

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 March 2008

CASE NO.: 2007-STA-00041

In the Matter of

MARTIN KERCHNER,
Complainant,

v.

GROCERY HAULERS, INCORPORATED,
Respondent.

Appearances:

Complainant Pro Se

Dion Kohler, Esq.
Brandon M. Cordell, Esq.
For Respondent

Before:

Administrative Law Judge Janice K. Bullard

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105¹ (“the Act” hereinafter), and implementing regulations set forth at 29 C.F.R. part 1978. Section 405 of the Act provides protection from retaliation against employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules. The pertinent provisions of the Act prohibit the discharge or discipline of, or any other discriminatory act against, covered employees. This recommended decision and order is also governed by those provisions, and the provisions of 29 C.F.R. Part 18.

¹ On August 3, 2007, President Bush signed “The Implementing Recommendations of the 9/11 Commission Act of 2007” (hereinafter “9/11 Act”). The 9/11 Act includes the “National Transit Systems Security Act of 2007.” (“NTSSA”). This is a new law which has the purpose of minimizing security threats and of maximizing the abilities of public transportation systems to mitigate damage that may result from terrorist attacks. Section 1413 provides employee protection (or “whistleblower”) coverage for public transportation employees. The Act did not include a specific provision for retroactivity, and therefore, I conclude that it does not apply to the instant adjudication. See, Elbert v. True Value Co., No. 07-CV-03629.

I. PROCEDURAL BACKGROUND

Martin Kerchner (“Complainant” hereinafter) was employed by Grocery Haulers Incorporated (“Respondent” or “Grocery Haulers” hereinafter) as a delivery driver from December, 2000 until his termination on August 29, 2005, retroactive to his suspension on August 11, 2005. On August 25, 2005, Complainant filed a complaint against Respondent with the United States Department of Labor’s Office of Occupational Safety and Health Administration (“OSHA” hereinafter) alleging that he was “terminated for complaining about unsafe work conditions”. ALJX-3. OSHA construed the complaint as involving a Section 11(c) violation, and in a letter dated October 22, 2005, OSHA advised Complainant that it did not find Complainant’s refusal to drive as an activity protected under Section 11(c) of the OSHA Act. RX 17 at 39. However, the record demonstrates that OSHA conducted an investigation into Complainant’s allegations, and issued a formal determination dismissing his complaint on May 11, 2006. RX 17 at 54.

Complainant appealed that determination in correspondence dated May 24, 2006. RX 17 at 56. In a letter dated June 8, 2006, the Director of OSHA’s Directorate of Enforcement Programs (“DEP”) acknowledged Complainant’s appeal of that determination, and advised Complainant that DEP would review OSHA’s findings. RX 17 at 52. In correspondence dated July 10, 2007, OSHA’s DEP advised Complainant that the agency did not consider his discharge from Respondent’s employment a violation of Section 11(c)². RX 17 at 53. However, DEP advised that his complaint would be investigated under the STAA. After conducting its investigation under the whistleblower provisions of the STAA, on June 13, 2007, OSHA issued the Secretary’s Findings and Preliminary Order, recommending that the complaint be dismissed.

During OSHA’s investigation into his complaint, Complainant made statements which OSHA construed to be an allegation that another entity, Silver Line Building Products Corp. (“Silver Line”, hereinafter), also had retaliated against him. Complainant alleged that he was blacklisted from employment with Silver Line when he applied for a job with the company in September, 2005.³ OSHA dismissed Complainant’s allegations regarding Silver Line as untimely filed. RX 12.

On July 17, 2007, Complainant filed an objection to OSHA’s findings with the Office of Administrative Law Judges (“OALJ”) and requested a hearing. Complainant’s objection was construed to be limited to his complaints against Grocery Haulers, and accordingly, Silver Line was not included as a Respondent in this appeal.⁴ The case was assigned to me, and a hearing was scheduled in the matter for Tuesday, August 14, 2007. On August 6, 2007, counsel for Respondent entered his appearance and requested a continuance. Complainant submitted correspondence dated August 7, 2007, that I construed to be a request to withdraw his objection to OSHA’s findings. On August 8, 2007, I held a telephone conference with the parties, during which Complainant advised that he wished to proceed

² I have no jurisdiction over the OSHA Act, and my inquiry is confined to complaints of violations of whistleblower protection under the STAA.

³ OSHA’s construction of Complainant’s allegations regarding blacklisting was erroneous, as I shall explain later in this Decision and Order.

⁴ Complainant specifically asserted that his allegations were not directed against that entity. See discussion, *infra*.

with the hearing, despite his inability to engage counsel. Complainant also had no objection to continuing the hearing.

On September 28, 2007, Respondent moved to dismiss the matter. By Order issued September 28, 2007, I denied the motion. A hearing in the matter was held on October 2, 2007, at which time the parties appeared and gave testimony and submitted documentary evidence. At the hearing, colloquy was held regarding OSHA's findings concerning Silver Line. See, Tr. at 66-80; 90; 189-192. I advised the parties that I would amend the caption to include Silver Line, and issue an Order regarding the timeliness of Complainant's complaint, if the evidence revealed that Complainant directed a complaint against the entity. Tr. at 189-190. Upon review of OSHA's findings and the documentary and testimonial evidence, I have concluded that OSHA mistakenly named Silver Line as a company that allegedly violated the Act. Accordingly, it was not necessary to amend the caption to include Silver Line, or give that company notice of the instant proceedings. My rationale for this determination shall be explained in the factual findings section of the instant Decision and Order.

Respondent filed written argument on December 17, 2007. Complainant filed an objection to Respondent's written closing argument on December 31, 2007. Respondent filed a reply to Complainant's response on January 4, 2008. The gravamen of Complainant's objection was to urge me to disregard arguments made by Respondent that he believed were not factual. In its reply, Respondent noted that argument was permitted. As I am not bound by the arguments of either party, Complainant's objection is overruled.

At the hearing, I admitted into the record Respondent's exhibits, identified as RX 1 through RX 21. Complainant's exhibit identified as CX 1 was discussed, as it provided the foundation for overruling Respondent's objection to the testimony of witness Paul Kinsaul. Complainant established that he had given Respondent notice of his intent to call Mr. Kinsaul when he responded to interrogatories posed by Respondent. Tr. at 10. I allowed Complainant thirty days to provide me with any evidence regarding the timeliness of his complaints about blacklisting. Tr. at 80. Complainant did not submit any post-hearing evidence. I have also admitted to the record the parties' prehearing statements, and two documents associated with OSHA's investigation.

The record is hereby closed in this matter. The findings of fact and conclusions of law set forth in this Recommended Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties may not be specifically referenced throughout, but each has been carefully reviewed and thoughtfully considered.⁵

II. ISSUES

1. Whether Complainant timely filed his objections with OALJ.

⁵ In this Recommended Decision and Order, "ALJX" refers to exhibits admitted into the record and offered by the Administrative Law Judge, "CX" refers to the Complainant's exhibits, and "EX" refers to Respondent's exhibits. "Tr." refers to the hearing transcript.

2. Whether Complainant timely filed complaints about alleged blacklisting with OSHA.
3. Whether Respondent took adverse employment actions against Complainant in retaliation for his alleged protected activities in violation of the STAA.

III. CONTENTIONS OF THE PARTIES

A. Complainant

Complainant contends that he was given unfavorable driving assignments for raising complaints about safety. He further maintained that he was first suspended and then terminated by Grocery Haulers for refusing to drive when fatigued and upset. Complainant also alleged that Respondent was responsible for his being blacklisted from employment with other companies.

B. Respondent

Respondent denies that Complainant engaged in protected activity when he refused to drive. Further, Respondent contends that Complainant's discharge was mandated by the collective bargaining agreement between the union local 863 International Brotherhood of Teamsters and Respondent. Respondent denies that Grocery Haulers took adverse action against Complainant because of his participation in protected activity. Respondent also denied knowledge that Complainant had made complaints to government agencies about safety issues.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Timeliness of Objection with OALJ

On June 13, 2007, OSHA issued the Secretary's Findings and Preliminary Order, recommending that the complaint be dismissed. On July 17, 2007, Complainant filed an objection to OSHA's findings with the Office of Administrative Law Judges ("OALJ") and requested a hearing. The Act and the regulations provide individuals 30 days after the issuance of OSHA's investigative findings within which to "file objections...and request a hearing on the record... Where a hearing is not timely requested, the preliminary order shall be deemed a final order which is not subject to judicial review." 49 U.S.C. §2305(c)(2)(A). The date of postmark shall determine whether a request for a hearing has been timely filed in cases brought under the Act. 29 C.F.R. §1978.105(a); Spearman v. Roadway Express, Inc., 92-STA-1 (Sec'y Aug. 5, 1992). Complainant's objection is timely filed, as it was postmarked on July 13, 2007, which was thirty days after the issuance of the Secretary's Findings.

B. Blacklisting complaint

1. Target of Complaint

During the course of OSHA's investigation into Complainant's complaint regarding his discharge from employment by Grocery Hauler's, Complainant advised that he believed he had

been blacklisted. Complainant had applied for work with Silver Line, and said that he believed Grocery Haulers had blacklisted him from that job. OSHA included Silver Line as a party in its investigation, but did not investigate the allegations because the agency dismissed the blacklisting complaint as untimely filed.

It is clear from Complainant's testimony and from the documentary evidence that Complainant had not meant to direct his complaint of blacklisting against Silver Line. A thorough review of Complainant's pleadings and miscellaneous documents reveals that he identified his local union and Respondent as alleged blacklisting parties. In his objection to OSHA's findings, filed with OALJ, Complainant wrote, in part, "Please accept this letter for my objection to the decision to dismiss my complaint of blacklisting by my former Employer Grocery Haulers Inc." RX 13. In his pre-hearing statement, Complainant referred to actions against him by Grocery Haulers Inc. and Local Union 863 of the International Brotherhood of Teamsters. ALJX-1. In a response to interrogatories from Respondent, Complainant referred to reprisals and intimidation by Grocery Haulers Inc. CX 1. In another response to interrogatories, Complainant wrote, "[t]here are numerous other attempts to find employment but with no success as most companies only retain an application for thirty days and shy away from informing you that your former employer or union is blacklisting you as the exception was Silverline." RX 16. Also, on April 17, 2006, Complainant submitted a written statement to OSHA, in which he stated that he had written a letter to OSHA on February 26, 2006⁶, in which he advised that he was "being blacklisted by 863 (Union Local) and Grocery Haulers." RX 21.

Complainant pointed out OSHA's mistaken identification of the target of his blacklisting complaints in his correspondence to the agency of July 12, 2007. Complainant wrote, "[y]our conclusion to my complaint as to the actions taken against me by my former employer Grocery Haulers Inc....and Teamster Local Union 863 which in your letter you do not mention Local 863 is not acceptable, and I question how your administration conducted the investigation into my complaint of being black listed by Grocery Haulers and Local Union 863...". RX 14 page 1. Complainant noted to OSHA that "in your letter in the heading you name Silver Line Building Products Corp. as one who is blacklisting me and for the record this is wrong because Silverline was kind enough to clue me in as to what was being done by Grocery Haulers and Kenneth Monica Chief Shop Steward at Grocery Haulers...". RX 14 page 2.

The following colloquy at the hearing further demonstrates Complainant's intent:

JUDGE BULLARD: You have submitted some writings that address when you brought or when you believe[d] or perceived yourself to have brought that information to O.S.H.A.'s attention and that's R-19; is that correct the 9/19/05 letter to Silver Line Windows?

THE WITNESS [Complainant]: Yes. That's when I applied for the position but Your Honor —

MR. KOHLER: I don't believe that document identifies the date that he made his complaint to O.S.H.A.

JUDGE BULLARD: No, it doesn't. That's the date that you applied and when did you raise this issue to O.S.H.A.?

THE WITNESS: This had gone on I don't recall. It's somewhere in the

⁶ This letter of February 26, 2006 is not in evidence.

paperwork and I can dig it out. I think it was probably within a few days after I became aware of the information that Silver Line gave me. Your Honor, I may be speaking out of turn saying this Silver Line black list me. Silver Line made me aware that I was being black listed.

JUDGE BULLARD: Okay.

THE WITNESS: Actually I cannot say that Grocery Haulers themselves was doing this but it was the two shop stewards and Mr. Monica the official of Local 863.
Tr. at 68.

THE WITNESS: If I remember right Your Honor, there was a letter to Mr. Porteus, the regional investigator in South Hackensack, and he responded to my letter that he would investigate it and that an investigation was ongoing. That would have been probably in September of 2005.

MR. KOHLER: I'm sorry what did he say?

JUDGE BULLARD: Mr. Kerchner said he believed he wrote a letter to the regional investigator in September of '05 and that would be about the Silver Line situation?

THE WITNESS: Yes. When I became aware of what Silver Line had informed me of.

JUDGE BULLARD: When did you apply for a job at Silver Line?

THE WITNESS: Right after I was told that I was terminated which was I guess a week or so after that they were looking for drivers. A friend of mine worked there and he said we need drivers and he spoke for me. In other words he gave me a recommendation and it was a few days later that somebody called me and asked me to write a letter to Silver Line explaining what had happened so that he could give it to his boss and go on my behalf and in other words get me hired at Silver Line. This didn't happen because from what I understood the shop steward and this I found out later —

Tr. at 71.

In consideration of all of the evidence regarding this issue, I conclude that OSHA mistakenly named Silver Line as an entity targeted by Complainant in his complaints. It is clear that Complainant referred to his application for employment with Silver Line to support his allegation that his union and Respondent were engaging in blacklisting activities. These allegations were not investigated by OSHA.

2. **Timeliness of Blacklisting Complaint**

Pursuant to 29 C.F.R. §2305, “any employee who believes he has been [discriminated against]...by any person in violation of [the Act] may, within one hundred and eighty days after such alleged violation occurs file...a complaint with the Secretary of Labor alleging such...” 29 C.F.R. §2305(c)(1). The time within which the complaint must be filed begins to run “at the time of the challenged conduct and its notification, rather than the time its painful consequences are ultimately felt...” English v. Whitfield, 858 F. 2d 957, 961 (4th Cir. 1988). OSHA determined that Complainant's allegations of blacklisting with respect to his potential employment with Silver Line were untimely filed. RX 12. OSHA found that Complainant applied for a job with that company in September, 2005, and was not hired. Id. OSHA further

found that Complainant first raised the issue of blacklisting in a statement dated May 5, 2006. Id.

Complainant's complaint with OSHA was filed on August 25, 2005. RX 17 at page 1. That complaint did not refer to alleged blacklisting. At the hearing, I engaged in extended discussion with Complainant regarding when he first raised complaints of blackballing. Complainant recalled applying for a job with Silver Line shortly after he was fired by Respondent in August, 2005. Tr. at 71. He also recalled writing to OSHA about being blacklisted. Id. In a letter dated September 19, 2005, Complainant wrote to Silver Line to explain the circumstances surrounding his termination by Grocery Haulers. RX 17 at 14. Construing the evidence liberally, Complainant would have had to have filed a complaint on this issue within 180 days from September 19, 2005.

Complainant testified that he corresponded with OSHA in September of 2005, and discussed the circumstances of his application with Silver Line. Tr. at 68-73. Complainant did not produce this correspondence, but in a letter dated November 3, 2005 addressed to OSHA Regional Investigator Richard J. Proteus, he thanked Mr. Proteus for his "letter of October 22, 2005 pertaining to the action taken against me by My Employer Grocery Haulers Inc." RX 17 at 37. Further, Complainant wrote that "it seems I have been blacklisted and I make this statement because of all the jobs I have applied for with my experience [sic] and safety record I have not had any response..." RX 17 at page 37-38. No specific entity was identified as engaging in blacklisting activity. Id. In an email sent on April 6, 2006 by Richard Proteus to another OSHA employee, Mr. Proteus acknowledged Complainant's blacklisting complaint; Mr. Proteus wrote: "we are going to handle his initial allegation of discriminatory discharge as one complaint and his subsequent blacklisting complaint as another case". RX 17 at 55. Complainant signed a written statement to OSHA dated April 17, 2006, in which he referred to alleged blacklisting by his union local and Respondent. RX 21. Complainant has alleged that Respondent and his union local continue to blacklist him from employment. Complainant declined to submit any evidence post-hearing on this issue.

I find the evidence sufficient to construe Complainant's complaints about blacklisting as timely filed. Complainant's correspondence to OSHA dated November 3, 2005 is sufficient to put the agency on notice regarding Complainant's complaints of blacklisting, particularly as the agency was engaged in investigating his prior complaint regarding his termination. Complainant's letter of November 3, 2005, is well within the 180 day period following his employment application with Silver Line. Complainant directly raised blacklisting in his correspondence with OSHA during the investigation of his complaint involving his suspension and termination, and his allegation was acknowledged by OSHA.

3. Recommended Remand for additional investigation

Complainant's complaints about blacklisting were not within the scope of his original complaint, but were raised in a timely fashion during the course of OSHA's investigation. As discussed herein, *supra.*, OSHA misidentified the targets of the complaints, and then erroneously dismissed the complaint as untimely filed. At the time of the hearing, it was difficult to determine whether the complaint was timely filed, but the evidence amply demonstrates that it

was timely raised with OSHA. I am not persuaded by Respondent's argument at the hearing that suggested that it should not be considered the target of Complainant's blacklisting complaint. Respondent relied in part upon Complainant's testimony regarding his union: See, Tr. at 68; 79..I find that the preponderance of the evidence establishes that Complainant directed his complaints of blacklisting against both Respondent and his union local, Teamsters Local 863. Complainant should not be penalized for OSHA's misidentification of the targets of his blacklisting complaint, nor should those allegations have been dismissed as untimely filed. Complainant's assertions that his complaint was not properly investigated by OSHA are supported by the record.

I concluded from colloquy with counsel for Respondent that Grocery Hauler's was not prepared to litigate the issue regarding blacklisting, which is consistent with their lack of notice by OSHA. I find no implied consent to litigate this issue. Moreover, Teamsters Local 863 has not had any notice that it was identified as an alleged blacklister. Considering the lack of due process to Respondent, and OSHA's mistaken identification of the alleged blacklisters, I find it appropriate to recommend remand of the matter to OSHA for investigation of Complainant's timely filed complaint regarding alleged blacklisting by Grocery Haulers and Teamsters Union local 863. See, 29 C.F.R. §1978.104.⁷

C. Timeliness of Complaint Regarding Other Allegations

The record establishes that Complainant was first suspended and then discharged from his employment with Respondent. The evidence is undisputed that on August 11, 2005, Complainant was suspended from his employment with Respondent for refusing to haul a load on that date. Complainant was later discharged from his employment, as demonstrated by the letter from Respondent to Complainant of August 29, 2005, with retroactive application to the date of his suspension. RX 5. Although these incidents were related, they are considered separate adverse actions. See, Delaware State College v. Ricks, 449 U.S. 250 (1980); Stoller v. Marsh, 682 F.2d 971 (D.C. Cir. 1982), cert. denied, 460 U.S. 1037 (1983).

On August 25, 2005, Complainant filed a complaint with OSHA, alleging that his suspension and discharge were in retaliation for whistleblowing activity. RX 17 at 1. In his written correspondence to OSHA, Complainant refers to a telephone conversation that he had with an OSHA employee regarding his termination. RX 17 at 1. I find that the evidence establishes that Complainant's complaint with OSHA was filed less than 180 days after the alleged adverse actions at issue in this matter, and therefore is timely. See, 29 C.F.R. §2305.

⁷ Although the prevailing regulations do not provide explicit authority to remand a matter to OSHA, neither do they preclude such action. (Cf. the regulatory scheme controlling the handling of complaints of whistleblowing brought under Section 896 of the Corporate and Criminal Accountability Act of 2002, Title VIII of the Sarbanes Oxley Act. Those regulations specifically provide in pertinent part at 29 C.F.R. §1980.109(a): "...a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge will hear the case on the merits." In the absence of such exclusionary language in the regulations controlling investigations of complaints under the STAA, I conclude that remand is authorized. See, Clement v. Milwaukee Transport Services Inc., 2000-STA-8 (ALJ Aug. 7 2000).

D. Summary of the Evidence

1. **Testimonial Evidence**

The following summary of the testimony of the witnesses who appeared at the hearing emphasizes those facts that I consider most consistent, probative and relevant to my findings. However, in reaching my findings of fact and conclusions of law, I have carefully considered all of the testimony of all of the witness, taking into account all relevant and probative evidence. I have evaluated the testimonial evidence by assessing its inherent consistency and consistency with other evidence of record. I have also made assessments of the credibility of the witnesses, considering the source of information, its reasonableness, its consistency with other evidence, and the demeanor and behavior of the witnesses.

Martin Kerchner

Complainant testified that he began working for Grocery Haulers on February 23, 2001, and disputed the company's record of his starting on February 26, 2001. Tr. at 24. He described the work that Grocery Haulers did as "very heavy work" that involved tractors and other equipment that he alleged were not well maintained. Tr. at 22. Complainant alleged that in early 2002 he complained to the Department of Transportation Federal Motor Carrier Safety Administration (DOT or FMCSA, hereinafter) in Trenton, New Jersey that Grocery Haulers was using unsafe equipment. Tr. at 22-23. He did not directly complain to Grocery Haulers management, but did raise the issue of unsafe equipment to his union, local 863. Tr. at 23. Complainant believed that management would have been aware of his concerns, because he identified defective equipment on pre-trip and post-trip inspection reports. Tr. at 24. These reports are mandated by FMCSA regulations. Id. He recalled putting four or five tractors out of service for safety issues. Tr. at 25.

Complainant explained that when he put tractors out of service, it caused a disruption in Grocery Hauler's work load, and he believed he was then "singled out for reprisal like the low paying trips, assigned different equipment tractors that are dirty inside". Tr. at 25. Complainant said that he kept the tractor that he was assigned clean, and believed he was given lesser paying and more time consuming trips as reprisal for complaining about conditions. Tr. at 25-26. Complainant testified that other drivers did not accurately complete the FMCSA pre-trip and post-trip inspection reports. Tr. at 26. Complainant recalled being assigned tractors several days after reporting a defect which remained unrepaired, and he inferred that the defective tractors would generally be assigned to another driver rather than be repaired. Tr. at 27. Complainant admitted that he did see equipment replaced during his employment with Respondent. Tr. at 29.

Complainant spent anywhere from eight to seventeen hours a day driving, depending upon assignments. Tr. at 30. He believed that he was given less paying and more time consuming trips because he voiced his concerns over safety. Tr. at 31. Complainant described tractors losing tires and transmissions because they were not properly attached. Tr. at 31. He raised these issues in his complaint with the FMCSA. Id.

Complainant described the events that preceded his suspension and discharge. He stated that on August 9, he was assigned a trip to Brooklyn, New York, that was difficult due to construction and traffic. Tr. at 32. He recalled starting work at about 9:00 p.m. o'clock and ending at 2:30 or 3:00 a.m. Tr. at 32. Complainant testified, "I was sent to a card store. I was detained in traffic going in and coming back and it was like two minutes after 2:00 [a.m.] on August 10th when I was given a Waldbaum's route and I told Mr. Proctor that I was tired..." Tr. at 33. Complainant told Joe Proctor that he

was going home because [he] was fatigued as per the Federal Motor Carrier Safety regulations and Mr. Proctor was there and Mr. Scott Vaughn was there and there was no problem. I went home. The only problem was I didn't get paid for the eight hours. The next day on August 10th at 9:00 p.m. I reported for work and once again I was given a time consuming long hard trip by Mr. Mertz. I returned at about five minutes to 2:00 again and this was another – [interrupted for question] I believe it was Proxy Avenue and it was because of the traffic it was time consuming going in and coming back and Mr. Mertz who normally left at midnight at two minutes after 2:00 a.m. on August 11th was still there working along with Tim Wall, Scott Vaughn and there were a few other people there and once again I was that night I was given a Waldbaum's route and I made the remark to Joe Proctor and Joe Proctor didn't give me the load. Lou Green, another dispatcher gave me the Waldbaum's...[interrupted for question] this was a load for one of the Waldbaum's to the stores in College Point, New York that because of the traffic would have been time consuming and I had already had enough [inadmissible conclusion stricken].

Tr. at 34-36.

Complainant testified that he had "mentioned...briefly" that he was fatigued and could not drive. Tr. at 36. Complainant stated that after being assigned the Waldbaum's route an argument occurred. He stated: "I had had enough. I was fatigued and with the heated conversation that went on over this Waldbaum's route and me being myself being so aggravated and I knew it wasn't safe for me to take the load." Tr. at 43. Complainant described shouting back and forth with Mr. Merz, Tim Wall and Lou Green. Id. Complainant told the others "that [he] was hired for Pathmark and in four and a half years [he] never did anything but Pathmark work and I also informed that they had their Waldbaum's drivers and – [objection]. They told me to take the load or call my shop steward". Tr. at 43-44. Complainant acknowledged telling Mr. Proctor that the Waldbaum's assignment was "more punishment and that [he] had had enough and there was a shouting match at the window". Tr. at 44-45. Complainant then went home. Tr. at 46.

Complainant elaborated in response to my question:

JUDGE BULLARD: All right. So you're saying that at that particular—in the course of this discussion with Mr. Proctor you told him that you were tired and you were going home?

MR. KERCHNER: Yes. I said I had enough and at this point.

JUDGE BULLARD: You had enough?

MR. KERCHNER: Intimidation and reprisal and actually it was time to bring it to an end.

MR. KOHLER: Are these his words or a summary of what he said. Can we clarify that please.

JUDGE BULLARD: Yes. Could you please state if you can recall exactly what you said to Mr. Proctor.

MR. KERCHNER: Mr. Proctor said are you taking the load Martin and I said no Joe I'm not taking the load I've been punished enough tonight. He said you call your shop steward and I said there is no shop steward and there was a statement made by Mr. Vaughn and basically Your Honor, this is my argument that I was intimidated. I was in a state of mental anguish or whatever. I was in no condition to drive that truck and this regulation says when you feel that you're that way you're the driver and you make that decision. Even if the boss has 188 loads it doesn't matter. When you say you're fatigued or otherwise that's it you're out of the game.

Tr. at 46-47.

Complainant explained that his comment that "there is no shop steward" referred to his perception that the shop steward and union were aligned with management, and that he had no effective union representation. Tr. at 40-42. Complainant called the company shop steward, Kenneth Monica, at about 9:00 a.m. on August 11th, and was told that he was suspended and would be fired. Tr. at 47-48. Respondent's personnel Director, Mike Layton, called him about his suspension. Tr. at 49. Complainant filed a grievance regarding his suspension. Tr. at 51. Complainant was informed by letter of August 29, 2005 that he was discharged. Tr. at 52.

Complainant was asked to distinguish his actions on August 11th from refusing to take a load. Tr. at 60. He testified that in his experience with Grocery Haulers, he was never able to pick a load for delivery. However, Complainant explained that "you could voice your displeasure with a load and if you had an honest dispatcher or a fair dispatcher if they gave you a bad one they came back and gave you a good one to make up for it because it's trip pay. It's not hourly pay." Tr. at 61. Complainant testified that on August 11, 2005, he was aware that other trips were available. Tr. at 62. He further stated that he believed that the trip he was assigned would have been too difficult for him to complete because of traffic and because "after a heated argument or discussion [he] was in no shape to get in a truck and go anywhere to the closest store or whatever". Tr. at 63-64. Complainant stated that he had complained about assignments at other times to Grocery Hauler's managers. Tr. at 64-65.

Upon cross examination, Complainant testified that 45 to 50 percent of Grocery Haulers' business required drivers to travel through the heavily congested New York area. Tr. at 83-84. Complainant agreed that when he refused a Waldbaum load on August 9, 2005 on the grounds of his fatigue, he went home and was not disciplined. Tr. at 85-86. Complainant stated that on the next evening when he was again assigned a Waldbaum load, he did not tell Mr. Proctor "in a clear statement" that he was fatigued. Tr. at 86. He also did not directly state that he advised his supervisor that he was fatigued in his complaint to OSHA. Tr. at 88. In his letter to Silver Line explaining his termination, Complainant did not state that he refused a load due to fatigue. Tr. at

89-90. In his written statement of April 17, 2006, made in conjunction with OSHA's investigation, Complainant stated that he "refused to make the trip because the trip to Brooklyn only paid \$49.00. It is my understanding and belief that the pay on different trips from \$18 to \$160.00 and that...the fair headed boys received the higher paying trips Because of my refusal to take the trip into Brooklyn, I was terminated by management." Tr. at 91-92; RX 21.

Complainant received a copy of Grocery Haulers' employee handbook shortly after he was hired, and signed a statement attesting to his familiarity with the work rules contained therein. Tr. at 95-96. He was aware that insubordination could lead to termination. Tr. at 96.

Complainant testified that he saw inspection reports prepared by drivers who had used a truck before he did. Tr. at 98. Complainant admitted making complaints about low paying jobs, and agreed that other drivers also complained about that issue. Tr. at 98-99. Complainant acknowledged that the drivers regularly objected to taking low paying trips in congested areas. Tr. at 99.

Complainant objected to the document identified as RX 21, and stated that he was not familiar with the document, and was equivocal in his admission that the signature on the signature page was his own. Tr. at 101-103.

Paul Kinsaul

Mr. Kinsaul worked with Complainant at Grocery Haulers in Avenel, New Jersey. Tr. at 111. Mr. Kinsaul testified that he had witnessed an altercation between Complainant and Respondent's employee Mr. Merz that involved the safety of equipment. Tr. at 111. Mr. Kinsaul could not recall the date, and said that he did not really know Complainant at the time. Tr. at 112. Mr. Kinsaul heard Mr. Merz asked Complainant "if he wanted to fight". Id. Mr. Kinsaul recalled that Mr. Kerchner and Mr. Merz were standing near the dispatch office, and he heard "a big bunch of yelling". Tr. at 115. During the argument, Mr. Kinsaul "heard something about putting trucks out of service. I caught the tail end of that and then the finger went up and he said go ahead and hit me you're under the camera but that might have been blowing smoke. He goes off like that sometimes". Tr. at 117. Mr. Kinsaul did not see Complainant leave, because Mr. Kinsaul "left and went back to work". Tr. at 115.

Mr. Kinsaul admitted that he was not present when Complainant refused a load on August 11, 2005. Tr. at 118. Mr. Kinsaul could not say if Mr. Merz played any role in Complainant's termination. Id. Mr. Kinsaul testified that Mr. Merz had heated altercations and arguments with other drivers. Id. Mr. Kinsaul answered affirmatively when asked whether he would describe Mr. Merz "as a man with a temper". Tr. at 118. Complainant clarified that the argument that Mr. Kinsaul described did not occur on August 11, 2005. Tr. at 116.

Joseph Proctor

Mr. Proctor is employed by Grocery Haulers as a "night shift terminal manager" at their Avenel facility. Tr. at 120. He has held that position for 12 years, and has been employed by the company for 29 years. Id. He supervises the dispatcher and clerical personnel and oversees the

dispatch operations. Tr. at 121. In August, 2005, Mr. Proctor typically worked from 12:00 a.m. until 10:00 a.m. There are three shifts, and each uses one dispatcher. Id. Mr. Proctor explained that hauls were assigned to drivers based upon their available hours and the expectations of customers for receiving deliveries. Tr. at 121-122. Drivers are sent on a haul, and some return to the facility or are dispatched to another facility, or just return home, depending on the work load and their hours. Tr. at 122. The dispatcher assigns the hauls according to work orders that are prioritized according to customers' needs. Tr. at 123. Mr. Proctor estimated that 350 to 400 trips are dispatched a day from his location. Id.

Drivers are not permitted to refuse a load unless they report that they are fatigued or have insufficient hours to service a load. Tr. at 123-124. Drivers who perceive vehicle problems are expected to report them to "the mechanical shop and the shop makes a decision to make the repair or to change the equipment." Tr. at 124. If a driver does not want to drive a vehicle because of a safety concern, the defect is repaired, or he is assigned a different vehicle. Tr. at 124. Mr. Proctor agreed that approximately half of the hauls from his location must go through congested areas, and that the drivers commonly complain about that. Tr. at 125. Drivers are paid by the load regardless of how long it takes to complete it, but are compensated for major delays. Id. Ordinary traffic is "calculated in their rate". Tr. at 126.

Mr. Proctor met Complainant when he first started to work for Respondent, and he saw him on a daily basis. Tr. at 126. Mr. Proctor never had a conflict or problem with Complainant, and described his relationship with him as good. Tr. at 126. Complainant never raised any safety complaints to Mr. Proctor. Id.

On August 11, 2005, Mr. Vaughn Scott told Mr. Proctor that Complainant would not deliver a load "because he was not hired to do Waldbaum work". Tr. at 127. Mr. Proctor asked Mr. Scott to tell Complainant to contact his shop steward before making the decision to refuse the haul. Tr. at 127. Mr. Proctor was on site during the incident, but didn't hear the conversation between Complainant and Mr. Scott. Tr. at 128. Mr. Proctor spoke directly to Complainant who told him "that he was hired to do Pathmark and not Waldbaum." Tr. at 128. He advised Complainant to contact his shop steward because his refusal to take the load could result in suspension and termination. Tr. at 128. Mr. Proctor testified that Complainant told him that he did not have a shop steward. Tr. at 128. Mr. Proctor did not "yell" at Complainant, and the tone of the verbal exchange was conversational. Tr. at 129.

Mr. Proctor testified that Complainant did not say he was tired or fatigued, or too mentally upset or distressed to take the load. Tr. at 129. Complainant gave no reason other than he was hired to do Pathmark, not Waldbaum. Tr. at 129. Mr. Proctor advised Complainant that he was hired to do Grocery Haulers' work, by which he meant that Complainant should be available for any work that Respondent contracted. Tr. at 130. No other conversation ensued, and Complainant was suspended for refusing the load. Tr. at 129. Complainant left the premises thereafter. Tr. at 129-130.

After Complainant left, Mr. Proctor "made a supervisor report and...asked Mr. Vaughn Scott to give [him] his statement." Tr. at 131. Mr. Proctor testified that it is normal procedure to record an incident that would result in an employee's suspension. Tr. at 131. He does not have

the authority to fire an individual, as that decision is made later. Tr. at 132. In the morning, Mr. Proctor reported the incident to his director Mark Palmer in a telephone conversation. Tr. at 134. He gave his and Mr. Scott's statements to Mr. Palmer later that morning. Tr. at 135. Mr. Proctor testified that although Mr. Merz was in the dispatch office at the time of the incident, he played no role in assigning the haul to Complainant. Tr. at 137.

Mr. Proctor explained that Waldbaum was a relatively new customer with a growing account that produced an increase in volume of loads. Tr. at 130. The increase in work required drivers who did not normally haul a Waldbaum load to perform that work. Tr. at 130. Mr. Proctor stated that Complainant was assigned the haul that he refused because it was a priority order, he wanted another haul, and he had hours remaining on his shift. Tr. at 133. He admitted that the delivery time frame was tight, as Complainant had only 1 ½ hours to get the haul to its destination and be on time. Tr. at 134.

Mr. Proctor testified that he had suspended one or two other drivers for refusing a load during his twelve years as supervisor. Tr. at 137-138. Mr. Proctor stated that a shift was typically scheduled for between eight and twelve hours, but sometimes they would extend to fifteen hours. Tr. at 138. Mr. Proctor believed that the load that Complainant refused could have been completed in a timely fashion. Tr. at 139. Complainant had been mostly confined to Pathmark loads, but since the Waldbaum account was new, all the drivers were being assigned hauls for that customer. Id. Mr. Proctor believed that the Pathmark and Waldbaum hauls would take about the same time, because "they're basically in the same city and same area". Tr. at 140.

According to Mr. Proctor, occasionally drivers say they are too tired to take an assignment, but not regularly. Tr. at 140. When it happens, "they would tell you before they received their assignment...not after their assignment that they were too fatigued". Drivers would typically tell you the number of hours they believed they could drive, or tell you they were tired and needed to go home. Tr. at 140. Mechanical problems come up regularly, like flat tires, or brake adjustments, and if they can be repaired quickly, they are. Tr. at 140-141. Mr. Proctor was familiar with pre trip and post trip inspection reports and observed that drivers report defects "all the time". Tr. at 141-142. A mechanic signs off on reports before the vehicle is "put back on the road". Tr. at 142. The company keeps the reports, and the Department of Transportation audits them from time to time. Tr. at 142.

Mr. Proctor testified that Mr. Merz did not influence him to assign Complainant the Waldbaum's load on August 11. Tr. at 143. Mr. Proctor agreed that Complainant did his job faithfully during the four plus years that they had worked together. Id. Mr. Proctor did not observe an exchange between Mr. Merz and Complainant on August 11, 2005.

Mark Palmer

Mr. Palmer worked for Grocery Haulers for the past eleven years, and worked for its predecessor company, Paul's Trucking, for 21 years. Tr. at 145. As Director of Operations, he is in charge of the daily operations of the Avenel facility, which is the company's main terminal. Tr. at 146. The terminal managers report directly to him. Id. Mr. Palmer testified that Grocery Haulers is "a carrier of food products for several food chains. We have contracts with Pathmark

directly, and contracts with A&P stores and some Waldbaum stores”. Tr. at 146. The company operates 24 hours a day, seven days a week and 363 days a year, hauling from 250 to 500 loads a day. Tr. at 146. The company employees approximately 400 drivers, and had between 300 to 400 drivers in August of 2005. Tr. at 147.

Mr. Palmer stated that during the period from 2001 to 2005, Pathmark was a major customer that required multiple drivers, some of whom drove only for that chain. Tr. at 148. In 2005, the company experienced a large influx of new business when it took over contracts for other companies, including Waldbaum and CVS. Tr. at 148. Drivers were assigned to haul loads for any of the customers. Tr. at 149. Drivers are not permitted to choose the hauls that they take. Tr. at 150. Mr. Palmer testified that in 2005, there was a collective bargaining agreement between the company and the Teamsters Union Local 863 that included a provision prohibiting drivers from refusing assignments, or from failing to complete assignments. Tr. at 149-150. In addition, there is a company rule that prohibits insubordination. Tr. at 150. Mr. Palmer characterized refusal to accept a load as insubordination, which would result in suspension “pending termination”. Tr. at 150. He explained that refusal of an assignment warranted a severe penalty because of the volume of work. Tr. at 151. Each shift dispatcher has approximately 100 deliveries that have to be assigned on a shift, and the logistics of assigning the work cannot accommodate individual requests. Tr. at 151-152.

Mr. Palmer denied that individuals who declined a load because of fatigue would be penalized. Tr. at 152. He observed that DOT regulations and safety concerns would warrant keeping a fatigued driver off the road. Tr. at 152. Mr. Palmer testified that drivers are responsible for inspecting their equipment for mechanical defects, which should be brought to the repair shop’s attention. Tr. at 152. Mechanics must certify that they made necessary repairs and the tractor cannot be used until the certification is made. Tr. at 152. Mr. Palmer explained that DOT regulations prescribe how these inspection and certification reports must be prepared and maintained by drivers and mechanics. Tr. at 153.

As soon as he awakens each morning, Mr. Palmer calls the terminal for a status report of operations. On the morning of August 11, 2005, he called and spoke with Joe Proctor, who said that Complainant had refused to take a Waldbaum delivery. Tr. at 153-154. When he arrived at work, he reviewed the statements from Joe Proctor and Vaughn Scott regarding the incident, and then spoke with Mr. Proctor again. Tr. at 155. Mr. Palmer then forwarded the information to Mike Layton in human resources. Id. Mr. Layton was responsible for advising the union that a driver had been suspended. Tr. at 156. Mr. Palmer asked Mr. Merz for a statement of his observation of the incident, which he sent in an email to Mr. Palmer. Tr. at 157. Mr. Palmer had never before had a conflict or problem with Complainant. Tr. at 152.

A labor-management hearing on Complainant’s suspension was held a short time after the incident, and Mr. Palmer attended with other Grocery Haulers and union representatives. Tr. at 157. Complainant admitted that he refused to deliver a load, and offered no explanation for his refusal. Tr. at 157. Complainant did not say that he had refused the load because he was fatigued or tired, or because of safety issues. Tr. at 158. Complainant did not state that he refused the load because he was mentally agitated by an argument with Mr. Proctor, nor did he say that he had had an argument with Mr. Proctor. Id. After considering the evidence introduced

at the hearing, Grocery Haulers terminated Complainant. Tr. at 158-159. Mr. Palmer, together with the company's owner and Chief Operating Officer, made the decision to discharge Complainant. Tr. at 159. Human Resources processed the paperwork involved in the termination. Id.

Mr. Palmer testified that he had no knowledge of safety complaints that Complainant had made to DOT in 2002 or 2003. Tr. at 160. He further denied knowledge that Complainant had contacted OSHA in May, 2005 about safety concerns. Id. He did not recall Complainant bringing safety issues to his attention. Tr. at 160.

Other drivers had refused to haul loads and were fired. Tr. at 160-162. Mr. Palmer testified about several individuals who were discharged after refusing loads a single time. Tr. at 162-164. Grocery Haulers has a Safety Director who is responsible for safety issues. Tr. at 165. Respondent complies with safety rules and sponsors safety training. Id. During Complainant's tenure with the company, OSHA conducted at least two inspections of Respondent operation. Tr. at 166. Respondent received satisfactory safety ratings, and no citations. Tr. at 166.

Complainant asked Mr. Palmer about Respondent's procedures in the event a driver is issued a traffic citation. Mr. Palmer stated that the company paid for parking or equipment violations but would not pay for a summons issued for speeding or similar offenses. Tr. at 172. Grocery Haulers reviews the driving record of each driver annually, and the Safety Department would assist drivers in clearing their record, particularly if the issue involved an unpaid citation. Tr. at 173. No disciplinary action would be taken against an employee who received a citation. Tr. at 173. Mr. Palmer recalled that Complainant brought an issue regarding his license to Mr. Palmer's attention, and it was decided to withhold assignments in areas where Complainant's license was compromised. Tr. at 174. Mr. Palmer was aware of other drivers who had restrictions imposed upon their licenses. Tr. at 174. Mr. Palmer acknowledged that DOT rules prohibited drivers from driving while their license was in question. Tr. at 175. It is the responsibility of the driver to inform the company when there is a problem with a license. Tr. at 175-176. Grocery Haulers tries to accommodate drivers by assigning them loads in jurisdictions that are not affected by their problem with a license. Tr. at 176. Different states have different rules regarding how citations affect the status of a license. Id. In Complainant's case, Grocery Haulers investigated whether he could drive in New York, and learned that there was no real issue with his license. Tr. at 186-187.

Mr. Palmer admitted that Grocery Haulers designated certain drivers to haul for Pathmark and certain drivers for Waldbaum. Tr. at 178-179. He explained that a listing of Waldbaum hauls identified as Respondent's exhibit 17 was made to track hauls. Tr. at 179. Mr. Palmer explained that the drivers were classified on lists "for billing purposes and identifying drivers who might be on Waldbaum or trying to make sure you have enough people in the slot to cover the Waldbaum's work on a normal basis. That doesn't mean that there aren't other drivers that would do that work for the peaks and the valleys or the conditions of the business. This is just establishing for the customer who they are paying for..." Tr. at 180. The list is an internal accounting document, and is not used for purposes of dispatching assignments. Tr. at 184.

Drivers could not choose which customers to haul for, and Mr. Palmer testified that the preferences of individual drivers would not be accommodated. Tr. at 182. He did not consider Waldbaum work less desirable than other work, and pointed out that both companies often had establishments in vicinity of one another. Tr. at 182. The same equipment would be used for either Waldbaum or Pathmark; the cargo would be the same weight and type; and the times of days that the loads would be hauled would be the same. Tr. at 183.

2. **Documentary and Other Evidence**

The parties' prehearing submissions were identified as ALJX 1 and 2, and were admitted to the record. Tr. at 6. In addition, documents associated with OSHA's investigation, which were provided to Respondent in response to a request under the Freedom of Information Act, and to me upon request, are identified as ALJ exhibits⁸ and are identified as follows:

- ALJX 3 OSHA's Discrimination Case Activity Worksheet noting August 25, 2005 complaint regarding Complainant's termination
- ALJX 4 OSHA case summary of case number 2-2140-06-009, recording February 21, 2006 filing of complaint in which Complainant criticized the conduct of OSHA's investigation into his retaliation complaint. This complaint was also construed to raise "new allegations of blacklisting".

Complainant's sole exhibit laid the foundation to establish that he had given proper notice of his intent to call a witness. Tr. at 10. In addition, in documents submitted by Respondent, Complainant specifically referred to lost wages as damages resulting from his suspension and termination. RX 16 at 6.

Respondent submitted exhibits identified as RX 1 through RX 21. RX 23 was offered into evidence, but was not admitted, as it was duplicative of a document contained within RX 17. Tr. at 185..Respondent withdrew RX 18.

Respondent's Exhibits are described generally as follows:

- RX 1 Respondent's response to Complainant's grievance of July 20, 2005
- RX 2 Complainant's grievances of August 15, 2005.
- RX 3 Respondent's response to Complainant's grievances of August 15, 2005
- RX 4 Notice of change in Complainant's payroll and status
- RX 5 Termination letter of August 29, 2005 from J. Michael Layton to Complainant

⁸ In the interest of completeness, copies of the OSHA records are provided to the parties together with this Decision and Order.

- RX 6 Respondent's Employee Handbook and Complainant's acknowledgment of receipt
- RX 7 Statement of Joseph Proctor dated August 11, 2005
- RX 8 August 11, 2005 Work Order
- RX 9 August 17, 2005 email from Tom Merz
- RX 10 Statement of Vaughn Scott dated August 11, 2005
- RX 11 Collective Bargaining Agreement dated February 1, 2004
- RX 12 OSHA determination of June 13, 2007 (duplicated at RX 17 at 8)
- RX 13 Complainant's Objection to OSHA's determination dated July 12, 2007
- RX 14 Letter of July 12, 2007 from Complainant to Patricia Clark (OSHA) (duplicated at RX 17 at 3)
- RX 15 Complainant's response to Respondent's interrogatories
- RX 16 Complainant's response to Respondent's request for production of documents
- RX 17
 - at 1 Complainant's August 25, 2005 letter to OSHA
 - at 2 List that Complainant identified as Waldbaum Drivers (duplicated at pp 42-43)
 - at 11 Selections of USDOT safety regulations
 - at 14 September 19, 2005 letter from Complainant to Silver Line (duplicated at RX 19)
 - at 15 Employee protection provision of Surface Transportation Safety Act, 49 U.S.C. §31105
 - at 16 USDOT regulations (duplicated at 44)
 - at 17 Complainant's discussion of regulations regarding license requirements; USDOT regulations; State of New York DOT letter of December 29, 2003, concerning summons issued to Complainant; correspondence from Respondent to Complainant regarding summons; miscellaneous documents involving Complainant's license
 - at 31 Statement of Complainant's income for 2005 and 2006 and corresponding W-2 forms
 - at 34 Correspondence between NLRB and Complainant alleging unfair labor practices by Respondent and Teamster Local Union 863.
 - at 37 November 3, 2005 correspondence to OSHA investigator Richard J. Porteus
 - at 38 Correspondence from OSHA regarding Complainant's Section 11(c) complaint, and documents pertaining to that complaint and investigation
 - at 45 Correspondence with Independent Review Board concerning Union local

- at 48 Correspondence with Representative Mike Ferguson, U.S. Congress
- at 49 USDOT response to congressional inquiry
- at 52 Correspondence with OSHA regarding review of Section 11(c) complaint dismissal
- RX 17 at 55 Email from Richard Porteus (OSHA) to Lonnia Simmons (OSHA) dated April 6, 2006
- at 56 Complainant's appeal to OALJ
- at 57 Correspondence with OSHA regarding Paul Kinsaul
- at 60 Correspondence with OSHA regarding Section 11(c) investigation
- at 65 Correspondence with Teamsters Union

- RX 18 Withdrawn

- RX 19 Letter of September 19, 2005 to Silver Line (duplicated at RX 17 at 14)

- RX 20 Documents relating to discharge of other drivers, including January 15, 2002 findings by Arbitrator J.J. Pierson in arbitration of grievance of discharged employee Jerome Lewis

- RX 21 Statement dated April 17, 2006 and signed by Complainant

E. Statement of the Law

The STAA, 49 U.S.C.A. §31105(a)(1), provides that an employer may not “discharge,” “discipline” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activity. A “commercial motor vehicle” includes “any self-propelled... vehicle used on the highways in commerce principally to transport passengers or cargo” with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. app. §2301(1). Section 405 of the STAA was enacted to encourage employees in the transportation industry to report employers’ noncompliance with safety regulations governing commercial motor vehicles and to protect these “whistle-blowers” by forbidding the employer to discharge, or to take other adverse employment action, in retaliation for their safety complaints. Brock v. Roadway Express, Inc., 481 U.S. 250, 258, 262 (1987); 49 U.S.C. app. §2305(a), (b). The STAA does not, however, prohibit an employer from discharging a whistleblower where the discharge is not motivated by retaliatory animus. See, e.g., Newkirk v. Cypress Trucking Lines, Inc., 88-STA-17 (Sec’y Feb. 13, 1989), slip op. at 9.

Protected activity includes making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order.” §31105(a)(1)(A). Internal complaints to management are protected under the STAA. Reed v. National Minerals Corp., Case no. 91-STA-34, Sec., Dec. and Order, slip op. at 4, (July 24, 1992). In addition, the STAA protects two categories of work refusal. 49 U.S.C.A. §31105(a)(1)(B)(i) and (ii).

To prevail under the STAA, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action

against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. Schwartz v. Young's Commercial Transfer, Inc., ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); Assistant Sac's v. Minnesota Corn Processors, Inc., ABR No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003). The burdens of proof that apply to allegations of discrimination under Title VII of the Civil Rights Act of 1964 have been adapted to the determination of whether violations of the whistleblower protections of the STAA have occurred. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Under the McDonnell-Douglas framework, the complainant has the initial burden of establishing a prima facie case of retaliation. The prima facie case is established where complainant has shown an inference that protected activity was the likely reason for Respondent's adverse action. The burden of production then shifts to Respondent to articulate a legitimate, nondiscriminatory reason for its employment decision. McDonnell Douglas Corp. v. Green, supra. The respondent need only articulate a legitimate reason for its action. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). If Respondent's reason rebuts the inference of retaliation, then Complainant must demonstrate by a preponderance of the evidence that the stated legitimate reasons for the adverse action were a pretext. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, supra. at 2752-56. In addition to discounting the employer's explanation, "the fact finder must believe the [complainant's] explanation of intentional discrimination." Id. The complainant must show that the reason for the adverse action was his protected safety complaints." Pike v. Public Storage Companies Inc., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). "When a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." Mitchell v. Link Trucking, Inc., ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

By establishing a prima facie case, a complainant creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, supra. In instances where a full hearing has been held, there is no need to determine whether the employee presented a *prima facie* case and whether the employer rebutted that showing. United States Postal Service Board of Governors v. Aikens, 460 U.S. 709, 713-14 (1983); Pike v. Public Storage Companies, Inc., 98-STA-35 (ARB July 8, 1998). The focus of inquiry should be whether the respondent establishes a nondiscriminatory justification for the adverse employment action. Carroll v. J.B. Hunt Transportation, 91- STA-17 (Sec'y June 23, 1992). However, where Complainant at hearing fails to demonstrate protected activity or adverse action, then he has failed to establish a prima facie case and dismissal is appropriate. Smith v. Sysco Foods of Baltimore, ARB No. 03-134, ALJ No. 2003-STA-32 (ARB Oct. 19, 2004).

Although a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the complainant must still carry the burden of proving the necessary elements of retaliation. Flener v. H.K. Cupp, Inc., 90-STA-42 (Sec'y Oct. 10, 1991).

F. Discussion and Analysis

1. **Coverage Under the Act**

The STAA provides protection from retaliation for “an employee-operator of a commercial motor vehicle” who has engaged in protected activity. §31105(a)(1)(A). A “commercial motor vehicle” includes “any self-propelled... vehicle used on the highways in commerce principally to transport passengers or cargo” with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. app. §2301(1).

Although Respondent did not dispute coverage under the Act, nor allege that Complainant was not an employee within the scope of the Act, I find it appropriate to address coverage. See, Minne v. Star Air, Inc. ARB No. 05-005, ALJ No. 2004-STA-00026 (ARB Oct. 31, 2007). Complainant used highways to haul large loads of cargo to Respondent’s customers in commercial tractor trailers. Respondent’s primary customers were grocery store chains. Tr. at 146. The evidence demonstrates that Respondent was subject to Department of Transportation regulations (RX 17 at 48-51), and OSHA concluded that Respondent was a commercial motor carrier within the meaning of the Act (RX 12). The record reflects that Complainant was an employee, who was assigned work by Respondent, to be completed within hours established by Respondent. Complainant acknowledged receipt of an employee handbook, and kept records of his hours worked. He was paid by Respondent, which issued Complainant a W-2. RX 17 at 32.

I find that both Complainant and Respondent are covered under the Act.

2. **Protected Activity**

a. Complaints regarding safety of equipment

Complaints with DOT FMCSA

In his correspondence, pleadings and testimony, Complainant has asserted that he filed complaints with DOT FMCSA that raised concerns about the safety of Respondent’s equipment. Correspondence between United States Congressman Michael Ferguson and DOT FMCSA reflects that Complainant had filed complaints with FMCSA in July 2002 and in May 2003 that alleged that Grocery Haulers drivers “routinely fail to conduct pre and post trip inspections, and do not report vehicle defects to their employer”. RX 17 at 48-51. Documentary evidence corroborates Complainant’s assertions. RX 17. I find that these complaints constitute protected activity under the Act.

Section 11(c) Complaint of May, 2005

Complainant testified that in May, 2005 he complained to OSHA that Respondent’s equipment was not safe, and sought an investigation under Section 11(c) of the Occupational

Safety and Health Act of 1970 (“OSHA Act”).⁹ Tr. at 56-57. Complainant did not have a copy of the complaint, but OSHA acknowledged the complaint in internal e-mails, and in correspondence to Complainant, wherein the agency assured him that Respondent had addressed the work hazards that he had complained about. RX 17 at 60. In a letter to OSHA dated November 3, 2005, Complainant referred to complaints that he had made to OSHA in April 2005¹⁰, regarding safety concerns, which were apparently investigated by OSHA. RX 17 at 27-38. In response to interrogatories, Complainant wrote that “in May of 2005” he “contacted OSHA at Avenel N.J. to have serious safety issues resolved”. RX 16 at 5. Complainant further alleged that an OSHA employee typed his complaint, which he signed. Id. Respondent’s Chief Operating Officer Mark Palmer testified that OSHA had conducted inspections of the Grocery Haulers Avenel Avenue facility in 2002 and 2003. Tr. at 165-166.

I find that the preponderance of the evidence establishes that Complainant did file a complaint with OSHA in May, 2005 regarding safety issues at his place of employment. I further find that by filing this complaint, Complainant engaged in protected activity under the STAA.

Direct reports to management of defective conditions

Complainant testified that he documented equipment defects on pre-trip and post-trip inspection reports, and further said that he put four or five tractors out of service because of safety concerns. Tr. at 24-25. Because internal safety complaints are protected under the Act, I find that Complainant engaged in protected activity when he reported defects and put equipment out of service. See, Davis v. H.R. Hill, Inc., 86 –STA-18 (Sec’y March 18, 1987) slip. Op. at 3-4; Reed v. National Minerals Corp., 91-STA-34 (Sec’y July 24, 1992).

b. Suspension of driver’s license

Complainant argues that Respondent violated DOT regulations by scheduling him to drive when his license was suspended. RX 17 at 17. RX 17 at 64. Although this may be the case, there is no evidence that Complainant filed a complaint about this activity to any authority, to his union, or to Respondent. I do not find any evidence in the record that any activity Respondent took with respect to Complainant’s driver’s license would constitute protected activity under the STAA.

c. Complaints to Congress, National Labor Relations Board and Teamsters

Complainant’s correspondence with his congressman, union and the NLRB raise allegations that complaints he had made about Respondent and his union were not properly investigated by responsible authorities. There is no evidence that this correspondence was shared with his employer. Moreover, his complaints to his Congressman were addressed by DOT FMSCA. His

⁹ Complainant filed another complaint under Section 11(c), alleging that his refusal to drive on August 11, 2005, was covered as a safety issue under the Occupational Safety and Health Act of 1970. OSHA determined that the incident did not fall within Section 11(c), and dismissed that complaint. RX 17.

¹⁰ I construe Complainant’s reference to complaints of April, 2005 to be the same as the alleged complaints of May, 2005.

complaints to NLRB and the national office of his union relate to concerns about his union representation, and do not implicate safety concerns. I find that these complaints do not constitute protected activity under the Act.

d. Grievance of July 20, 2005

In July, 2005, Complainant filed a labor-management grievance, alleging that his union and Respondent had improperly negotiated an increase in wages for new drivers. RX 1. In correspondence signed August 17, 2005, Complainant wrote to his local Union 863 IBT to complain that under the agreement, some new hires would earn more than senior drivers. RX 2(a). Complainant suggested that those who joined in his grievance on this issue would be punished by “less money, more hours for less money”. RX 2(a). Complainant advised the national office of his union that he believed he was not being properly represented by his union Local 863 IBT. Nothing in any correspondence relating to this complaint alleges violations of safety procedures by Respondent. In addition, I infer that Complainant’s allegations of potential adverse action (“less money, more hours”) would be related to employees’ participation in union activity, and not because they raised safety concerns. Even if Complainant did suggest that employees would receive less money and more hours for raising a safety complaint, prospective and potential recriminations do not constitute adverse action under the STAA. There is no evidence that Complainant or other employees experienced a tangible job consequence for challenging the wage agreement between Respondent and the union. See, West V. Kasbar, Inc., ARB No. 04-155, ALJ No. 2004-STA-34, slip op. 5 (ARB Nov. 30, 2005). I find that Complainant’s July 20, 2005 grievance does not constitute protected activity under the STAA.

e. Complaints to OSHA of continuing violations

In response to OSHA’s determination letter of June 13, 2007, Complainant sent correspondence dated July 12, 2007, in which he alleged that Respondent continued to engage in safety violations, such as improper loading of cargo (RX 17 at 5-6); accidents involving injury to employees (RX 17 at 6); and collision of two speeding trucks (RX 17 at 6). This complaint was made subsequent to the events that are the subject of my inquiry under the STAA, and therefore is not part of the instant adjudication.

In addition, Complainant alleges that he continues to be blacklisted from employment with other employers. As I have discussed at length herein, supra, that issue also is not before me, and I decline to make a determination about whether Complainant’s has alleged an adverse action because of blacklisting in violation of the Act.

f. Complaint to OSHA regarding Paul Kinsaul

Complainant authored a letter of April 17, 2007 to OSHA, in which he alleged that Respondent continued to violate safety regulations and engaged in reprisals against Paul Kinsaul. OSHA responded in correspondence dated May 17, 2007. RX 17 at 57. These allegations involve matters that occurred subsequent to the issues under adjudication in the instant matter, and are not before me. I decline to consider whether the substance of Complainant’s allegations in this correspondence constitutes protected activity under the STAA.

g. Refusal to drive and OSHA Section 11(c) complaint of August 25, 2005

On August 25, 2005, Complainant filed a complaint with OSHA that alleged that he was “terminated for complaining about unsafe work conditions”. The complaint was considered to involve a Section 11(c) violation. ALJX 3. In a letter dated October 22, 2005, OSHA advised Complainant that his refusal to drive was not an activity protected under Section 11(c) of the OSHA Act. RX 17 at 39. However, the record demonstrates that OSHA conducted an investigation into Complainant’s allegations, and issued a formal determination dismissing his complaint on May 11, 2006. RX 17 at 54. Complainant appealed that determination in correspondence dated May 24, 2006. RX 17 at 56. In a letter dated June 8, 2006, the Director of OSHA’s Directorate of Enforcement Programs (“DEP” hereinafter) acknowledged Complainant’s appeal of that determination, and advised Complainant that DEP would review OSHA’s findings. RX 17 at 52 (duplicated at 63). In correspondence dated July 10, 2007, OSHA’s DEP advised Complainant that his discharge from Respondent’s employment did not violate Section 11(c). RX 17 at 53. However, DEP explained that in reviewing the case, it asked OSHA to reopen the complaint under the STAA, and conduct an investigation into whether Complainant was discharged because of whistleblowing activity. *Id.*

I have no jurisdiction over the dismissal of Complainant’s Section 11(c) complaint. However, because OSHA investigated the allegations in this complaint under the STAA, I find that this complaint raises an allegation of protected activity under the Act.

Summary

I find that Complainant has failed to produce evidence sufficient to find that his correspondence to Congress, to his union’s national office, or the National Labor Relations Board, or his grievance of July 20, 2005, constitute protected activity. Accordingly, Complainant has failed to establish a prima facie case regarding these matters and I recommend that they be dismissed. See, Smith v. Sysco Foods of Baltimore, ARB No. 03-134, ALJ No. 2003-STA-32 (ARB Oct. 19, 2004).

Because Complainant’s allegations of continuing safety violations by Respondent and his complaint to OSHA regarding Paul Kinsaul concern matters that were not subject to OSHA’s investigation on the complaint before me, I recommend that they be dismissed.

3. Adverse Action

Under the STAA, discrimination “regarding pay, terms or privileges of employment” constitutes a prohibited adverse action. Section 31106(a)(1)(A). It has been determined that an adverse action occurs when complainant has shown that he suffered a “tangible job consequence”. Shelton v. Oak Ridge Nat’l Labs, ARB No. 980100, ALJ No. 980CAA-19, slip op. at 8. (ARB March. 30, 2001), citing Oest v. Illinois Dep’t of Corrections, 240 F.3d605, 612-613 (7th Cir. 2001).

a. Suspension and Termination

The evidence establishes that Claimant filed complaints that alleged unsafe conditions at his employer's facility. It is also uncontroverted that Complainant was terminated from his employment with Respondent, retroactive to his suspension from employment several weeks prior to his discharge. Respondent has not contested that Complainant's suspension and discharge from his employment were not adverse actions. I find that the suspension and later discharge constitute adverse employment actions within the meaning of the STAA.

b. Waldbaum Assignments

Complainant alleged that he suffered adverse action by being assigned different work than he had been accustomed to receiving. Complainant believed that he was hired to haul loads to Pathmark stores, and had been assigned loads to Pathmark for most of his tenure with Respondent. Tr. at 43-44; 181. In August, 2005, when he was assigned the Waldbaum jobs, Complainant believed it was "punishment" for reporting defects on his mandatory pre-trip and post-trip inspection reports. Tr. at 23-26. Complainant alleged that the Waldbaum loads were more difficult to deliver because of congestion on the road and were less remunerative than other trips. Tr. at 30; 61-63; 83. Complainant testified that his work assignments changed from when he first worked at the company, and became "the least paying and the more time consuming trips" which he attributed to his "bad reputation of being safety conscious". Tr. at 30-31. He testified that because he "caused a ripple or a bump in the flow of the work...and [he] did things that were inconvenient for Grocery Haulers and their operation...[he] was singled out for reprisal like low paying ...and time consuming trips". Tr. at 25-26. In support of his allegation, Complainant relied upon a document that he believed to identify drivers as Waldbaum drivers. RX 17 at 2. Complainant raised this argument in correspondence to OSHA regarding his termination. RX 17 at 1 and 37.

Complainant's immediate supervisor, Joseph Proctor, testified that drivers were not assigned to particular customers, but rather were assigned by availability and delivery needs. Tr. at 130-140. Mr. Proctor admitted that Complainant had generally been confined to Pathmark deliveries, but explained that Waldbaum was a new and growing account that generated more work. Tr. at 130; 139-140. Because of the extra workload, Mr. Proctor had to assign Waldbaum loads to drivers who had not generally hauled to those stores before. Tr. at 130. Mr. Proctor did not consider drivers to be assigned to a particular customer. Tr. at 130. Mr. Proctor testified that he believed the delivery time for both a Pathmark and a Waldbaum load would be the same, as both customers were in the same geographic area. Tr. at 139-140.

Respondent's Director of Operations, Mark Palmer, testified that Grocery Haulers' main terminal was in Avenel, and that between 250 to 500 loads were dispatched daily from that location. Tr. at 146-147. During 2005, Respondent employed approximately 400 drivers. Tr. at 147. Mr. Palmer explained that a number of drivers delivered loads primarily to Pathmark before 2005, when the company acquired Waldbaum as a customer. Tr. at 148. The acquisition of Waldbaum work meant a large increase in Respondent's business, and required assigning Waldbaum deliveries to all of the driving staff. Tr. at 148-149. Mr. Palmer denied that drivers were permitted to express preference for driving for specific customers. Tr. at 182. He did not

believe that an assignment to Waldbaum would be less desirable than any other assignment, and stated that the Waldbaum load that Complainant had been assigned was “right down the street” from a Pathmark store. Tr. at 182. The cargo, equipment, time of day and distance would all be about the same for either load. Tr. at 182-183.

Mr. Palmer was shown a document listing Waldbaum deliveries and denied that it was intended to identify drivers by assignment to Waldbaum. Tr. at 179. He explained that the document identified all loads performed by a particular driver for a particular customer for the purposes of billing and tracking employee time. Tr. at 180-181. The document was not used to dispatch work, and was only used by the company’s accounting department. Tr. at 184.

I accord substantial weight to Respondent’s explanations regarding the assignment of Waldbaum loads. Complainant did not rebut Respondent’s explanation that the work was essentially the same as that to which Complainant was generally assigned. Even accepting Complainant’s assertion that he was a Pathmark driver, Complainant did not produce any evidence that the Waldbaum loads would be less remunerative or more burdensome. Complainant did not refute the evidence that placed the Pathmark and Waldbaum deliveries in the same geographic area. He admitted that approximately half of the work emanating from Respondent’s Avenel facility involves routes through the congested roads near New York City. Complainant has not established that he experienced any tangible employment consequence relating to the Waldbaum assignment. He expressed comfort with doing Pathmark work, and believed that his familiarity with those deliveries made him more efficient. Tr. at 60. However, since he never completed a Waldbaum load, he was unable to establish how it would have been more time consuming and lower paying than other work.

I find that Complainant has failed to establish that his assignment to haul Waldbaum loads constitutes adverse action.

c. Intimidation and harassment

Complainant also asserted that he experienced adverse action through intimidation and harassment. Tr. at 29-30. Complainant alleged that he was harassed for making complaints about safety issues, such as loose lug nuts, which would cause tires to fall off and transmissions to fall on the road. Tr. at 32. Complainant contended that he was the only driver to complain about Respondent’s equipment, which he believed to be unsafe. Tr. at 23. Complainant explained that the workload placed great demands on Grocery Haulers’ drivers and equipment, and stated that his complaints were unwelcome because they interrupted the work flow. Tr. at 23. In response to being asked to describe the acts that comprise intimidation, Complainant testified:

Because of causing a ripple or a bump in the flow of the work under the high pressure of the work load that had to be done because I was considered I guess a non-conformist and I did things that were inconvenient for Grocery Haulers and their operation and from that point I was not labeled a team player and I was singled out for reprisal like the low paying trips, assigned different equipment tractors that are dirty inside which the tractor that I was assigned to I kept clean.

They basically it was I was given the lesser paying trips and the time consuming trips. The New York metropolitan area is well publicized for its construction. When they have a driver, this is the kind of reprisals that are taken.

Tr. at 25. Complainant stated that he “was picked on and reprisals were taken against me because of my activities and my safety consciousness.” Id.

In addition to filing complaints with government agencies, Complainant’s activities included reporting equipment defects on the mandatory pre trip and post trip inspection reports. Tr. at 25-26. Complainant believed that other drivers did not make reports of defective equipment because several days after reporting a defect, he would be assigned a tractor with the same defect. Tr. at 26. He believed that after reporting a defect, the tractor would be reassigned to another driver rather than repaired. Id. He cited as an example an instance where a universal joint on the steering shaft of a tractor was not repaired, though it had been reported. Tr. at 27. Complainant contended that the workload did not allow Respondent sufficient time to maintain and repair equipment. Tr. at 29.

Complainant traced the alleged assignment of lower paying and more time consuming trips to his trip inspection reports and his 2002 and 2003 complaints with DOT. Tr. at 28. Complainant testified that he advised his union of his concerns about safety, but did not directly speak to anyone in Grocery Haulers’ management about his safety concerns, other than to report defective equipment on inspection reports. Tr. at 23-24. He also took tractors out of service. Tr. at 108. The following colloquy represents Complainant’s allegations of this adverse action:

JUDGE BULLARD: You used the term intimidation.

THE WITNESS: Yes, I did Your Honor constantly.

JUDGE BULLARD: In the form of being given bad assignments?

THE WITNESS: Remarks and things being done by the shop and the mechanics in the shop. Like I say the truck that I was assigned to I took care of it even though I just had it for a day.

JUDGE BULLARD: How long typically would you spend in your truck?

THE WITNESS: Any place from eight to 15 to 16 to 17 hours in a day.

JUDGE BULLARD: It depended on where the trip was?

THE WITNESS: It depended on how you were being punished.

JUDGE BULLARD: Just answer the question.

THE WITNESS: It depended on the amount of work and the trips that were involved.

JUDGE BULLARD: And your contention is that you were given less remunerative trips and more difficult trips?

THE WITNESS: Yes.

JUDGE BULLARD: And was that the pattern of assignment when you first started to work for Grocery Hauling?

THE WITNESS: Yes. The assignments were different. They were the least paying and the more time consuming trips from when I had first started until I got my bad

reputation of being safety conscious.

Tr. at 30-33.

Complainant further alleged he was intimidated by one of Respondent's managers, Mr. Merz. Complainant suggested that Mr. Merz was hostile to him, and called Grocery Haulers' employee Paul Kinsaul to corroborate that contention. Mr. Kinsaul testified that he had worked at Grocery Haulers at the same time as Complainant, and had witnessed an incident where Mr. Merz and Complainant openly argued. Tr. at 111. Mr. Kinsaul recalled "that night that Merz went up to Mr. Kerchner and put his finger he was like going off." Tr. at 114. Mr. Kinsaul was taking a coffee break and overheard Merz and Complainant arguing in loud voices. Tr. at 115. Mr. Kinsaul described the incident thusly: "I heard something about putting trucks out of service. I caught the tail end of that and then the finger went up and he said go ahead and hit me you're under the camera but that might have been blowing smoke. He goes off like that sometimes." Tr. at 117. Mr. Kinsaul stated that Mr. Merz often argues with other drivers and raises his voice during disagreements with drivers. Tr. at 118-199. Mr. Kinsaul could not recall the date of the argument, and did not know Complainant at the time. Tr. at 112. Mr. Kerchner clarified that the incident took place after he filed his DOT complaints in 2002. Tr. at 116. Mr. Kinsaul witnessed only that incident, and was not present on the night that Complainant refused to deliver an assignment. Tr. at 118; 112. The witness could not say it was Mr. Merz who assigned the load.

Complainant must prove by a preponderance of the evidence that he was harassed for engaging in protected activity. See, Tierney v. Sun-Re Cheese, Inc., ARB No. 00-052 ALJ No. 2000 STA-12 (ARB Mar. 22, 2001). The preponderance of the evidence fails to establish that Complainant suffered reprisals through unfavorable load assignments because he reported defects on inspection reports or because he raised safety concerns with authorities. The record is clear that Complainant filed complaints about Respondent's equipment with federal agencies and his union in 2002 and 2003, but he did not share those concerns directly to management except through inspection reports. There is no evidence to establish that Complainant's assignments were different from other drivers'. In fact, Complainant testified that during his employment with Respondent he never had the opportunity to pick a load. Tr. at 61. Complainant stated that "[y]ou could voice your displeasure with a load and if you had an honest dispatcher or a fair dispatcher if they gave you a bad one they came back and gave you a good one to make up for it because its trip pay. It's not hourly pay". Tr. at 61. When asked what happened if there was no other load available, Complainant testified that "you took what was there. In other words whatever you were dispatched to you did your job." Tr. at 61. Moreover, Complainant admitted that approximately one half of Respondent's loads from the facility where he worked required trips through the congested traffic of New York City. Tr. at 83-84.

The record further reflects that Complainant first vocally complained about an assignment in August, 2005, after Respondent assigned Waldbaum loads to him. There is no record that he disputed job assignments before that time. The only documented complaint is a labor-management grievance that Complainant filed in July, 2005, in which he alleged that his union and Respondent had improperly negotiated an increase in wages for new drivers. RX 1. In correspondence signed August 17, 2005, Complainant wrote to his local Union 863 IBT to

complain that under the agreement, some new hires would earn more than senior drivers. RX 2(a). Complainant suggested that those who joined in his grievance on this issue would be punished by “less money, more hours for less money”. See RX 2(a). However, Complainant’s grievance does not suggest that he would receive less money and more hours because he filed complaints about safety issues. There also is no evidence that drivers did receive less pay and more hours of work.

In addition, there is no evidence that Complainant lost work because of his complaints. Complainant testified that when he put tractors out of service, he was assigned replacement tractors and allowed to deliver loads. Complainant agreed that when he reported defects on inspection reports, he was assigned different equipment and was able to work. There is no evidence to support Complainant’s allegations that he was the only driver who correctly completed pre and post inspection reports. Complainant testified that he only had seen post-trip inspection reports prepared by drivers who had used the tractor assigned to him before he received it. Tr. at 97-98. Complainant’s regular dispatcher, Joseph Proctor, testified that drivers report defective equipment “all the time” on inspection reports and directly to him. Tr. at 141-142. I note that since at least 2005 Respondent has employed approximately 400 drivers. Tr. at 147-148. Complainant acknowledged that drivers prepared hundreds of inspection reports in the aggregate daily. Tr. at 96.

In the instant matter, Complainant had acknowledged that Respondent’s fleet was replaced during his employment. While Complainant maintained that Respondent did not correct reported defects, there is no corroborative evidence supporting this contention. I note that in 2006, OSHA advised Complainant that Respondent addressed safety issues that were disclosed in its inspection. RX 17 at 60. Respondent’s contention that OSHA issued satisfactory safety issues is not disputed. On December 3, 2002, DOT FMCSA answered an inquiry from Complainant’s Congressman that acknowledged his complaints to the agency in July 2002 and May, 2003. RX 17 at 49-51. DOT advised Congressman Ferguson that the agency’s investigation identified some violations, which did not warrant enforcement action. RX 17 at 49. Moreover, DOT confirmed that it issued a satisfactory safety rating to Grocery Haulers. *Id.* DOT’s investigation of Complainant’s second complaint produced similar findings. RX 17 at 50.

An administrative law judge’s credibility findings are due deference unless they are inherently incredible or patently unreasonable. See, Johnson v. Rocket City Drywall, ARB No. 05-131, ALJ No. 2005-STA-24 (ARB Jan. 31, 2007). I accord substantial weight to Mr. Proctor’s credible testimony that defective equipment is not returned to service unless a mechanic verifies that the defect was repaired. Tr. at 142. Mr. Proctor could not say whether drivers report every potential defect, but said that drivers must complete the reports. Tr. at 143. I further find credible Mr. Palmer’s testimony that drivers are responsible to inspect the equipment for safety, and that mechanics must certify that repairs are made in accordance with DOT regulations. Tr. at 152. Mr. Palmer denied that certain tractors experienced more mechanical defects than others, but acknowledged that some tractors were kept from service because repairs were needed. Tr. at 170-171. He testified that Respondent’s fleet is replaced when mileage and the costs of maintenance warrant replacement. Tr. at 171. I find it significant that Respondent maintains a Safety Department headed by a safety expert (Tr. at 165).

I note that it is has been determined that the fact that safety complaints are subsequently resolved or found to be unsubstantiated does not negate their status as protected activity or provide animus for retaliatory action. Stack v. Preston Trucking Co., 86 STA-22 (Sec’y Feb. 26, 1987). However, in the instant matter, I find no evidence that Complainant suffered tangible job consequences related to his complaints. He continued to drive for Respondent and was given regular work assignments. There is no evidence that he suffered any loss relating to the terms or privileges of his employment with Respondent.

I further find little support for Complainant’s contention that he suffered an adverse action due to the conduct of Mr. Merz. I find wholly credible his testimony that Mr. Merz threatened him. His testimony is corroborated by Mr. Kinsaul, who credibly testified about his observations as an unbiased witness. However, despite finding that Mr. Merz had a difficult temperament, I am unable to find that he engaged in harassment or intimidation of Complainant for purposes of finding an adverse action under the STAA. To establish a hostile work environment, Complainant must demonstrate that he was subjected to harassing behavior “sufficiently severe or pervasive to alter the conditions of his employment.” Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). There is no evidence that Mr. Merz regularly assigned Complainant unfavorable work, or gave him unsatisfactory performance ratings, or regularly subjected him to ridicule and criticism. Mr. Kinsaul credibly testified that Merz has a temper, which he apparently unleashes indiscriminately. I accord substantial weight to Mr. Proctor’s un rebutted testimony that Mr. Merz was not involved in the assignment of the load that Complainant refused. Moreover, Complainant was able to work for Respondent contemporaneously with Mr. Merz for years without complaining about Merz to other managers. Although Mr. Merz’ testimony may have clarified his relationship with Complainant and the degree to which he was involved with Complainant’s work, neither Respondent nor Complainant called Mr. Merz as a witness. Based upon the evidence of record, I am unable to conclude that the tension from the relationship between Complainant and Mr. Merz was so severe as to impact Complainant’s terms or privileges of employment.

Complainant also stated that during his employment with Respondent, his driving privileges were suspended in New York State. Tr. at 171. Complainant further testified that “Grocery Haulers paid the summons and this was part of what I feel was the intimidation”. Although Complainant did not articulate it in his testimony, he alleged in submissions to OSHA that he believed he should not have been required to drive at all while his license was suspended. RX 17 at 17. In his written submission, Complainant explained that he learned by mail one Saturday afternoon that his New York State license was suspended. He wrote that he “could not and did not work”, but on the following Monday met with Respondent’s Directory of Safety, Don Wrege, together with his shop steward Ken Monica. RX 17 at 17. Mr. Wrege assured him that he could operate in jurisdictions other than New York. Id. Complainant believed that he was prohibited by DOT regulation from driving anywhere while his license was suspended. RX 17 at 17-18. In addition, Complainant believed that Respondent deliberately failed to address his license problem, which he explained went directly to Respondent’s place of business. RX 17 at 17 and 22; Tr. at 171. Complainant alleged that Respondent’s failure to promptly fix his problem was in retaliation for his complaints to DOT. RX 17 at a7.

The record demonstrates that Complainant was issued a summons from the State of New York Department of Motor Vehicles (NY State DOT), which threatened suspension of his license. RX 17 at 19. The correspondence from NY State DOT was directed to Complainant at Respondent's address. *Id.* Correspondence from Respondent to Complainant reflects that Respondent's legal department resolved the issue when it was brought to Respondent's direct attention. RX 17 at 20. Mr. Palmer testified that it is the company's practice to help drivers keep their licenses in compliance and pay for certain tickets. Tr. at 172-173. The company's Safety Department reviews drivers' driving records to verify compliance with licensing laws. Tr. at 173. Complainant advised Grocery Haulers that his license was compromised because of an outstanding unpaid summons. Tr. at 172-174. Mr. Palmer testified that Respondent "made some accommodations not to send him to certain areas because his license was revoked in that particular area as an accommodation because it was our error and it was our issue and they finally ended up working that out." Tr. at 174. Mr. Palmer stated that other drivers had restrictions on their licenses from time to time. *Id.* Grocery Haulers typically would confine drivers to deliveries in jurisdictions where they had valid licenses until they could work the problem out. Tr. at 176. Mr. Palmer did not believe that Complainant was driving in violation of DOT regulations because the matter was cleared up quickly. Tr. at 175. Mr. Palmer acknowledged that if Complainant's license was impaired, and he carried loads, then Grocery Haulers would have violated DOT regulations. *Id.* Mr. Palmer expects drivers to advise Respondent of problems with their licenses, because drivers would know of the problem before Respondent would. Tr. at 176.

I find no evidence that Respondent intentionally allowed Complainant's license to be compromised. The record establishes that Respondent's legal staff worked to clear the license. I find it logical to conclude that it was in Grocery Haulers' interests to help their drivers keep their licenses. In addition, I find no corroboration of Complainant's contention that he was prohibited from driving anywhere other than the jurisdiction where his license was suspended. Respondent's safety officer and Complainant's union steward both agreed that he could work in other jurisdictions. Respondent clearly believed that it had not violated DOT regulations by assigning work to Complainant in jurisdictions where he held a valid license.

I am unable to find that the circumstances involving Complainant's license represent reprisal, intimidation, or retaliation. Complainant has failed to demonstrate how Respondent's action with respect to his driver's license constitutes an adverse employment action. The company continued to assign deliveries to Complainant in areas where his license was valid, thereby assuring no loss in wages. I find it difficult to accept that a company with 400 drivers in its employ would adopt a policy that is facially in violation of DOT regulations and receive the union's approval for the policy. Complainant did not bring a complaint to DOT about this issue, which occurred in 2003.

I find that Complainant has failed to establish that he suffered an adverse action by being intimidated and harassed, or by being assigned Waldbaum loads, or by being assigned unfavorable loads that involved longer trips for less pay, or by Respondent's failure to timely address an impediment on his license. Complainant has failed to meet his burden of establishing a *prima facie* case of adverse action with respect to these allegations, and I recommend that they be dismissed.

4. Respondent's Knowledge of Protected Activity

a. Complaints involving safety issues

Complainant must prove by a preponderance of the evidence that those responsible for the adverse action were aware of the alleged protected activity. Mace v. Ona Delivery Systems, Inc., 91 STA-10 (Sec'y Jan. 27, 1992). I have found that Complainant's complaints to DOT in 2002 and 2003 about safety concerns represent protected activity. I have also found that Complainant has failed to establish by a preponderance of the evidence that he suffered an adverse employment action as the result of making those complaints. Further, there is no evidence that Complainant told anyone in Grocery Haulers' management about the defects that he reported to DOT and OSHA. Complainant's direct supervisor, Joseph Proctor, credibly testified that in the four and one half years that Complainant had worked for Grocery Haulers, he had never raised a safety issue to him. Tr. at 126. Respondent's Director of Operations Mark Palmer credibly testified that Complainant did not raise safety issues to him during the course of his employment at Grocery Haulers. Mr. Palmer testified that he had no knowledge that Complainant had complained to DOT about the company's equipment. Tr. at 167. He had no knowledge that Complainant had contacted his congressional representative. Tr. at 167-168.

I find no evidence to contradict Respondent's contention that it was unaware that Complainant filed complaints about safety with DOT. Respondent employs 400 drivers and routinely submits to investigation by agencies charged with verifying safety. Complainant admitted that he did not advise Respondent that he had concerns over the safety of the company's tractor trailers. Tr. at 22-23. He testified that he complained to his union about the problems. Tr. at 23. There is no evidence that demonstrates that the union shared Complainant's concerns with Respondent. Complainant has failed to establish that the officials who decided to terminate his employment knew that he had filed complaints with DOT. Nor has he shown that he was assigned certain work because of his complaints.

The record establishes that Complainant and other drivers identified potential safety hazards during pre and post trip inspections. Tr. at 24; 141-142; 152-153. Complainant testified that he had put tractors out of service four or five times because of safety issues that he had identified during routine inspections. Tr. at 25. Respondent was aware of these reports, and maintained records of reports and repairs. There is no evidence that Complainant suffered an adverse action from making these reports. Despite filing safety complaints to DOT in 2002 and 2003, and putting equipment out of service and reporting safety defects on inspection reports, Complainant worked with apparent success until his suspension and termination in 2005. I find no inference between his safety reports and the adverse actions that Complainant has established, i.e., his suspension and discharge.

It has been held that close proximity between protected activity and adverse action may raise an inference that the protected activity was the likely reason for the action. Koras v. Morin Transport Inc., 92-STA-41 (Sec'y Oct. 1, 1993). Although Complainant filed a safety-related complaint with OSHA a few months before his suspension and discharge in August 2005, I find

no evidence of inference between that complaint and the adverse action. The preponderance of the evidence demonstrates that Respondent did not know that Complainant had made complaints to OSHA or DOT. I have found that the only adverse action taken against Complainant was his suspension and discharge. The evidence demonstrates that those actions were taken because Complainant refused to haul a load.

In consideration of all of the evidence, I find that Complainant has failed to establish the requisite elements of a prima facie case with respect to his complaints to DOT, his internal complaints, and his May 2005 complaint to OSHA. I recommend that they be dismissed.

b. Refusal to Drive

The record is undisputed that Complainant refused to accept a delivery assignment and was suspended and then discharged for his refusal. Complainant was immediately suspended for his refusal to drive, and his discharge was formalized after an arbitration hearing, and related back to the date of his suspension and refusal.

The STAA protects two categories of work refusal. 49 U.S.C.A. §31105(a)(1)(B)(i) deals with conditions as they actually exist, and 49 U.S.C.A. §31105(a)(1)(B)(ii) deals with conditions as a reasonable person would believe them to be. A refusal to drive due to fatigue would fall within the actual violation category if the operation of the vehicle would have violated the DOT “fatigue rule” at 49 C.F.R. §392.3 (2003). A complainant must prove that there would be an actual violation of the specific requirements of this rule for application of the STAA. If a complainant has an objectively reasonable apprehension that an unsafe condition exists, including the driver’s physical condition or fatigue, then his actions may be protected under the second category. Eash v. Roadway Express, Inc., ARB No. 04-036, ALJ No. 1998-STA-28 (ARB Sept. 30, 2005). A complainant’s apprehension of serious injury is reasonable where a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. *Id.*

Complainant has alleged that his refusal to drive falls within the protection of both the actual violation and reasonable apprehension subsections. Complainant invoked the DOT “fatigue rule”, set forth at 49 C.F.R. §392.3. Complainant sent a copy of that rule to OSHA in conjunction with his 11(c) complaint to the agency. RX 17. Complainant maintained that he refused to drive because he was fatigued, thus engaging in protected activity. In the alternative, Complainant has alleged that he was too upset to drive safely after being engaged in an argument with his dispatcher about his assignment. He thereby alleges that his refusal to drive was protected by the reasonable apprehension rule. Under this prong of protected refusal to drive, Complainant is required to establish that “he sought from employer, and had been unable to obtain correction of the unsafe condition”. 49 U.S.C. 31105(a)(2).

Complainant worked for Respondent for approximately four and one half years as a driver who hauled loads from Respondent’s Avenel New Jersey terminal to various large grocery retailers. Approximately 50% of his loads involved hauls to or near New York City. Tr. at 84. On August, 10, 2005, Complainant reported to work at 9:00 p.m. for his regular tour of duty and was assigned a trip that he described as “a time consuming long hard trip”. Tr. at 34; 85. He

believed that the dispatcher who assigned him the work was night terminal manager and dispatcher Tom Merz. Id.

Complainant returned to the terminal from that assignment a little after 2:00 a.m. on August 11, 2005. Tr. at 35. He described the first trip as time consuming because of traffic. Id. He recalled that Mr. Merz was there, although he usually leaves at midnight. Id. Complainant recalled that Tim Wall, Scott Vaughn and Joe Proctor were also there. Tr. at 35. Another dispatcher, Lou Green, assigned him a route that was similar to one that he had been assigned the previous day. Tr. at 35. Complainant described the load as “one of the Waldbaum’s to the stores in College Point, New York that because of the traffic would have been time consuming.” Tr. at 35-36. Mr. Green had never before assigned Complainant work. Tr. at 36. Complainant testified that he “made the remark to Mr. Proctor and Joe Proctor didn’t give me the load. Lou Green, another dispatcher, gave me the Waldbaum’s and I told him that was...” Tr. at 36. Complainant testified that he was fatigued, and when asked whether he told people at that time that he was fatigued and could not drive, he stated: “I mentioned it briefly but it felt on deaf ears. As we went on and I went through the ritual by Mr. Tim Wall”. Tr. at 36-37. Complainant refused the assignment and had a discussion with Joe Proctor that he recalled: “I said I don’t have a shop steward and Joe shouted call your union. I said there’s no union here either Joe”. Tr. at 37.

The exact hearing testimony on this issue is as follows:

JUDGE BULLARD: Mr. Kerchner, when you refused the load tell me the scenario.

THE WITNESS: Your Honor, I had had enough. I was fatigued and with the heated conversation that went on over this Waldbaum’s route and me being myself being so aggravated and I knew it wasn’t safe for me to take the load. Your Honor ---

JUDGE BULLARD: Let’s go back to this heated conversation. Just tell me what was said by whom.

THE WITNESS: All of the shouting back and forth by Mr. Merz in the background Tim Wall and Lou Green in other words I knew ---

JUDGE BULLARD: No, no. Let’s start with you drive in and you’re given this assignment of Waldbaum’s.

THE WITNESS: Yes.

JUDGE BULLARD: And you said what?

THE WITNESS: When I was given the assignment when I seen that it was back through Brooklyn through the traffic it didn’t dawn on me then that it was continued punishment.

JUDGE BULLARD: What did you say?

THE WITNESS: I just told them that I was hired for Pathmark and in four and a half years I never did anything but Pathmark work and I also informed them that they had their Waldbaum’s drivers and ---

MR. KOHLER: Your Honor, he’s mixing ---

JUDGE BULLARD: I understand that. I’m trying to get you, Mr. Kerchner, to lay out a picture of what happened that night. We can go back to all of these documents at another time. Let’s talk about what happened that night. You said you’re not a Pathmark - you’re a Pathmark driver and not a Waldbaum’s driver; is that right?

THE WITNESS: Say that again Your Honor.

JUDGE BULLARD: You said I am not a Waldbaum's driver I'm a Pathmark driver.

THE WITNESS: Yes.

JUDGE BULLARD: And then what happened?

THE WITNESS: They told me to take the load or call my shop steward.

JUDGE BULLARD: And who was it that said that?

THE WITNESS: It was Joe Proctor. When I said that I wasn't a Waldbaum's driver I believe it was Scott Vaughn called Mr. Proctor over to the window.

JUDGE BULLARD: All right. Then what happened?

THE WITNESS: Then Joe said take the load and go and I said I'm not a Waldbaum's driver and I think I mentioned to him or I know I mentioned to him that it was more punishment and that I had had enough and there was a shouting match at the window.

JUDGE BULLARD: You were still in the truck at this time?

THE WITNESS: Pardon me.

JUDGE BULLARD: Were you still in your truck at this time?

THE WITNESS: No, I was in the dispatch office at the dispatch window. The tractor was outside unhooked from the trailer.

JUDGE BULLARD: Okay.

THE WITNESS: The trailer that I had come back from Brooklyn with. That's the procedure. You drop the trailer and you go back to dispatch and you get your next assignment. Then you go find the trailer, you do a pre-trip check. This was the case for most drivers. Other drivers would call in on their way in so that they could save time and they could get a trailer number from dispatch. In other words these were the drivers that were negligent in their pre and post trip —

JUDGE BULLARD: Well let's not say that because that's not in evidence today. All that's before me is what happened here. So at this point you had an argumentative conversation.

THE WITNESS: Yes we had a heated conversation.

JUDGE BULLARD: Okay. How did it end?

THE WITNESS: I went home and I say my argument is that under the regulations and I know this at 392.3 under the power and the shield of this regulation any driver is justified in going home. The union contract says you have to work at least 10 hours a day or 50 hours a week. This is not true. The union contract has to comply with the Federal Motor Carrier regulations and also any union contract has an escape clause which is in contracts when the contract comes in conflict with the law or the regulations. This is the truck drivers gospel or the Bible that the Federal Motor Carrier Safety regulations.

JUDGE BULLARD: All right. So you're saying that at that particular - in the course of this discussion with Mr. Proctor you told him that you were tired and you were going home?

THE WITNESS: Yes. I said I had enough and at this point —

JUDGE BULLARD: You had enough?

THE WITNESS: Intimidation and reprisal and actually it was time to bring it to an end.

MR. KOHLER: Are these his words or a summary of what he said. Can we clarify that please.

JUDGE BULLARD: Yes. Could you please state if you can recall exactly what

you said to Mr. Proctor.

THE WITNESS: Mr. Proctor said are you taking the load Martin and I said no Joe I'm not taking the load I've been punished enough tonight. He said you call your shop steward and I said there is no shop steward and there was a statement made by Mr. Vaughn and basically Your Honor, this is my argument that I was intimidated. I was in a state of mental anguish or whatever. I was in no condition to drive that truck and this regulation says when you feel that you're that way you're the driver and you make that decision. Even if the boss has 188 loads it doesn't matter. When you say you're fatigued or otherwise that's it you're out of the game.

Tr. at 43-47.

Complainant further testified about his actions in the early morning of August 11, 2005:

JUDGE BULLARD...I'm going to ask you are you familiar with the contract provision that does talk about suspension if any individual refuses work?

THE WITNESS: Yes.

JUDGE BULLARD: How would you distinguish what you did from someone just refusing to take a load?

THE WITNESS: Your Honor, I went to work and I took my sick days off and my vacation and I performed my job for Grocery Haulers as safe as possible. The problem was because I was involved in safety and if I didn't cause any inconveniences I could be like many other drivers. I could have picked any load that I wanted. At Grocery Haulers it would cause an inconvenience in not knowing your job or not knowing your way around the stores or not delivering the loads fast enough or taking care of the equipment or whatever. If you fell out of grace, you fell out of favor and there was reprisals taken against you.

MR. KOHLER: I object. The entire response is unresponsive to the question.

JUDGE BULLARD: It's argument and I understand. Just let me ask you Mr. Kerchner in your experience what - were you able to pick loads during your tenure with Grocery Haulers?

THE WITNESS: No.

JUDGE BULLARD: Never?

THE WITNESS: No. You could voice your displeasure with a load and if you had an honest dispatcher or a fair dispatcher if they gave you a bad one they came back and gave you a good one to make up for it because it's trip pay. It's not hourly pay.

JUDGE BULLARD: I understand. What if there was no other load available and that's all they had that night?

THE WITNESS: Then you took what was there. In other words whatever you were dispatched to you did your job.

JUDGE BULLARD: And on the evening or the early morning rather of August 11th, were you aware of whether or not there were other trips available for you to take?

THE WITNESS: Yes.

JUDGE BULLARD: And did you ask for one of those instead?

THE WITNESS: No, I did not. I voiced my displeasure with being sent back through traffic. If the traffic wasn't that heavy, I probably would have did the route like I did the Edgewater Store in North Jersey was 30 to 35 minutes but with the traffic in New York City there was no way around it. In other words what I'm saying Your Honor is you had to do

penance for your sins.

JUDGE BULLARD: All right. That's the kind of argument that you can make to me at the end and I get the gist. I know. I hear a lot of whistle blowing cases. I understand the connection that you're trying to make but you have to try to stick to the factual discussion at this point. Let me ask you this. You're saying to me and here's what you're saying is somewhat inconsistent. You're saying that you were too tired. You were fatigued and could not take that load but then you just said if the traffic wasn't that heavy you could have taken a load.

THE WITNESS: Because if the traffic wasn't that heavy Your Honor there wouldn't have been stop and go for hours and maybe go three miles in an hour. I'm not going to use the word zip in and out but when you operate a business and you drive a truck and the speed limit is 50 miles an hour and you get a chance to do 55 to make up lost time especially in the New York metropolitan area.

JUDGE BULLARD: Mr. Kerchner, I drove up from South Jersey this morning and I took full advantage of the speed limit but let me ask you to focus on the question I'm presenting to you. Here you're saying that you were too fatigued and could not take that load. Is it because you knew from your experience the night before that the traffic or other nights that the traffic would generally be such that you'd be driving much longer than a different load.

THE WITNESS: Your Honor, -

JUDGE BULLARD: Just can you answer that question.

THE WITNESS: I made the determination that I wasn't fit or able to take the trip and do it in and complete it safely.

JUDGE BULLARD: Okay. You felt that given your experience that particular trip you could not in your present state finish it completely. If you had been given a closer load or one that required less traffic in your experience would you have taken it and I'm asking you to speculate.

THE WITNESS: No, Your Honor. As the situation unfolded that night after a heated argument or discussion I was in no shape to get in a truck and go anywhere to the closest store or whatever. In his experience if a driver doesn't know his limitations it just - it just wasn't safe to take the load.

JUDGE BULLARD: Any load?

THE WITNESS: Any load.

JUDGE BULLARD: All right. Were there other times when you refused to take loads during your five years of employment with Grocery Haulers?

THE WITNESS: We had numerous heated discussions over it constantly.

JUDGE BULLARD: With Mr. Proctor?

THE WITNESS: Mr. Proctor and Mr. Merz.

Tr. at 60-63.

On cross examination, Complainant acknowledged that the traffic at 2:00 a.m. would have been lighter than at other times of the day. Tr. at 64. Complainant clarified his statements of August 11, 2005, when he refused the load:

Q Now I want to make sure that your testimony is clear on this. You told was it Mr. Proctor. You told Mr. Proctor that you felt fatigued.

A I told Mr. Proctor what?

Q Did you tell Mr. - you testified before that you told Mr. Proctor again that

evening that you felt fatigued.

A Yes. Not in a clear statement. I just said I don't want to get anybody in trouble. Joe basically was a reasonable dispatcher and if there was a problem he handled the problem more or less the way it should be handled.

Q But my question was I wrote down that you testified before I felt fatigued. I mentioned it briefly but –

A Yes.

Q Let me finish the question but it fell on deaf ears.

A Yes.

Q And those deaf ears belonged to Mr. Proctor. That's your testimony; correct?

A Yes. Mr. Proctor and whoever else was behind the dispatch window.

Tr. at 86-87.

Mr. Joseph Proctor testified that there are three shifts at Respondent's Avenel terminal, and one dispatcher is assigned to each shift. Tr. at 121. The dispatchers report to him, and during August, 2005, the three dispatchers were Billy Woods, Tim Wall and Vaughn Scott. Tr. at 121-122. Mr. Proctor explained that assignments are made to drivers according to the hours that drivers may drive. Tr. at 122. If their hours of service are filled or shift is completed, they would be sent home instead of assigned another load. Tr. at 122-123. Work is also assigned by the customer's expected delivery time. Tr. at 123. Drivers are not permitted to pick loads, or refuse to drive a load unless they are fatigued or observe a defect with equipment. Tr. at 123-124. Mr. Proctor testified that drivers frequently complain about traffic and construction along delivery routes. Tr. at 124. Drivers are paid by the load and are not generally paid more for encountering congested conditions. Tr. at 125.

Mr. Proctor has known Complainant since he began working for Grocery Haulers in 2001 and saw him on a daily basis. Tr. at 126. He had never had a conflict with Complainant during the years they had worked together until August 11, 2005, when Complainant refused a load. Tr. at 126-127. Mr. Proctor recalled being told by Mr. Scott that Complainant had refused to drive. Tr. at 127. He said that Mr. Wall was not on the premises during the incident, and recalled that Mr. Scott was the dispatcher who had given Complainant the assignment. Tr. at 127; 134. Mr. Proctor was in the dispatch room when Mr. Scott told him that Complainant had refused a load "because he was not hired to do Waldbaum's work". Tr. at 127-128. Mr. Proctor spoke with Complainant, who told him that he was hired to do Pathmark work and not Waldbaum work. Tr. at 128. Mr. Proctor advised Complainant to contact his shop steward before refusing the load because he could be suspended and ultimately fired. Tr. at 128-129. Mr. Proctor described the conversation with Complainant:

Q What was the tone of the conversation between you and Mr. Kerchner?

A The same tone that we're having here now. I told him that if he refused the load he was going to be suspended.

Q Did you yell at him?

A No.

Q Did he yell at you?

A No.

Q Did he tell you that he was fatigued?

A No.

Q Did he tell you that he was tired?

A No.

Q Did he tell you that he was mad after this issue and too mentally upset or distressed to take this load?

A No.

Q Did he give you any reason as to why he would not take this load other than he was hired to do Pathmark and not Waldbaum's?

A No.

Q After you spoke with - was that the end of your conversation or did more happen with Mr. Kerchner?

A No, that was the end of it. He refused to do and he was suspended.

Q And did he leave at that point?

A Yes, he did.

Tr. at 129-130.

After Complainant left, Mr. Proctor prepared a report of the incident that is consistent with his testimony. Tr. at 130-131; RX 7. Mr. Proctor explained that Complainant was assigned the load because it was a priority delivery and Complainant had not exhausted his permitted driving hours. Tr. at 132-133. Later that morning, Mr. Proctor advised Mr. Palmer about the incident when Mr. Palmer called to check in. Tr. at 134. Mr. Proctor asked Mr. Scott to prepare a report describing the incident. Tr. at 135. Mr. Proctor also received an e-mail from Mr. Merz regarding the incident. Tr. at 136. Although Mr. Merz was in the dispatch area at the time of the incident, he was not dispatching, but was doing other paperwork. Tr. at 137. Mr. Merz had nothing to do with the incident.

Mr. Proctor testified that drivers occasionally decline loads because of fatigue, and usually tell him they are too tired to drive before they receive the next assignment. Tr. at 140. Mechanical difficulties come up all the time and require adjustments in assignments. Tr. at 140-141. Mr. Palmer testified that Grocery Haulers was "well aware" of DOT rules regarding driver's fatigue and defective equipment, the company abides by those rules. Tr. at 152-153. Mr. Palmer learned of Complainant's refusal to drive in a telephone conversation with Mr. Proctor, who followed company policy and suspended Complainant. Tr. at 154. The company and union local 863 Teamsters negotiated the company policy regarding refusing a load in collective bargaining. Tr. at 149; RX 11. Refusing an assignment is considered insubordination, and merits "suspension pending termination". Tr. at 150; RX 11. That policy is included in an employee handbook that is provided to all employees. Tr. at 150; RX 6. Complainant signed an acknowledgement that he had received the handbook. RX 6.

When Mr. Palmer arrived at the terminal on August 11, 2005, he reviewed the written statements of Mr. Proctor and Mr. Scott. Tr. at 154. He then spoke again with Mr. Proctor, and forwarded the statements to the company's personnel director, Michael Layton. Tr. 155. One of Mr. Layton's duties is to alert the union that an employee has been disciplined and notify the employee about union hearing procedure. Tr. at 156. Mr. Palmer attended the hearing, which he

recalled was held approximately one week after the incident. Tr. at 157. At the hearing, Complainant admitted that he had refused a load, and did not offer an explanation for his refusal. Tr. at 157. Complainant did not state that he refused the load because he was too tired to drive, or because of mechanical defects, or because he was emotionally upset, or because he had been in an argument with Mr. Proctor. Tr. at 158. Mr. Palmer approved Complainant's discharge, along with Respondent's owner Mark Jacobson and Chief Operating Officer Michael Scolarz. Tr. at 159.

Mr. Palmer testified that other Grocery Haulers' employees were discharged for refusing a single load, and said that he could not recall an incident where an employee was not discharged for refusing a load. Tr. at 161-165. Respondent submitted samples of other employees who had been discharged for refusing work. RX 20.

I accord substantial weight to Mr. Proctor's testimony, as the preponderance of the evidence supports his recollection of the events of that morning.¹¹ Complainant's testimony about the incident is inconsistent. Complainant testified that he "briefly mentioned" that he was fatigued to Mr. Proctor and the others at the dispatch window, but "it fell on deaf ears." Tr. at 87. Complainant also testified that he told the people in the dispatch area that he was "hired for Pathmark" and was not a Waldbaum's driver. Tr. at 44. In addition, Complainant stated that he told Mr. Proctor that he believed the assignment was punishment and said that he "had had enough". Tr. at 45. When asked whether he told Mr. Proctor that he was tired, Complainant responded "Yes. I said I had had enough and at this point...". Tr. at 46 I asked him to clarify what he meant by "had had enough" and he answered: "intimidation and reprisal and actually it was time to bring it to an end." Tr. at 46. Complainant stated that he "was intimidated" and "in a state of mental anguish or whatever. I was in no condition to drive that truck and this regulation says that when you feel that you're that way you're the driver and you make that decision. Even if the boss has 188 loads it doesn't matter. When you say you're fatigued or otherwise that's it, you're out of the game." Tr. at 47.

The evidence demonstrates that if Complainant had clearly stated that he had a safety concern about his ability to drive, he would have been relieved of duty. Complainant and Mr. Proctor consistently testified that on the previous day, August 10, 2005, when Complainant notified Proctor that he was fatigued, he was not given another assignment. Both Mr. Proctor and Mr. Palmer credibly testified that Respondent observed the driver fatigue and equipment safety rules and honored drivers' requests to be relieved of assignments in those circumstances.

The documentary evidence also impugns Complainant's credibility on this issue. He filed a grievance dated August 15, 2005, in which he protested the assignment of a Waldbaum¹² load, stating that he was hired to do Pathmark work and had done nothing but Pathmark work during his years with Grocery Haulers. RX 2(b). Complainant further wrote:

¹¹ Respondent submitted a statement written by Vaughn Scott that described the incident. RX 10. A copy of an e-mail from Tom Merz that addressed the incident was also submitted. RX 9. I give limited weight to this hearsay evidence, and note that both of these individuals were still employed by Respondent at the time of the hearing. Respondent offered no explanation regarding their unavailability.

¹² The spelling of this entity varies throughout the documentary evidence. For the sake of consistency, I have used "Waldbaum" throughout this Recommended Decision and Order.

At the time of this incident there were Pathmark loads available. This action was a set up to intimidate me because of my participation in the grievance pertaining to Article VII wages of the collective bargaining agreement on July 20, 2005 and because of my actions contacting government agencies concerning job safety because local union 863 did not represent the membership as per job safety and Grocery Haulers does not take job safety serious and does very little to maintain job site safety, safe operation of it's [sic] equipment as per federal motor carrier regulations...

RX 2(b).

In his complaint of August 25, 2005 to OSHA, Complainant asserts that on August 11, 2005, when he was assigned a Waldbaum load, he "became upset enough to turn down a trip that would be time consuming...". RX 17 at 1. The complaint does not assert that he was suspended despite being too fatigued to drive. In correspondence to OSHA dated November 3, 2005, Complainant asserts that he was given an unfavorable load in reprisal for contacting government agencies regarding safety concerns. RX 17 at 37. In correspondence to the Independent Review Board in which he complained about his treatment by his union local, Complainant wrote that he refused a load that he believed to be unfavorable, and that he further believed was assigned to him as reprisal for making complaints about safety. RX 17 at 47. There is no reference to fatigue in this correspondence. There is also no reference to fatigue as the reason for refusing a load in a statement that appears to be signed by Complainant on April 17, 2006. RX 21. (However, I give limited weight to this document because Complainant disavowed this statement, despite initially admitting that the signature was his. See, Tr. at 98-106.)

Most significantly, Complainant appears to admit that he did not inform Respondent that he was too fatigued to drive in correspondence he wrote to OSHA on July 12, 2007. Complainant describes declining a load on August 10, 2005 after advising Mr. Proctor that he was fatigued. RX 14. Complainant then wrote:

The night I was suspended for refusing the Waldbaums load I could have did the same as I had done the night before. The night I was suspended Mr. Mertz [sic] one of the head henchmen for Grocery Haulers who usually left at midnight was still on the job and it was he who engineered the scheme to have me terminated. I had enough intimation [sic] from Grocery Haulers and even on the night I was suspended I could have stated that I was fatigued as I had done the night before as per FMCSR 398.2 paragraph C and for the record let me inform you that FMCSR 398.4 C states that fatigued or illness or any other cause as to make it unsafe to begin or continue to drive and wording other cause covers the driver through intimidation becoming upset or angry and the beauty part of FMCSR 398.4 C the driver has the right to invoke the regulation just as the carrier can use this regulation to stop an impaired driver from driving a CMV.

RX 14 at 3.

Complainant filed a grievance about his suspension and termination, and was provided a hearing. Complainant testified that his shop steward denied his request for union representation at the hearing. Tr. at 47. An August 29, 2005 letter issued by Respondent's Director of Human Resources, refers to a union/management meeting on Wednesday August 17, 2005. RX 5. Mr. Palmer testified that he attended this meeting, and said that Complainant did not explain that he refused the load on August 11, 2005 because of fatigue, upset or a safety problem. Tr. at 156-157.

I find that the preponderance of the evidence demonstrates that Complainant did not tell any representative for Respondent that he was too fatigued to drive when assigned a Waldbaum's load on August 11, 2005. I find that Complainant did not engage in protected activity under the first prong of the refusal to drive provisions of the STAA, 49 U.S.C.A. §31105(a)(1)(B)(i). Complainant has not established that he refused to drive due to fatigue and that operation of a vehicle would have violated DOT's fatigue rule set forth at 49 C.F.R. §392.3.

Complainant has argued in the alternative that he was too upset to drive safely, thus invoking the second category of protected refusal to drive. 49 U.S.C.A. §31105(a)(1)(B)(ii) protects drivers who refuse a load because of an objectively reasonable apprehension that their physical condition or fatigue would present a safety hazard. The protections of the STAA have been extended to cover an incident where Complainant asked to be relieved because an altercation with his manager left him clearly too distressed to drive and Respondent was aware of it. Logan v. UPS, 96-STA-2 (ARB Dec. 19, 1996). However, a contention that an individual could not drive because of his emotional state after being admonished by a supervisor was rejected in circumstances where Complainant left work and engaged in other activity after refusing to drive. Palinkas v. UPS, 95-STA-30 (ALJ De. 13, 1995).

Complainant contended that he had engaged in a heated discussion with Mr. Merz about being assigned a Waldbaum route, and as a result felt that he was too fatigued and "aggravated" to drive safely. Tr. at 43. Complainant also reported that he was too upset to drive in his August 25, 2005 complaint to OSHA about his termination (RX 17 at 1), and in an undated statement directed to OALJ¹³. RX 17 at 42. Mr. Proctor denied arguing with Complainant and testified that Mr. Merz was not involved in Complainant's assignment that night. He stated that he and Complainant conversed about his work refusal in a normal tone. Tr. at 129.

The record lacks evidence to corroborate the conflicting testimony about whether an argument occurred. Regardless, I am unable to conclude that Complainant's state of mind was such that he could not safely drive. The evidence is uncontroverted that he did not ask to be relieved of the assignment because of his mental state. The preponderance of the evidence establishes that Complainant did not want to drive a Waldbaum's load. Complainant believed that he should have been limited to Pathmark work, and was angry. It is clear that he would be upset any time he was assigned work he did not want to

¹³ I have made this inference because the document uses the caption of his administrative appeal, and refers to Case No. 2006 STA 00041, which is the docket number assigned by OALJ to his case.

perform. However, I find no support for Complainant's contention that he refused the driving assignment because he was emotionally unable to safely complete the haul. Complainant testified that he got in heated discussions "all the time" with dispatchers about being assigned loads through heavy traffic. Tr. at 63. Despite those arguments, Complainant only refused to drive loads when he began to be assigned Waldbaum work.

In addition, the documentary evidence does not consistently reflect that Complainant believed his mental state prevented him from driving. Although he mentioned his mental state in his complaint to OSHA, he did not raise it as a defense to his termination at his grievance hearing, and did not refer to it in complaints to his union. In answers to interrogatories, Complainant alleged that he was "terminated for contacting OSHA and the FMCSA" and was "set up for insubordination" by being assigned Waldbaum loads. RX 15 and 16. I find that Complainant refused to accept the Waldbaum load for reasons that are unrelated to protected activity.

I further find that Respondent has articulated a legitimate reason for Complainant's discharge. I find it entirely credible that Respondent needs to retain full responsibility for the assignment of work, and cannot allow drivers to choose their hauls. Respondent's decision to suspend and terminate Complainant was within the understanding of the collective bargaining agreement between Respondent and Complainant. Although Complainant alleged collusion between those parties, he presented no evidence to support that contention. Complainant was advised to consult his union representative before refusing the load, and was given several opportunities to accept the work. Respondent provided evidence of similar situations where drivers refused a load and were suspended and discharged.

Complainant has failed to provide evidence that his dismissal was a pretext for engaging in protected activity. His refusal to drive was not protected activity, and he has failed to establish an inference between his complaints to OSHA and DOT and his suspension and termination. I further discount Complainant's contention that he was assigned Waldbaum loads as reprisal for filing safety complaints. Complainant worked with apparent success for years after filing his complaints with DOT. Complainant has failed to show how those loads were more time consuming and less remunerative than other jobs.

I find that Respondent's suspension of the Complainant on August 11, 2005, and the subsequent termination effective that date, were due to his refusal to accept a load. Neither the suspension nor termination was causally related to any protected activity under the STAA, and Respondent's adverse actions against Complainant do not constitute violations of the Act.

RECOMMENDED ORDER

It is hereby recommended that the complaint filed herein by MARTIN KERCHNER be dismissed.

It is further recommended that Complainant's allegations of blacklisting by Respondent and his union local 863 International Brotherhood of Teamsters be considered filed *nunc pro tunc*, and investigated by OSHA upon remand.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

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.