the exceptions and exemptions in Sec. 395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(1) More than 11 cumulative hours following 10 consecutive hours off duty; or

(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of Sec. 395.1(o).

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after:

(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) Any period of 7 consecutive days may end with the beginning of any off duty period of 34 or more consecutive hours; or

(2) Any period of 8 consecutive days may end with the beginning of any off duty period of 34 or more consecutive hours.

49 C.F.R. 395.3 (Oct. 1, 2004).

exceeded the 60/70 hour rule, and must continue to calculate hour available under the 60/70 hour rule.

…

The regulation, which drivers and motor carriers had to comply with beginning on January 4, 2004, includes the following provisions:

- 11 hours of driving time following 10 consecutive hours off duty.
- No driving beyond the 14th hour after coming on-duty, following 10 consecutive hours off duty.

…

The regulation also includes a new exception for drivers who regularly return to their normal work reporting location. Under this exception, a driver is allowed to accumulate 11 hours of driving time within 16 consecutive hours on duty once every seven days, provided three conditions are met:

- The driver returns to the work reporting location on that day, and is released from duty at that work reporting location for the previous five on-duty days;
- The driver is released from duty within 16 hours after coming on duty (no additional on duty time after 16 hours); and
- The driver has not used this exception within the previous seven consecutive days (unless the driver has complied with the 34-hour voluntary restart provision).

Complainant's Exhibit 11

Complainant's Exhibit 11 is a print out of email correspondence between the OSHA investigator and a North Carolina state employee who was investigating Complainant's state workman's compensation complaint. In that correspondence, the OSHA investigator stated that he spoke to Mr. Wallace who told him that he decided "to discharge [Complainant] after he learned that [Complainant] had been treated for kidney stones but was trying to say it was a Workman's comp issue." The OSHA investigator further stated that Mr. Wallace had called the doctor's office himself and learned of the treatment for kidney stones and had said that this was "the straw that broke the camel's back."

Complainant's Exhibit 12

Complainant's Exhibit 12 is a copy of a letter, dated July 27, 2005, sent by AIG acknowledging that a workers' compensation claim had been reported to the company on July 26, 2005. The letter states that after the matter was evaluated, it was determined to be a "Notice Only." The letter further advises that, while the company had established a claim number, the file had not been set up for handling. The description of the accident in the letter states "[Employee] rolling up gear/strain to groin area/possible kidney stones." Complainant's Exhibit

12 also contains a handwritten note by Mr. Wallace, dated August 4, 2005, which states "called [the AIG representative] and notified her this was not a work-related injury/issue. CW"

Complainant's Exhibit 13

Complainant's Exhibit 13 is part of Respondent's Employee Manual. The Manual describes the company's telephone policy, which states that use of company telephones for "personal use is strictly forbidden except when authorized by the management." The Manual also lists other rules, the violation of which could result in disciplinary action. Included in these rules is "intentionally, or through gross negligence, destroying, damaging, or defacing Company merchandise or property," and "insubordination to Supervisory personnel, threatening of fellow employees, or any other person." Also listed in the manual is a description of Respondent's disciplinary policy, which states that an employee will receive either a verbal or written warning for his first offense, a written warning and possibly three to five days off without pay for a second offense, and that the employee will be fired for a third offense. Respondent's disciplinary policy further states that an employee may be fired immediately for several specific offenses, including lying about an incident or accident.

Complainant's Exhibit 14

Complainant's Exhibit 14 appears to be a treatment note by Dr. Timothy A. Moses, who treated Complainant for his alleged injury that occurred on July 21, 2005. The treatment note is dated July 26, 2005.

Complainant's Exhibit 15

Complainant's Exhibit 15 is a page from the report generated in conjunction with his North Carolina Department of Labor Retaliatory Employment Discrimination Act ("REDA") claim. The page which discusses whether Complainant engaged in protected activity *under REDA* by filing a workers' compensation claim has no relevance in adjudicating the current matter, i.e. Complainant's Exhibit 15 provides no probative evidence regarding any relevant matter in this case. Accordingly, this exhibit is not being considered by the Presiding Judge in adjudicating Complainant's STAA claim.

Respondent's Evidence

1. Testimony of Charles Wallace

At the hearing, Charles Wallace, president of Wallace Trucking Company, testified that Respondent owns approximately twenty-five trucks and employs around twelve drivers. (TR 132:25-133:6.) He stated that Respondent's home base is located in Laurinburg, North Carolina and that the company, which is a family owned business, has been in business for approximately forty-five years. (TR 133:7-23.)

With regard to Complainant, Mr. Wallace testified that Complainant was hired in August of 2004 and that problems involving Complainant began shortly after he was hired. (TR 134:14-

19.) Mr. Wallace pointed out at the hearing that Complainant had been in a "couple of other fender benders" and that on one occasion, Complainant had said that his head light had "just kind of [fallen] out as [he] was going down the road[,]" but that once the truck was returned to the yard, it was obvious that Complainant had "struck something." (TR 133:11-135:13.) Mr. Wallace testified that this "was the first red flag." (TR 134:14-135:15.) Thereafter, Mr. Wallace testified that the other problems involving Complainant, i.e. the hours of service problem and Complainant dictating his own schedule, began around January of 2005. (TR 135:10-15.)

With regard to the hours of service issue, Mr. Wallace testified that he believed the problem arose because Complainant did not know how to correctly calculate his hours. (TR 135:25-136:4.) Mr. Wallace testified that Complainant complained about having to drive extra hours beyond what was allowed under the hours of service rules but that after speaking with Complainant he felt this problem stemmed from Complainant's inability to correctly calculate his hours.[10] (TR 135:25-136:9.) Mr. Wallace testified that Complainant "was not run out of hours of service" and that he was given safety handouts that explained how to correctly calculate his hours. (TR 131:21-23.) Mr. Wallace further stated that no driver at Wallace Trucking Company was asked to work extra hours or falsify their logbooks. (TR 136:10-17, 198:7-22.)

At the hearing, Mr. Wallace explained that Complainant continually seemed to run out of hours whenever he was close to home and it was near the end of the week. (TR 142:12-19.) Mr. Wallace testified that Complainant would not pick up backloads on his way home because Complainant would determine that he could not do so without running out of hours unless he laid over for the night, which Complainant was apparently unwilling to do. (TR 142:12-143:11.) Mr. Wallace stated at the hearing that Complainant was the only one who could determine how many hours he had available to drive. (TR 94:11-22, 116:1-10.) Mr. Wallace also stated, later at the hearing, that the fact that Complainant may have had to layover during his runs was never held against him. (TR 200:2-18.) Moreover, with regard to how Mr. Bethea dictated his own schedule, Mr. Wallace stated that Mr. Bethea was unwilling to begin his work week before Monday or Tuesday, unlike Respondent's other drivers who began their work week typically on Sunday, and that Mr. Bethea would take unapproved days off, such as an extra day for the Company's holiday week of July Fourth. (TR 77:6-17, 121:16-122:13.) Mr. Wallace stated that these problems began in around January 2005 and became progressively worse over time. (TR 97:15-22, 143:20.)

Mr. Wallace further testified at the hearing that, while there may have been drivers working for Respondent who had been cited for violating the hours of service rules, such violations were violations by the drivers themselves rather than violations by Respondent. (TR 182:10-14, 183:1-3.) Mr. Wallace stated that it was the drivers' obligation to maintain their log books and hours of service. (TR 182:19-25.)

At the hearing, Mr. Wallace also provided testimony regarding Complainant's report of a fuel leak, refusal to pick up the backload from Tennessee, and alleged groin injury and how these

[10] The Presiding Judge notes that, at the hearing, when the parties were discussing Complainant's last week of employment, from Monday, July 18, 2005 through Friday, July 22, 2005, Complainant stated, with regard to whether he had run out of hours for that week, "[b]ut the point I'm making, the five day interval, that's the time that the clock should be resetting[, b]ecause you run up to the 70 hour period at that fifth day." (TR 117:20-22.)

issues contributed to Complainant's being fired. Specifically, Mr. Wallace stated that Complainant was fired as a result of the "culmination of the untruthfulness, the insubordination of saying I'm not going to try to pick up that load, [and] the damages to the truck." (TR 148:13-16.)

With regard to the fuel leak, Mr. Wallace stated that his general manager and head mechanic had said that when they moved Complainant's truck to "bring it in the shop" to find and fix the fuel leak, there was no fuel underneath the truck. (TR143:20-144:3.) Mr. Wallace further testified that when the truck was brought over the pit, so that it could be viewed from below, there was no sign of a fuel leak and that when Complainant was asked to point out where the fuel leak was, Complainant could not do so. (TR 144:9-145:1.) Mr. Wallace also stated that the truck had not been washed, either before or after Complainant saw the truck. (TR 144:22-25.) Moreover, at the hearing, when Complainant asserted that the reason he could not point out the fuel leak to Respondent was because it had already been fixed, Mr. Wallace stated that Complainant's allegation was untrue. (TR127:19.) Mr. Wallace stated that based on the foregoing and the fact that it seemed that Complainant had really wanted to return home that Friday and not pick up the backload, Mr. Wallace felt that "the fuel leak was a made-up situation." (TR 145:2-14.) On the other hand, Mr. Wallace also testified that a few months later there was a fuel leak and that the tank on Complainant's truck was replaced at that time. (TR 150:4-6.)

With regard to Complainant's refusal to pick up the backload in Tennessee on his way back to North Carolina of July 22, 2005, Mr. Wallace said that after Complainant had learned of the alleged fuel leak, which Mr. Wallace said Complainant said was minor, Respondent's general manager asked Complainant if he would be able to pick up the backload on his way home. (TR 149:2-7, 149:24-150:3.) Mr. Wallace stated that Complainant told his general manger that he could pick up the backload but that he refused to do so. (TR 149:9-13.) Mr. Wallace testified that his general manager told Complainant that it sounded like he didn't want to pick up the backload and that Complainant agreed. (TR 149:9-13.)

With regard to Complainant's alleged groin injury, Mr. Wallace testified that he thought it was strange that Complainant said he was injured on Thursday, July 21, 2005, yet did not report the injury until Monday, July 25, 2005. (TR 145:15-17.) Nevertheless, Mr. Wallace testified that Complainant was never denied medical treatment by Respondent. (TR 145:18-22.) He stated that on the day he found out Complainant was injured, he himself called AIG, Respondent's workman's compensation provider, and began a claim on behalf of Complainant. (TR 146:6-10.) Mr. Wallace stated that he told AIG that Complainant "had a groin strain, rolling up landing gear." (TR 153:22-24.) He stated that he did not mention that Complainant may have had kidney stones at that time because he didn't know then that that was a potential cause of Complainant's pain. (TR 154:1-18.) Mr. Wallace testified that Complainant was sent first to Respondent's company doctor, who then referred Complainant to a urologist, Dr. Timothy Moses. (TR 145:18-22.) Thereafter, Complainant was scheduled for outpatient surgery by Dr. Moses. Mr. Wallace testified that he told the hospital that he approved the surgery for Complainant because he thought at the time that Complainant had been injured while working. (TR 166:7-10.) Mr. Wallace further testified that he did not know how the surgery was being paid for at the time, i.e. whether it was being covered by Respondent's workers' compensation

provider or health insurance provider. (TR 166:13-14.) Mr. Wallace also stated that he was never able to get a straight answer from Complainant regarding his injury and, on August 4, 2005, he called Dr. Moses' office himself to learn what was wrong with Complainant. (TR 146:1-16, 155:1-8.) Mr. Wallace testified that he was told that Complainant had kidney stones and that the condition was not a work related problem. (TR 146:7-21.) Mr. Wallace stated that he thereafter called AIG and stopped the workman's compensation claim and transferred the matter to First Carolina Care, Respondent's insurance carrier. (TR 146:20-25.)

At the hearing, Mr. Wallace also testified that while employed by Respondent, Complainant had accrued an $893.00 phone bill, making calls primarily to Bennettsville, South Carolina, Complainant's home town. (TR 147:20-25.) Mr. Wallace stated that the amount was deducted from Complainant's pay and that Complainant had been warned, like all of Respondent's other drivers, that his cell phone was only to be used for company business. (TR 148:1-8.)

2. Respondent's Exhibits

Respondent's Exhibit 1

Respondent's Exhibit 1 is comprised of Complainant's original Driver's Daily Logs for July 15, 2005 through July 22, 2005. These logs, which are certified by Complainant, show that Complainant was off duty from 7:00 p.m. on July 14th through 2:45 pm on July 18th (43 ¾ hours). The logs also show that Complainant's total time spent either driving or on duty from July 18th through July 22nd was 39.75 hours: July 18th - 8.25 hrs, July 19th – 6.75 hrs, July 20th – 5 hrs, July 21st – 8.5 hrs, and July 22nd – 11.25 hrs. Complainant's log for July 21, 2005 states that Complainant was off duty until 3:30 p.m., when he came on duty in Laurinburg, North Carolina. Complainant then apparently drove an hour to Cheraw, South Carolina and then drove to Athens, Tennessee.[11] On July 22, 2005, Complainant wrote on his log that he went on duty in Clinton, Tennessee at 10:00 a.m. and then half an hour later drove for half an hour to Etowah, Tennessee, where he was detained from 11:00 a.m. until 3:00 p.m.[12] Thereafter, Complainant left Etowah, Tennessee and drove for six hours back to Respondent's yard in Laurinburg, North Carolina.

Respondent's Exhibit 1 is also comprised of Complainant's original Driver's Vehicle Inspection Reports for July 15, 2005 through July 22, 2005, which are also certified by Complainant. On Complainant's July 22, 2005 inspection report, Complainant wrote on the second line of the report "fuel leak right tank." Also on this report, Complainant checked the

[11] At the hearing, Complainant testified that he drove to Cheraw, South Carolina on July 21, 2005. Based on the distance and reasonable estimated travel time between Laurinburg, North Carolina and Cheraw, South Carolina (based on examination of RX-2), and the fact that there is no evidence disputing Complainant's testimony, the Presiding Judge finds that the unmarked stop on Complainant's July 21, 2005 log was at Cheraw, South Carolina.

[12] Based on Complainant's July 21, 2005 log, which noted that Complainant stopped in Athens, Tennessee, Complainant's July 22, 2005 log, which notes that Complainant only drove that day for half an hour to Etowah, Tennessee, Respondent's RX-2, which shows that Clinton is approximately 76 miles away, and Complainant's testimony (TR 46:3-7), it is possible that Complainant actually drove from Athens to Etowah, rather than Clinton to Etowah.

box certifying that he detected "no defect or deficiency in this motor vehicle as would be likely to affect the safety of its operation or result in its mechanical breakdown."

Respondent's Exhibit 2

Respondent's Exhibit 2 is a map of Tennessee showing the distances between Clinton, Etowah, and Chattanooga. On the map, Respondent noted the exact distances between Clinton and Etowah and Etowah and Chattanooga. Upon examining the map and considering Mr. Wallace's testimony at the hearing on the matter, which the Presiding Judge finds to be credible, the Presiding Judge finds that the distance between Clinton and Etowah is seventy-six miles and the distance between Etowah and Chattanooga is fifty-eight miles.

Respondent's Exhibit 3

Respondent's Exhibit 3 is a road service receipt for towing service, which was signed by Complainant. The receipt, which is dated November 23, 2004, shows that the towing service cost $450.00.

Respondent's Exhibit 4

Respondent's Exhibit 4 is a loss run report which describes an accident involving Complainant that occurred on August 10, 2004. The report describes the accident which was caused by Complainant who "clipped" another car as Complainant was turning into a mall parking lot and the other car was leaving the lot.

Respondent's Exhibit 5

Respondent's Exhibit 5 is Complainant's file for his North Carolina Department of Labor Retaliatory Employment Discrimination Act ("REDA") claim.

On December 11, 2006, Respondent submitted additional evidence, as permitted by the Presiding Judge at the hearing. The following exhibits were submitted by Respondent as proposed post-hearing exhibits:

Respondent's Exhibit 6

Respondent's Exhibit 6 is comprised of Complainant's original Driver's Daily Logs and Vehicle Inspection Reports for August 2004 through June 2005.[13] The following table summarizes Complainant's on duty and driving hours:[14]

[13] The Presiding Judge notes that Complainant's logs appear to show that, on a few occasions, Complainant drove more than eleven hours before going off duty for ten hours. See logs dated August 31, 2004; September 29, 2004; October 11, 2004; January 4, 2005; and March 22, 2005. Yet, due to the number of discrepancies and errors in the logs, the Presiding Judge cannot actually determine if in fact any violations occurred. The Presiding Judge also notes that Complainant's logs appear to show that on several occasions, Complainant drove after the fourteenth consecutive hour after he went on duty.

[14] The data in the table is based on the marked hours on Complainant's logs rather than the total hours listed on the logs. After reviewing the logs, the Presiding Judge finds that some of the "total hour" calculations are inaccurate.

Start Date and Time	End Date and Time	Total Days	Total Hours
Mon, August 9, 2004, 2:30 p.m.	Fri, August 13, 2004, 10:30 a.m.	5	38
Sun, August 15, 2004, 11:00 a.m.	Fri, August 20, 2004, 10:00 p.m.	6	64
Sun, August 22, 2004, 1:00 p.m.	Fri, August 27, 2004, 9:00 p.m.	6	55 ¾
Sun, August 29, 2004, 2:00 p.m.	Wed, September 1, 2004, 9 p.m.	4	42 ½
Mon, September 6, 2004, 2:00 p.m.	Wed, September 8, 2004, 11:59 p.m.	3	23
Mon, September 13, 2004, 10:00 a.m.	Mon, September 13, 2004, 6:15 p.m.	1	8 ¼
Wed, September 15, 2004, 2:00 p.m.	Thu, September 16, 2004, 10:00 p.m.	2	21
Sun, September 19, 2004, 12:00 p.m.	Fri, September 24, 2004, 9:15 p.m.	6	56 ¾
Sun, September 26, 2004, 2:30 p.m.	Thu, September 30, 2004, 11:59 p.m.	5	39 ½
Sat, October 2, 2004, 2:00 p.m.	Mon, September 8, 2004, 11:59 p.m.	7	52 ¾
Sun, October 10, 2004, 2:00 p.m.	Fri, October 15, 2004, 6:00 p.m.	6	46
Tue, October 19, 2004, 2:00 p.m.	Thu, October 21, 2004, 7:15 p.m.[15]	3 (or 4)	39 ¼
Sun, October 24, 2004, 3:00 p.m.	Thu, October 28, 2004, 4:45 p.m.	5	39
Insufficient data for period 10/31/04 through 11/6/04, no logs for 11/1/04, 11/2/04, or 11/4/04 through 11/6/04			
Mon, November 8, 2004, 3:00 p.m.[16]	Fri, November 12, 2004, 6:30 p.m.	5 (or 6)	60 ½
Sun, November 14, 2004, 3:45 p.m.	Fri, November 19, 2004, 10:15 p.m.	6	59
Sun, November 21, 2004, 2:30 p.m.	Wed, November 24, 2004, 9:00 a.m.	4	23 ¼
Sun, November 28, 2004, 3:00 p.m.[17]	Fri, December 3, 2004, 2:15 p.m.	6	43 ¾
Sun, December 5, 2004, 6:00 p.m.	Fri, December 10, 2004, 11:59 p.m.	6	42 ¾
Sun, December 12, 2004, 5:00 a.m.	Thu, December 16, 6:00 p.m.	5	35
Sun, December 19, 2004, 4:30 p.m.	Thu, December 23, 2004, 5:30 p.m.	5	43
Sun, December 26, 2004, 3:00 p.m.	Thu, December 30, 2004, 11:00 a.m.	5	33
Sun, January 2, 2005, 4:00 p.m.	Fri, January 7, 2005, 10:30 p.m.	6	58 ½
Mon, January 10, 2005, 3:00 p.m.	Fri, January 14, 2005, 2:00 p.m.	5	49
Tue, January 18, 2005, 5:00 p.m.	Fri, January 21, 2005, 4:15 p.m.	4	34 ½
Sun, January 23, 2005, 4:00 p.m.	Thu, January 27, 2005, 11:30 p.m.	5	39 ¼
Mon, January 31, 2005, 12:00 p.m.	Thu, February 3, 2005, 8:00 p.m.	4	36 ¼
Mon, February 7, 2005, 3:45 p.m.	Thu, February 10, 2005, 7:00 p.m.	4	38
Mon, February 14, 2005, 3:00 p.m.	Thu, February 17, 2005, 7:00 p.m.	4	36 ½
Mon, February 21, 2005, 4:00 p.m.	Fri, February 25, 2005, 10:30 p.m.	5	39 ½
Mon, February 28, 2005, 3:00 p.m.	Fri, March 4, 2005, 9:30 a.m.	5	37 ¾
Mon, March 7, 2005, 3:30 p.m.	Fri, March 11, 2005, 11:00 a.m.	5	38 ¼
Mon, March 14, 2005, 3:00 p.m.	Wed, March 16, 2005, 9:00 a.m.	3	21 ¾
Mon, March 21, 2005, 7:00 p.m.	Fri, March, 25, 2005, 9:00 a.m.	5	35 ½
Insufficient data for period 3/27/05 through 4/1/04, no logs for 3/30/05 or 3/31/05			
Mon, April 4, 2005, 3:45 p.m.	Fri, April 8, 2005, 10:15 a.m.	5	37
Mon, April 11, 2005, 4:00 p.m.	Thu, April 14, 2005, 8:00 p.m.	4	38 ¼

[15] There are two logs dated September 20, 2004 which have overlapping hours. Yet based on the sequence of the destinations listed on the logs, the Presiding Judge finds that it is likely that Complainant misdated the second log dated September 20, 2004 and the log dated September 21, 2004. Accordingly, the Presiding Judge has counted all hours noted on the logs for the period between October 19, 2004 and October 21 (or 22), 2004, although the end date is listed in the table as being Thursday, October 21, 2004.

[16] There are two logs dated November 8, 2004 which have overlapping hours. Yet based on the sequence of the destinations listed on the logs and how other reset periods have been noted in Complainant's logs, the Presiding Judge finds that it is likely that Complainant misdated the first log dated November 8, 2004. Accordingly, the Presiding Judge has counted all hours noted on the logs for the period between November 8 (or 7), 2004 and November 12, 2004, although the beginning date is listed in the table as being Monday November 8, 2004.

[17] Complainant marked one of his logs as November 31, 2004, there is a log dated December 1, 2004, and no log for December 2, 2004. Based on the foregoing, other mistakes in Complainant's logs, and the sequence of destinations listed on the logs, the Presiding Judge presumes that the November 31, 2004 log should be dated December 1, 2004 and that the December 1, 2004 log should be dated December 2, 2004.

Mon, April 18, 2005, 5:45 p.m.	Thu, April 21, 2005, 5:00 p.m.	4	29 ¼
Mon, April 25, 2005, 3:30 p.m.	Thu, April 28, 2005, 9:30 p.m.	4	36 ½
Mon, May 2, 2005, 2:45 p.m.	Thu, April 5, 2005, 9:30 p.m.	4	39
Mon, May 9, 2005, 5:00 p.m.	Fri, May 20, 2005, 8:00 p.m.	12	67 ¾, 74 ¾, 73 ¼, 74 ½, 74 ¾ [18]
Wed, May 25, 2005, 3:00 p.m.	Thu, May 26, 2005, 10:00 p.m.	2	20
Tue, May 31, 2005, 2:45 p.m.	Fri, June 3, 2005, 8:00 p.m.	4	35 ½
Mon, June 6, 2005, 3:00 p.m.	Thu, June 9, 2005, 8:00 p.m.	4	42
Mon, June 20, 2005, 3:00 p.m.	Fri, June 24, 2005, 9:00 p.m.	5	44 ¾
Mon, June 27, 2005, 2:00 p.m.	Thu, June 30, 2005, 11 p.m.	4	39 ½
Insufficient data for beginning of July 2005[19]			

Respondent's Exhibit 7

Respondent's Exhibit 7 is a signed statement by Respondent's manger G.W. Baldwin. In his statement, Mr. Baldwin wrote, "I, G.W. (Bud) Baldwin, do honorably swear to the best of my knowledge that David Bethea was neither asked nor expected to drive a truck longer than the legal hours of service laws at the time of his employment with Wallace Trucking Co."

Respondent's Exhibit 8

Respondent's Exhibit 8 is a signed statement by Respondent's dispatcher Toni [Blossom] Baldwin. In her statement, Ms. Baldwin wrote, I, Toni Baldwin, do honorably swear to the best of my knowledge that David Bethea was neither asked nor expected to drive a truck longer than the legal hours of service laws at the time of his employment with Wallace Trucking Co."

Findings of Fact and Conclusions at Law

1. The legal standard

In this case, Complainant has alleged that he was discriminated against by Respondent because he reported hours of service violations and a fuel leak to Respondent's management. (TR 2-5; OSHA record of original verbally filed compliant dated January 9, 2006.) Accordingly, at issue in this case are the Department of Transportation's regulations for drivers of commercial motor vehicles, 49 C.F.R. Parts 393-96. 49 C.F.R. Parts 393-96 (2006). As relevant to this case, under the STAA, an employer may not discharge, discipline, or discriminate against an employee regarding the employee's pay, terms, or privileges of employment because "the employee, or

[18] The total hours for this period were calculated as follows: 5/9/05-5/16/05 – 67 ¾ hrs; 5/10/05-5/17/05 – 74 ¾ hrs; 5/11/05-5/18/05 – 73 ¼ hrs; 5/12/05-5/19/05 – 74 ½ hrs; 5/13/05-5/20/05 – 74 ¾ hrs. The Presiding Judge notes that Complainant was off duty between 11:15 a.m. on 5/16/05 and 4:00 p.m. on 5/17/05 (28 ¾ hours). Based on the evidence presented in this case, it is unclear if this break was in fact an attempt to reset Complainant's time and, if so, who was responsible for the miscalculation (Complainant needed 5 ¼ additional hours in order to reset his time). If in fact the break between 5/16/05 and 5/17/05 was intended to reset Complainant time and had it been for the correct amount of time (34 hours), the violations for periods 5/10/05-5/17/05, 5/11/05-5/18/05, 5/12/05-5/19/05, and 5/13/05-5/20/05 would not have occurred. Instead, Complainant's total hours for the period between Tuesday, May 17, 2005 and Friday, May 20, 2005 would have been 39 ½, which appears to be on par with Complainant's normal total hours.

[19] At the hearing, Mr. Wallace testified that Complainant was given the week of July 4th off and that Complainant also took an additional day on Monday off. (TR 122:7-11; 172:5-13.)

another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding." 40 U.S.C. § 31105(a)(1)(A).

The Fourth Circuit Court of Appeals has stated that the "basic Title VII proof scheme governs actions under the STAA." *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 983 (4th Cir. 1993). Therefore, Complainant must initially establish a prima facie case by a preponderance of the evidence. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Thereafter, the Respondent may rebut Complainant's prima facie case by articulating a legitimate, nondiscriminatory reason for the action taken against Complainant. *Id.* at 253. If Respondent is successful, Complainant must then "prove by a preponderance of the evidence that the legitimate reasons offered by [Respondent] were not its true reasons, but were a pretext for discrimination." *Id.*

Accordingly, in order to prevail in this case, Complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) his employer was aware of the protected activity, (3) the employer discharged, disciplined, or discriminated against him, and (4) the protected activity was the reason for the adverse action. *Ramirez v. Frito-Lay, Inc.*, ARB No. 06-025, ALJ No. 2005-STA-37, slip op. at 5 (ARB Nov. 30, 2006) (internal citations omitted).

2. The employee engaged in protected activity

As previously stated, under the STAA, an employee engages in protected activity when he files a complaint related to a violation of a commercial motor vehicle safety or health law. In proving his case, "a complainant need only show that he reasonably believed he was complaining about a safety hazard." *Schuler v. M & P Contracting, Inc.*, 94-STA-14 (Sec'y Dec. 15, 1994). Accordingly, to prevail, a complainant need not prove that an actual violation of an applicable law occurred. *See Barr v. ACW Truck Lines*, 91- STA-42 (Sec'y Apr. 22, 1992).

In this case, Complainant has asserted that he engaged in several different protected activities. Complainant has asserted that he (1) complained that he had to drive too many hours; (2) complained that he had to drive too many hours *and* was asked (or required) to falsify his logbooks; (3) reported a fuel leak on July 22, 2005; and (4) attempted to file a workers' compensation claim with Respondent.

First, with regard to Complainant's assertions that he complained about having to drive too many hours and that his truck had a fuel leak on July 22, 2005, the Presiding Judge notes that it is undisputed between the parties that Complainant in fact made these complaints and that his complaints were made before he was fired. On the other hand, based on the preponderance of the evidence of record, the Presiding Judge finds that when Complainant made these complaints, he did not reasonably believe that he was complaining about safety hazards.

With regard to Complainant's belief that Respondent was violating hours of service regulations by requiring Complainant to drive extra hours, the Presiding Judge finds that, under the circumstances as proven by the evidence presented in this case, Complainant's belief was not reasonable. While the Presiding Judge notes that Complainant need not prove that Respondent's

alleged activity *actually* violated the law, Complainant must *at least* convince the court that the alleged activity in fact *occurred*, or that he reasonably but mistakenly believed that it had occurred, in order to prove that he *reasonably believed* Respondent's alleged activity violated the law.

In this case, Complainant testified that Respondent directed him to work additional hours in violation of federal hours of service regulations. Yet, Complainant has provided no testimony to substantiate this claim. Complainant has merely stated that when he complained about having to work too many hours, Respondent's dispatcher told Complainant that other drivers "do it."[20] Other than this statement, Complainant has provided little detail regarding what Respondent's actual directions to him entailed. Complainant has merely stated that, on occasion, late in the day, after Complainant had been on duty for several hours, Respondent's dispatcher would give him a new assignment. (*See, e.g.*, TR 42:15-43:25) Yet, this testimony does not establish that Complainant was ever actually given an assignment that itself violated the hours of service regulations or that Respondent ever actually made Complainant drive beyond the hours permitted under applicable law. While the Presiding Judge notes that Complainant has asserted that his driver's logs substantiate his claim and that, in this case, if no other evidence on the matter had been presented, it could be inferred from Complainant's logs that Respondent required Complainant to drive too many hours, under the circumstances of this case, drawing such an inference would be inappropriate.[21]

Notably, Respondent has presented evidence in this case which establishes that Respondent did not order or expect Complainant to drive too many hours in violation of federal hours of service regulations. In this case, Respondent's president, Mr. Wallace, general manager, Mr. Baldwin, and dispatcher, Ms. Baldwin, have all stated that Complainant was never asked or required to drive additional hours in violation of federal hours of service regulations. Moreover, at the hearing, Mr. Wallace testified that Complainant was permitted to take layovers when necessary. (*See, e.g.*, 200:2-18.) Notably, Complainant does not dispute this assertion. In fact, Complainant's own testimony at the hearing establishes that Respondent has directed Complainant, on at least one occasion, to go off duty after Complainant informed Respondent's dispatcher that he could not complete an assignment and return to Respondent's yard without violating the hours of service regulations. (TR 46:24-47:6). Moreover, at the hearing, Mr. Wallace further stated that Respondent could not calculate or keep track of Complainant's hours. Mr. Wallace explained that Complainant was responsible for keeping track of his hours because he was the only one who actually knew how he was spending his time while on the road. Mr. Wallace also explained that Respondent's dispatcher relied on the information Complainant provided regarding his hours when she decided how Complainant would be dispatched.

Overall, in light of the foregoing evidence presented by Respondent, the Presiding Judge finds that Complainant has failed to convince the court that the hours of service violations noted

[20] Yet, the Presiding Judge notes that the first time Complainant mentioned at the hearing that Respondent's dispatcher told Complainant that other drivers "do it," Complainant was discussing his assertion that he was forced to take layovers when he was close to home.

[21] Complainant's driver's logs do reveal that Complainant may have violated federal hours of service regulations. Yet, the Presiding Judge notes that, due to numerous discrepancies and errors in the logs, it is unclear whether federal hours of service regulations were in fact violated.

in Complainant's driver's logs are evidence that Respondent directed Complainant to drive in violation of federal hours of service regulations. Moreover, in weighing Complainant's evidence against that of Respondent, the Presiding Judge finds Respondent's evidence to be more credible and persuasive. The Presiding Judge notes that, based on the demeanor of Complainant and Mr. Wallace at the hearing and the extent to which their testimonies were consistent, the Presiding Judge finds Mr. Wallace's testimony generally to be credible and Complainant's testimony to generally not be credible. Additionally, the Presiding Judge notes that, overall, Mr. Wallace's testimony is supported by the evidence of record while Complainant's testimony is not. Therefore, the Presiding Judge finds that the preponderance of the evidence establishes that Respondent did not in fact direct Complainant to drive in violation of federal hours of service regulations.

Accordingly, the only issue remaining with regard to whether Complainant reasonably believed he was reporting a safety hazard by complaining that Respondent made him drive too many hours, is whether Complainant could have reasonably, although mistakenly, interpreted Respondent's instructions as in fact directing him to violate the law. In this case, as previously stated, Complainant has merely asserted that on occasion, late in the day, after he had been on duty for several hours, Respondent's dispatcher would give Complainant a new assignment. (*See, e.g.*, TR 42:15-43:25) Yet, in this case, in light of the fact that Complainant could layover to avoid violating the federal hours of service regulations and the fact that Respondent's dispatcher relied on information provided by Complainant in deciding how to dispatch Complainant, the Presiding Judge finds that Complainant could not have reasonably interpreted Respondent's instructions as requiring him to violate the law. Accordingly, because Complainant has failed to establish that he reasonably believed he was reporting a safety hazard when he complained to Respondent that he was being required to drive too many hours, the Presiding Judge finds that Complainant has not proven by a preponderance of the evidence that he engaged in protected activity by reporting hours of service violations.

Next, with regard to Complainant's complaint of a fuel leak on July 22, 2005, the Presiding Judge finds that Complainant has not proven by a preponderance of the evidence that he in fact reasonably believed he was complaining about a safety hazard when he reported the leak to Respondent. Again, as previously stated, while the Presiding Judge notes that Complainant need not prove that a law was actually violated, Complainant must *at least* convince the court that the facts upon which he based his belief that a law had been violated in fact *occurred*, or that he reasonably but mistakenly believed that they had occurred, in order to prove that he *reasonably believed* that he was complaining about a safety hazard. In this case, the Presiding Judge finds that the preponderance of the evidence demonstrates that there was no fuel leak.

While the Presiding Judge notes that Complainant testified at the hearing that he had a fuel leak on July 22, 2005, Complainant's testimony, which the Presiding Judge finds not to be credible, is not substantiated by any evidence other than Complainant's inspection report for July 22, 2005 on which Complainant himself wrote that he had a fuel leak. Yet, in this case, the Presiding Judge finds that Complainant's July 22, 2005 inspection report provides, at most, evidence that Respondent had notice of Complainant's complaint. The inspection report does not prove that Complainant's truck did in fact have a fuel leak. Moreover, the Presiding Judge

notes that Mr. Baldwin, Respondent's general manager, stated that when the truck was inspected after Complainant returned from Tennessee, neither he nor Respondent's head mechanic could find a leak. (CX-9.) Additionally, it is undisputed between the parties that when Complainant was asked to point out where there was or had been a leak, Complainant could not do so. While the Presiding Judge notes that Complainant has argued that the reason he could not point out the leak to Respondent on July 26, 2005 was because the truck had been washed and the leak had been fixed, the Presiding Judge finds these unsubstantiated arguments to be unpersuasive. Moreover, at the hearing, Mr. Wallace testified that the truck had not in fact been washed or fixed. Accordingly, after weighing the evidence presented in this case, the Presiding Judge finds that Complainant has failed to establish that there was a fuel leak and therefore has further failed to prove that he reasonably believed he was reporting a safety hazard. As a result, Complainant has not proven by a preponderance of the evidence that he engaged in protected activity by complaining to Respondent about a fuel leak.

In this case, with regard to the remaining alleged protected activities that Complainant claims he engaged in, the Presiding Judge finds that the preponderance of the evidence does not support Complainant's claims. First, with regard to Complainant's assertion that he engaged in protected activity by filing a workers' compensation claim with Respondent, the Presiding Judge finds that filing such a claim is not in fact protected activity under the STAA. Overall, Complainant has not alleged or proven any facts demonstrating that his attempt to file a workers' compensation claim through Respondent in any way related to either a motor carrier safety complaint or a refusal to work.

With regard to Complainant's assertion that, as part of his complaint that he had to work too many hours, Complainant also complained that he was required to falsify his logbooks, the Presiding Judge finds Complainant's allegation to be unsupported by the credible evidence of record. In this case, there is no evidence, other than Complainant's own testimony, that Respondent either told or expected him to falsify his logs. With regard to Complainant's testimony on the matter, the Presiding Judge finds that Complainant's testimony is not credible. At the hearing, Complainant first denied, but then later admitted that he falsified his logs. Moreover, Complainant's testimony from the hearing regarding how he falsified his logs is contradicted by other evidence of record. Specifically, at the hearing Mr. Bethea testified that on July 22, 2005, he went on duty at 6 a.m., although he wrote on his driver's log for that day that he went on duty at 10 a.m. Yet, in a handwritten note signed by Complainant addressed to a Mr. Turnham, dated January 12, 2006, Complainant wrote that on "7-22-05 I was dispatched at 10 AM to Ethwah [sic.] Tenn from Clinton, Tenn." (RX5 at C-1.) Moreover, at the hearing, Mr. Wallace, whom the Presiding Judge finds to be credible, testified that Complainant was never told by Respondent to falsify his logs. Accordingly, based on the foregoing, the Presiding Judge finds that Complainant was never ordered by Respondent to falsify his logs and never in fact falsified his logs. As a result, the Presiding Judge further finds that Complainant has not proven by a preponderance of the evidence that he engaged in protected activity by complaining to Respondent that he was directed to falsify his logs in violation of applicable law.

Overall, in this case, the Presiding Judge finds that Complainant has failed to prove by a preponderance of the evidence that he engaged in any protected activity under the STAA. Complainant has not proven that he reasonably believed he was reporting a safety hazard when

he complained to Respondent that federal hours of service regulations were being violated or when he reported a fuel leak. Moreover, Complainant was not engaging in activity protected under the Act when he attempted to file a workers' compensation claim with Respondent. Additionally, Complainant failed to establish either that Respondent required Complainant to falsify his logbooks or that he had actually done so. Accordingly, Complainant has failed to establish the first element of his STAA claim.

3. The employer was aware of the protected activity

In this case there is no dispute that Respondent knew (i) of Complainant's complaints regarding hours of service violations and the fuel leak, and (ii) that Complainant had notified Respondent of his alleged work related injury and had attempted to file a worker's compensation claim. Accordingly, the Presiding Judge finds that Complainant has proven by a preponderance of the evidence that Respondent was aware of the foregoing activities. On the other hand, with regard to Complainant's allegation that he complained to Respondent because he was being directed to falsify his driver's logs, the Presiding Judge finds that Complainant has not proven by a preponderance of the evidence that Respondent knew of these activities. As previously discussed, the Presiding Judge finds that the evidence of record does not establish that Respondent ever asked Complainant to falsify his logs or that Complainant complained to Respondent about being directed to falsify his logs.

4. The employee was discharged, disciplined, or discriminated against

There is no dispute in this case that Complainant was fired. Accordingly the Presiding Judge finds that Complainant has proven by a preponderance of the evidence that Respondent took adverse action against him.

5. The protected activity was the reason for the adverse action.

In this case, Respondent has asserted that Complainant was fired due to his poor job performance during his employment. Respondent has asserted that while employed by Respondent, (i) Complainant damaged several of Respondent's vehicles when he first began working for Respondent (Test. of Mr. Wallace, RX-3, RX-4), (ii) Complainant dictated his own schedule by refusing to begin his work week before Monday, even though Respondent's other employees began their work week on Sunday, and took unapproved days off, such as an extra day during the company's holiday week of July fourth (Test. of Mr. Wallace, RX-3, RX-4), and (iii) Complainant falsely reported a fuel leak and work related injury (Test. of Mr. Wallace, CX-9, CX-5). According to Respondent's president, Mr. Wallace, it was the culmination of all the foregoing problems that led to Complainant's termination on August 10, 2005.

Conversely, Complainant asserts that Respondent's stated reasons for firing him are a mere pretext for discrimination. Complainant states that he was never warned about his job performance and states that CX-9 substantiates this claim. Complainant further asserts that he did not in fact dictate his own schedule and that he began his work week on Sundays like Respondent's other employees. Complainant also asserts that Respondent's claim that he was fired for being untruthful is false because Respondent knew when it fired Complainant that there

had in fact been a fuel leak and knew that Complainant's injury may have in fact been work related.

In this case, based on a review of the evidence of record, the Presiding Judge finds that Respondent has established that it had legitimate, nondiscriminatory business reasons for firing Complainant. Overall, the Presiding Judge finds that Complainant did damage Respondent's vehicles on several occasions, did dictate when he would work, and did take unapproved days off. Moreover, the Presiding Judge also finds that Mr. Wallace did believe, at the time Complainant was fired, that Complainant had lied about the fuel leak and the nature of his injury.[22]

Accordingly, to prevail in this case, Complainant must prove that Respondent's clearly articulated legitimate, nondiscriminatory business reasons for firing him are a mere pretext for discrimination. In this case, after considering Complainant's arguments and the evidence of record, the Presiding Judge finds that Complainant has failed to meet this burden. As previously stated, Complainant has asserted that Respondent never warned him that he was performing poorly. Complainant claims that this is evidence that Respondent's reasons for firing him are a pretext for discrimination.[23] Yet, under the circumstances of this case, the Presiding Judge disagrees. Here, Respondent's president Mr. Wallace has stated that Complainant was fired due to several problems that had compounded over time. After reviewing the evidence of record, the Presiding Judge finds Mr. Wallace's statement to be credible, notwithstanding the fact that Complainant was apparently never given formal warnings about his job performance.

On the other hand, the fact that Complainant was not previously warned about his job performance leads the Presiding Judge to believe that the problems between the parties, other than the incidents involving Complainant's alleged dishonesty, did not play a significant role in Respondent's decision to fire Complainant. Notably, the problems between the parties, other than the incidents involving Complainant's alleged dishonesty, had either occurred several months beforehand or had been occurring over the course of several months. Only the incidents involving the fuel leak and Complainant's injury occurred immediately before Complainant was fired. Accordingly, the Presiding Judge finds that the main reason Complainant was fired was because Respondent believed he had lied about having a fuel leak and a work related injury.

With regard to Respondent's assertion that Complainant was fired because he was dishonest, the Presiding Judge notes that, under the circumstances of this case, the fact that Complainant received no warning before he was fired does not prove that Respondent's reason for firing him is a mere pretext for discrimination. The Presiding Judge notes that Respondent's

[22] The Presiding Judge notes that he does not find credible Complainant's unsubstantiated assertion that Respondent knew he was not lying about the fuel leak and the nature of his injury when he was fired. Contrary to Complainant's opinion, the Presiding Judge finds that the evidence of record does not support Complainant's assertion. None of the credible evidence of record contradicts Mr. Wallace's testimony regarding what he knew at the time Complainant was fired. Moreover, based on Mr. Wallace's knowledge of the events surrounding the alleged fuel leak and Complainant's alleged work related injury, the Presiding Judge finds that it was reasonable for Mr. Wallace to conclude that Complainant had in fact lied.

[23] Contrary to Complainant's assertion, CX-9 does not prove that Respondent never warned Complainant about his job performance. Rather, CX-9 merely provides evidence that Complainant was not warned on July 22, 2005 that he would be disciplined or terminated for failing to pick up the backhaul from Tennessee on that date.

policy states that an employee may be terminated immediately for being dishonest. Moreover, as previously stated, Complainant was fired shortly after Respondent had determined that Complainant had been dishonest: on July 25, 2005, Respondent discovered that there was no fuel leak; on August 4, 2005, Respondent discovered that Complainant did not have a work related injury; and on August 10, 2005, Complainant was fired. Accordingly, under these circumstances, the Presiding Judge finds that it was reasonable for Respondent not to warn Complainant before firing him. As a result, the Presiding Judge finds that Complainant has not proven that Respondent's reasons for firing him are a mere pretext for discrimination based on the fact that Complainant was never warned about his job performance.

Accordingly, in this case, because Complainant has presented no other credible arguments or evidence to support a finding that Respondent's legitimate, nondiscriminatory business reasons for firing him are mere pretext, the Presiding Judge finds that Complainant has not proven by a preponderance of the evidence that Respondent fired him because he engaged in the activities which he claims are protected under the Act.[24]

Conclusion

In this case, Complainant has failed to prove by a preponderance of the evidence two elements of his STAA claim. Complainant has failed to prove that he engaged in activity protected under the Act. Complainant has also failed to prove that the activity, which he claimed was protected under the Act, was the reason he was fired by Respondent. Overall, in this case, the evidence shows that Complainant was fired by Respondent for legitimate, nondiscriminatory business reasons.

ORDER

Accordingly, for the reasons set forth above, it is **ORDERED** that the claim of Complainant David Bethea be, and hereby is, **DENIED**.

SO ORDERED.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/mam

[24] Complainant has presented no evidence that leads the Presiding Judge to believe that Respondent's stated reasons for firing Complainant are false. He has presented no evidence showing that he was treated differently than other employees in similar situations or that his termination was inconsistent with either Respondent's disciplinary policies or what he had previously been told by Respondent regarding his own job performance. Moreover, Complainant has not demonstrated that Respondent's decision to fire him was disproportionately severe in comparison to the seriousness of Complainant's misconduct.

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002). 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.