

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 April 2008

Case No.: 2007-STA-00011

In the matter of:

MICHAEL WILCOX,

Complainant,

v.

UNITED PARCEL SERVICE,

Respondent.

Appearances: Paul O. Taylor, Esq.
Ryan Kaess, Esq.
For the Complainant

Matthew R. Estabrook, Esq.
For the Respondent

Before: ALAN L. BERGSTROM
Administrative Law Judge

RECOMMENDED DECISION AND ORDER - DENYING COMPLAINT

This proceeding arises from a complaint filed under the provisions of Section 31105 of the Surface Transportation Act of 1982, as amended (Act), U.S. Code, Title 33, § 901 et seq., and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 19. The claim was referred to the Office of Administrative Law Judges for formal hearing on appeal by Complainant of the Occupational Safety and Health Administration December 12, 2006, determination that the Complainant's case was without merit.

A formal hearing was held in Winston Salem, North Carolina, on October 24, 2007, at which time the parties were afforded full opportunity to present evidence and argument as provided in the Act and applicable regulations. At the hearing, joint exhibits 1 through 17, Administrative Law Judge exhibit 1 through 7, Complainant exhibits 1 through 4, pages 5 through 13 of Complainant exhibit 5, Complainant exhibits 6 through 8, and Employer exhibits 29 and 30 were

admitted without objection¹ (TR 7 to 14, 232). Complainant's objections to Employer exhibits 1 through 7, 12, 13, 15 through 19, the January 20, 2003 entry on EX 21, 25, and 27 through 28 were sustained (TR 292). Employer exhibits 8 through 11, 14, 20, remainder of 21, 23, and 24 were admitted over Complainant's objections (TR 20, 21, 292). During the testimony of T. Kaiser he identified pages 1 through 4 of CE 5 as his statement to the Atlantic Area Parcel Grievance Committee such that those remaining pages of CE 5 are admitted into evidence and considered. As provided for during the formal hearing, the post-hearing deposition of Employer's witness T. Cox was taken on November 19, 2007 with counsel for both Parties present (TR 294). The written transcript of that deposition was filed on December 11, 2007, and considered as EX 31. The post-hearing written briefs filed on February 8, 2008, by the respective counsel for the Complainant² and the Employer were also considered.

The findings of fact and conclusions which follow are based upon a complete review of the entire record, the argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The parties have stipulated to, and this Administrative Law Judge finds, the following as fact (JX 17, TR 6):

1. Complainant resides at 1216 Clubhouse Drive, Rockledge, Florida, 32955.
2. Respondent is engaged in interstate trucking operations and operates commercial vehicles on the highways in commerce with a gross vehicle weight rating of 10,001 pounds or more.
3. Complainant was an employee of Respondent from May 22, 1985 until about March 1, 2006.
4. As an employee of Respondent, Complainant operated commercial motor vehicles with a gross vehicle weight rating of 10,001 pounds or more on the highways in interstate commerce.
5. On March 1, 2006, Respondent discharged the Complainant.
6. On August 21, 2006, Complainant filed a complaint with the North Carolina Department of Labor alleging that the Respondent had illegally discharged him. The North Carolina Department of Labor referred and provided Complainant's complaint to the United States Department of Labor, Occupational Safety and Health Administration.
7. Complainant timely filed a complaint against Respondent under the employee protection provisions of the Surface Transportation Act, 49 U.S.C. § 31105 (STAA).

¹ The following exhibit notation applies: JX - joint exhibit; ALJX – Administrative Law Judge exhibit; CX – Complainant exhibit; EX – Employer exhibit; TR – transcript page

² After August 1, 2006, the Department of Labor policy requires the use of initials for Complainants' name in the headings and use of a descriptive title in the decision. Accordingly, "Complainant" is used in this decision vice the proper name of the individual who is the subject of this decision.

8. On December 18, 2006, the United States Department of Labor, Occupational Safety and Health Administration, issued its determination pursuant to 49 U.S.C. §31105(b)2(A), dismissing Complainant's complaint.
9. On or about January 15, 2007, Complainant filed an objection to the Secretary's preliminary determination and requested a hearing de novo before the United States Department of Labor, Office of Administrative Law Judges. The Complainant's objection and request for a hearing de novo was timely filed.
10. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the Parties and the subject matter of this proceeding.
11. The Complainant was subject to adverse employment action on March 1, 2006, in the form of termination of employment.

ISSUES

The issues remaining to be resolved are (TR 6 to 7):

1. Did the Complainant engage in protected activity prior to March 1, 2006?
2. Was Respondent aware of Complainant's protected activity?
3. Is the Complainant entitled to the rebuttable presumption that a qualified adverse employment action was taken as the proximate result of the protected activity?
4. Did Respondent establish that adverse employment action was the result of events and/or decisions independent of protected activity?
5. Is the Complainant entitled to an Order of Reinstatement to a work position?
6. Is the Complainant entitled to compensatory damages, attorney fees, and/or legal costs?

PARTY CONTENTIONS

Complainant's Contentions:

Complainant's counsel submits that the Complainant reported to the North Carolina Department of Transportation particular violations of federal regulations related to commercial vehicle safety of a particular P-500 package truck and advised Respondent's manager of the complaint during a second meeting with her in February 2006. He submits that Federal Regulations, Title 49, §§ 392.7 (parts and accessories necessary for safe operation), 393.207 (suspension), 393.209 (steering), 396.3(a)(1) (required parts), 396.7 (unsafe operations), 396.11 (inspection reports), and 396.13 (inspections) apply in this case. Counsel submits that the Complainant made the complaints when he expressed safety concerns related to the P-500 package truck assigned to the Complainant relating to the vehicle, pulling to one side without warning, the vehicle tracking erratically, poor suspension, and excessive noise. He submits that Complainant's report of the vehicle veering off to one side or the other relates to 49 CFR §392.7; the report about poor

suspension relates to 49 CFR §393.207; the report of difficulty controlling the P-500 package truck relates to 49 CFR §393.209; the report of unsafe to drive relates to 49 CFR §§ 396.3 and 396.7(a); and the report of excessive noise relates to 49 CFR §393.94.

Complainant's counsel argues that the Complainant submitted daily inspection reports to Respondent's mechanic on February 15, 16 and 17, 2006, concerning defects in the assigned P-500 package truck, and notified the manager of suspension defects during two meetings in February 2006. He submits the Respondent had actual knowledge of the safety complaints because the manager reported the mechanic said the vehicle was safe to drive. He also argues that the closeness in time between the report of safety concerns and the employment discharge supports the rebuttable presumption that the Complainant was discharged because of his protected activity.

Complainant's counsel argues that Respondent's articulated reason to discharge the Complainant for dishonesty with respect to his annual certification of driving offenses was a pretext for the discharge from employment. He submits that the manager originally thought the failure to record a speeding violation in the annual certification was an honest mistake when she fired the Complainant. He also submits that a similarly situated individual who failed to record a conviction for driving while intoxicated on the annual certification was retained in employment; thereby demonstrating that the Complainant was discharged because of his protected activity and not dishonesty on the annual certification alone.

Complainant's counsel requests that the Complainant be reinstated to his previous position with the seniority and benefits he would have received had he not been discharged on March 1, 2006. He requests back pay at the rate of \$1,074.89 per week from March 1, 2006 through the date of reinstatement; payment into the appropriate pension fund for contributions that would have been made from March 1, 2006 through the date of reinstatement; a compensatory damage award in the amount of \$50,000.00; interest on the back pay awarded; attorney fees and costs adjudged appropriate by the presiding Judge upon submission of a petition for attorney fees and costs; non-monetary relief in the form of requiring the Respondent to post a copy of any favorable Decision and Order in this case "at all its terminals for 90 consecutive days in all places where employee notices are customarily posted; and non-monetary relief in the form of requiring Respondent to "expunge all information related to his March 1, 2006 (discharge) from its files."

Employer's Contentions:

Employer's counsel argues that the Complainant's employment was terminated on March 1, 2006, for falsifying his annual Motor Vehicle Driver's Certification form (MVDC) by reporting no traffic violations in the previous year when he had actually been cited for a speeding traffic violation. The counsel argues that this was the third time the Complainant had been terminated for dishonest conduct; that the termination was not related to any retaliation for making safety complaints about a UPS package car; and that the Complainant was terminated for a legitimate and non-discriminatory reason in accordance with Article 50 of the UPS contract with the International Brotherhood of Teamsters (Union).

Employer's counsel submits that the Complainant received his MVDC form on January 6, 2006, and returned it to his supervisor the same day with the notation of "none" to indicate that he had not received any traffic citations the previous 12 months in 2005. He indicates that when the company's West Carolina District Health & Safety Department compared the Complainant's MVDC form with his Motor Vehicle Report from the state Department of Motor Vehicles, the Complainant had received a speeding ticket on February 14, 2005, and had been convicted of the speeding offense. This was followed by direction from the District Labor Manager and Health & Safety Manager by written memorandum of February 15, 2006, to each business manager to approach employees who had a violation in 2005 they failed to report on the MVDC form and to give warning notices to those "employees who came forward and were truthful about their previously unreported traffic violations" and that those employees "who do not volunteer their traffic violations that occurred in 2005 should be discharged for dishonesty and falsification of company documents." Counsel submits that the Complainant and another employee at the same facility had certified no violations in 2005 which was false since both had convictions for traffic violations in 2005.

Employer's counsel submits that the Complainant was approached on March 1, 2006, by supervisor Nieters regarding the MVDC form, again stated that he had not traffic violations to report, was advised by supervisor Nieters of the discrepancy, and was notified by supervisor Nieters his employment "was being terminated for dishonesty, falsifying records." Supervisor Nieters then drafted a termination letter and forwarded it to the District Labor Manager for approval. Counsel submits that the District Labor Manager had the final approval of the termination, that the District Labor Manager became aware that the Complainant's record indicated a 2001 termination for dishonesty for failure to report an accident which, was reduced to an unpaid suspension, and had a 2003 termination for "sheeting up" packages, which was reduced to a lengthy disciplinary suspension without pay with a written "final warning advising the [Complainant] that any behavior exhibited less than that of a model employee will subject him to immediate termination of employment." Following the record review, the District Labor Manager approved termination of the Complainant's employment.

Employer's counsel states that the Complainant noted that his assigned temporary replacement package car #508946 was "unsafe to drive, also rides so rough it hurts, bottoms out on the smallest bumps and holes [and is] also very loud inside driver's area" on the February 15, 2006, Driver Vehicle Inspection Report (DVIR). The same complaints were reported by the Complainant on the DVIRs completed on February 16, 2006 and February 17, 2006, which the Employer argues are unreasonable duplicates of the February 15, 2006 DVIR and are unprotected activity under the Act since the Employer investigated and acted upon the original DVIR. The Complainant did not refuse to drive package car #508946. Employer's counsel submits that the February 15, 2006 complaints were inspected and the inspection found all new parts in the front suspension and was safe to drive. The February 16, 2006 complaints were investigated and a new engine cover was put on in an attempt to reduce truck noise. The February 17, 2006 complaints were investigated and new tires were placed on the vehicle. In each detailed inspection and test drive, the truck was declared safe to drive by local mechanic Cox.

Employer's counsel argues that the Complainant only made generalized vehicle complaints in order to get his regular P-32 vehicle returned from the mechanic repair and failed make complaints about specific safety problem complaints about the assigned P-500 package car #508946 in order for the complaints to be found sufficient to relate to a violation of a commercial motor vehicle safety regulation and thereby amount to protected activity under the Act. He argues that the Complaint's three written February 2006 DVIRs provide "no indication that [the Complainant] believed UPS was in violation of any specific regulation and suggests instead that [his] complaints were about personal comfort" which "do not constitute 'complaints' that are 'filed' within the meaning of the STAA."

Employer's counsel argues that District Labor Manager Vinkler, not local supervisor Nieters, was the person with the decision making authority to terminate Complainant's employment; that it was District Labor Manager Vinkler who directed supervisor Nieters to terminate the Complainant and another employee if they didn't correct their MVDC form for 2005 traffic violations; and that District Labor Manager Vinkler was unaware of the Complainant's three DVIRs, safety grievances, or any complaint to the North Carolina Department of Transportation, at the time he made the decision to terminate the Complainant for dishonesty. Counsel argues that supervisor Nieters' notification on March 1, 2006 that the Complainant was terminated for dishonesty was the beginning of the termination process since she was required to submit a written draft termination letter with a "Termination Letter Request" to company management and that the Division Manager, District Manager and District Labor Manager were all required to approve the termination, with the District Labor Manager having the final decision on termination. Counsel submits that the District Labor Manager stood by his decision to terminate the Complainant at a March 2006 local union panel hearing and again at a May 2006 Teamsters' Atlantic Area Parcel Grievance Committee, where the District Labor Manager remained unaware of the Complainant's prior February 2006 DVIRs, safety grievances, or any complaint to the North Carolina Department of Transportation.

Employer's counsel submits that the District Labor Manager and District Director advised the supervisors by memorandum of February 15, 2006, to approach each employee with a MVDC discrepancy and terminate those employees who were not truthful about 2005 traffic convictions. He argues that this direction from district level management was without any knowledge of the Complainant's February 15, 16 or 17, 2006 DVIRs and therefore the proximity of time between the February 2006 DVIRs and the Complainant's March 1, 2006, employment termination does not cause an inference of causation. He argues that the March 1, 2006, actions by the Complainant in affirming his 2005 driving record as being without any traffic convictions, when confronted by supervisor Nieters, was a dishonest act occurring after the February 2006 DVIRs that justified the Complainant's termination and severed any causal link between the Complainant's reports and his termination.

Employer's counsel submits that the Complainant was treated the same as similarly situated individuals. He reports that both of the employees approached by supervisor Nieters on March 1, 2006 about discrepancies on their MVDC form for 2005 traffic violations were addressed the same day, in the same manner, and ended in termination notice from supervisor Nieters. He reports that three other employees who made the same or similar DVIRs complaints on P-500 #508946 had their complaints addressed in ways similar to the Complainant's DVIRs and were

not terminated. He also reports that UPS did not discipline or discharge any drivers, including the Complainant, who had refused to drive an assigned package vehicle for safety-related issues. He argues that the Complainant has failed to demonstrate that he was discriminated against for protected activity.

Employer's counsel argues that the Complainant was terminated for legitimate reasons – that is for a third dishonesty event in a five year time-span, which was compounded when he failed to correct the false January 6, 2006 MVDC form on March 1, 2006 when confronted by supervisor Nieters. He argues that such dishonesty is a “cardinal sin” which is punishable by immediate termination.

The Employer seeks to have the complaint denied.

SUMMARY OF RELEVANT EVIDENCE

Testimony of Complainant (TR 23 – 117)

The Complainant testified that he graduated from high school in Wilkesboro, North Carolina and attended two years of college at Wilkes Community College and then studies in management at Appalachian State University where he received a degree in business administration. After graduation he worked as the assistant production manager for Ithaca Industries for three years. He then began work for UPS (United Parcel Service) in 1983 as a part-time package car driver. In 1985 he began full-time work as a package car driver, a position he held while employed by UPS. He stated that as a package car driver his day started at 8:30 AM with a pre-communications meeting (PCM) at the service hub where packages are loaded and unloaded onto the vehicles. The PCM is where the supervisor would inform the drivers of different things before going out for deliveries. After the PCM, the driver finishes loading the truck and then does a three to five minute pre-trip examination of the vehicle to check tire pressure, lights, signals, horn and things. The driver would then leave the terminal and drive the route to deliver and pick-up packages. He reported the same route was “pretty much” driven every day and that routes were determined by seniority of those drivers who would bid a route.

The Complainant reported he is married with two daughters, ages 19 and 2 years old, and twin sons, 11 years old.

The Complainant testified that the Teamsters, Local 61, is the union for the UPS package car drivers. He stated that he has been a member of the Teamsters since joining UPS. He reported that safe driving awards can be received for each year of driving and that he has received safe driving awards from UPS in the past.

The Complainant testified that in 2001 there was an incident where he was at a customer's house to deliver a package and he “tapped the [customer's] mailbox with the back corner of the bumper.” He reported he stopped the vehicle, checked the mailbox, found no damage on the

truck or mailbox, and then continued his daily route. He testified that the next day his center manager, D. Weston, informed him that someone called in about his hitting a mailbox and that he had failed to report the incident. The Complainant reported he was suspended for five days without pay for being “dishonest” but he didn’t remember what the dishonesty issue was about.

The Complainant testified that in 2003 there was another event about being dishonest. That time he was on his route, had a lot of delays, was very far behind, and was not going to have enough time to deliver all the packages that day. He reported that when he notified his supervisor that he would not be able to make all his deliveries he was advised that there was no one available to help him and that he should do the best he could. He stated that he “sheeted up” the packages he could not deliver in time with either “not in” or “incomplete address” so the packages would not reflect that the delivery was “missed.” For this event he testified that his employment was terminated, a local grievance meeting on his behalf by the union representative resulted in his grievance going to the Atlantic Area Grievance Panel where the termination was changed to five months suspension without pay. He stated that he did not consider what he did as dishonest since he was doing what he had been advised to do in the past by supervisors and he received no benefit from “sheeting up” the packages.

The Complainant testified that for most of his career with UPS he drove the P-500 package car and that towards the end of his employment he would only drive the P-500 package car if his own assigned package car was out of service. The Complainant described the P-500 package car as being unsafe to drive, that the vehicle would go to one side or the other for no reason or when a bump in the road was hit, that the vehicle would skid if you braked on the painted lines when the road was wet.

The Complainant identified JX 10, page 1, as a vehicle inspection report he signed and filed with the mechanic on February 15, 2006, because he felt the vehicle was unsafe after his morning inspection of the vehicle. He reported the vehicle as “unsafe to drive, also rides so rough it hurts, bottoms out on the smallest bumps and holes, also very loud inside driver’s area.” He stated JX 10, page 2, was a vehicle report he gave the mechanic on February 16, 2006, stating that the vehicle was “unsafe to drive, rides very rough, bottoms out, loud inside driver’s area.” He considered the vehicle unsafe because he would not be in control of the vehicle when it would “just veer off one direction or the other without my control.” He reported that the noise was “just deafening.” He reported that the mechanic advised him that he would try to fix the items reported. The Complainant identified JX 10, page 3, as the vehicle inspection report he filled out on February 17, 2006, where he reported the vehicle was “unsafe, bottoms out all the time, very loud.” He stated the vehicle was “unsafe” because “it had a tendency to veer in one direction or the other.” He stated that all three vehicle inspection reports involved package car #508946. The Complainant testified that he did not report the problems about the vehicle to anyone else in UPS other than the company mechanic, and that he did talk to the North Carolina Department of Transportation about the unsafe vehicle and was advised to just document everything in case there was an accident.

The Complainant reported that he subsequently filed a grievance through the union Local 61 to notify someone other than the mechanic about the safety problems with the P-500 package car #508946. He stated that CX 2 was that grievance and that he had completed the form and given

it to his union steward, J. Sturgill, on February 17, 2006. The Complainant testified that he used the form to report the vehicle as unsafe because it would veer uncontrollably at times and the loud noise would affect your hearing. He testified that he was called up to the office by the union steward sometime between February 17, 2006 and March 1, 2006, where the manager, D. Nieters, told him “that she could do nothing else for the truck.” He stated that he told the manager about his call to the North Carolina Department of Transportation but could not remember what her response was beyond “fine.”

The Complainant identified JX 1 as the Motor Vehicle Driver Certification form (MVDC) that is used to list any traffic violations received in the past twelve months while driving any vehicle, even the personal car. It is filled out once a year at the beginning of the year. The Complainant testified that JX 1 is the MVDC he filled out January 6, 2006, at the morning meeting and indicated “none” to represent that he had not received any traffic violations in the previous twelve months. He stated that this was not a correct entry because he had received a traffic ticket February 14, 2005.

The Complainant testified that he came to work March 1, 2006, and was accompanied by his union steward, J. Sturgill, to a meeting with his supervisor, T. Ward and the business manager, D. Nieters. He testified that he walked into the meeting and was told he was being terminated without any prior discussion. When he asked why he was being terminated he was told for dishonesty. He reported he asked what was dishonest and was told by Ms. Nieters that he had put down on his January 6, 2006 MVDC that he had no traffic tickets when a check of DMV records indicated he had received a speeding ticket in February 2005. The Complainant testified that he had forgotten about the speeding ticket when he completed the MVDC and that his failure to list it on the MVDC form was an honest mistake. He reported that he was not given an opportunity on March 1, 2006, to correct the error on the MVDC form and that he did not request to correct the MVDC form.

The Complainant testified that he notified the local union representative, T. Kiser, that he had been terminated and a local level meeting was set up for a few weeks later. At the local level meeting Mr. J. Vinkler and Ms. D. Nieters were present. The Complainant stated he was asked why he did not put the ticket on the MVDC form and why he did not change the form when given an opportunity to correct the form. He reported that at the local level meeting was the first time he heard he could have an opportunity to correct the MVDC form. He stated that Ms. Nieters reported that “No, he was not present that day” when asked if the Complainant had an opportunity to correct the MVDC form. He stated that the grievance was not settled at the local level and it went to the Atlantic Area Grievance Panel. The Complainant testified that the Atlantic Area Grievance Panel was composed of three members from the Teamsters’ Union and that the decision to terminate the Complainant was upheld.

The Complainant testified that after being terminated he sold his house in Wilkesboro, moved his family into a small rental, and continued to look for employment; but, he couldn’t find any work. He subsequently moved to Rockledge, Florida, and began working at Window World selling replacement windows for a company partly owned by his wife. He reported that the construction business is slow now and business has been slow with no profit in the business yet. The

Complainant identified CX 6 as copies of his income statements for 2004 and 2005 while working for UPS.

The Complainant testified that he was seeking reinstatement to his job in Wilkesboro with UPS, back pay from UPS, interest on the back pay, payment of legal fees, and compensation for the emotional damages incurred.

The Complainant testified that receiving a traffic ticket would not create a problem with UPS but something that would cause a loss of license, like a DUI, would be a problem with UPS. The Complainant testified that the speeding ticket he received involved driving 55 MPH in a 45 MPH speed zone while on the way to Boone, North Carolina, with his father.

The Complainant testified that the words in the grievance CX 2, "There's a big difference out on a rural route like mine" means that "there's more opportunity, the rough roads I'm on, to have an accident because you've got more bumps and holes. The kind of rural route that I drive can throw you, you know, out in one direction or the other." He reported that the rural roads are paved; but that some roads are gravel and dirt.

On cross-examination, the Complainant testified that Ms. Nieters was the Center Manager who discharged him in March 2006, that she was not antagonistic towards him, and that she was professional and business-like during the meeting over the filed grievance. He stated that the MVDC, JX 1 form, was distributed at the pre-work communications meeting, that he filled it out, and that he understood that by signing the form he was certifying that the information was true and correct. He reported that he had completed a similar MVDC form every January while he drove for UPS.

The Complainant testified that he did not remember Ms. Nieters asking if the MVDC form was correct at the time he was told his employment was terminated. The Complainant reviewed his deposition testimony, JX 15 at pages 103 to 105, concerning his prior statement that after he was told his employment was terminated for dishonesty, Ms. Nieters asked about remembering filling out the NVDC form, that he did not list his February ticket, and that he had simply forgotten he had received a ticket within twelve months. He testified that Ms. Nieters had asked him if he remembered filling out the MVDC form, had indicated on the MVDC form that he had not received any tickets in twelve months, and that she subsequently told him she was aware of a ticket within the twelve month period. He reported that the conversation with Ms. Nieters took place with his Union Steward present.

The Complainant testified that he was terminated from UPS in 2001 for dishonesty involving failure to report on striking a customer's mailbox; but that it was downgraded to a suspension. He reported that he was terminated by UPS in 2003 for falsifying company records by indicating undelivered packages had incomplete addresses or the customer was not home when he didn't have time to get to the delivery. He stated that this termination was reviewed at a Panel level and was reduced to a severe suspension and was told at that time that any behavior less than that of a model employee would subject him to immediate termination of employment.

The Complainant testified that he had a brief discussion about the grievance he filed concerning the package car with Ms. Nieters when Mr. Sturgill was present. He reported that Ms. Nieters stated either she had discussed, or would discuss the matter with the mechanic. He stated that he is not a mechanic but that when “something’s so bad its veering off the road ... at any time ... I know for a fact there’s something wrong ... not that I know what the problem is.” He reported that he had no reason not to believe that the mechanic was dishonest when he noted on the vehicle reports that he had checked out the vehicle after the complaint was filed. He stated that he put down “unsafe to drive” on the vehicle inspection reports to mean “veering all over the road.” The Complainant testified that when he drove over the same roads on his assigned route, his personal vehicle would not veer over the road like the package car did when a bump or hole was hit. He testified that he thought about refusing to drive the package car for being unsafe but that he did not refuse to drive because he “figured if you refuse to drive [there’s] a good chance you’d be terminated” even though he had refused to drive on an icy day and was not terminated or disciplined in any way.

The Complainant testified that his regularly assigned vehicle had an automatic transmission, power steering, was quieter, had a smoother ride and was more comfortable than the replacement P-500 package car. He reported the P-500 package car had a manual transmission and manual steering. He reported that he did not recall any concern about injuring his knee from problems with the P-500 package car. He stated that “in order to save his job” he might take a vehicle on the road that might put others at risk. But that the company kept putting the P-500 “out there for us to drive” so that they must have believed it was safe. He testified that other drivers who drove the particular P-500 truck had also complained about bumpy ride, being loud and being uncomfortable to drive.

The Complainant testified that he appealed his March 2006 employment termination through union procedures of a local meeting and a subsequent panel. He reported that he did not remember raising any issue at those proceedings about being terminated for making any safety complaints about vehicles. He also did not mention such an issue with his union steward, Mr. Sturgill. He stated that he probably raised the safety complaint issue with the union business manager, Mr. Kiser. He stated that he did not appeal the grievance of the P-500 car repairs after his discussion with Ms. Nieters, nor discuss it further with Mr. Sturgill or Mr. Kiser.

The Complainant testified that he had filed a complaint with the Equal Employment Opportunity Commission in which he alleged that his employment had been terminated in March 2006 because of his age. He stated that at one time he believed his termination had been due to his age but that now he did not think age was an issue.

On re-direct examination, the Complainant testified that Ms. Nieters had not been working at the center very long before his employment was terminated. He stated that he did not know her that well and only saw her at work. With regard to the 2003 disciplinary action for “sheeting up” packages, he believed he was to do his best job which meant “deliver as many packages as I could and bring the other ones back, sheet them up as missed [or] something other than missed.” He stated that the statement he prepared for the Panel, EX 23, about the 2003 termination was drafted to get his job back even though he felt he had done “what I’d been informed to do in the past” and was nothing wrong with what he had done then.

The Complainant testified that he filed the vehicle inspection reports in JX 10 with the mechanic, Mr. Cox, and that he had talked to him many times about the P-500 package car. He reported the “bottoming out” in the report means that “it feels like the bottom of the truck is hitting the ground” and is unsafe because it can throw you or throw the truck out uncontrollably. If you hit a pothole the truck would have a tendency to jerk or veer one way or the other.

The Complainant testified that the time he told the supervisors he was not going to drive because of safety concerns over the icy conditions of the road, he had told T. Ward about his concerns. He reported that it was his idea not to drive that day because of the icy conditions and difficulties he had driving to work in his personal vehicle.

The Complainant testified that the Grievance Panel reviewing the March 2006 employment termination was considering whether to uphold the termination. He stated he had no idea if they were looking at safety issues.

On re-cross examination, the Complainant testified that he did not recall if he raised as a defense that he was told to falsify records (by sheeting up packages) in the 2003 termination review. He reported that he talked many times with Mr. Cox about the safety of vehicles but could not recall when those times were. He stated that he did not recall discussing the particular P-500 package truck in the February 2006 inspection reports with Mr. Cox, the mechanic.

Upon examination by this Administrative Law Judge, the Complainant testified that he was driving his regularly assigned package car with automatic transmission and power steering until it was taken out of service on February 14, 2006, when he was assigned the P-500 package car. He stated he did not recall why the regular vehicle was taken out of service and did not recall how long he drove the P-500 vehicle. He reported that he completed the vehicle inspection reports in February 2006 after he got back from his trips as part of the “finishing up process.” He reported that he gave the February 2006 grievance on the P-500 package car to his union steward, Mr. Sturgill, most likely at the end of the workday. He stated that a few days before he filed the February 2006 grievance he had called the North Carolina Department of Transportation about the safety of the P-500 package car and that when he told Ms. Nieters that he had notified the state she said “fine.”

Testimony of W. Sexton (TR 117 – 131)

Mr. W. Sexton testified that he has been employed by UPS for approximately 29-1/2 years at the Wilkesboro, North Carolina, service center. He reported a high school education, some college courses, and works part-time as a paramedic. He stated that he was a package car driver for 17 to 19 years before becoming a feeder driver of tractor trailers at night between UPS sort centers. He stated that he is a member of Teamsters Local 61 and was a shop steward for 22 to 23 years before being elected to the Executive Board, where he has served as a trustee, recording secretary, vice president and then president.

Mr. Sexton testified that he started as a driver for UPS with the smaller P-300 package cars and then the P-400s and the P-500s, which he drove for about ten years. He reported that the P-500

package cars came to the Wilkesboro facility about 15 years ago. He stated that the P-500s had been used by other service centers before coming to the Wilkesboro facility and “they were pretty well worn when we got them.” He reported the P-500s run for a long time and that the Wilkesboro center still gets them from the larger centers, such as Greensboro and Charlotte. He stated that the P-500 didn’t handle very well, were top-heavy, had a lot of air holes in them that would cause a lot of dust going down dirt roads. He reported that he was unaware of any frame problems with the P-500, though he had heard stories about frame problems. When the roads were wet you had to be careful with the P-500 brakes since the P-500 was light and if you hit a spot like a wet painted line the car could slide around and get sideways. The car would break traction fairly easily so you had to be careful hitting the brakes. A driver also had to be careful on gravel and dirt roads because the P-500 could get around on you in a hurry. He reported it took awhile for a driver “to become adaptable to the P-500 so you could reduce the risk by being real careful.” After driving awhile you got the feel of the P-500 and knew what you could and couldn’t do over your regular route. He stated that in package cars drivers were in the same unit every day. He stated that there were times, like peak season, that the vehicles would be switched around and that it was fair to say that it would take a little time to get use to a different vehicle. Mr. Sexton stated that it took a while to get use to the P-500 because they feel different than other vehicles, they’re light unloaded for posted speed limits, they’re really worn with too much free play in the loose steering. He reported that the P-500 wanders and veers so that you have to continually stay on top of the vehicle. He stated that the P-500 is noisy with everything rattling and banging on the shelves and a lot of engine noise. He reported his opinion that the noise level was a safety issue since you can’t here a siren or horn blowing so you have to check your mirrors.

Mr. Sexton testified that to him “bottoming out” meant the vehicle went all the way down against the shock because the shocks are worn. He considered that to make the P-500 unstable and affects the ride and keeps you off balance when sitting at the wheel.

Mr. Sexton testified that in 2006 there were 30 to 35 package car drivers in the Wilkesboro service center. He stated that as a union steward or union official he has represented union members in a couple of hundred grievance disputes. This included local level members who were discharged for dishonesty, including stealing, intentionally falsifying records, and lying. Most of the time, the disputes were settled without actually discharging the union member. If a grievance is not settled at the local level it can be taken to a panel.

Mr. Sexton testified that as a driver for UPS he has completed the annual certification concerning driving infractions the previous year about 29 times. He reported that getting a speeding ticket in a personal vehicle would not affect employment with UPS.

There were no questions posed to Mr. Sexton for cross-examination.

Testimony of J. Sturgill (TR 131 – 154)

Mr. J. Sturgill testified that he is a UPS employee and has been at the Wilkesboro service center approximately 11 years, first as a pre-loader and as a full-time package car driver the past two years. He reported that he is the designated local union shop steward in Wilkesboro.

Mr. Sturgill testified that considers the P-500 safe to operate depending on the road conditions and how fast the driver is willing to go on those roads. He stated that the official speed limit is the route speed endorsed by UPS but with the workload you can't drive the safe speed a lot of the time. For the P-500 small gravel roads are really bad because the P-500 basically has no suspension and when you hit bumps the wheels lose traction and packages come off the shelves from the bouncing so you have to slow down. When the roads are wet you have to really cut back on the speed because they are more apt to slide when entering a turn. It takes a period of time to get use to an assigned P-500 because everyone is unique due to different tire wear, different front-end settings, alignment, age and mileage. With new tires and alignment the P-500 is pretty decent, but as the tires wear and you hit bumps and knock the front-end out of alignment, they get harder to drive. The rougher the road the slower you have to drive.

Mr. Sturgill identified CX 2 as a grievance that the Complainant had filed. He reported that the Complainant was called into Ms. Nieters office, with him present as the union representative, and Ms. Nieters told the Complainant that he was over his allotted time for driving routes and that he would have to drive faster. The Complainant advised Ms. Nieters that his regular vehicle was in the body shop and that he had to drive slower in the P-500 because of the bumps and suspension being rough and that the vehicle was unsafe because of the suspension. Ms. Nieters then reminded the Complainant that he needed to pick up his pace, he had numbers to meet, and he would need to drive faster if that is what it took. He stated that, in return, the Complainant approached him and wanted to file a complaint about an unsafe vehicle; he provided a grievance form and received the completed form back from the Complainant. He signed the grievance as the union steward and gave the completed form to the center manager, D. Nieters. He reported he discussed the grievance with the Complainant when he received the form back and stated to the Complainant that he was "not sure that we can file a grievance just because the car rides rough, because they all ride rough" and that he did not know if it was a valid grievance; but that the Complainant had the right to file it. When he gave the grievance to Ms. Nieters he told her the same thing, that "we've all driven P-500s and they don't drive good." He reported that Ms. Nieters told him that the center's mechanic, Mr. T. Cox, had reported the vehicle safe to drive and she didn't know what the Complainant was fussing about.

Mr. Sturgill testified that on one occasion he was driving a P-800 vehicle and the muffler and tailpipe fell off. He picked up the pieces and took them back to the center; but the vehicle went months before the exhaust was repaired. "That was really not an issue in the summertime because you could drive with the doors open and you get ventilation. But once it started getting cold and you had to close the doors, then you started getting fumes." He reported Mr. Cox stated he didn't smell anything and was not going to put a muffler on the vehicle. He stated that he eventually refused to drive the vehicle and switched his load to another vehicle.

Mr. Sturgill identified CX 5, page 18, as his statement of events of March 1, 2006; reviewed the document; reported the contents as true and accurate; and adopted the document as his testimony in the case.

Mr. Sturgill testified that another driver, Mr. J. Denny, had also been terminated at the time of the Complainant on March 1, 2006. He stated that Mr. T. Ward advised him to set up a local hearing to get Mr. Denny back and that he did not care about the Complainant coming back. He reported that Mr. Denny had been fired for falsifying his report of driving record the prior year by failing to list a DUI. He reported his understanding that with a DUI you lose your driver's license and you can't drive for UPS without a driver's license. He reported that Mr. Denny drove package cars for several months without a license because UPS was unaware his license was suspended. Mr. Denny was subsequently returned to work after he went to the Regional Grievance Panel but was later discharged when he failed to complete the prescribed program for his alcoholism.

Mr. Sturgill testified that at the meeting on March 1, 2006, when the Complainant was terminated, he, Ms. Nieters, Mr. T. Ward and the Complainant were present. He stated that when he first arrived at the center he was called to the office and met with Ms. Nieters and T. Ward. When he went to the office he was told by Ms. Nieters that there would be two terminations for dishonesty in falsifying their MVDC report. The individual concerned were the Complainant and Mr. J. Denny. He stated that JX 6 did not correctly set forth the sequence of events at the March 1, 2006, meeting with the Complainant and Ms. Nieters and Mr. Ward. He testified that when the Complainant was brought into the meeting he was not asked if he had anything to tell Ms. Nieters or Mr. Ward but they proceeded directly to the termination. He was not given an opportunity to explain the MVDC form until after told he was terminated.

Mr. Sturgill testified that he had heard of the term "sheeting a package." The term refers to the actions at delivery where the hand-held Diad Board is used to scan the package and enter in the computer what was done with the package. He stated that he had never received instructions to enter packages as having bad addresses, incomplete addresses, or nobody home when he couldn't make a delivery. He also reported that he had never represented a union member claiming to have received such instructions.

On cross-examination, Mr. Sturgill testified that he "[did not] think that the Complainant's one grievance had anything to do with his termination [and] it may have been a combination of a career of grievances." He reported that he was unaware of any other grievances from the Complainant that were based on safety issues. He stated that the Complainant's grievance on the P-500 included it being uncomfortable; but, he had no recollection of a complaint concerning the Complainant's knees.

Mr. Sturgill testified that the one time he had refused to drive a vehicle because of the exhaust system, the on-car supervisor, T. Ward took the vehicle and had it repaired the same day by someone other than the center's mechanic.

Mr. Sturgill testified that during the termination meetings on March 1, 2006, neither the Complainant nor Mr. Denny were given an opportunity by Ms. Nieters to correct their respective

MVDC forms. He reported that Mr. Denny was a good employee and known as a team player. He stated the Complainant was not known as a similar team player.

On re-direct examination, Mr. Sturgill testified that the Complainant's grievance on the P-500 might have been "the straw that broke the camel's back [with] respect to [the Complainant's] discharge." He reported that if a mechanic has stated a P-500 is safe to drive and a driver refuses to drive, not a lot is going to happen because there are usually a lot of other vehicles to drive and the driver only has to move the packages to the other vehicle. If there is not another vehicle available to drive, there may be ramifications.

Upon examination by this Administrative Law Judge, Mr. Sturgill testified that the sequence of events for the day the Complainant filed his grievance about the P-500 being unsafe was (1) that after the morning PCM meeting, there was a meeting with Ms. Nieters about the length of time it took him to drive his route and the Complainant's response that he had to drive slower because of the P-500's safety; (2) that the Complainant asked for a grievance form after we left the meeting; (3) that he gave the Complainant the grievance form probably the same day as the meeting before the Complainant went out on his deliveries; and (4) that the Complainant gave the completed form back a day or two later.

Testimony of D. Nieters (TR 154 – 185; 286 - 291)

Ms. D. Nieters was called as an adverse witness by the Complainant's counsel and testified on cross-examination that she is the business manager for the UPS at Wilkesboro and that she was the individual who discharged the Complainant. At the time she discharged the Complainant she had been at the Wilkesboro service center from February 13, 2006. She stated that she now works in Charlotte, North Carolina.

Ms. Nieters testified that as business manager of Wilkesboro she was responsible for overseeing the operations at the center. The Wilkesboro center is a smaller center in the West Carolina District of UPS. Her immediate supervisor when she was in Wilkesboro was Mr. C. Stephenson. She identified Mr. J. Vinkler as the District Labor Manager and not one of her supervisors. Ms. Nieters identified JX 4 as a letter signed by Mr. Vinkler's secretary but issued by her authority as the Wilkesboro business manager.

Ms. Nieters testified that she discharged the Complainant for dishonesty. She stated that she was the business manager of the Wilkesboro and Statesville the first week she managed Wilkesboro so she is not certain whether February 15, 2006, is the exact date she learned the Complainant failed to list a speeding ticket on his annual MVDC certification form for UPS. Ms. Nieters identified JX 3 as a letter she received from MR. Vinkler. She was notified that the Complainant and Mr. Denny had errors on their respective MVDC forms. Mr. Denny had failed to list a citation for DUI. She reported that employees with a DUI are not permitted to drive for UPS without a license. She stated that Mr. Denny did drive for UPS without a license but was taken out of service the day he was terminated. The Complainant's error was failure to report a citation for speeding.

Ms. Nieters testified that there was a grievance from the Complainant with her signature on it but she did not remember signing the grievance. Nor did she remember talking to the Complainant about an unsafe P-500 package car. She identified CX 2 as a complaint from the Complainant. She testified that she did not remember the grievance or talking to the local union steward, Mr. Sturgill. She also denied memory of discussions with the Complainant or Mr. Sturgill about an unsafe package car. She denied any memory of discussing a P-500 package car condition with the center mechanic. She correctly identified the Complainant in the courtroom from her dealings with him in the termination and panel review process.

Ms. Nieters testified that she has been in management with UPS for ten years and had been a package car driver in Charlotte, North Carolina, for five years. She drove the P-500 package car. She reported that there are some cars older than the P-500 in the UPS fleet. She reported that as a driver she had completed annual MVDC forms and had to report a personal speeding citation. She noted that a speeding ticket is no important as having a valid driver's license. She reported that the Complainant would suffer no adverse action to pay or employment had he reported the speeding ticket. She reported the Complainant's speeding ticket was 11 months old at the time the Complainant completed his MVDC form. Ms. Nieters acknowledged the letter form J. Tullis and J. Vinkler and the notation that the listed employees had traffic violations in 2005 and that the consequences of falsifying the MVDC was to be addressed at a pre-work communications meeting. She did not recall if the consequences of a false MVDC form were addressed at a PCM or not.

Ms. Nieters testified that a local level hearing is a review of a grievance between the employee and UPS without testimony under oath. At the Complainant's local hearing after termination, Mr. T. Kiser and Mr. J. Vinkler were present. She reported that because of the form she received, she gave the Complainant and Mr. Denny opportunity to say whether they remembered filing out their respective MVDC form and whether the information was correct. The Complainant remembered filing out the form and stated the information was correct. Ms. Nieters testified that she then informed the Complainant "It's not correct, you have a violation against it and at this point I'm going to terminate you for dishonesty." She reported that at that point, during the termination meeting, she believed "maybe he made a mistake." She stated that at the local level hearing the Complainant could remember great detail about the speeding ticket and at that point, as well as having reviewed the Complainant's prior records of dishonesty, she "realized that, yes, it could be the fact that he was dishonest on it." She testified that "I'm saying that everybody makes mistakes [and] I thought it was an honest mistake going in until the local hearing where, after discovering his background of being dishonest for two prior dishonesties, then at that point I felt that he was being dishonest." She reported the local level hearing was at the end of March. Ms. Nieters testified that when she fired the Complainant on March 1, 2006, she thought the Complainant had made a mistake and was not dishonest. She reported that it is a cardinal sin at UPS to falsify documentation so that termination is automatic. She described falsification of records and integrity issues as being cardinal sins with UPS and under the collective bargaining agreement with the union there were cardinal sins and lesser graduated infractions. She reported that she did not get DVIRs which went straight to the mechanic and she was unaware that the Complainant had filed inspection reports concerning an unsafe package car when she terminated the Complainant's employment.

Ms. Nieters testified that Mr. Denny was terminated on March 1, 2006 and hired back sometime after the local level hearing to work part-time as an inside worker.

On direct examination Ms. Nieters testified that she participated in the local level hearing involving Mr. Denny and that Mr. Denny had told his supervisor, T. Ward, at UPS of his DUI in October or November the prior year and management was not aware the DUI had been reported to Mr. Ward. When management checked with Mr. Ward it was confirmed that the supervisor knew of the DUI and it was felt that Mr. Denny should be brought back to work. Mr. Denny was a good employee, didn't have any past record, and did everything that was asked of him.

Ms. Nieters testified that she did not terminate Complainant's employment for complaining about any unsafe package car.

On re-cross examination, Ms. Nieters testified that Mr. Ward knew of the DUI but never questioned Mr. Denny about whether he still had a driver's license. She did talk with Mr. Ward about how the DUI report should have been handled after Mr. Denny's local level hearing. She reported that at the time she terminated Mr. Denny's employment on March 1, 2006, she knew of the completed MVDC form which did not list a DUI citation and of the DMV report of a September 2005 DUI citation. She stated that she felt that Mr. Denny had lied on the MVDC form at that time.

When recalled the second day of the hearing, Ms. Nieters testified that on March 1, 2006, when she discharged the Complainant she believed that the Complainant had "made an honest mistake in omitting [the speeding] infraction from his [MVDC] form." She reported that she fired the Complainant at that time because she had received written instruction from Mr. Vinkler "that if given the opportunity to correct the form and they didn't, at that point we were to terminate him for falsification of records." She reported that subsequently she went through the Complainant's record and found two prior terminations. Additionally, at the local level hearing she realized that the Complainant "could remember great details of the speeding ticket, that it was really that he was trying to be dishonest with it and not come out with the truth of it."

On cross-examination Ms. Nieters testified that the memorandum she referred to about giving a chance to correct the MVDC and then firing the employee if a correction is not made was issued by J. Tillis and J. Vinkler who are not her bosses. She reported that she was the top official at the Wilkesboro UPS center.

In response to questions from this Administrative Law Judge, Ms. Nieters testified that JX 3 is the memorandum from J. Tullis and J. Vinkler that she addressed in testimony. She reported that she had ten days after notifying an employee of disciplinary action to review the employee's file, supply current information to the labor department and to issue a warning, suspension or termination letter. She stated that she went through the Complainant's file after the March 1, 2006, discharge meeting. She identified EX 29 as the sheet of paper used to request the labor department issue a termination letter and the second sheet of paper is a termination letter. The papers go from Ms. Nieters to her manager for approval, then to Mr. Vinkler for approval, and then it is issued to the employee by certified mail. She identified JX 4 as the final letter that was sent out from Mr. Vinkler's office to the Complainant by certified mail. She reported that when

she notified the Complainant verbally on March 1, 2006, that he was terminated, he left the property. Had Mr. Vinkler decided not to terminate the Complainant, he would have been brought back to work.

Testimony of J. Vinkler (TR 188 – 225)

Mr. J. Vinkler testified that he has been employed by UPS since 1978 and had worked as a package car driver, feeder tractor-trailer supervisor and trainer, labor negotiations, hub manager, feeder manager, and transportation manager before going into a labor relation manager position in Philadelphia in 1997. He was transferred to South Carolina District Labor Relations Manager position in 1999, transferred to the East Bay District in California and Labor Relations Manager, and then to the West Carolina District Labor Relations Manager in 2004. He stated that the West Carolina District includes Charlotte, Greensboro, Wilkesboro, and the area to the Tennessee and Georgia borders.

Mr. Vinkler identified JX 3 as a memo put out jointly by the Health and Safety and Labor Relations departments of UPS regarding the annual MVDCs that are sent out in January each year. The memo basically sends out the annual MVDC forms to the UPS centers with the names of the drivers on their respective form. The forms are distributed at an early January PCM meeting to fill out and list moving violations for the prior year, here 2005. Parking violations need not be listed. The center collects the completed forms and sends them back to Ms. J. Tullis in the Health and Safety Department. The Health and Safety Department separates the completed forms to make sure that those with listed violations are not driving with an invalid driver's license and that those with DUI/DWI notations are handled in accordance with the collective bargaining agreement.

Mr. Vinkler testified that a memo was issued for the past three years when an employee has indicated that he had no prior violations on his MVDC form and the District office found that the driver did have a violation. The memo was to the center manager and directed to hold a PCM meeting about the consequences of falsifying the MVDC, give the employees the opportunity to come forward and correct their MVDC after the PCM meeting, to issue a warning to the employees who correct their MVDC forms and to terminate those who do not volunteer their 2005 violations for dishonesty and falsification of company records. The annual certification is to ensure the commercial drivers have a valid driver license and to comply with DOT regulations on an annual basis. He reported he authored the memorandum on handling the MVDC report discrepancies but that the memo was sent out by the Health and Safety Committee.

Mr. Vinkler testified that he subsequently learned, from either D. Nieters or C. Stephenson, of two employees at the Wilkesboro center who had not correctly filled out their annual MVDC form. He reported that Ms. Nieters ultimately terminated the Complainant. He stated that he believed he had a conversation with Ms. Nieters before the Complainant was terminated and that the conversation included that all employees should be given an opportunity to correct the MVDC and not just go out and fire people. It did not matter whether the opportunity was given at a PCM meeting or at individual meetings. Subsequent to the termination, Mr. Vinkler was contacted by the union to set up a local level hearing. He reviewed the disciplinary records of

the two employees involved and noted the Complainant had two prior discharge actions for dishonesty and that the 2003 dishonesty event had gone to the Labor Panel and resulted in a final warning. He reported that progressive discipline was not required for a cardinal sin which was considered one of the four or five listed offenses set forth in Article 40 of the labor agreement. Dishonesty was one of the listed offenses.

Mr. Vinkler testified that any disciplinary letters are sent from the center manager to the division manager who then sends it to the district labor relations department if the action is approved at the division level. Mr. Vinkler then makes the final approval and sends it to his clerk, P. Phillips, who types up the letter, signs it and sends it out by certified mail. He reviewed the validity of the termination and believed they were valid dishonesty discharges. At the time he approved the termination letters he was unaware of any safety complaints by the Complainant and was unaware that the Complainant had stated he had made a complaint with the North Carolina Department of Transportation. He reported that after the termination letters go out, the union gets to file a grievance for a local level hearing.

Mr. Vinkler testified that he participated in the Complainant's local level hearing involving his March 2006 termination. The Complainant, Ms. Nieters, Mr. T. Kiser and Mr. C. Stephenson were present at the local level hearing. To prepare for the hearing, he copied the DOT report, the MVDC, and what was on file. He also found out about the two previous discharges, one in 2001 for not reporting an accident, that was changed to a suspension, and the other in 2003 for falsifying company records involving delivery stops not made and addresses he reported as no such numbers when he had previously delivered to the addresses, that was changed at an Atlantic Area Parcel Grievance Panel to a lengthy suspension and a final warning that subjected him to immediate termination of employment if he exhibited any behavior less than that of a model employee. Mr. Vinkler stated that his review of the Complainant's file also revealed numerous customer complaints. At the local level hearing the Complainant stated he had not been given a chance to correct his MVDC form and related the cost of the speeding ticket, calling his insurance company about rate changes, and details of the speeding ticket like it had happened yesterday. The reason for not listing the speeding ticket on the MVDC form was that the Complainant forgot. The Complainant had entered "none" on the MVDC form for past year citations. Mr. Vinkler opined the Complainant did not list the speeding ticket because he was on a final warning from the Labor Panel 2003 determination. He opined that getting a speeding ticket in a personal vehicle means the person may not be driving safely in the company vehicle. He reported the Complainant did not mention any safety complaints about vehicles at the local level hearing and that he was unaware of any vehicle safety reports being submitted, any safety grievances being submitted by the Complainant, or any complaint by the Complainant to the North Carolina Department of Transportation.

Mr. Vinkler testified that after the Complainant's local level hearing, there was a hearing for Mr. Denny for his termination. Mr. Denny was apologetic and reported he had notified his supervisor when he had lost his driver's license for DUI. Mr. Denny's MVDC form had been left blank and not notated with the word "none" as had been done by the Complainant on his 2006 MVDC form. He reported that Mr. Denny had a provisional license and there was some question on whether that was adequate to continue driving for UPS. Now it is understood that a provisional license is only to get to and from work and not to drive as part of UPS work. Since

Mr. Denny had told his supervisor about the DUI, Mr. Ward had made a mistake in the way he handled the report by not reporting it further up the management chain.

Mr. Vinkler testified that the Complainant filed an appeal to the Regional Panel. At the Regional Panel the Complainant said he had forgot to put the speeding ticket on the 2006 MVDC form, then said he had put it on the previous year's MVDC form, and reported details of the speeding ticket happening on Valentine's day while he was driving somewhere with his father; but he recalled the details as if the event had been yesterday. The Complainant did not mention any safety complaint issues at the Regional Panel. Mr. Vinkler testified that the Complainant "was absolutely not fired for a safety complaint [or] making safety complaints. He was fired due to his dishonest actions."

On cross-examination Mr. Vinkler testified that Ms. Nieters fired the Complainant but that her decision is subject to review by other decision makers and that when the letter for termination comes to his office, he is the final decision maker whether someone should be discharged or not. He stated that "I can arbitrarily say, 'No, you're not going to discharge him, put him back to work.' I am the final sayer in the District. ... I'm above [Ms. Nieters]."

Mr. Vickers testified that the Complainant's speeding made him an unsafe driver because if he was driving that way in his personal car no one knows what he would do in a package car when working without supervision on a day-to-day basis. He reported that there could be consequences with UPS for a driver getting a speeding ticket in a personal vehicle, such as accumulating sufficient points in successive years to lose a driver's license and then be unable to drive for UPS. If a driver loses a driver's license, they are given an opportunity to work inside. Had the Complainant reported his speeding ticket on his MVDC form, nothing would have happened with UPS, unless he had accumulated enough points to lose his license.

Mr. Vinkers testified that the collective bargaining agreement with the union provides in one sentence that warning notices "wear off" a member's disciplinary record after nine months. Suspensions and discharges do not wear off; they can be brought up at anytime through grievance procedures or hearings.

Mr. Vinkler testified that at the Complainant's local level hearing he did not ask Ms. Nieters if the Complainant had received the PCM message about changing his annual MVDC certification. He stated that he did ask Ms. Nieters if she had given the Complainant an opportunity to correct the form. He reported that it came out after the local level hearing that the Complainant was not present at the PCM about correcting MVDC forms. He stated that he never had a conference call with Ms. Nieters. He reported that the Complainant was fired on March 1, 2006, and the termination letter, JX 4, carries a March 3, 2006, date because of the time delay caused by review of the center manager's letter by the division manager and by his labor management office. The request for the discharge letter to be issued was after the Complainant's termination.

Upon examination by this Administrative Law Judge, Mr. Vinkler testified that when his secretary, P. Philips, sends out the discharge letter, the termination is final. If the discharge letter is not sent out within ten days of the face-to-face meeting of the union member with the Center Manager, then management would be in default under the union agreement, and the discharge

would be lost. The Center Manager send up a work document for the discharge letter and a cover letter request setting forth the union member's name, identification and reason for the discharge. The next supervisor approves the request and then sends it to him. The letter request is a request to send out the discharge letter by certified mail. Ms. Phillips sends the letters out to the union and union member and keeps the return green mail delivery receipt cards. He reported that the termination letters are required by Article 50 of the collective bargaining agreement.

Testimony of T. Kiser (TR 233 – 263)

Mr. T. Kiser testified that he is the principal officer and business agent of Teamsters Local Union 61 since January 2005. Prior to then he worked for UPS for approximately 28 years, first as a part-time car washer and then for 24 or 25 years as a package car driver. He reported he began operating the P-500 package car around 1990 for about 12 to 15 years. He stated that he did not particularly like the P-500 package car and there were a lot of things about them that he felt were a little unsafe. He reported that he discussed with the mechanics the major concern that "they have a tendency that when the rod was wet, if you would put on your brakes and you would hit the white line on the outside line or center line ... the front would lock up on you" and it would skid. You had to get use to the P-500 and know it would skid. He reported that the individual P-500s would drive differently; some steering would be looser than others. The recurring incident on the P-500 was the skidding part. All the P-500s are noisy.

Mr. Kiser testified that he discussed the firing of two union members from Wilkesboro in early 2006 with Mr. Vinkler. Mr. Vinkler had called him to advise that there were several people who had not properly filled out there 12-month certifications on moving violations or citations. He reported that he found out the Complainant had been terminated on the day of termination from J. Sturgill. Mr. Sturgill had stated that the Complainant had been terminated for dishonesty involving filing out his certification incorrectly.

Mr. Kiser testified that he took over as the Complainant's union representative and arranged for a local level hearing. The Complainant, J. Vinkler, D. Nieters and C. Stevenson were also present at the local level hearing. The Complainant stated that he had forgotten he had a speeding ticket. Mr. Kiser stated that he had been told by Ms. Nieters that she had held a PCM with the Wilkesboro people and had asked the Complainant if he had anything to tell management. At the local level hearing he asked how management could say they gave the Complainant an opportunity to fix his annual certification when he was unsure of what was the problem. He reported that Mr. Vinkler asked Ms. Nieters if the Complainant had been given a chance to correct his certification form and she replied "No, he wasn't at the PCM."

Mr. Kiser testified that he attended the Atlantic Area Parcel Grievance hearing for the Complainant and that he submitted CE 5, pages 1 through 4, as his statement that he thought the Complainant had made a mistake in filling out the annual certification form. Everything in CX 5 was before the grievance committee. At the committee hearing the Complainant stated that he had forgotten to include the speeding ticket on the certification form. He did not recall the Complainant telling the committee that he had put the speeding ticket on the prior year's certification form.

Mr. Kiser testified that at UPS “sheeting a package” meant the recording in the Diad, the package information on address, bar code, numbers and z-scan. It does not include marking a package as delivery attempted as opposed to marking it as a missed delivery.

On cross-examination, Mr. Kiser testified that he did not think the company terminated the Complainant for retaliation for making safety complaints about his package car. He reported that he did not recall the Complainant saying to him that he believed he was being retaliated against for making safety complaints. He stated he was aware of the Complainant’s prior discharge determinations but was not serving in union office at those times.

On re-direct examination, Mr. Kiser testified that the Complainant told the grievance panel that “he forgot that he had a ticket or that he forgot he had it in the past twelve months.” He did not recall if the Complainant told the panel that he had written the ticket done in the prior year annual driver’s certification. He stated that the grievance panel was considering whether the Complainant had been dishonest. He reported that Ms. Nieters had considered the Complainant as being dishonest with the certification form from his first discussion with her. He reported that his opinion that safety complaints were not involved in the Complainant’s termination if he knew the Complainant filed a vehicle safety complaint with the North Carolina Department of Transportation two weeks before his termination; and, the Complainant had told Ms. Nieters about the complaint to North Carolina two weeks before the firing; and, the Complainant and J. Sturgill had discussions with Ms. Nieters about unsafe package cars shortly before the Complainant’s discharge; and, Ms. Nieters thought the Complainant had made a mistake with remembering the speeding ticket and wasn’t being dishonest at the discharge meeting on March 1, 2006.

Testimony of T. Ward (TR 263 – 285)

Mr. T. Ward testified that he retired from UPS on August 31, 2007 after thirty years and six months of work for the company. His last position was as the call supervisor in the Wilkesboro center where is supervised the Complainant. He stated that the MVDC form was used for the drivers to put down any kind of traffic violations they may have. The MVDC was usually handed out at a PCM meeting, completed by the drivers, and turned back in. Additional time to complete the form would be given if needed.

Mr. Ward testified that he was aware of complaints made by the Complainant about the P-500 package car bottoming out on roads and being hard to drive. He had told the Complainant to write the complaints down in the daily vehicle inspection reports (DVIR) for the vehicle involved so the mechanic could review the complaint. He reported that the P-500s were spare vehicles and not the normal P-32 assigned to the Complainant at the time. The P-32 was a smaller vehicle with automatic transmission, power steering, and a softer ride. The P-500s are bigger vehicles that ride like a truck and are straight drive with no power steering. He did not consider the P-500 to be an unsafe vehicle. The P-500s are older vehicles which are hard to drive around rural routes, especially in the mountains. He stated that drivers will complain about the P-500s if that is not their normal vehicle and that the drivers prefer the newer vehicles for the power steering. He reported that he never had a driver refuse to drive a P-500 because they were

concerned about safety issues. There would be no discipline taken if a driver refused to drive a vehicle they thought was unsafe. If a driver didn't want to drive because the vehicle was unsafe, the vehicle would be unloaded and the packages put into another vehicle to use.

Mr. Ward testified that the DVIRs are reviewed by the mechanic, who was T. Cox at the time. He believes Mr. Cox is a good mechanic and trusts Mr. Cox to review DVIRs and fix anything that needed fixed.

Mr. Ward testified that a "planned day" is the delivery plan a driver is dispatched with that provides for an 8-1/2 to 9-1/2 hour work day for deliveries and pickups. If the driver misses the time goal by a small amount of time, nothing happens. If the driver is an hour or two over the planned day goal, you would usually talk to the driver to see if there were problems on the route that caused the driver to be over the time goal. He had never given warning letters or terminated a driver for being over the time goal. UPS practices to help make the time goal includes package selection, where packages are placed in the truck so a package can be selected at the delivery point and be out of the truck in 20 seconds, customer contact time, where irrelevant talking is minimized, and driving the posted speed limit.

Mr. Ward testified he was present at the meeting where the Complainant was terminated by Ms. Nieters, at Ms. Nieters' request she made about a 1/2 hour before the meeting. He reported that Ms. Nieters asked the Complainant if he remembered signing his MVDC form, to which the Complainant said he did. Ms. Nieters asked the Complainant if he forgot anything, to which the Complainant said no, he didn't forget anything. Ms. Nieters then told the Complainant that he was being terminated for falsifying records. The Complainant then said he had received a speeding ticket up around Boone and forgot to put it on the form. The Complainant did not mention any safety complaints at that meeting. He reported that a meeting was held with Mr. Denny the same day and in a similar manner. He stated that after the meeting he told Mr. T. Ward to hurry up and schedule a local level meeting for Mr. Denny as quick as he could. He told Mr. Ward that he didn't care about what he did for the Complainant. Mr. Denny was an excellent driver and an asset to the company. It had nothing to do with complaints by the Complainant. Both Mr. Denny and the Complainant challenged their terminations. Mr. Denny was brought back to work part-time off the road. He reported that he knew of Mr. Denny's 2005 DUI citation in the fall of 2005 during a check-in audit when Mr. Denny had a temporary license. He believed that it was alright to drive on a temporary license and did not report the DUI to others. Later he learned that you can't drive a UPS vehicle on a temporary license and that he should have taken Mr. Denny off the road and let the human resources department seal with the DUI issue.

Mr. Ward testified that Mr. Denny did not have any customer complaints in his file and was an excellent employee who was always there. He was aware that the Complainant had been terminated twice before and had received a lot of customer complaints like leaving packages in different places and not going to the customer's house. He opined that Ms. Nieters is a good manager and did not terminate the Complainant because of safety complaints about package cars.

On cross-examination Mr. Ward testified that Mr. Denny was a package car driver for about ten years and had been a part-time supervisor before that. He reported the Complainant was a

package car driver about 25 years. He learned of Mr. Denny's DUI in September or October of 2005 while checking on it and that he permitted Mr. Denny to continue to drive package cars because he had a temporary license. Mr. Denny was subsequently discharge because he failed to go to alcohol classes while working part-time

Mr. Ward testified that he was a package car driver for about 18 years and that he never had a package car driver refuse to drive a vehicle because of safety concerns. When he was a supervisor he supervised 25 to 30 drivers and they made 25 to 27 runs a day. During that time as a supervisor he never had a driver refuse to drive a vehicle because of safety issues.

Mr. Ward testified that he did not remember seeing JX 3, the February 15, 2006, memorandum "from Tillis and Vinkler to the business manager." He read the memo and stated that he didn't think the PCM in the memo was held. He reported that he had no idea why the Complainant did not list his speeding ticket on the MVDC form and that had the Complainant listed the speeding ticket there would be no punishment given that he knew of.

July 27, 2007, Deposition Testimony of the Complainant (JX 15)

On July 27, 2007, the Complainant was deposed and testified that he had been residing in Florida since July 2006. He stated that he graduated form high school and had two years of studies for an Associates degree at Wilkes Community College in Wilkesboro, North Carolina. He reported he finished his education in 1980 at Appalachian State University and received a Bachelor of Science in business administration. He reported that, prior to working with UPS as a Christmas season driver in 1983, he was an assistant production manager for Ithaca Industries. After the seasonal driving position ended he worked for Steam Systems cleaning carpets before being called back to UPS as a full-time driver in 1985. He acknowledged that UPS tried to terminate him in 2001 for dishonesty in failing to report hitting a customer's mailbox with the UPS package car he was driving and it resulted in a five day suspension. He stated that he did not report the incident because the mailbox looked fine and there was no damage on the package car. He identified RX 9 (DE 1 in JX 15) as the termination letter issued April 18, 2001 for that incident. He identified RX 11 (DE 2 in JX 15) as his agreement to the change in the 2001 termination to suspension without pay.

The Complainant testified that he was terminated in 2003 for dishonesty in bringing back packages that he did not attempt delivery, a "missed" package, and reporting them in another category like customer not in, couldn't find address, or something, known as "sheet them up." He reported that the package car supervisors would ask for "sheeting up" packages to keep them from looking bad. He stated that supervisors T. Smith, T. Ward and S. Collins had asked him to report missed packages as something else in the past. He acknowledged that he had recorded packages that were missed in other categories in the past. He stated that, when questioned by center manager D. Hooker about specific missed packages listed as incomplete addresses, he explained to Mr. Hooker what had transpired and that he was subsequently terminated for dishonesty. He stated he grieved the termination, went to a panel hearing and got his job back. He read RX 24 (DE 4 in JX 15) and stated that the 2003 termination was reduced to a lengthy suspension without pay and issuance of a final warning to behave honestly on the job. He

identified RX 23 (DE 5 in JX 15) as his statement to the grievance panel on the 2003 termination panel hearing. He reported that his supervisor did not ask him to “sheet up” the particular packages that led to the 2003 termination/suspension.

The Complainant identified JX 8, pages 2 through 8 (DE 6) as his 2006 complaint to the North Carolina Department of Transportation. He stated that in question 12.a on the last page of the exhibit he referred to being terminated on April 29, 2003, after “being targeted me for being dishonest ... after I had complained of safety issues on January 28, 2003, February 10, 2003 and February 8, 2003.” He stated that he did not think he was being retaliated against for filing safety complaints at the time he was terminated in 2003 but that he thought that might have been a possibility when he completed question 12.a in 2006.

The Complainant testified that he filed an age discrimination complaint with the EEOC upon advice from a union representative following the March 2006 termination. He stated that age discrimination could have been one of the reasons he was fired in 2006 but he was not sure if that was a reason. He also stated that he believes he was terminated for making safety complaints in 2006.

The Complainant identified D. Nieters as the Wilkesboro center manager who he would see at some morning PCM meetings. He reported that he was called into Ms. Nieters’ office with a union representative, believed to be J. Sturgill, days before his termination to discuss “some complaints I had filed on safety issues.” He stated he was told “that whatever the complaint was, that there was nothing really that could be done about it. The mechanic says the truck is as good as it gets or something like that.” The Complainant identified CX 2 (DX 7 in JX 15) as the complaint/grievance he filed February 17, 2006, with his union representative about the unsafe work conditions / unsafe assigned package truck. He stated that this was the topic of the conversation with Ms. Nieters when called into her office. He also reported that during this meeting with Ms. Nieters he told her that he had called the North Carolina Department of Transportation to report the P-500 vehicle he was driving was unsafe and “to see what my rights were as far as, you know, having a safe vehicle.” He believed that this meeting on the February 17, 2006 grievance was the first face-to-face meeting he had with Ms. Nieters. He reported that he did not feel the grievance had been resolved when he left the meeting because “the only thing that was going to satisfy me was if I was in the truck and it wasn’t all over the place.”

The Complainant testified that he was normally assigned a package car with power steering, automatic transmission and power brakes. He reported the P-500 did not have power steering or automatic transmission and had a more uncomfortable ride.

The Complainant testified that his employment was terminated by Ms. Nieters in 2006. He stated he believed that division manager B. Cooper was involved in the termination and possibly Mr. D. Wesson. He stated he thought B. Cooper was involved because after he returned from his 2003 termination/suspension, B. Cooper told him, “Wilcox, I know what kind of person you are. You are never going to change. ... and I will tell you one thing right now ... I’m going to get you.”

The Complainant identified JX 1 (DE 9, page 1, of JX 15) as the MVDC form he filled out on January 6, 2006. He reported that he had filled out MVDC form each year and that you are supposed to write down any traffic violations that were received in the past twelve months. He stated that he had received a speeding ticket in February 2005 and that when he wrote "none" on the form it was inaccurate. He reported that when he filled out the form he did not remember receiving a ticket in the preceding twelve months. He stated that he now remembered the ticket as being issued on Valentine's Day for going 55 MPH in a 45 MPH zone while driving to Boone, North Carolina with his father.

The Complainant testified that his second face-to-face meeting with Ms. Nieters was with union steward J. Sturgill and package car supervisor T. Ward. He reported that "you are being terminated from the property [was] pretty much the first thing that came out of her mouth." He stated that when he asked why he was being terminated, Ms. Nieters told him it was for dishonesty. When he asked "what was the dishonesty," Ms. Nieters asked if he remembered filling out the MVDC to which he looked at the form and replied that he did. He agreed with her that he had not listed any tickets in the past twelve months. He stated that when Ms. Nieters then showed him that he had received a ticket back in February of 2005, he reported that he had "simply forgot that I had that ticket in the past twelve months." He stated that when Ms. Nieters repeated "you are being terminated from the property for dishonesty," he told her "It was an honest mistake. It wasn't anything, like you said, deceiving, trying to deceive anybody." He reported that neither he nor Ms. Nieters brought up his prior safety complaints at the March 1, 2006, termination meeting.

The Complainant identified JX 4 and JX 11 (DE 10 of JX 15) as the termination letter he received to confirm his termination on March 1, 2006.

The Complainant testified that about two weeks after the March 2006 termination he learned, in a local level hearing with Mr. Binkler, Ms. Nieters and T. Kaiser, about a PCM meeting where drivers were given the opportunity to correct MVDC forms if there had been incorrect information placed on the form. He stated that Ms. Nieters reported to Mr. Binkler that the Complainant had not been present at that particular PCM meeting. He stated that he believed he had talked to Ms. Nieters by telephone between the termination and the local level hearing and had restated putting "none" on the form was an honest mistake and if there was anything she could do to help him get his job back. He did not mention safety complaints as the basis of his termination in the telephone call. He reported that he was "sure" that he had a conversation with either J. Sturgill or T. Kaiser and stated he had been terminated due to age and safety complaints.

The Complainant testified that he told the local hearing panel that he signed the MVDC form and made a mistake in not listing the traffic ticket. When asked by the panel if he had a chance to correct the MVDC entry he responded by stating that it was the first time he had heard there was an opportunity to correct the MVDC form. He stated the local panel asked Ms. Nieters about an opportunity to correct the form and she stated that the Complainant was not present at work the day of the PCM meeting but that at the final panel hearing Ms. Nieters and T. Ward both stated that he had been given an opportunity to correct the MVDC form. He stated he gave his account of what happened to the local panel, he left the room, and was told later that day of the outcome. He stated that later that afternoon T. Kaiser called him and advised him that the local panel was

going to reinstate and keep the driver who did not report the DUI on the MVDC form and terminate him. He reported that he did not mention safety complaints to the local panel.

The Complainant testified that the regional panel subsequently heard his appeal. He identified CE 5 pages 1 through 4 (DE 11 to JX 15) as the union statement made by T. Kaiser for the area grievance committee concerning his March 1, 2006, termination situation. He reported that Mr. Kaiser's statements to the grievance panel were similar to the statements in the exhibit and did not involve safety complaints. He identified CE 3 (DE 12 of JX 15) as a written statement he prepared for the grievance panel and read to them. He stated he did not include any safety complaints in his written or oral statements to the grievance panel. He reported that he had discussed safety complaints as a basis for the termination with Mr. Kaiser before the regional grievance panel hearing but was advised that it would not be the best time to present those facts. He stated that he also did not mention age discrimination at the grievance panel.

The Complainant testified that on a typical day at work for UPS he would arrive for an 8:30 to 6:30 workday and have a PCM at 8:30. He was assigned a car and punch in on the computer. He then would go to the truck and finish loading the vehicle, if needed. He would conduct a pre-inspection of the vehicle to check the lights, signals, horn, mirrors, tires, tire pressure, underneath the vehicle and check the basic condition of the truck. He stated that "if you refuse to work, you are fired. So you pretty much have to drive what's there." He stated that in 21 years with UPS he may have refused to drive only one time due to ice on the roads and was not disciplined or terminated or talked to by a member of management. He reported that he was not told he would be fired if he refused to drive a car he thought was unsafe.

The Complainant identified JX 10 (DE 13 of JX 15, pages 1, 2 and 7) as the DVIRs he wrote for package car #508946 on February 15 and 16, 2006, and that it concerned the same package car on which he filed a safety grievance on February 17, 2006. He reported that he considered the vehicle unsafe because when you hit a bump the vehicle wants to go its own direction, like a mind of its own. He reported that when he completed a DVIR with comments mechanic T. Cox would look at the vehicle. He stated that bottoming out was like riding without shocks and hitting a bump really jars the driver because there is no suspension cushion. He stated that he has no training as a mechanic. He stated that he has written complaints on a lot of trucks in the UPS fleet and that a lot of the same size and aged trucks behave the same as package car 508946 and would also be considered by him as unsafe vehicles. He reported that the complaint about vehicle 508946 on February 16, 2006 was the same complaint as on February 15, 2006, because there had been no change in the vehicle's condition from the previous day. He reported the grievance about the vehicle was filed the same day as the February 17, 2006, DVIR and that he filled out the forms to document the vehicle's condition as he was told to do by the North Carolina Department of Transportation (DOT) when he called the DOT around the week of mid-February 2006. He restated that the grievance on the vehicle involved the same safety complaints contained in the February 2006 DVIRs.

The Complainant testified that he had no explanation for why several months past from the time of the grievance panel upholding his termination and the filing of the retaliation complaint with the North Carolina Department of Labor (JX 8 pages 2 through 8; DE 6 of JX 15).

The Complainant testified that he has been treated two or three times for emotional distress because of his termination. The symptoms included being unable to sleep, eating problems and depression. He reported starting a new business, Window World, in August 2006, which they ran out of a small rented storefront.

In closing the Complainant testified that he told his union representative, T. Kaiser, about his feeling about being terminated for filing safety complaints and for age discrimination but that his union representative instructed him not to bring it up to the grievance panel in May 2006.

November 19, 2007, Deposition Testimony of T. Cox (EX 31)

On November 19, 2007, Mr. T. Cox was deposed telephonically by counsel for the Parties. Mr. Cox testified that he is employed by UPS as an automotive technician but has not been at work since July 27, 2007 and does not expect to return to work for another six to eight months due to back surgery and recovery time. He reported that he was a mechanic for UPS from 2000 and serviced all the different UPS vehicles including package cars. Prior to UPS he worked as a mechanic for A.T. Williams Oil Company from 1992 to 1999. Between 1999 and 2000 he was a mechanic for a Freightliner dealership on heavy chassis trucks.

Mr. Cox testified that as a UPS mechanic he had worked on the vehicles the Complainant drove for UPS. He stated he would never allow a driver to drive an unsafe truck and that if the driver feels a vehicle is unsafe, the driver should refuse to drive the vehicle. He reported that his scheduled start time was 4:00 PM and that during the winter with sleet, snow and freezing rain, he would see half the UPS fleet in the lot when he arrived because the drivers had refused to drive the trucks then.

Mr. Cox testified that the drivers would fill out a DVIR to report problems to him with the vehicles they drive. He identified JX 10 as DVIR forms for vehicle #508946, which was a GMC P-500 that was assigned to the Complainant on the days indicated on the DVIRs. That particular P-500 was not the Complainant's normally assigned vehicle and was a spare vehicle. That particular P-500 was probably a 1985 to 1988 model. The Complainant was normally assigned a P-32 that is a Ford vehicle and is more driver-friendly with independent front end suspension for better ride, a low step for entering or exiting the vehicle, power steering, automatic transmission, and a lower capacity for packages. The P-500 is a straight front axel, manual transmission, no power steering, a larger capacity to haul packages, and a lot less comfortable than the P-32. He opined that the P-500 is a safe vehicle; but that he'd rather drive the P-32 because of the comfort.

Mr. Cox testified that as of the time he left UPS for his back surgery he considered P-500 package car #508946 to be a safe vehicle. He identified JX 10, page 1, as a DVIR for P-500 package car #508946 dated February 15, 2006, and recalled seeing the report when it was first submitted. He reported that when a report is written as vague as this report, he likes to talk to the driver about the complaint; however, in this case he did not talk to the reporting driver (the Complainant). He stated that the steps taken after the DVIR is to take the vehicle from the parking lot to the shop, review the repair history, and inspect the truck for safety items, like steering, stopping, loose, missing or broken items, especially on the suspension. He made sure

that nothing was cracked, broken, loose or missing on the axles and that the axles were properly aligned. He checked to make sure the leaf springs were not cracked, broken, missing or shifted out of position. He checked to make sure the torsion bar was not cracked or broken. He reported the vehicle was inspected end-to-end, test driven and brought back. He reported the vehicle as having received all new parts on the front axle, leaf springs, bearings, brake calipers, brake rotors, tie rod ends, sway bar and bushings at a recent period prior to the February 15, 2006 DVIR inspection. He reported that with all new suspension parts it was "as good as it gets" for a 1985 to 1988 model truck. He stated that the P-500 had a straight suspension where both front tires move up and down together. He reported that the newer vehicles had independent front-end suspension with coil springs on each wheel so it will ride smoother. He reported that it was not unsafe to drive a straight suspension.

Mr. Cox identified JX 9 as the repair history of the P-500 package car #508946 which indicates the front stabilizer link was replaced May 8, 2003; the axle and steering gear box were replaced April 18, 2005; and the bearings, tie-rods, front-end alignment, brake lines, front pads, calipers, rotors, and spring pads were replaced April 19, 2005.

Mr. Cox identified JX 10, page 2, as the February 16, 2006, DVIR on the same P-500 package car. The DVIR reports "a non-safety related service" for "unsafe to drive, rides very rough, bottoms out, loud inside driver's area." He reported that he considered this DVIR to be the same complaint as the DVIR submitted the day before. He stated he re-inspected all the items on the truck and again concluded that the vehicle was safe for service. He reported that he did put on a new engine cover and seal to try and keep some of the noise out of the cab. He classified the vehicle as safe to drive. He reported that the Complainant's normal P-32 was out of service for work on the front-end ball joints and for an alignment by the Ford dealership and that his work on the P-500 due to the DVIRs kept him from working on the Complainant's P-32.

Mr. Cox identified JX 10, page 3, as the February 17, 2006, DVIR on the same P-500 being driven by the Complainant. He reported that the Complainant came by the shop on February 17, 2006, to ask when his P-32 vehicle would be coming back from the Ford dealership not to discuss the P-500 DVIRs. He testified that he told the Complainant that he did not know when the P-32 would return from the Ford dealership and that he was unable to find anything wrong with the P-500 assigned to the Complainant, other than it rattles, is hard to steer and is hard for the transmission. He reported that the tires on the P-500 were not worn out; but, that he replaced the front tires with new tires because he thought that they could have been out of balance, even though the tires did not seem out of balance when he test drove the vehicle. He reported that he re-inspected the vehicle again and found the vehicle safe to drive, even if he hadn't replaced tires.

Mr. Cox identified JX 9, page 7, as a preventive maintenance inspection report (B-PMI). It is part of a 510 item inspection required by DOT and UPS. The regulations set forth the inspection items and tolerances and if a problem is discovered it is fixed or the vehicle red-tagged and taken out of service. The page reports the January 18, 2006 B-PMI done on P-500 package car #508946. On the original printout for the inspection safety related items are highlighted in grey but the exhibit doesn't indicate the grayed items. The form indicates that the vehicle passed the inspection on January 18, 2006.

Mr. Cox testified that JX 9, page 7, was the B-PMI completed on June 25, 2007, by UPS mechanic A. Cooke for P-500 package car #508946. The report indicates that the vehicle passed the inspection.

Mr. Cox testified that vehicle #508946 had not been involved in an accident to his knowledge and was still in service when he left UPS for his back surgery. He reported UPS takes safety very seriously; he has never been pressured to keep an unsafe vehicle in service, and has never been told to ignore safety complaints. He reported that he did not recall J. Sturgill refusing to drive a vehicle because he did not repair a vehicle that Mr. Sturgill reported as smelling fumes.

On cross-examination Mr. Cox testified that he has extensive experience and training as an automotive technician; but has not had any outside schooling in the field from UPS which does its training in-house. He acknowledged that a driver could reasonably believe a vehicle was unsafe when it was not because the drivers don't have the experience as a mechanic. He reported that drivers have complained about the P-500 bottoming out because "with the straight front axle you feel a whole lot more of the jar when you go over a pothole or a rut in the road ... and a lot of what they are actually hearing is the hood hitting against the cab." He stated that the drivers aren't to diagnose a problem but to bring the concern to the mechanic.

Mr. Cox testified that his understanding was that if a vehicle was out of compliance with DOT requirements it needs to be out-of-service. He reported that when he checks out a complaint on a vehicle he drives the vehicle and tries to duplicate the problem. This includes driving the vehicle on bumpy, gravel roads. He stated that he does not have equipment to measure the decibel level inside a cab. He reported that when he inspects for loose, broken, missing or cracked parts, he will replace those he finds or take the vehicle out-of-service if he doesn't have a replacement part. If there is a broken leaf spring the vehicle will sit at a different level and it can be discovered by driving the vehicle. He reported that the first thing he inspects for on a complaint involves steering and stopping because the driver has to be able to steer and stop the vehicle. The inspection involves the steering, steering lash and drag drop to a tolerance tighter than the DOT provisions. He reported that he inspected the steering system and drag drop on P-500 package car #508946 on February 15, 2006, to make sure the vehicle was safe. He stated that he drives the P-500 vehicles for a PMI, when there is something reported wrong with a P-500, and when he actually works on P-500s, which amounted to two or three times a week.

Mr. Cox testified that he changed the tires on the P-500 assigned the Complainant "to maybe change the ride of the vehicle from the tires that were on it." He reported that some drivers have reported that the P-500 operates differently when it has new rear tires and "almost feels like they're on a marshmallow sometimes until some of the tread depth gets worn off of the tires." He stated that on JX 9, page 3, there is a job description code to the right of "axle W slash out bushing ring" indicating number "32" which means "inspect and test" that item, not repair. He stated that he holds a commercial driver's license with endorsements X, T, and H. He reported that he usually tests package vehicles when they are empty and opined that the vehicle would ride better when they are loaded because the rear springs would relax with the additional weight.

Mr. Cox testified that he did not speak with any UPS management members about the DVIRs on the P-500 vehicle that the Complainant submitted in February 2006.

Copies of Completed Motor Vehicle Certification Forms (JX 1)

JX 1 contains ten "Motor Vehicle Driver Certification" forms signed by the Complainant On 3/6/1996, 1/19/1997, 1/1/1998, 1/7/1999, 4/18/2000, 3/26/2001, 1/16/2002, 1/10/2003, 1/12/2004, and 1/6/2006. There was no certification form in JX 1 for 2005.

In each of the certification forms the Complainant acknowledged his obligation to inform his supervisor of conviction for a non-parking traffic violation within thirty days of the conviction and his certification that "If no violations are listed above, I certify that I have not been convicted or forfeited bond or collateral on account of any violation required to be listed during the past 12 months." In each of the certification forms, the Complainant entered "none".

Copies of North Carolina MVR Reports (JX 2)

JX 2 contains seven MVR reports on the Complainant's driving record from 1996. The reports indicate that the Complainant had no motor vehicle driving violations or suspensions for the period from 1996 through January 2005. The January 26, 2006, report indicates that on February 14, 2005 the Complainant was cited for "speeding (55 MPH in a 45)". He was convicted in the Watauga County Court, North Carolina, on March 10, 2005, and assigned 2 points on his driving record.

February 15, 2006, letter to Business Manager on "Employees showing no violations on the signed MVDC with traffic violations listed on the Motor Vehicle Report." (JX 3)

JX 3 is a letter to Business Managers (without enclosures) advising the recipients that they supervised an employee(s) who had indicated no violations on their respective MVDC form but were reported by the State as having a conviction in 2005. The Business Managers were asked to "Please PCM the work group again and explain the consequences of falsifying the MVDC. Employees that come forward and are truthful after the PCM should be issued a warning notice. Those who do not volunteer their traffic violations that occurred in 2005 should be discharged for dishonesty and falsification of company records." The Managers were directed to advise J. Tillis and J. Vinkler of the results of the review with the impacted employees.

Notification of Termination (JX 4 and JX 11)

JX 4 is a copy of the termination letter issued to the Complainant that notifies him that his "employment with United Parcel Service is, hereby, terminated, effective March 1, 2006, in accordance with Article 50 of the current labor agreement, for just cause: dishonesty." The letter was issued over the signature of D. Nieters as Wilkesboro Business Manager and carries a March 3, 2006, date. JX 11 is a duplicate copy.

Sworn Statement of T. Ward dated May 10, 2006 (JX 5)

JX 5 is the sworn statement of Mr. T. Ward that “At the beginning of this year I gave out the MVDC forms during a PCM. I told everyone to list any tickets and if they did not have any to write none and sign the bottom of the form. I then collected the forms and sent them to Human Resources.”

Sworn Statements of T. Ward and D. Nieters dated May 10, 2006 (JX 6)

JX 6 contains the May 10, 2006, sworn statement of T. Ward that “On Wednesday March 1, 2006, Jerry Sturgill, Debra Nieters and I were talking to [the Complainant] about his MVDC. Debra asked [the Complainant] if he had remembered filling out the form and if the information he put on the record was correct. [The Complainant] stated, yes that it was correct. At that time Debra explained to him that the information we received showed that he had violations that were not reported. She then explained to him that he would be terminated due to falsification of records.”

JX 6 also contains the May 10, 2006, sworn statement of D. Nieters where she indicated that she received information that the Complainant had falsified his MVDC and that she spoke to him after he returned from vacation. She reported that she “spoke to the [the Complainant] on that Wednesday, March 1, 2006. I spoke to him that morning and asked if he had remembered completing the [MVDC]. He replied that he did remember. I then asked him if the information was correct on the form and he stated that it was correct. At that point I then showed him the report we had gotten back from the DMV stating that he had violations that he did not report. I then explained that he would be terminated due to falsification of records.”

Excerpt of Atlantic Area Parcel Grievance Committee Minutes (JX 7)

JX 7 indicates that the Atlantic Area Parcel Grievance Committee met in May 2006 to review 151 cases on the May 2006 agenda. The Chairman called case 209-06, Local 61 vs. UPS, Wilkesboro, NC, involving the discharge of the Complainant. The reported decision was “Based on the facts presented and the grievant’s own testimony, the claim of the Union is denied.”

Notice of Complaint (JX 8)

JX 8 is the notice of complaint issued by the U.S. Department of Labor on September 8, 2006, notifying UPS, Wilkesboro, North Carolina, that the Complainant had filed a complaint under the STAA. JX 8 contains a copy of the “Employment Discrimination Complaint Form” the Complainant submitted to the North Carolina Department of Labor. The complaint form was signed by the Complainant on August 15, 2006, and alleges that he was terminated on March 1, 2006, “because I filed a complaint about a safety issue at work.” In the supporting “Complaint Questionnaire (OSH)”, the Complainant states that he made the safety complaint on January 4,

2006 and February 17, 2006 (response #5(b)) and previous safety complaints on January 28, 2003, February 10, 2003 and February 8, 2003 (response #12).

Package Car #508946 Equipment Repair History and Preventive Maintenance Inspection Reports (JX 9)

JX 9 contains the repair history for P-500 package car #508946 for the period January 1, 2005 through September 14, 2007. The February 2006 entries indicate a DVIR book change on February 7, 2006, when the vehicle mileage was 449,928 miles; mirror arm/bracket work on February 8, 2006; axle w/out bushing ream on February 15, 2006 with mileage at 450,566 miles and again on February 16, 2006 with mileage at 450,734 miles; the air bag was addressed on February 16, 2006; and with mileage at 450,917 on February 17, 2006, the exhaust system was addressed, tire change completed, and the axle w/out bushing ream was addressed. Tires and brakes were also addressed on February 21 and 27, 2006.

Driver Vehicle Inspect Reports (DVIRs) for Vehicle #508946 (JX 10)

JX 10 contains copies of the DVIRs submitted by the Complainant on February 15, 2006, February 16, 2006, and February 17, 2006.

On the February 15, 2006, DVIR, the Complainant checked the box to indicate "This vehicle requires safety related service." The Complainant indicated "unsafe to drive, rides so rough it hurts, bottoms out on the smallest bumps & holes, also very loud inside drivers area." On the same date the mechanic indicated "car has all new parts. This is safe. This is as good as it gets. OK for service."

On the February 16, 2006, DVIR, the Complainant checked the box to indicate "This vehicle requires non-safety related service." He indicated "unsafe to drive, rides very rough, bottoms out, loud inside drivers' area." The mechanic indicated on the following day "new engine cover seal. Truck save (sic) to drive. I can't work on your truck for working on this one. OK for service."

On the February 17, 2006, DVIR, the Complainant checked the box to indicate "This vehicle requires non-safety related service." He indicated "unsafe, bottoms out all the time, very loud." The mechanic indicated on the same sate "new tires. Truck safe. OK for service."

MVDC Form of D. Denny dated January 5, 2006 (JX12)

JX 12 is the MVDC of D. Denny. As discussed herein after, this exhibit is not relevant.

Motor Vehicle Report Form for D. Denny (JX 13)

JX 13 is the motor vehicle report indicating D. Denny incurred a “driving while impaired” conviction on September 1, 2005, and suspension of license with a subsequent reinstatement of a limited license. As discussed herein, this exhibit is not relevant.

OSHA Report of Findings (JX 14)

JX 14 is the December 18, 2006, report of findings to the Complainant contained in ALJX 2.

Excerpts of Teamsters Atlantic Area United Parcel Service Supplemental Agreement and the National Master United Parcel Service Agreement (JX 16)

JX 16 contains excerpts of the national master agreement and supplemental agreement to the collective bargaining agreement between the Employer and Teamsters Local 61 in effect between August 1, 2002 and July 31, 2008. The supplement excerpts contain a copy of “Article 49 – Grievance Procedure” and “Article 50 – Discharge or Suspension.” The national master agreement excerpts include a copy of “Article 18 Safety and Health Equipment, Accidents and Reports.”

Factual Stipulations (JX 17)

JX 17 contains the stipulations of fact entered into by the Parties and listed at the beginning of this Decision and Order.

Copy Local Union No. 61 Grievance of Termination Letter dated March 6, 2006 (CX 1)

CX 1 is a copy of the grievance filed by T. Kiser as Local Union 61 secretary/treasurer. It refers to the Complainant’s termination letter dated March 3, 2006. The exhibit states the union’s position that the Complainant’s “termination letter is unjust and/or improper” and requests the letter be removed from the Complainant’s file and that a meeting be scheduled pursuant to Article 49 of the collective bargaining agreement.

February 17, 2006, Complaint Form (CX 2)

CX 2 is a copy of Complainant’s grievance filed on February 17, 2006, concerning the package car the Complainant drove on February 15 and 16, 2006. The complaint is “Unsafe work conditions, truck I have driven the past two days rides very, very rough. It bottoms out on the smallest of holes and bumps, even on newly paved roads. Mechanic says it is safe and has all new parts and is as good as it gets; but he isn’t driving it on the kind of roads I do all day long. There is a big difference out on a rural route like mine.” He requested “Safe working

environment or a safe vehicle to work in.” The form indicates that the complaint was taken up with D. Nieters of the company on February 17, 2006. The form also is signed by the Complainant and union steward J. Sturgill.

Written Statement of Complainant to T. Kaiser (CX 3)

CX 3 is a written statement Complainant has stated he read to the area grievance panel which heard his appeal of the March 1, 2006 termination. In CE 3 the Complainant apologized “for making an honest mistake” and putting his family and fellow UPS employees through a stressful situation. The Complainant stated he “honestly could not remember the date of my last ticket. I honestly thought it had been longer than one year when I received it. I was not trying to deceive anyone and I had no reason to hide the fact that I received a ticket because this is not a terminating offense to receive a minor traffic violation. And most important of all, I would never jeopardize my job me doing anything dishonest.” He noted that he had been with UPS for 21 years and planned to retire from UPS in the future. He asked to be permitted to return to work at UPS.

Copy of May 11, 2006, E-mail from J. Tullis (CX 4)

CX 4 is a copy of an e-mail from Health and Safety Manager, J. Tillis, to J. Vinkler stating that T. Kaiser had requested information on when D. Nieters was notified of the discrepancies in the MVDC forms for D. Denny and the Complainant. J. Tillis notes that she sent a copy of the respective MVDC form and MVR citation to the Business Managers on February 14, 2006. She noted a suspended license for D. Denny and a February 2005 speeding ticket for the Complainant.

Union Representative Statement of Facts to Area Parcel Grievance Committee (CX 5)

CX 5 is a copy of the Statement of Facts submitted to the Atlanta Area Parcel Grievance Committee by union representative T. Kaiser on behalf of the Complainant protesting the March 2006 termination of the Complainant. The statement notes the Complainant began work for UPS on May 22, 1985. T. Kaiser states that he was notified on February 17, 2006 by teamster members from the UPS Lenoir Center that several members had filled out their MVDC forms incorrectly and were being disciplined and that he called UPD Labor Manger, J. Vinkler for additional information. He reports that on February 22, 2006, he talked to J. Vinkler, requested a list of drivers involved in improper MVDC forms, and was told a list would be sent to him by secretary P. Philips. He states that the list of affected drivers never came.

Attached to CX 5 as exhibits were a copy of the Complainant’s termination letter (JX 4 and JX 11); a March 6, 2006, notice of grievance over the termination letter; the January 6, 2006, MVDC form completed by the Complainant (JX 1); the January 26, 2006 state motor vehicle report for Complainant listing the February 2005 speeding citation (JX 2); written statement by the Complainant (CE 3); copy of collective bargaining agreement Article 50 (JX 16); copy of the

March 3, 2006, termination letter given to D. Denny; copy of the January 5, 2006, MVDC form completed by D. Denny; copy of the January 26, 2006 state MVR for D. Denny; four May 4, 2006, memos involving a PCM at the UPS center in Lenoir, North Carolina; and a typed statement of Teamster Shop Steward, J. Sturgill.

In his statement, J. Sturgill reports that on March 1, 2006, he was called to D. Nieters' office at 8:30 AM, and told that she was going to terminate the Complainant and D. Denny for dishonesty in falsifying a DOT report "drivers have to fill out detailing the past year's citations, tickets, accidents, ect." He stated that he then called T. Kaiser for assistance and both he and D. Nieters talked to him. He and D. Nieters then met with the Complainant. Ms. Nieters told the Complainant he was being terminated for dishonesty for falsifying a report and showed the Complainant the details about his speeding ticket of February 14, 2005. The Complainant stated he remembered the ticket; thought it had been the year before and put on that year's form; and that if he had been given more time to complete the report he would have reviewed his records at home first to see if the ticket had already been reported. J. Sturgill reported that at no time in his presence did D. Nieters ask the Complainant "if there was something that he needed to tell them before she proceeded with the termination." He reported "at no time did we at the Wilkesboro Center have a PCM where management ask[ed] the drivers in a group if any of us had made a mistake or forgot to put a ticket on the DOT Report" and that it was his understanding "that the drivers at the Lenoir Center did have the opportunity to come back and redo the DOT Report if anyone forgot anything. But not at Wilkesboro."

Copy of Complainant's Tax Returns for 2004 and 2005 (CX 6)

CX 6 indicates that the Complainant earned \$54,227.93 from UPS in 2004 and earned \$48,384.78 from UPS in 2005.

Copy of August 21, 2006 Employment Discrimination Complaint Form (CX 7)

CX 7 is contained in JX 8, summarized above.

Multiple Copies of Claimant's Request for Hearing (CX 8)

CX 8 contains multiple copies of typed and hand-written request for hearing contained in ALJX 3.

Record of Customer Complaint of April 9, 2001 (EX 8)

EX 8 indicates that a UPS customer called in a complaint that a driver delivered a package on April 9, 2001, pulled out of her driveway, hit her mailbox and the mail box does not close now. The center recorded the Complainant was the driver, that he hit the mail box turning into the

customer's driveway, the mail box fell to the ground, that he placed the mail box back on the post, that he delivered the package and left without telling anyone.

April 18, 2001, Notice of Termination for Dishonesty (EX 9)

EX 9 is a copy of the April 18, 2001, termination notice given to the Complainant indicating that he was being terminated under Article 50 of the labor agreement for dishonesty, effective April 12, 2001.

April 18, 2001, Notice of Termination for Auto Accident (EX 10)

EX 10 is a copy of the April 18, 2001, termination notice given to the Complainant for failing to report the accident of striking a stationary object while operating a UPS vehicle. The termination was effective April 12, 2001. This is the same event which is the basis for EX 8 and EX 9.

Copy of Complainant's April 24, 2001, Agreement to Disciplinary Reduction (EX 11)

EX 11 is the Complainant's agreement that the April 12, 2001, termination set forth in EX 9 and EX 10 would be reduced to a period of suspension without pay.

May 6, 2003, Notice of Termination for Dishonesty (EX 14)

EX 14 is a copy of the May 6, 2003, termination notice given to the Complainant indicating that he was being terminated under Article 50 of the labor agreement for dishonesty, effective April 29, 2003.

April 29, 2003 Statement of UPS Business Manager, H.D. Hooker (EX 20)

EX 20 is the written statement of H. Hooker that he called the Complainant and union steward to his office on April 29, 2003, to discuss the Complainant's reporting 14 packages on April 24, 2003, as "No such number" and "No such street." He reported that the Complainant stated he did not know the streets or addresses and did not remember going to those particular locations before. He reported the Complainant had called in for help with deliveries that day and was told there was no help available and was told to deliver all the packages. H. Hooker reported that he terminated the Complainant for dishonesty because he believed the Complainant "was heavy that day and chose not to deliver those packages and sheeted them 'No such number' and 'No such street' and brought them back to be looked up."

July 14, 2003, Individual Disciplinary Action (EX 21)

That portion of EX 21 admitted into evidence indicates that the Complainant received disciplinary action on April 12, 2001, for dishonesty and accident as on April 29, 2003, for dishonesty. The form also indicates the Complainant was hired on January 1, 1984.

Written Statement of Complainant Concerning April 24, 2003 Events (EX 23)

EX 23 is a typed statement by the Complainant in which he states “I have worked as a package car driver at UPS Wilkesboro, NC, for the past eighteen (18) years. On April 24, 2003, I made a decision to record several packages as No Such Number (NSN). I had previously delivered to these addresses and knew their locations. I realized that I would be unable to deliver all these packages and made a terrible decision to record these packages as NSN.” He asks “this Committee for a chance to continue my career at UPS.”

Summary of July 2003 Minutes of the Atlantic Area Parcel Grievance Committee (EX 24)

EX 24 is a summary of actions taken by the Atlantic Area Parcel Grievance Committee during the July 22 to 24, 2003, timeframe. EX 24 indicates that the Committee found that “the company was proper in discharging the Complainant for dishonesty. However, in this instant case the discharge is reduced to a severe lengthy disciplinary suspension with the Grievant returning to work on 9/8/03. Finally, this is a final warning; advising the Grievant that any behavior exhibited less than that of a model employee will subject him to immediate termination of employment.”

March 1, 2006, Termination Letter Request for Complainant (EX 29)

EX 29 contains the e-mail cover and Termination Letter Request submitted by D. Nieters concerning the termination of the Complainant. By a 10:48 AM, March 2, 2006, e-mail, D. Nieters requested that the attached word file documents regarding a termination request for the Complainant be approved. The termination request indicated that the Complainant “failed to list violations that he had for the past year on the MVDC. He listed no occurrences.” The reason listed for termination was “Dishonesty.” The UPS Package Division Manager, C. Stevenson, forwarded the request at 10:57 AM, March 2, 2006. At 3:06 PM, March 2, 2006, J. Vinkler notified P. Philips by e-mail that it was “Okay to send” a termination letter.

March 1, 2006, Termination Letter Request for D. Denny (EX 30)

EX 30 contains the e-mail cover and Termination Letter Request word document file attachment submitted by D. Nieters concerning D. Denny. By a 10:57 AM, March 2, 2006, e-mail, D. Nieters requested that the attached word file document regarding a termination request for D. Denny be approved. The termination request indicated D. Denny as the individual concerned but

used the Complainant name and identical entry as in EX 29 for the “Other: (Describe)” entry. The reason listed for termination was “Dishonesty.” The UPS Package Division Manager, C. Stevenson, forwarded the request at 11:01 AM, March 2, 2006. At 3:06 PM, March 2, 2006, J. Vinkler notified P. Philips by e-mail that it was “Okay to send” a termination letter.

DISCUSSION

The “whistle-blower” provisions under the Surface Transportation Assistance Act of 1982, as amended, are designed to protect “employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance.” *Brock v. Roadway Express, Inc.*, 481 US 252 (1987)

To be entitled to a remedy under the Act, the Complainant must show that he engaged in protected activity, that the respondent was aware of the protected activity, that he was subjected to an adverse employment action, and that there was a causal connection between the protected activity and the adverse action (i.e.: the employer was aware of the protected activity when it took the adverse action). *Bechtel Construction Co. v. United States Sec’y of Labor*, 50 F.3d 926 (11th Cir. 1995); *Self v. Carolina Freight Carriers Corp.*, ARB No. 89-STA-9 (Jan. 12, 1990); *Clean Harbors Environmental Services, Inc. v. Herman*, 1998 WL 293060 (1st Cir. June 10, 1998); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987) If the Complainant establishes a prima facie case under the Act, the Respondent will not be held to have violated the Act if it establishes that that adverse employment action was the result of events and/or decisions independent of protected activity.

I. The Complainant engaged in protected activity prior to March 1, 2006.

Here the Complainant’s cause of action is under Section 31105(a)(1)(A) of the Act, which deals with filing complaints regarding equipment safety on commercial vehicles with a gross vehicle weight rating of 10,001 pounds or more. “Protected activity” under the Act includes reporting of motor vehicle equipment defects and discrepancies that may reasonably have an adverse impact on the safe operation of the motor vehicle or the safety of the public. In this case, the Complainant’s written complaints on three consecutive Driver Vehicle Inspection Reports (DVIRs) concerning UPS P-500 package car #508946 submitted on February 15, 16 and 17, 2006, and a written grievance concerning the same vehicle submitted on February 17, 2006, constituted “protected activity” under the Act. It is specifically noted that the four written complaints all alleged (1) unsafe to drive; (2) rides rough; and (3) bottoms out. The three DVIRs also included (4) very loud inside driver’s area. (JX 9 and CX 2)

II. Respondent was aware of the Complainant's protected activity of filing safety complaints concerning UPS P-500 Package car #508946 suspension and noise level.

The Complainant met two times with the Business Manager, Service Center Wilkesboro, North Carolina, Ms. D. Nieters. The first face-to-face meeting was on or shortly before February 15, 2006 to address the Complainant's delivery route completion time. At that meeting, the union steward, J. Sturgill, was present and the Complainant verbally advised Ms. Nieters that part of the reason he was over his planned route time was that he had to drive slower in the temporary replacement P-500 package car because the vehicle was unsafe due to the suspension. This verbal exchange took place after a morning PCM meeting but before the Complainant received a grievance form from J. Sturgill and before the Complainant filed the three DVIRs on February 15 to 17, 2006. The grievance form was given to the Complainant after the face-to-face meeting on the morning of February 15, 2006, and before the Complainant began his February 15, 2006, delivery of packages.

The Complainant verbally discussed the P-500 package car bottoming out on roads and being hard to drive with his call supervisor, T. Ward, on or shortly before February 15, 2006. The supervisor directed the Complainant to write the vehicle complaints down in the daily DVIRs for the vehicle involved so that the UPS mechanic could review the complaints. The Complainant filed the first DVIR with a safety complaint about package car #508946 at the end of his 8:30 AM to 6:30 PM workday on February 15, 2006. The wording used in the February 15, 2006, DVIR referred to unsafe suspension conditions and the level of noise in the driver's area in package car #508946. The February 15, 2006, DVIR was given to UPS mechanic T. Cox for evaluation. The work day for Mr. Cox begins at 4:00 PM. Mr. Cox did not talk to the Complainant about the contents of the DVIR on February 15, 2007. Mr. Cox took package car #508946 to the shop where he reviewed the vehicle's repair history and inspected the truck to make sure that nothing was cracked, broken, loose or missing on the axels, that the axels were properly aligned, that the leaf springs were not cracked, broken, missing or shifted out of position, and that the torsion bar was not cracked or broken. The vehicle repair history indicated that the axel and steering box were replaced April 18, 2005, and the wheel bearings, tie-rods, spring pads, brake lines, front brake pads, rotors and calipers were replaced the following day before a front-end alignment was performed. In the evening of February 15, 2006, Mr. Cox inspected the vehicle "end-to-end", inspected the steering and drag/drop, inspected the braking system, test drove the vehicle, and reported the vehicle on the DVIR as "car has all new parts. This is safe. This is as good as it gets. OK for service." Mr. Cox made no verbal communication about this DVIR to a member of management.

After completion of his delivery route on February 16, 2007, the Complainant filed his second DVIR on package car #508946. Again, the Complainant listed the vehicle as "unsafe to drive, rides very rough, bottoms out. Loud inside driver's area." This wording was similar to the February 15, 2006, DVIR, and again referred to the vehicle suspension system and cab noise level. Mr. Cox considered the February 16, 2006, DVIR to be the same compliant as the day before but again re-inspected the entire vehicle. He placed a new engine cover and seal on the vehicle in an attempt to reduce the noise level in the cab area. He did not talk to the Complainant about the vehicle and reported the vehicle on the DVIR as "New engine cover seal.

Truck safe to drive ... OK for service.” Mr. Cox made no verbal communication about this DVIR to a member of management.

After completion of his delivery route on February 17, 2006, the Complainant filed his third DVIR on package car #508946. Again, the Complainant indicated “unsafe, bottoms out all the time, very loud.” Mr. Cox re-inspected the vehicle and replaced the front tires because he thought the tire might have been out of balance, even though they were not worn out and did not seem out of balance when he test drove the vehicle. Subsequently, that evening, the Complainant saw Mr. Cox about the Complainant’s normally assigned P-32 package car becoming available for his use. During that discussion Mr. Cox informed the Complainant that was unable to find anything wrong with package car #508946 other than it rattled, was hard to steer and had a hard transmission. He informed the Complainant that he had changed the tires. Mr. Cox reported the vehicle on the DVIR as “new tires. Truck safe. OK for service.” Mr. Cox reported he considered the vehicle safe even without changing the tires. Mr. Cox made no verbal communication about this DVIR to a member of management.

On February 17, 2006, the Complainant delivered the completed grievance form (CX 2) to union steward, J. Sturgill. J. Sturgill then delivered the grievance form to the Business Manager, D. Nieters the same day. By that time, Ms. Nieters had reviewed the Complainant’s concerns listed on the February 15 and 16, 2006 DVIRs on package car #508946 and the response noted on the respective DVIRs by UPS mechanic, T. Cox, and was aware that Mr. Cox considered the vehicle safe to drive.

While the UPS business manager, D. Nieters did not discuss the safety complaints made by the Complainant on the February 15, 16 and 17, 2006, DVIR, or in the February 17, 2006, grievance, with the Complainant, the call supervisor, T. Ward, or UPS mechanic, T. Cox, she did have a brief conversation about P-500 package cars with the union steward, J. Sturgill, on February 17, 2006, and was aware of the Claimant’s complaints as set forth in the DVIRs and written grievance. These complaints about P-500 package car #508946 only dealt with the vehicle suspension system and cab noise levels.

At no time prior to the March 1, 2006, adverse employment action of termination did the Complainant discuss with, or otherwise inform, Ms. Nieters, or other members of management, of any concerns about P-500 package car #508946 steering, vehicle veering when hitting a bump or hole, or braking and sliding on wet roads. These concepts were advanced by the Complainant as being what he considered “unsafe to drive” to mean on the DVIRs in communications and testimony subsequent to the May 2006 area grievance level hearing action upholding the Complainant’s March 1, 2006, employment termination. Such meaning is not evident on the plain reading of the DVIRs or grievance and cannot be imputed to members of management based on the actual writings. Accordingly, these particular concerns of the Complainant were not communicated by the Complainant to the Employer prior to the adverse employment action and may not be considered as reports of safety concerns constituting protected activity known by the Employer prior to the adverse employment action of March 1, 2006.

III. The Complainant is initially entitled to an inference that the March 1, 2006 employment termination was the proximate result of the Complainant filing safety complaints on February 15, 16 and 17, 2006.

An inference of causal connection that an employer has discharged an employee in retaliation for engaging in protected activity may be raised by the proximity in time when an employee discharge immediately follows that employee's engagement in protected activity. *Kahn v. United States Sec'y of Labor*, 64 F.3d 261 (7th Cir. 1995); *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987) If the evidence raises an inference that protected activity was the likely reason for the adverse action, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) If the employer articulates a legitimate, nondiscriminatory reason for the adverse employment action, the ultimate burden of demonstrating by a preponderance of the evidence that the employer's stated reason for the adverse employment action was pretextual and that intentional retaliation was present shifts to the employee. *Roadway Express, Inc. v. United States Department of Labor*, 495 F.3d 477 (7th Cir. 2007); *Buie v Quad/Graphics, Inc.*, 366 F.3d 496 (7th Cir. 2004); *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998) This sequence creates an issue of fact: what was the true cause of the discharge? *Roadway Express Inc.* at 482.

In this case, the Complainant filed three safety complaints in the form of DVIRs submitted on February 15, 16 and 17, 2006 and an additional safety complaint in the form of a grievance on February 17, 2006. The face-to-face meeting between the Complainant and business manager D. Nieters on February 17, 2006, also gave rise to an oral complaint of safety of P-500 package car #508946. These complaints about the suspension system and loud noise of the package car were clearly known to Ms. Nieters as of February 17, 2006. Two weeks later, on the morning of March 1, 2006, Ms. Nieters terminated the Complainant's employment. This sequence of protected activity followed in close proximity of time by the adverse employment action gives rise to the inference that the employment termination was causally connected to the filing of the February 2006 safety complaints concerning P-500 package car #508946.

IV. The Respondent terminated the Complainant's employment on March 1, 2006, for a legitimate, nondiscriminatory, non-retaliatory reason.

Federal Regulations at 49 CFR §391.25, "Annual inquiry and review of driving record" requires motor carriers such as UPS to "make an inquiry into the driving record of each driver it employs, covering at least the preceding 12 months, to the appropriate agency of every State in which the driver held a commercial operator's license or permit during the time period." The motor carrier such as UPS is required to "review the driving record of each driver it employs to determine whether that driver meets the minimum requirements for safe driving or is disqualified to drive a commercial vehicle ... the motor carrier must consider the driver's accident record and any evidence that the driver has violated laws governing the operation of motor vehicles, and must give great weight to violations, such as speeding, reckless driving, and operating while under the influence of alcohol or drugs, that indicate that the driver has exhibited a disregard for the safety of the public."

Federal Regulations at 49 CFR §391.27, "Record of violations" requires motor carriers such as UPS to "require each driver it employs to prepare and furnish it with a list of all violations of motor vehicle traffic laws and ordinances (other than violations involving only parking) of which the driver has been convicted ... during the preceding 12 months. Each driver shall furnish the list required ... If the driver has not been convicted of, or forfeited bond or collateral on account of, any violation which must be listed, he/she shall so certify. ... Drivers who have provided information required by §383.31 of this subchapter need not repeat that information in the annual list of violations required by this section." 49 CFR §383.31(b) provides for a driver to notify his employer of reportable traffic convictions within 30 days of the conviction. 49 CFR §383.31(c) requires the notice to be in writing and signed by the driver.

On the morning of February 15, 2006, the Complainant was addressed by the UPS Wilkesboro Center business manager, D. Nieters, about specific deficiencies in handling his delivery route for which the Complainant blamed the need for additional route time on the need to drive slower in the assigned P-500 package car due to suspension problems. At the end of that day's shift, and for the next two days, the Complainant submitted written daily DVIRs and a written union grievance concerning the suspension system and loud noise in P-500 package car #508946. The issue of P-500 package car #508946 being "unsafe" was put to rest by UPS management by February 17, 2006, based on the three repeated inspections by the assigned mechanic, T. Cox, and communications to the union steward, J. Sturgill, by Ms. Nieters that the vehicle was considered safe. Safety complaints concerning the package car by the Complainant ended that day. Subsequent complaints and explanations by the Complainant were made after his March 1, 2006 termination was upheld on review by the local level and area level hearings under the collective bargaining agreement between Local 61 and UPS. Those subsequent complaints and explanations played no part in Ms. Nieters determination to terminate the Complainant's employment on March 1, 2006.

On January 6, 2006, the Complainant certified in writing that he had not received any traffic convictions the previous 12 months. This statement was false when the Complainant made in since he had been convicted on February 14, 2005, for speeding in North Carolina. There is no evidence that the Complainant had reported this speeding offense to any supervisor within 30 days of the conviction so the Complainant's failure to include the offense on his January 6, 2006, MVDC form was in violation of federal regulations at 49 CFR §391.27.

UPS performed its duties as required by federal regulations at 49 CFR §391.25 when it made the January 26, 2006, inquiry of the North Carolina Department of Transportation for the driving records of each commercial driver, including the Complainant and D. Denny. The state motor vehicle reports set in motion the sequence of events related to the falsification of MVDC forms several weeks before the Complainant made his February 15, 2006, safety complaint on P-500 package car #508946.

On March 1, 2006, Ms. Nieters confronted the Complainant about the MVDC entries and the February 14, 2005 speeding conviction. J. Sturgill and T. Ward were present. The Complainant was asked about any additions missing from his January 6, 2006, MVDC and denied the need to

make any additions.³ The Complainant was then given a verbal termination notice by D. Nieters which became final after review by the division manager and the Director of Labor Relations, J. Vinkler, and issuance of the termination letter of March 3, 2006. There is no evidence that either the division director or J. Vinkler were aware of the February 2006 safety complaints concerning P-500 package car #508946. The subsequent events that played out at the local hearing level and at the area grievance panel level affirm the independent basis for termination of the Complainant based on dishonesty for submitting a false MVDC while on a final warning of immediate termination for future infractions.

In view of the credible evidence of record, the Respondent has established that the Complainant's employment was terminated on March 1, 2006, for a legitimate, nondiscriminatory, non-retaliatory reason independent of his earlier safety complaints concerning P-500 package car #508946.

V. The Complainant has failed to establish a preponderance of the evidence that the employer's stated reason for the March 1, 2006, employment termination was pretextual and intentional retaliation.

It is noted that the correspondence sent to D. Nieters, which forwarded the Complainant's name and the name of D. Denny as employees at the UPS Wilkesboro center who failed to report 2005 traffic convictions in their respective January 2006 MVDC certifications, directed termination of employment if the employees did not correct their false MVDC entries when confronted. This directive was issued at the direction of the Director of Labor Relations and the Health and Safety Manager, neither of whom had knowledge of the Complainant's February 2006 protected activity prior to the March 3, 2006, final approval of the Complainant's March 1, 2006, employment termination.

In support of the position that the actions by UPS were pretextual and intentional, the Complainant alleges that D. Denny was treated in a different manner than he for the exact same offense. This is not established by the evidence of record.

D. Denny did complete his January 2006 MVDC in a manner similar to the Complainant by not listing a 2005 conviction related to driving a vehicle while intoxicated. D. Denny was treated exactly the same as the Complainant at the local level by Ms. Nieters. Both termination actions were approved by the division manager and the Director of Labor Relations, J. Vinkler. Both were terminated for making a false report on the federally required annual MVDC and both were treated the same by Ms. Nieters and through the March 3, 2006, final termination approval process.

³ T. Ward noted the opportunity given the Complainant to correct his MVDC in a May 2006 written statement and again in sworn testimony at the hearing. Ms. Nieters noted the opportunity given the Complainant in a May 2006 statement and testified at the hearing that the Complainant was given an opportunity to correct his MVDC. J. Sturgill testified that the Complainant was not given the opportunity to correct his MVDC. Greater weight is given to the testimony of D. Nieters and T. Ward since their prior respective statements, made closely following the events in 2006, are consistent with their testimony. Also considered was the Complainant's testimony that D. Nieters inquired about his filling out the MVDC after he asked what did he do that was dishonest.

It was only later, when the two individuals appeared at the local level hearing for review of the final termination, did the Complainant and D. Denny receive different outcomes. The Complainant maintained his innocence of being dishonest by stating it was an honest mistake of failing to remember a speeding conviction. However, unlike the Complainant, D. Denny had actually reported his conviction to his supervisor shortly after the event occurred. While his supervisor failed to have the report of conviction reduced to writing as required by 49 CFR §383.31(c) and failed to follow UPS policy of placing Mr. Denny in an inside, non-driving, work position; the local level hearing determined that D. Denny should return to work in a non-driving position and in an alcohol treatment program. Such action is not inconsistent with the spirit of federal regulations providing that a driver need not report on the MVDC a traffic conviction reported to the supervisor within thirty days of occurrence. Furthermore, during the reviews of the Complainant's termination, his prior disciplinary record included two prior disciplinary actions for dishonesty with the last action resulting in a final warning that further improper employee actions would result in immediate termination. D. Denny had no such prior disciplinary record.

The Complainant has failed to establish by a preponderance of the evidence that his termination by Ms. Nieters and the final approval of termination by the division manager and J. Vinkler were a pretext for the Complainant filing safety complaints in February 2006 concerning P-500 package car #508946. He has also failed to establish by a preponderance of the evidence that the appeal actions at the local hearing level and the area grievance level were a pretext for terminating the Complainant for his safety complaints made in February 2006 about P-500 package car #598946.

VI. The Complaint must be denied.

In view of all the foregoing, the Complainant has failed to establish that the Respondent violated the provisions of the Act. Accordingly, the complaint must be denied.

VII. The Complainant is not entitled to compensatory damages, reinstatement, attorney fees, or legal costs related to his March 1, 2006, employment termination.

In order to be entitled to reinstatement, compensatory damages, attorney fees and/or legal costs associated with his termination of employment on March 1, 2006, the Complainant must have established that the Respondent had terminated the Complainant in violation of the Act due to his safety complaints related to P-500 package car #508946. In view of all the foregoing, the Complainant has failed to establish that such violation occurred in this case. Accordingly, the Complainant is not entitled to reinstatement, compensatory damages, attorney fees and/or legal costs associated with this complaint.

CONCLUSION AND FINDINGS OF FACT

After deliberation on all the evidence of record, including post-hearing briefs of counsel, this Administrative Law judge finds:

1. Through out 2005 and 2006 the Respondent was engaged in interstate trucking operations and operated commercial vehicles on the highways in commerce with a gross vehicle weight rating of 10,001 pounds or more.
2. The Complainant was an employee of Respondent from May 22, 1985 to March 1, 2006, and operated commercial motor vehicles with a gross vehicle weight rating of 10,001 pounds or more on the highways in interstate commerce.
3. The Complainant engaged in protected activity under the Act as related to P-500 package car #508946 in February 2006.
4. The Complainant was subject to an adverse employment action on March 1, 2006, in the form of termination of employment.
5. Respondent was aware of the Complainant's protected activity of filing safety complaints concerning UPS P-500 Package car #508946 suspension and noise level at the time of his March 1, 2006, employment termination.
6. The Complainant was initially entitled to an inference that the March 1, 2006 employment termination was the proximate result of the Complainant filing safety complaints about P-500 package car #508946 on February 15, 16 and 17, 2006.
7. The Respondent terminated the Complainant's employment on March 1, 2006, for a legitimate, nondiscriminatory, non-retaliatory reason.
8. The Complainant failed to establish by a preponderance of the evidence that the employer's stated reason for the March 1, 2006, employment termination was pretextual retaliation
9. The Complaint must be denied.
10. The Complainant is not entitled to compensatory damages, reinstatement, attorney fees, or legal costs related to his March 1, 2006, employment termination.

ORDER

It is hereby **ORDERED** that the complaint is **DENIED**.

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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, Suite S-5220, 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.