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Issue Date: 31 July 2015

Case No: 2013-STA-00050

In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,
Prosecuting Party,

and

MICHAEL BECKER,
Complainant,

v.

SMITHSTONIAN MATERIALS, LLC
Respondent.

DECISION AND ORDER AWARDING DAMAGES

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("Act" or "STAA"), and implementing regulations set forth at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the discharge, discipline of, or discrimination against an employee in retaliation for the employee engaging in certain protected activity.

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law.

PROCEDURAL BACKGROUND

On January 3, 2011, Complainant ("Mr. Becker") filed a complaint with the Secretary of Labor alleging violations of STAA. The complaint was investigated by the Department of Labor's ("DOL") Occupational Safety and Health Administration ("OSHA"). On May 8, 2013, the Secretary issued findings and an order awarding Mr. Becker back pay in the amount of $49,700, as well as various forms of injunctive relief. On May 22, 2013, Respondent timely objected to the Secretary's findings and the order and requested a hearing before an administrative law judge ("ALJ"). On June 6, 2013, the Secretary of Labor, acting through the DOL Region V Office of the Solicitor, entered an appearance. I denied Respondent's Motion to Dismiss/Summary Judgment on December 17, 2013. On May 14-15, 2014, I held a hearing in

Milwaukee, Wisconsin. The Prosecuting Party submitted a hearing brief ("DOL Hr'g Br.") as did the Respondent ("R. Hr'g Br."). The parties also submitted Joint Stipulations ("J. Stips."). At the hearing, I admitted the following evidence: ALJ's Exhibits ("ALJX") 1-2; Department of Labor's Exhibits ("DOL-EX") 101, 104-113, 115, 117-20, 123-24, 129-33, 134-2, and 134-3; and Respondent's Exhibits ("RE") 4-6, 10, 12, 17-19, and 23.

At the hearing, ten witnesses testified: during Prosecuting Party's case-in-chief, I heard the testimony of Mr. Becker; James Smith,[1] Mr. Becker's supervisor and Respondent's owner; and Sean Mullins, an OSHA whistleblower complaint investigator. During Respondent's case-in-chief I heard the testimony of Jaime Carillo, a former employee of Respondent and Mr. Becker's former coworker; Timothy Sweeney, the vice-president of Auction Associates; Bryan Pfaff, a mechanic who had been contracted by Respondent, who testified as both an expert and a fact witness; George Loomans, the project coordinator for Beres Builders, who supervised a project on which Complainant worked; Michael Brown, Respondent's employee and a former coworker of Mr. Becker; Raul Rodriguez, the president and owner of Rodriguez Landscape Company, where Mr. Becker was employed after his employment with Respondent ended; and James Smith. Their testimony is summarized below.

I kept the record open for an additional thirty days following the parties' receipt of hearing transcripts, and I requested that the Prosecuting Party and the Respondent submit post-hearing briefs on the issue of mitigation of damages within thirty days. On July 11, 2014, I received both parties' post-hearing briefs ("DOL post-Hr'g Br." and "R. post-Hr'g Br.", respectively). On December 2, 2014, I issued an evidentiary order detailing the admitted evidence and closing the record.

FACTUAL BACKGROUND

A. The Prosecuting Party's Case-in-Chief

Testimony of Michael Becker

1. Direct Testimony

Mr. Becker began his testimony by describing his employment with Smithstonian Materials. (Tr. at 61-68). He testified that he began working for Respondent in December 2008, that he became a full-time "field supervisor" in April 2009, and that his last day as an employee for Smithsonian was November 30, 2010. (Tr. at 61-63). He testified that as a field supervisor he supervised a variety of Respondent's landscaping jobs, as well as inspecting and repairing Respondent's equipment. (Tr. at 65-66). He testified that he had a class B commercial driver's license ("CDL") and that the certification process for the CDL required mechanical training. (Tr. at 68).

[1] Mr. Smith testified as both an adverse and a friendly witness.

a. Purchase of TopKick and Mr. Becker's Experience Driving it Prior to November 29, 2010

Mr. Becker then testified about Respondent's purchase of a 1992 GMC TopKick dump truck and his experiences driving the truck prior to November 29, 2010. (Tr. at 69-77). He testified that Mr. Smith purchased the truck at auction in May 2010 and that Mr. Becker drove the truck back to Respondent's shop on that day. (Tr. at 70-72). He testified that the steering wheel moved 2-3 inches during the trip, an amount of wheel "play"—i.e., horizontal movement—which Mr. Becker stated was "abnormal" and "extreme," and which signaled mechanical problems (specifically, problems related to the vehicle's kingpin). (Tr. at 71-72). Mr. Becker testified that he next drove the truck in September 2010. (Tr. at 75). The truck's condition had not improved, and in fact, Mr. Becker testified, the steering was "actually a little worse" at that time. (Tr. at 76-77). He stated that to his knowledge the truck had not been repaired or inspected by a mechanic at that time. (Tr. at 76).

b. The Events of November 29, 2010

Mr. Becker then testified that he drove the truck for a third time on November 29, 2010. (Tr. at 77-92). On that day, Mr. Smith told Mr. Becker to haul a load of gravel from a gravel pit to a job site. (Tr. at 77). While driving to the plant, Mr. Becker noticed that the truck was in the same condition as it was on September 29, 2010, *i.e.*, "all over the road" and "bouncing." (Tr. at 79). At the plant, Mr. Becker was asked by a pit employee for the truck's license plate number, which the employee intended to use to determine the truck's load weight limit. (Tr. at 77-78). Mr. Becker testified that he then noticed that the truck did not have license plates. (Tr. at 78). Nor, he stated, could he find registration information in the truck. (Tr. at 78). Mr. Becker advised the plant employee to call Mr. Smith; she did so, and after speaking to Mr. Smith she allowed Mr. Becker to leave the pit with a load of gravel. (Tr. at 78-79).

Mr. Becker described a conversation with Mr. Smith after leaving the gravel pit. (Tr. at 79-91). First, he said, he called Mr. Smith from the gravel pit's parking lot and inquired into the truck's registration. (Tr. at 79). Mr. Becker informed Mr. Smith that the truck did not have registration information. (Tr. at 79). Mr. Becker stated that Mr. Smith told him that the tickets for lack of registration would be made out to the company and that Mr. Smith would pay for them. (Tr. at 79). Mr. Becker testified that he told Mr. Smith that tickets would actually be in Mr. Becker's name, but that Mr. Smith said again "not to worry about it." (Tr. at 79). Mr. Becker testified that Mr. Smith told him during the conversation that the truck's registration was being "'taken care of as we speak.'" (Tr. at 81). Mr. Becker said that he told Mr. Smith that the truck's steering was "'still bad and acting up,'" and that he intended to park the truck back at the shop. (Tr. at 79).

Mr. Becker testified that after leaving the gravel pit, while making a left turn through an intersection, the truck's power steering failed. (Tr. at 79-81). Mr. Becker was able to drive the truck first to the job site and then back to Respondent's shop by driving 5 to 10 miles per hour along surface streets with his hazard signals activated. (Tr. at 80-81).

At Respondent's shop, Respondent's mechanic, Chris Schulz, examined the truck. (Tr. at 82-91). That included performing a "pry-bar test": raising the truck a few and using a pry bar to manipulate the tire. (Tr. at 83). Mr. Becker testified that Mr. Schulz told Mr. Becker to observe

him perform the pry-bar test, and that during the test the pry-bar was able to move the tires between one-and one-half to two inches from side-to-side, *i.e.*, the kingpin demonstrated up to two inches of "play." (Tr. at 83). Based on the tire's movement, Mr. Becker testified, Mr. Schulz found that the truck's kingpin—a vertical bolt used as a pivot in a vehicle's steering mechanism to "hol[d] the tire straight with the road" (Tr. at 87; 89)—had failed. (Tr. at 85). He stated that Mr. Schulz told him it was "the worst [kingpin failure that he had] ever seen." (Tr. at 83). He stated that he told Mr. Schulz the kingpin's failure probably caused the power steering to fail. (Tr. at 83).

This failure, Mr. Becker testified, was caused by the truck bearing weight (either in the form of hauling heavy loads or pushing a plow), and would lead to the truck's tires to become loose and bowed. (Tr. at 90-91). He stated that the kingpin's play far exceeded the acceptable degree of play. (Tr. at 83; 90-91). Mr. Becker stated that he was concerned that this mechanical failure could result in the wheel dismounting from the truck and becoming a "missile." (Tr. at 85). He stated that he was worried that the truck could harm him and others, as well as harm the Respondent's reputation. (Tr. at 85).

Mr. Becker stated that after Mr. Schulz showed him the results of his [Mr. Schulz's] pry-bar test, Mr. Becker performed his own test which also resulted in one-and-one-half to two inches of kingpin play. (Tr. at 85). Mr. Becker testified that he was familiar with a kingpin's mechanics from prior work experience, including work on a farm he grew up on, work in an auto-repair shop, and work he had previously performed for Mr. Smith. (Tr. at 88-89).

Mr. Becker testified that Mr. Schulz said that it would take several days for a replacement kingpin to be ordered. (Tr. at 85). He stated that they agreed that in the meantime the truck should be taken out of service. (Tr. at 85-86). They stated that they agreed to "run [their decision] past Mr. Smith." (Tr. at 86).

Together, Mr. Becker testified, he and Mr. Schulz informed Mr. Smith that the truck was unsafe to drive. (Tr. at 86-87). Mr. Becker stated that he told Mr. Smith that he would not drive the truck the next day, and that Mr. Schulz told Mr. Smith that he had taken the truck out of service. (Tr. at 86). Mr. Becker stated that Mr. Smith then said "'You don't take shit out of service around here. I tell you what's in and out of service.'" (Tr. at 86). Mr. Schulz walked away. (Tr. at 86).

Mr. Becker continued to speak with Mr. Smith, and complained about the safety issues associated with the power steering, the kingpin, and the truck's unregistered status. (Tr. at 87). He stated that Mr. Smith told him that he would "drive what [Mr. Smith told him] to drive" or "stay home." (Tr. at 87). After saying this, Mr. Becker stated, Mr. Smith slammed the door on his truck and drove off." (Tr. at 87).

Mr. Becker stated that he spoke with Mr. Schulz later that day and reassured him that they were right to tell Mr. Smith that the truck should be taken out of service. (Tr. at 87). He then left for the day. (Tr. at 87).

c. <u>The Events of November 30, 2010</u>

Mr. Becker then testified as to events that took place at Respondent's shop on the morning of November 30, 2010. (Tr. at 92-94). Mr. Becker stated that he was preparing

equipment for the day's work when Mr. Smith arrived at about 7:30 am. (Tr. at 92). Mr. Smith, Mr. Becker said, asked why a trailer was not attached to the TopKick truck. Mr. Becker stated that he told Mr. Smith that he would not drive the truck because the kingpin was "shot" and because the truck was not registered. (Tr. at 92). He stated that although he was not told anything about the kingpin on November 30, that he could determine that it was not functional because a replacement would take several days to arrive. (Tr. at 94). Mr. Becker testified that Mr. Smith insisted that Mr. Becker drive the truck and trailer:

> Q: And what happened after you made that first statement that you weren't going to drive it?
>
> A: He became upset. I was standing by the truck door . . . . He walked up to me pushing me out of the way. He says, "Get the fuck out of the way"; jumps up in the cab of the truck; wiggles the wheel; gets out of the truck; comes up to me. He says, "Hook the truck up to the trailer and get headed to the job." I said, "Man, I'm not driving that truck today. It has no registration and the kingpin is shot."

(Tr. at 93). Mr. Smith continued to insist, Mr. Becker testified, that Mr. Becker "[g]et into that fucking truck" and "[d]rive it to the job." (Tr. at 93). Mr. Becker refused and asked if he could take another truck. At that point, Mr. Becker testified, Mr. Smith said: "'That's it. Leave my shit here. You're done. Bye-bye,' [and he] gets in his truck and leaves. I know at that moment, I'm fired." (Tr. at 93).

Mr. Becker testified that he then unloaded equipment from Respondent's truck, drove Respondent's truck (which Mr. Becker was permitted to take home from work, *cf.* Tr. at 149-51) to his house, picked up the keys to Respondent's truck, and returned to the shop in Respondent's truck. (Tr. at 94; 95-96). At Respondent's shop he picked up his personal truck (which had been left at the shop) and returned home, leaving Respondent's truck at the shop as well as a remote control he had used to access the shop; however, he retained keys to Respondent's shop and a cell phone provided by Respondent. (Tr. at 94-96). He stated that he kept the key ring because it had both personal and work keys, and he did not realize that he was retaining the shop keys. (Tr. at 94). He stated that he intentionally kept the cell phone because he needed to transfer personal information and data from the phone. (Tr. at 95). He stated that Mr. Smith called him on his personal phone on the afternoon of November 30 and asked where the phone and shop keys were, and that he told Mr. Smith he had the keys, and that he was keeping the phone temporarily to transfer personal data from it. (Tr. at 95). He stated that he asked Mr. Smith if he "wanted to talk" but that Mr. Smith hung up on him. (Tr. at 95).

d. Events Subsequent to November 30, 2010

Mr. Becker stated that he returned to the shop on December 3, 2010, to drop off the shop keys and cell phone. (Tr. at 95). He stated that on December 3, he briefly spoke with Jaime Carillo, one of Respondent's employees, and that he told Mr. Carillo, "'I think I've got another job. I've got another job. I'm not going to tell you where because Jim knows the guy.'" (Tr. at 95).

Mr. Becker testified that he spoke with Mr. Smith by phone on December 7. (Tr. at 96). He stated that he asked if Mr. Smith would "reconsider terminating" his employment. (Tr. at 96). He testified that Mr. Smith said that he had found a replacement for Mr. Becker; Mr. Becker said that he "pleaded a little more" but that Mr. Smith said "I'm telling [the unemployment compensation agency] you quit." (Tr. at 96).

Mr. Becker testified that it was his belief that he had been terminated on November 30 because Mr. Smith yelled in Mr. Becker's face, told him to "leave [Mr. Smith's] shit here" and told Mr. Becker "'That's it. You're done. Bye-bye.'" (Tr. at 97). Mr. Becker stated that Respondent had never disciplined him or given him verbal warnings, though he defined discipline not to include verbal warnings. (Tr. at 98).

e. Tickets Issued to Mr. Becker

Mr. Becker testified as to tickets he had received as Respondent's employee. (Tr. at 99-105). Mr. Becker stated, and the record confirms, that three tickets for vehicle registration violations were issued for Respondent's vehicles while Mr. Becker drove the vehicles. (DOL-EX 124). One was issued to Mr. Becker (DOL-EX 124 at 1), and two were issued to Respondent (DOL-EX 124 at 2-3).

f. Mr. Becker's Training Duties

Mr. Becker testified that one of his responsibilities was to train new employees, and that he had not met a new employee named David Smith at Respondent's shop on November 30, 2010, or heard from Mr. Smith that a new employee would be starting on that date. (Tr. at 107-08). He further stated that Mr. Smith was not hiring new employees during that period of time. (Tr. at 108). Mr. Becker concluded his direct testimony by stating that he had never met Bryan Pfaff, Respondent's expert, prior to Mr. Becker's deposition. (Tr. at 109).

2. **Cross-Examination**

a. Status Within the Company

During his cross-examination, Mr. Becker testified briefly as to his training and work experience prior to becoming an employee for Respondent. (Tr. at 110-12). Counsel for Respondent then elicited testimony that Mr. Becker had stated during the investigation of his complaint that he had performed his work well and that "'the guys liked me.'" (Tr. at 113). He maintained that he had not used a racial slur nor had he had a physical fight with a coworker. (Tr. at 113). He testified that he had not threatened "any employee at Smithstonian Material." (Tr. at 117).

Mr. Becker testified that he believed that he was "exceptional" and the "number one" employee at Smithstonian. (Tr. at 125-26). He stated that Respondent could only say positive things about him. (Tr. at 126).

Mr. Becker testified as to his practice of recording the time he arrived at work. (Tr. at 123-24). He stated that there was no company policy that required punching in a clock and having a timecard machine-stamped versus signing a timesheet by hand. (Tr. at 124). He stated

that it would not surprise him if he signed in by hand fifty-eight percent of the time, and that Mr. Smith never complained about his signing in. (Tr. at 124).

b. Beres Builders's Job

Mr. Becker testified as to the work he had performed for Respondent for a client named Beres Builders. (Tr. at 118-23). Mr. Becker testified that he had struck a power line at the job site while digging holes with skid loader fitted with an auger. (Tr. at 119-21). He stated that the client had marked areas that were to be dug; the client, he stated, also marked areas where a power line was buried. (Tr. at 120-21). He stated that Mr. Smith, without explanation, changed the position of the holes. (Tr. at 120). Mr. Becker then stated that four hours after the initial excavation of the holes Mr. Smith designated, the client complained and changed position of the holes at the job site, and that this led to a delay in Respondent's completion of the job of over a week and caused Mr. Becker to feel a sense of urgency to complete the job. (Tr. at 120-21).

Mr. Becker testified that he knew he had hit a power line when he saw plastic "chips" rise form the hole he was digging; these were from the casing that insulated the buried wire. (Tr. at 122). He stated that he called Mr. Smith immediately after discovering that he had hit the power line. (Tr. at 122). He stated that the client had not complained about the presence of chips from the buried wire's casing, and that no-one had mentioned the chips to him. (Tr. at 122-23). He further stated that he had not been advised to dig the hole by hand prior to hitting the buried line. (Tr. at 119; 121). Mr. Becker denied that he subsequently admitted culpability for the Beres Builders's project to Mr. Carillo, though he did state that he felt "somewhat bad" about hitting the buried power line and that he had "screw[ed] up." (Tr. at 132-34).

c. Condition of the TopKick

Mr. Becker testified as to the condition and status of the TopKick from the time it was purchased at auction up until November 30, 2010. (Tr. at 126-32). Mr. Becker testified that he believed that the TopKick was designated a "tow-away"[2] vehicle at the auction. (Tr. at 127). He stated that tow-away vehicles would be so designated by a large sticker on the vehicle. (Tr. at 128). Mr. Becker based this belief on attending hundreds of auctions, including attending for six consecutive years the auction at which Mr. Smith purchased the TopKick. (Tr. at 128).

Mr. Becker testified that he believed he was the only one who had driven the TopKick on the highway, and that each time he drove the vehicle, he performed a Department of Transportation-approved safety inspection on the TopKick. (Tr. at 129).

Mr. Becker testified that he may have stated at an earlier time that the TopKick had "no plate, no insurance, no nothing,"[3] that he was not "privy to whether things had insurance or not" and did not know whether it was insured on November 30, 2010. (Tr. at 131-32).

[2] Counsel for Respondent later elicited testimony from Timothy Sweeney, whom I find to be qualified as an expert in Wisconsin automobile auctions, that a vehicle sold as "tow-away" at auction is one that suffers from a "major fault" or that has been towed by a municipality. (Tr. at 256-57).

[3] The statement was made during Mr. Becker's certified deposition; however, the deposition was not admitted into evidence, and the statement is only considered for purposes of impeachment.

Mr. Becker then testified as to his knowledge of and experience with kingpins. (Tr. at 140-43). He stated that at the time of his deposition (*i.e.*, after November 30, 2010) that he had little or no knowledge of how to repair or replace a dump truck's kingpin, including the process required to install a new kingpin in a vehicle. (Tr. at 140-41). He stated that he did not know the state of the kingpin's bearings on the evening of November 29, 2010. (Tr. at 142-43).

d. Events of November 30, 2010

Mr. Becker reiterated his testimony regarding his last day of employment with Respondent. (Tr. at 143-45; 162). He stated that he believed that Mr. Smith terminated him only after stating: "'[g]et out. You're done. Bye-bye'"—*i.e.*, the earlier statement "'[t]hat's it. You're done. Leave my shit here. Go home'" did not, Mr. Becker stated, effect his termination. (Tr. at 144-45). Respondent then impeached Mr. Becker's testimony with a prior inconsistent statement made to Luis Madrigal, an OSHA investigator, in which Mr. Becker stated "[u]nderstandably when I walked out, handed in my phone, I didn't know it would be my last day. I thought I'd be back in a week." (Resp't-23 at 36:10-36:17).

e. Subsequent Employment

Mr. Becker then testified as to his employment with Rodriguez Landscape Company ("Rodriguez Co."). (Tr. at 151-57). He stated that he began working for Rodriguez Co. in April 2011 and was an employee until November 29, 2012. (Tr. at 151-52). He stated that he ceased working at Rodriguez Co. after a municipal contract expired, and that he was not terminated for cause. (Tr. at 155-56). He stated that his termination was a "good business decision" given the company's lack of work. (Tr. at 156; 157). He stated that Raul Rodriguez, the president and owner of Rodriguez Co., had not given him a choice between quitting and being fired following an internal investigation, and Mr. Becker stated that the unemployment commission had determined that he was terminated for cause. (Tr. at 156-57). He stated that Mr. Rodriguez would testify that he had not been terminated for cause. (Tr. at 156-57).

3. **Redirect Examination**

a. Beres Builders's Job

On redirect examination, Mr. Becker was questioned about the Beres Builders's job. (Tr. at 162-65). He stated that Mr. Smith did not send him directly home from the job, but rather that he returned to the shop. (Tr. at 162). He stated that he was sent back to the job site a week after hitting the buried power line to perform cleanup. (Tr. at 162). He stated that he was assigned to mow lawns in a dangerous neighborhood the day after hitting the power line as punishment. (Tr. at 163). He stated that he had dug the holes at the Beres Builders's job site that Mr. Smith had painted. (Tr. at 163). He stated that Mr. Smith had supervised him when he was digging the "first couple" holes. (Tr. at 163). He stated that he was using a machine when Mr. Smith supervised him digging the initial holes and that Mr. Smith did not tell him to dig the holes by hand. (Tr. at 164; 165). He stated that he had brought shovels to use by hand only to complete the final stages of the job. (Tr. at 164-65). He stated that he was never disciplined for hitting the power line. (Tr. at 165).

b. Disciplinary Action

Mr. Becker testified as to any putative disciplinary action Mr. Smith took against him. (Tr. at 165-67). He stated that he was never verbally reprimanded or otherwise disciplined for incidents involving coworkers. (Tr. at 165). Mr. Becker stated that Mr. Smith never amended his handwritten timecards. (Tr. at 167).

c. Events of November 30

Mr. Becker then clarified portions of his testimony relating the incidents of November 30, 2010 and their aftermath. (Tr. at 174-78; 180-81). He stated that when he told Mr. Mullins that he did not believe he was fired on the morning of November 30 (*see* Resp't-23), he in fact meant that "I knew I just had gotten fired, but I really thought he'd reconsider. I really thought that there would be a phone call coming that would change everything around and I wouldn't be out of a job." (Tr. at 174). He stated that Mr. Smith had thrown "these kinds of temper tantrums before." (Tr. at 175). He stated that he called Mr. Smith on December 7 to inquire if he had "reconsidered." (Tr. at 175). He stated that he believed he was terminated given Mr. Smith's demeanor. (Tr. at 178). He stated that he returned to the Smithstonian shop on December 3, 2010, and at that time he never told anyone that he had quit. (Tr. at 180). He stated that he did tell Mr. Carillo that he had found a new job. (Tr. at 180).

d. Subsequent Employment

Mr. Becker then testified about how his employment with Rodriguez Co. ended. (Tr. at 178-80). He stated that he believed he was let go. (Tr. at 179). Mr. Becker stated that before his employment with Rodriguez Co. ended, Mr. Rodriguez had told him that he was conducting an investigation into a "prank phone call" at the office, and that he wanted Mr. Becker to either resign or accept a suspension while the investigation was ongoing. (Tr. at 179). Mr. Becker stated that he accepted a suspension, that the prank caller "recanted" the phone call, but that Mr. Rodriguez decided to terminated Mr. Becker's employment anyway for economic reasons. (Tr. at 179-80).

e. Additional Testimony

I then asked Mr. Becker about his perception of the TopKick's registration and safety issues. (Tr. at 181-85). I first asked Mr. Becker how, if he performed routine safety "walk-throughs" on Respondent's vehicles, he had not noticed that the TopKick was not registered. (Tr. at 181-82). Mr. Becker stated that many of Respondent's vehicles were not registered and that he never asked Mr. Becker about the TopKick's registration status. (Tr. at 182). I asked Mr. Becker if he had not noticed a problem with the TopKick's steering during the walk-through. (Tr. at 182). Mr. Becker stated that he had, but that he drove the truck anyway at Mr. Smith's request, but that the refused to drive it when it "became apparent that it had a very serious kingpin issue." (Tr. at 182). In response to my questioning, Mr. Becker also described safety inspections he performed in the evening at Respondent's shop. (Tr. at 183-84).

On redirect examination, Mr. Becker stated that he had not perceived that the TopKick's kingpin was damaged the first two times he drove the vehicle because a kingpin's malfunctioning could not be detected without performing the "pry-bar test" that Mr. Schulz and Mr. Becker performed on November 29, 2010; once that test was performed "that put [the

TopKick] out of service in my mind. I'm not driving it anymore." (Tr. at 184). Mr. Becker stated that he had complained about the TopKick's non-registration status on November 29 and 30, that he had "chanced" driving the vehicle that it was not registered on November 29, that he might have risked driving it without registration the following day, but that "after seeing the kingpin, I was out"—*i.e.*, he would not drive the vehicle. (Tr. at 185).

Testimony of Jaime Carillo[4]

1. Direct Examination

Mr. Carillo began his testimony by stating that he had worked for Smithstonian with Mr. Becker, though he was no longer an employee of Respondent's. (Tr. at 187). He then testified as to Mr. Becker's "last day" at Smithstonian. (Tr. at 187-88). Mr. Carillo stated that on that day he was in Respondent's shop and heard Mr. Smith and Mr. Becker speaking. (Tr. at 188). He stated that he heard them discussing "[s]omething about the steering of the truck" and whether the truck was fixed. (Tr. at 188). Mr. Carillo testified that he then heard Mr. Smith tell Mr. Becker to "[g]o home for the day." (Tr. at 188).

2. Cross-Examination

During his cross-examination, Mr. Carillo testified that Mr. Becker "never said he quit on November 30." (Tr. at 189). He testified that Mr. Becker returned to Respondent's shop sometime after November 30 and that on that day Mr. Becker returned company equipment and told Mr. Carillo that he quit. (Tr. at 189).

Mr. Carillo admitted that he had testified at Mr. Becker's unemployment compensation hearing that Mr. Becker had told Mr. Carillo that he was "done." (Tr. at 191). In response to my questioning, Mr. Carillo stated that he had also testified at the unemployment hearing that Mr. Becker "quit" working for Respondent, and that Mr. Becker had stated this to him when returned to Respondent's shop after November 30. (Tr. at 191-92). Mr. Carillo then testified that he recalled writing in a document that Mr. Becker was "done working for [Respondent]." (Tr. at 195).

Testimony of James Smith

1. **Direct Examination**

a. Hiring of David Smith

James Smith was called by the Prosecuting Party to testify as to his hiring of an employee named David Smith, and specifically, whether David Smith was hired to replace Mr. Becker. (Tr. at 198-205). James Smith testified, and the record confirms, that David Smith listed his last day of employment with his previous employer as November 30, 2010. (Tr. at 199; DOL-119). He further testified, and the record confirms, that David Smith's first timecard lists his first machine-stamped day working for Respondent as December 1, 2010. (Tr. at 200; DOL-120).

[4] Mr. Carillo was called by Counsel for Respondent out of order, *i.e.*, before the conclusion of the Prosecuting Party's case-in-chief. His testimony is presented in this section to reflect the chronology of the testimony at the hearing.

James Smith testified that on December 1, David Smith drove the TopKick to a job site. (Tr. at 202). He testified that David Smith had not been hired to replace Mr. Becker, however, but that David Smith was hired at about the same time that Mr. Becker ceased working for Respondent, and that after Mr. Becker did not return to Respondent's shop it "worked out" that David Smith took over his responsibilities. (Tr. at 202).

2. **Cross-Examination**

On cross-examination, James Smith testified that David Smith had been scheduled to train with Mr. Becker on November 30, 2010. (Tr. at 205-06). He stated that David Smith had previously worked for him, and that David Smith had applied for a job in the spring of 2010. (Tr. at 205-06). He stated that the timecard also showed in handwriting that David Smith worked on November 30, 2010, and that he assumed he was paid for that day's work (205-06).

3. **Redirect Examination**

On redirect examination, James Smith testified that David Smith drove the TopKick on November 30 after Mr. Becker went home and that he was hired during the "slower part of the season." (Tr. at 207).

Testimony of Sean Mullins

1. **Direct Examination**

Mr. Mullins began his testimony by describing his career as an OSHA whistleblower investigator. (Tr. at 220-22). Mr. Mullins testified as to extensive experience and training that have made him expert in investigating violations of federal whistleblower statutes administered by OSHA (Tr. at 220-22), including that he had previously investigated thirteen STAA complaints. (Tr. at 222).

a. Statements of Mr. Smith

Mr. Mullins then testified as to his investigation of Mr. Becker's complaint, which began in September 2011 and ended on May 8, 2013. (Tr. at 222-52; 232). Mr. Mullins stated that he first spoke with Mr. Smith by telephone in January, 2012. (Tr. at 222-23). Mr. Mullins stated that in response to his asking Mr. Smith whether Mr. Becker had "raised issues regarding the kingpin," Mr. Smith stated that Mr. Becker had raised the issue. (Tr. at 224). Mr. Mullins stated that Mr. Smith told him that he had brought in two mechanics, Chris Schulz and a man named Chico. (Tr. at 224; 227). I then admitted into evidence an email in which Counsel for Respondent identified the mechanics as Chris Schulz and Francisco Valerio. (DOL-123).

Mr. Mullins testified that during his January 2012 interview of Mr. Smith[5], Mr. Smith told Mr. Mullins that a replacement kingpin was available and "on the table" on November 29 or 30, 2010 (Tr. at 228-30). This statement to Mr. Mullins impeached Mr. Smith's credibility, as Respondent subsequently stipulated that a replacement kingpin was not available and that if the

[5] Mr. Mullins prepared a memorandum based on his interview which is identified, though not admitted into evidence, as Resp't-3.

kingpin were to have been replaced, Mr. Smith would have needed to order a new one that would take several days to arrive. (Tr. at 229-30).

Mr. Mullins testified as to asking Mr. Smith why he believed that Mr. Becker resigned. (Tr. at 230-32). Mr. Mullins stated that Mr. Smith told him that he was made aware of Mr. Becker's putative resignation by Mr. Becker writing "thanks" on a timecard. (Tr. at 231). Mr. Mullins then stated that he told Mr. Smith that Mr. Becker had actually written "thanks" on a timecard that included the date November 25, 2010, which was Thanksgiving, five days before Mr. Becker's last day working at Respondent's shop. (Tr. at 231-32). Mr. Mullins stated that when he pointed this out to Mr. Smith, Mr. Smith "became angry" and stated that he "didn't know he was going to be grilled and have to answer questions." (Tr. at 232).

b. Additional Testimony

Mr. Mullins testified that during the course of the investigation, Mr. Smith did not mention the name Bryan Pfaff, Respondent's expert witness and a fact witness. (Tr. at 232). Mr. Mullins stated that he did interview Chris Schulz, and that Mr. Schulz told Mr. Mullins that he did not remember a conversation with Mr. Becker on November 30. (Tr. at 234).

2. **Cross-Examination**

a. Mr. Mullins's Putative Bias

On cross-examination, Respondent first sought to demonstrate Mr. Mullins' bias. (Tr. at 235-37). Mr. Mullins admitted that in a statement he prepared memorializing his December 2011 interview of Mr. Carillo[6], he wrote that Mr. Carillo was a witness to "protected activity and adverse action," which could be interpreted as conclusory as it predated the interview of Mr. Smith; he stated that he "probably should have said [sic] 'alleged'" protected activity and adverse action. (Tr. at 235-36). He maintained, however, that he was a neutral investigator of whistleblower complaints. (Tr. at 236-37).

b. Statements of Mr. Smith

Respondent then sought clarification of the reasons Mr. Smith gave Mr. Mullins for believing that Mr. Becker had quit his employment with Respondent. (Tr. at 237; 241-42). Mr. Mullins stated that Mr. Smith told him that Mr. Smith attempted to contact Mr. Becker by cell-phone, and that he also asked another employee to contact Mr. Becker. (Tr. at 241). Mr. Mullins admitted that Mr. Smith told him that he concluded Mr. Becker had quit based on his inability to contact Mr. Becker and his abseentism from work. (Tr. at 241-42). Mr. Mullins stated that this explanation actually preceded Mr. Smith's explanation that he believed Mr. Becker quit because he wrote "thanks" on his timecard. (Tr. at 241).

[6] Identified, though not admitted into evidence, as Resp't-8.

3. **Redirect Examination**

a. Rehabilitation

During redirect examination, the Prosecuting Party attempted to rehabilitate Mr. Mullins by demonstrating a lack of bias. Mr. Mullins stated that the memorandum he prepared from his interview notes was not formal, that the memo did at certain points use the word allegedly in reference to protected activity and adverse action, and that Mr. Mullins had determined in close cases that a whistleblower did not establish a prima facie case of retaliation. (Tr. at 242-43).

b. Statement of Mr. Schulz

Mr. Mullins also stated that Mr. Schulz had told him that he felt that he was in a difficult position to come between Mr. Smith, the company's owner, and Mr. Becker, Mr. Schulz's supervisor. (Tr. at 244-45). The tension he felt was exacerbated by the fact that Mr. Schulz believed that "everyone's afraid of Mr. Smith." (Tr. at 244-45).

B. **Respondent's Case-in-Chief**

Testimony of Timothy Sweeney

1. Direct Examination

Mr. Sweeney, the vice-president and a long-time employee of Auction Associates, testified as to whether the TopKick sold by his company to Mr. Smith was a tow-away vehicle or not. (Tr. at 252-61). He stated that after reviewing his company's records and a live-recording of the auction, he did not believe that the TopKick was a tow-away vehicle. (Tr. at 256-59). He further stated that a photograph of the TopKick did not appear to include the windshield markings that would indicate that the vehicle was a tow-away. (Tr. at 259-61).

2. Cross-Examination

During his cross examination, Mr. Sweeney stated that he could not see the passenger-side window of the TopKick. (Tr. at 262).

Testimony of Bryan Pfaff

1. **Direct Examination**

Mr. Pfaff testified as to his qualifications (Tr. at 264-70), how a kingpin operates generally (Tr. at 270-79), and his inspection of the TopKick's kingpin in late November 2010 specifically (Tr. at 280-89). Mr. Pfaff is a heavy equipment mechanic with an associate's degree in diesel equipment mechanics, a certification from the Automotive Society of Engineers, and about twenty years of experience as a mechanic. (Tr. at 263-67). Mr. Pfaff explained that inspecting, evaluating, and replacing a vehicle's kingpin requires expertise with which he considered himself endowed. (Tr. at 271).

a. Kingpin Mechanics

Mr. Pfaff explained that a kingpin deteriorates as a result of friction between the part and the bearings inside a spindle that rotates when the vehicle's steering wheel is turned. (Tr. at 275). He stated that a kingpin is to be inspected, at a minimum, once a year, but that with proper maintenance it should last the lifetime of a vehicle. (Tr. at 275). Mr. Pfaff explained that the "industry standard" test for a kingpin's functionality is the pry-bar test. (Tr. at 275-76). He stated that the test is performed by checking the kingpin's vertical—not horizontal—movement. (Tr. at 278-79). He stated that a vehicle should be immediately taken out of service given one to two inches of kingpin play. (Tr. at 277). He stated that a kingpin functioned independently of a vehicle's power steering. (Tr. at 283-84).

b. Mr. Pfaff's Inspection

Mr. Pfaff testified as to his own inspection of the TopKick in late November 2010. (Tr. at 280). He stated that Mr. Smith had called him during the afternoon and asked him to perform the test at Respondent's shop; he was not offered compensation, and he did not keep a record of the test as he was a novice businessman. (Tr. at 280). Mr. Pfaff estimated that his inspection detected a quarter-inch of play. (Tr. at 281). He stated that this was not an alarming amount of play; though the part would need to be replaced, he stated, a vehicle would not need to be taken out of service immediately given a quarter-inch of kingpin play. (Tr. at 282). Mr. Pfaff stated that these findings were consistent with those recorded by Mr. Schulz in an affidavit. (Tr. at 286-88; Resp't Ex. 10).

Mr. Pfaff stated that he believed Mr. Becker incorrectly performed the pry bar test based on noting one-and-one-half to two inches of play, and stated that he believed Mr. Becker ascertained horizontal movement unrelated to the kingpin's play. (Tr. at 278). He stated that this amount of play would be "extremely excessive." (Tr. at 285).

2. **Cross-Examination**

a. Acceptable and Unacceptable Amount of Kingpin Play

On cross-examination, Mr. Pfaff restated that one-and-one-half to two inches of kingpin play would require that a truck immediately be removed from service because it might cause a catastrophic failure in the truck, including the wheel becoming completely "disjointed" from the vehicle. (Tr. at 290). He stated that even one-quarter of kingpin play is technically out of compliance and that there is no set threshold for kingpin play that would qualify as a safety issue. (Tr. at 291-93). He stated that he had taken out of service a vehicle with three-quarters of an inch of play and that he would advise a customer to take a truck with one-half of play out of service. (Tr. at 293). He stated that a steering wheel that violently pulls from side-to-side, as well as a seized steering wheel, could indicate a worn kingpin. (Tr. at 294).

b. Condition of the TopKick's Kingpin

Mr. Pfaff testified that he thought the kingpin would need to be replaced as soon as possible. (Tr. at 299). He stated that this amount of play combined with difficulty steering would constitute a "problem." (Tr. at 299-300). He stated that he would have recommended it

be taken out of service if Respondent had not needed the truck for a job. (Tr. at 299). He stated that he never drove the TopKick. (Tr. at 300).

c. Additional Testimony

Mr. Pfaff stated that he began maintaining Mr. Smith's fleet of vehicles in 2010, had serviced those vehicles approximately a dozen times prior to November 29, 2010, and received invoices for some (though not all) of these visits. (Tr. at 301-02). He stated that at the time of the hearing he rented his business's space from Jim Smith's father and that he did not move to this space until December 2011. (Tr. at 302). He stated that he was first contacted about serving as a witness in February 2014. (Tr. at 302).

The Prosecuting Party elicited testimony that Mr. Pfaff incorrectly identified the color of the DropKick during his deposition. (Tr. at 295-98).

3. **Redirect Examination**

a. Testimony Regarding Kingpins

On redirect examination, Mr. Pfaff stated that although a quarter-inch of kingpin play would technically put a vehicle of "tolerance" [sic], that this amount of play would not make it an immediate safety hazard. (Tr. at 303). He stated that if a vehicle had one-and-one-half to two inches of kingpin play the driver would not be able to control it, in his opinion. (Tr. at 306).

He stated that after inspecting the TopKick he advised Mr. Smith to perform repairs as soon as possible. (Tr. at 304). He stated that a truck will only begin steering "hard" after the power-steering line has been severed. (Tr. at 304). He

b. Additional Testimony

He stated that he did not give Mr. Smith an invoice for the inspection because he customarily gave inspections and advice as a courtesy, and had given them to other customers. (Tr. at 304-05). He stated that his opinions were negatively impacted by the fact that he rented his business place from Jim Smith's father as Mr. Smith, senior, was evicting Mr. Pfaff from his place of business. (Tr. at 305).

Testimony of George Loomans

1. **Direct Examination**

Mr. Loomans, the project coordinator for Beres Builders who supervised the job in which Mr. Becker severed a buried power line, testified as to that job. (Tr. at 308-17). Mr. Loomans stated that he believed Mr. Becker was a foreman on the job (Tr. at 309). Mr. Loomans stated that there were two distinct paint markings at the job site to indicate where holes were to be dug and where the power lines ran. (Tr. at 310-11).

Mr. Loomans testified that he gave instructions to Mr. Becker to dig by hand when the crew was near the power lines. (Tr. at 313). He stated that his instructions were not followed: he noticed that in that area he saw scraps of PVC piping, which indicated that a power line had been hit. (Tr. at 313-14). Mr. Loomans stated that he asked Mr. Becker if he had dug by hand or with

an auger, and that Mr. Becker at first said that he had dug by hand, but eventually admitted that he used an auger. (Tr. at 315). He stated that the line had not been disconnected. (Tr. at 316).

Testimony of Michael Brown

1. **Direct Examination**

Mr. Brown, an employee of Respondent who worked with Mr. Becker, testified as his relationship with Mr. Becker as a co-worker. (Tr. 321-23). Mr. Brown stated that Mr. Becker had threatened to "beat [his] ass" if Mr. Brown made mistakes on the job. (Tr. at 322). Mr. Brown stated that he found some of Mr. Becker's threats "concerning." (Tr. at 323).

2. **Cross-Examination**

Mr. Brown stated that he was currently employed by Respondent. (Tr. at 323). He stated that he was not being paid for his time at the hearing. (Tr. at 323).

Testimony of Raul Rodriguez

1. **Direct Examination**

Mr. Rodriguez, the president and owner of Rodriguez Co., where Mr. Becker worked after Smithstonian, testified as to Mr. Becker's employment. (325-32). Mr. Rodriguez testified that Mr. Becker was not terminated because his company's municipal contracts had expired. (Tr. at 326). Rather, he stated, Mr. Becker was terminated because of misconduct. (Tr. at 328). Mr. Rodriguez testified that he was reluctant to testify because Mr. Becker had threatened legal action. (Tr. at 328-32).

On cross-examination, Mr. Rodriguez stated that Mr. Becker had been given the choice to be terminated or to resign. (Tr. at 33). He stated that following a subsequent unemployment compensation hearing, Mr. Becker was awarded compensation. (Tr. at 332).

Testimony of James Smith

1. **Direct Examination**

Mr. Smith testified as to Respondent, and specifically as to Mr. Becker's employment with Respondent and the circumstances that led to his separation from Respondent. (333-85).

a. Management

Mr. Smith stated that Respondent did not have an official discipline policy. (Tr. at 337-38). Rather, he stated, he would address situations individually by speaking with employees and sometimes sending them home for a day. (Tr. at 338). He stated that he had previously fired employees and in the circumstance he would tell them "you're fired" or you're terminated." (Tr. at 338). Mr. Smith stated that he was "100% percent sure" that he did not fire Mr. Becker. (Tr. at 336).

Mr. Smith stated that in 2010, he relied on drivers reporting problems with vehicles, either by alerting a mechanic or supervisor or by writing the problem on a dry-erase board. (Tr.

at 339-40). He stated that mechanics also performed annual inspections on larger equipment. (Tr. at 340-41). He stated that Respondent's vehicle and equipment recordkeeping was "probably a little bit inadequate." (Tr. at 341).

b. Initial Impression of Mr. Becker

Mr. Smith testified that initially he viewed Mr. Becker as someone who "carried himself well" and "was articulate." (Tr. at 343). "In the beginning," he stated, "I thought he was great." (Tr. at 343). Mr. Smith stated that he frequently had conversations with Mr. Becker about signing in using the time clock rather than by hand, but stated that perhaps he should have been "a little bit more vocal" about the issue. (Tr. at 343). He stated that as Mr. Becker's responsibilities grew more "in-depth" that his "demeanor with the crews, with me, and with certain customers at times were abrasive and argumentative to the point where I had to pull him to the side" and warn him that his behavior was unprofessional. (Tr. at 344). He stated that he observed one incident between Mr. Becker and a co-worker that led to a fistfight, and that Mr. Becker's opponent in the fight stated that Mr. Becker instigated the fight by using a racial slur. (Tr. at 344). Mr. Smith stated that he verbally reprimanded Mr. Becker a "good dozen" times. (Tr. at 346). He stated that Mr. Becker's willingness to obey instructions and respect for equipment were "lackluster." (Tr. at 345-46).

c. Beres Builders's Job

Mr. Smith testified as to the Beres Builders's job. (Tr. at 346-50). He stated that Mr. Loomans and other managers of Beres Builders gave Respondent instructions for the job, which included marking an area that contained power lines and was to be excavated by hand. (Tr. at 347). Mr. Smith stated he left the job site after his employees received the directions, and that he received a phone call later that afternoon from the clients, who, Mr. Smith stated, told him that if Mr. Becker was not removed from the job site that he would be arrested. (Tr. at 348). Mr. Smith stated that he called Mr. Becker, who told Mr. Smith that the crew might have hit the pipe that insulated the buried power line. (Tr. at 349). Mr. Smith stated that he paid several thousand dollars because of the incident. (Tr. at 349-50). Mr. Smith stated that he reprimanded Mr. Becker verbally as a result of the incident and removed him from the Beres's Builders job. (Tr. at 350).

d. Purchase of the TopKick and Its Condition Prior to November 29

Mr. Smith testified about the purchase of the TopKick and its condition prior to November 29, 2010. (Tr. at 350-56). He stated that Respondent had never purchased a tow-away vehicle (Tr. at 351). He stated that he planned to have the truck serviced and then registered. (Tr. at 352). He stated that several other people had driven the truck, and that none of those drivers had complained about its condition. (Tr. at 352). He estimated that the truck was used three to five times between its purchase and Mr. Becker's last as an employee. (Tr. at 354). He stated that Mr. Becker mentioned on the day he drove the truck from the auction to Respondent's shop that it "steered a little rough." (Tr. at 354).

Additionally, Mr. Smith stated that he was aware that Respondent had received tickets for operating unregistered vehicles. (Tr. at 355-56).

e. Events of November 29

Mr. Smith testified as to the events of November 29, 2010. (Tr. at 357-64). He stated that Mr. Becker called him from the gravel pit to raise—for the first time—an issue with the TopKick's registration status. (Tr. at 357). Mr. Smith stated that he informed the gravel pit manager that the TopKick was being registered to a certain weight specification. (Tr. at 357). Mr. Smith stated that Mr. Becker then delivered the gravel to a job site, and that he indicated that he had blown a power steering hose to Mr. Smith while they were both at the job site. (Tr. at 358). He stated that Mr. Becker did not refuse to operate the truck at that time, and indeed, that he drove it back to the shop. (Tr. at 358). Mr. Smith stated that on that day he told Mr. Becker to "[d]rive what I tell you to drive or stay home." (Tr. at 359). He stated that he did not intend to fire Mr. Becker by telling him that and that Mr. Becker returned to work on the following day. (Tr. at 359).

Mr. Smith stated that he was not present when Mr. Schulz, the mechanic, replaced the power steering pump or when he may have inspected the vehicle's kingpin. (Tr. at 359). He stated that Mr. Schulz told him the vehicle was safe to drive, but that Mr. Schulz stated that Mr. Becker did not think the vehicle was safe to drive. (Tr. at 359). Mr. Smith stated that he called Mr. Pfaff to ask him to inspect the vehicle and provide a "second opinion." (Tr. at 360). Mr. Smith acknowledged that he initially told Mr. Mullins, the OSHA investigator, that he had called "Chico" for a second opinion, but that he had remembered later that it was in fact Mr. Pfaff who had inspected the vehicle on November 29. (Tr. at 360-61). At that point, he stated, he called counsel for Respondent. (Tr. at 361). Mr. Smith stated that Mr. Pfaff called him after examining the TopKick and told him that the kingpin had some play and needed to be replaced, but could be used the next day. (Tr. at 362).

Mr. Smith stated that he believed Mr. Schulz had repaired the power steering hose on November 29. (Tr. at 361). Mr. Smith stated that because he would be liable for any harm caused by one of his vehicles, he was not interested in putting an unsafe truck on the road. (Tr. at 361-62). He testified that Mr. Becker told him on November 29 that he would not drive the truck unless "'the hose is fixed.'" (Tr. at 363). He stated that Mr. Becker did not say anything about the kingpin, other than what he told Mr. Smith on the phone. (Tr. at 363).

f. Events of November 30 and After

Mr. Smith then testified as to the events of November 30, 2010. (Tr. at 364-66). He stated that on the morning of November 30, he noticed that the TopKick was not hooked to the trailer, which was contrary to Mr. Smith's expectations. (Tr. at 364). Mr. Smith stated that he asked why the trailer wasn't attached and that Mr. Becker told him that he wasn't going to drive it because it was unsafe and because it was unregistered. (Tr. at 364). Mr. Smith said that he told Mr. Becker that the truck had been repaired by Mr. Schulz, though he did not give an opinion as to whether it was roadworthy and safe. (Tr. at 365). He stated that he had "always" stated to his employees that he would pay for any tickets they received that were his fault. (Tr. at 365). Mr. Smith stated that he climbed into the cab of the truck and turned the wheel and stated that it appeared "fine to [Mr. Smith]." (Tr. at 365-66).

After Mr. Becker stated that he would not be driving the vehicle, Mr. Smith told him to "'go home for the day.'" (Tr. at 366). He stated that he did not intend to fire Mr. Becker and

that he did not fire him. (Tr. at 366-67). He noted that November 30 was the day that David Smith was scheduled to be trained by Mr. Becker. (Tr. at 367).

Mr. Smith stated that he called Mr. Becker later in the day, and that when Mr. Becker did not answer Mr. Smith left a message. (Tr. at 367). In that message, Mr. Smith stated, he told Mr. Becker that Mr. Becker was "lucky to have a job" and the he needed images stored on Mr. Becker's company-issued phone. (Tr. at 367).

Mr. Smith stated that after November 30 he tried to reach Mr. Becker by phone and by having other employees call Mr. Becker, but that he was unable to reach him. (Tr. at 369). He stated that the next time Mr. Becker was back at the shop was the day he returned Respondent's equipment; Mr. Smith was not at the shop at that time, however. (Tr. at 369). He stated that he believed Respondent responded to Mr. Becker's safety complaints. (Tr. at 369). He stated that he himself drove the TopKick on November 30, and that it "seemed to be fine." (Tr. at 370).

2. **Cross Examination**

a. TopKick's Registration Status

On cross-examination Mr. Smith stated that although Mr. Becker complained about the lack of registration on November 29 and 30, the TopKick was not registered until January 21, 2011. (Tr. at 370). He stated that he sent another driver out in the truck before he was issued a title. (Tr. at 370).

b. Impeachment via Prior Inconsistent Statements

Mr. Smith stated that Mr. Schulz did not seem unsure about his diagnosis of the kingpin, but the Prosecuting Party impeached this account via inconsistent deposition testimony in which Mr. Smith stated that Mr. Schulz did seem unsure about his diagnosis. (Tr. at 371-73). Mr. Smith testified that, to his knowledge, Mr. Schulz did not speak to Mr. Becker on November 30 and that Mr. Pfaff did not speak to Mr. Becker on November 29 or 30. (Tr. at 373-74). He stated that he never had the two mechanics tell Mr. Becker that the TopKick was safe to drive. (Tr. at 374). But the Prosecuting Party impeached Mr. Smith's credibility via prior inconsistent testimony from Mr. Smith's deposition in which he said he had had two mechanics tell Mr. Becker that the truck was safe to drive. (Tr. at 374-75; *see* DOL-EX 113 at 16).

Mr. Smith admitted that he had told Mr. Mullins that the kingpin was available on November 29 and 30, and that he also indicated that it was available in response to an OSHA letter, but that in fact the part was replaced within a few days of November 30. (Tr. at 375-76).

Mr. Smith stated that he had never previously suspended or written up Mr. Becker. (Tr. at 380-81). He stated that he had disciplined Mr. Becker for the fistfight with a co-worker; the Prosecuting Party, however, impeached this statement by reading Mr. Smith's deposition testimony in which Mr. Smith stated that he did not discipline other of his employees, although he did testify at his deposition that they needed to "get along or they both had to get out" and counseled them about cooperating in the workplace. (Tr. at 382-83).

c. Mr. Pfaff as Witness

Mr. Smith admitted that he had not mentioned Mr. Pfaff to Mr. Mullins during Mr. Mullins's interview. (Tr. at 376). Mr. Smith explained that this was because he was quite busy and "deal[t] with a lot of other people." (Tr. at 377). He admitted that he did not identify Mr. Pfaff as a witness until February 2014, although Mr. Pfaff would come to Respondent's shop about twice a month since 2010. (Tr. at 379). He stated that there were no documents reflecting Mr. Pfaff's inspection on November 29. (Tr. at 379).

d. Events of November 30

Mr. Smith stated that on November 30, 2010, he told Mr. Becker to "leave your shit here" and that he called Mr. Becker later that afternoon, although he could not recall whether he called to inquire if Mr. Becker was going to return Respondent's equipment. (Tr. at 379-80). The Prosecuting Party then read testimony from Mr. Smith's deposition in which he stated that he had called Mr. Becker to ask him to "turn his stuff in." (Tr. at 380). Mr. Smith stated that there were no vehicles other than the TopKick available to transport equipment to the job site on November 30. (Tr. at 381). The Prosecuting party, however, impeached this statement via deposition testimony in which Mr. Smith stated that he was "sure" that other options were available, and that he could have used multiple trucks with multiple trailers, although this option was less efficient and less profitable. (Tr. at 381-82).

I then asked Mr. Smith why, if he had not terminated Mr. Becker on November 30, he had insisted that Mr. Becker "give [him his] shit back." (Tr. at 384). Mr. Smith stated that he was "probably caught up in the heat of the moment" and asked for Mr. Becker to return the equipment so that Mr. Smith could "calm myself down." (Tr. at 384). He also suggested that it not "necessary" for Mr. Becker to "take a company vehicle home" if he had been suspended or sent home for the day. (Tr. at 384).

Mr. Smith stated that he could not recall any other instance of telling an employee to "go home" without intending to fire him, although he stated that he was sure was such an instance. (Tr. at 385).

3. **Redirect Examination**

On redirect examination, Mr. Smith stated that he had called Mr. Becker to inform him that he needed pictures of an accident stored on Respondent's cellphone. (Tr. at 385).

ISSUES

The parties do not dispute that Respondent, Mr. Becker, and the TopKick dump truck are covered by the Act. (J. Stips. at 1-2).

The following issues must be decided:

1. Whether Mr. Becker engaged in protected activity;

2. Whether Respondent took an adverse action against Mr. Becker;

3. If Mr. Becker did engage in protected activity and Respondent did take adverse action against him, whether the protected activity was a contributing factor in the adverse action;

4. If yes to all of the above, whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

DISCUSSION

A. Applicable Standards

In an STAA proceeding the initial burden of proof is on the Complainant, who must establish by a preponderance of the evidence that the employer took adverse action against him for engaging in protected activity. *U.S. Postal Service Board of Governors v. Aiken*, 460 U.S. 711, 713-14 (1983); *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 8 (ARB Sept. 14, 2007). The protected activity need only be a contributing factor to the employer's decision to terminate the Complainant. 29 C.F.R. § 1978.109(a) ("A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."). Thus, Complainant must show (1) that he engaged in protected activity; (2) that Respondent took an adverse employment action against him; and (3) that his protected activity was a contributing factor in the adverse personnel action. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 6 (ARB Feb. 29, 2012); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008- STA-052, slip op. at 5 (ARB Jan. 31, 2011); 29 C.F.R. § 1978.109(a). If complainant makes this showing, the Respondent may escape liability only by showing by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant's protected activity. *Warren*, ARB No. 10-092, slip op. at 12; 29 C.F.R. § 1978.109(b).

B. Complainant Has Shown that He Engaged in a Protected Activity

The Act protects employees who, among other activities, file complaints regarding commercial motor vehicle safety or who refuse to operate commercial motor vehicle that the employee reasonably perceives to be unsafe. *See* 49 U.S.C. § 31105(a)(1)(A)-(B). More specifically, the STAA prohibits an employer from disciplining an employee because:

> (A)
>
> > (i): the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order . . . ;
>
> . . .
>
> (B): the employee refuses to operate a vehicle because

…

> (ii): the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

Id.

1. Mr. Becker's Complaints Regarding the TopKick's Registration Status

Mr. Becker engaged in protected activity on November 29 and 30 by reporting his concerns regarding the TopKick's lack of registration.[7] The parties have stipulated that on those dates, the TopKick was not registered in Wisconsin and that Mr. Becker complained to Mr. Smith about the vehicle being unregistered. (J. Stips at 2-3, Nos. 16-18). The ARB and several federal appellate courts have held that to "file" a complaint under § 31105(a)(1)(A)(i), an employee need not submit a formal, written complaint but may instead orally complain to a supervisor or employer about a safety violation. *See Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-0030, slip op. at 15 FN 6 (ARB Feb. 29, 2012) (Brown, J., concurring) (citing cases). Vehicle registration is required by Wisconsin law, *see* WIS. STAT. ANN § 341 *et. seq*. Thus the only issue predicate to determining whether Mr. Becker's complaints regarding the TopKick's registration constituted a protected activity is whether the state statute and federal regulation is "related to a . . . commercial motor vehicle safety or security regulation, standard, or order" under 49 U.S.C. § 31105(a)(1)(A). I find that the complaint regarding registration related to safety and security statutes and regulations, for several reasons.[8]

First, I find that the registration requirement is part and parcel of a comprehensive state regulatory scheme enacted under the police power. Wisconsin requires by statute that motor trucks be registered by weight. WIS. STAT. ANN § 341.25(1)(c). State statute also limits a vehicle's maximum gross weight. *See* WIS. STAT. ANN § 348.15. Furthermore, the Wisconsin

[7] Although I previously ruled on this issue in denying Respt's Mot. to Dismiss/Summ. J., both parties have recapitulated their arguments in their hearing briefs and at the hearing.

[8] I do not find it particularly probative that the Federal Motor Carrier Safety Regulations ("FMCSRs") incorporate by reference Wisconsin's vehicle registration statutes. Under 49 C.F.R. § 392.2, "every commercial vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated." The Prosecuting Party argues that the title of the FMCSRs indicates that *all* of its sections, including § 392.2, necessarily relate to safety or security. I am not persuaded by this argument: given the sweeping nature of 49 C.F.R. § 392.2, this would mean that every law, ordinance, and regulation of commercial vehicles from every jurisdiction relates to safety. But it seems highly probable that some rules governing commercial vehicles do not relate to safety, but to other concerns like generating revenue for a municipality—*e.g.*, a city ordinance that charges higher toll rates for commercial vehicles seems at best attenuated from safety concerns. Nor am I convinced by the Prosecuting Party's argument that § 392.2's placement adjacent to sections of the FMCSR that unquestionably do relate to safety and security fails: the Wisconsin statute is only "adjacent" to those regulations that are inarguably related to safety or security through the fortuitous functioning of § 392.2 inclusion, accidentally, and not through the intent of the FMCSRs' drafter. Finally, I find unpersuasive the Prosecuting Party's argument that because proof of insurance is necessary to register a vehicle, and because insurance promotes public safety, the registration statute "addresses public safety concerns." If the order of operations were inverted—if Wisconsin required that a vehicle be registered before it could be insured—then the argument would be more persuasive. But a vehicle owner may insure a vehicle without ever registering it.

Department of Transportation requires that certain vehicles display on their registered license plates the vehicle's gross weight. Wisconsin Dep't Transp., *Registered Gross Weight*, http://wisconsindot.gov/Pages/dmv/vehicles/title-plates/val-gross-weight.aspx (last visited July 31, 2015).[9] The Wisconsin Supreme Court has held that the police power authorizes these statutes and regulations.[10] *State v. Dried Milk Prods. Co-op*, 114 N.W.2d 412, 415 (Wis. 1962). Given its provenance in the Tenth Amendment, the motor truck registration regulatory scheme necessarily relates to the safety, health, and welfare of Wisconsin residents. Furthermore, common-sense dictates that the registration statute, particularly in its interrelation with the statutory weight limits, relates to vehicular safety. Thus a complaint regarding a violation of the regulatory scheme falls under 49 U.S.C. § 31105(a)(1)(A).

Second, I note that Wisconsin courts have characterized one of the registration statutes' purposes as promoting safety and security. The Wisconsin court of appeal has held that § 341 was designed, in part, "to aid law enforcement by furnishing means of identifying a vehicle and its owner in case of loss, theft or other violation of the law." *State v. Yellow Freight Sys., Inc.*, 292 N.W.2d 361, 364 (Wis. Ct. App. 1980), *aff'd* 303 N.W.2d 834 (Wis. 1981). The same court has held that the statute allows law enforcement to trace "irresponsible drivers," thereby aiding in keeping these drivers "off the road." *City of Sheboygan v. Wilson*, 618 N.W.2d 272, slip op. at *2 (Wis. Ct. App. 2000). Aiding law enforcement implicates security and protecting motorists from irresponsible drivers implicates safety; thus, complaints about violations of the statute fall under 49 U.S.C. § 31105(a)(1)(A).

Because the Wisconsin vehicle registration statute is enmeshed in a comprehensive regulatory scheme that establishes limits on motor trucks' weight related to safety or security, and because Wisconsin courts have characterized the purpose of the statute as promoting safety and security, I find that Mr. Becker's complaints to Mr. Smith on November 29 and 30 concerning the TopKick's registration constituted protected activity under 49 U.S.C. § 31105(a)(1)(A)(i).

2. Mr. Becker's Refusal to Drive the TopKick

Mr. Becker also engaged in protected activity on November 30 when he refused to drive the TopKick because he reasonably perceived that the vehicle was unsafe to drive. Under STAA's refusal to drive clause,

> an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

[9] The hearing testimony illustrates how the regulatory scheme functions: when Mr. Becker attempted to load gravel at the pit, the attendant at first would not load the truck because the TopKick lacked license plates that displayed the vehicle's weight limits.

[10] The court held that the purpose of the weight limits was to prevent "premature deterioration of public highways"—a purpose related to safety. 114 N.W.2d at 415.

49 U.S.C. § 31105(a)(2). Thus for an employee's refusal to drive to qualify as protected activity the driver must (1) refuse to operate a vehicle because he is apprehensive of an unsafe condition; (2) his apprehension must be objectively reasonable; (3) the driver must have sought correction of the condition; and (4) the employer must have failed to correct the condition. *See Brink's, Inc. v. Herman*, 148 F.3d 175, 180 (2d Cir. 1998).

It is undisputed that on November 30, Mr. Becker refused to drive the TopKick. (J. Stips. at 3, no. 23). A preponderance of the evidence heard during the hearing, including the testimony of Mr. Becker, Mr. Smith, and Mr. Carillo, establishes that he stated that he refused to drive it because he believed the truck to be unsafe. Thus the first element of a protected activity has been met. Furthermore, I find that Mr. Becker "sought correction" of the condition he perceived to be unsafe. Although Mr. Smith testified that Mr. Becker only raised the kingpin's condition on November 29 during the phone call from the gravel pit, I find that Mr. Smith must have been aware of Mr. Becker's concerns regarding the kingpin because he asked Mr. Pfaff to perform a pry-bar test late in the day on November 29. Accordingly I find that the third element of a protected activity has been met. And it is undisputed that Mr. Smith did not "correct the condition" that Mr. Becker perceived to be unsafe: he refused to allow Mr. Becker to drive another truck, and told David Smith to drive the truck without replacing the kingpin.

Thus Mr. Becker's refusal to drive was a protected activity if his apprehension that the truck was unsafe to drive was reasonable, *i.e*., if it posed a "real danger of accident, injury, or serious impairment of health." I find that Mr. Becker's belief was reasonable. Objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances and with the same training and experience as the aggrieved employee." *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012) (quoting *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009)).

Here, the knowledge available to Mr. Becker on November 30 was limited: he had performed a pry-bar test on November 29 and had seen Mr. Schulz perform the pry-bar test on the TopKick on November 29, but he was never made aware of Mr. Pfaff's test done later in the day on November 29. It is also unclear what in fact was Mr. Becker's knowledge. His own test yielded an undisputedly dangerous degree of kingpin play; however, Mr. Pfaff testified that Mr. Becker likely performed his own test incorrectly, and Mr. Becker did not have the expertise of Mr. Schulz. The evidence conflicts over what result Mr. Becker observed from Mr. Schulz's test. Mr. Becker reported observing Mr. Schulz's test result in one-and-one-half to two inches of kingpin play on that date. On the other hand, Mr. Schulz in his affidavit states that the kingpin's bearing were becoming "slightly worn" but that the truck was "safe to drive"—a result markedly different from what Mr. Becker reported he had observed Mr. Schulz ascertain. (Aff. of Christopher Schulz, Resp't EX-10 at 1). On the other hand, the parties' joint stipulation that Mr. Smith told Mr. Schulz that he was the one to take "vehicles out of service" undercuts Mr. Schulz's affidavit. (J. Stips. at 3, No. 21). That comment, which (unlike the facts testified to in Mr. Schulz's affidavit) neither party disputes, strongly suggests that Mr. Schulz provoked Mr. Smith's comment by attempting to take the TopKick out of service. Additionally, Mr. Smith's testimony regarding Mr. Schulz's certainty about the vehicle's safety has varied over the course of this matter.

Ultimately, however, I find that a preponderance of the evidence demonstrates that Mr. Becker's belief that the kingpin's play was unsafe was a reasonable belief, even if Mr. Schulz diagnosed much less than one-and-one-half inches of kingpin play. Mr. Pfaff, Respondent's expert, stated that even a quarter-inch of play was technically out of compliance, and that there was no threshold number for kingpin play that would qualify as a safety issue. Mr. Pfaff himself found a quarter-inch of play and stated that he would have advised Mr. Smith to not use the TopKick if Mr. Smith did not need it for a job the next day. Thus, even assuming that Mr. Becker only observed a quarter-inch of kingpin play on November 29, his belief that the truck was unsafe to drive is reasonable given his own experience and training.

Furthermore, the background factual circumstances point to the reasonableness of Mr. Becker's apprehension: he testified, credibly, that he had driven the truck three times and each time had difficulty steering it, and that on November 29 the power steering line was severed. These facts suggest that Mr. Becker knew that the truck was unreliable and potentially dangerous. Thus Mr. Becker's apprehension that the TopKick was unsafe to drive on November 30 was reasonable, based on the limited knowledge available to him in light of his training and experience, and accordingly Mr. Becker's refusal to drive the TopKick on November 30 was a protected activity.

Respondent emphasizes that Mr. Becker had "limited" experience with kingpin inspection, maintenance, and repair. (Resp't Tr. Br. at 2). Limited experience, however, bolsters the reasonableness of Mr. Becker's refusal to drive the TopKick: the regulation states that apprehension is reasonable based on the employee's actual "training and experience" (and not, *e.g.*, the training and experience of a mechanic). Thus less training and experience would give Mr. Becker *more* leeway to mistakenly, but reasonably, conclude that the vehicle was unsafe to drive.[11]

Respondent cites *Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201 (4th Cir. 2009), for the proposition that an employee cannot "design his own inspection routine" to supersede the employer's when the employer's "prescribed inspection methods are themselves reasonable." *Id.* at 211. The case is distinguishable on the facts, however: in *Calhoun*, the employer had a clearly prescribed, reasonable safety routine that was well-known to the employee. Here, Mr. Smith testified that he relied on drivers self-reporting problems with vehicles. He testified that he kept records of the vehicles that were, in his estimation, inadequate. The inspection by Mr. Pfaff was never made known to Mr. Becker. Under these circumstances, it cannot be said that Mr. Smith had in place a reasonable inspection routine that was well-known his employees, and which therefore displaced the employees' own inspections. Indeed, Mr. Becker appears to have followed Respondent's protocol, not superseded it, by alerting Mr. Schulz and Mr. Smith to the mechanical problems he perceived the TopKick to have.

[11] Note that if Mr. Becker had *no* mechanical experience and knew nothing about kingpins, then his refusal to drive the TopKick because he believed the truck's kingpin was damaged would be unreasonable. Mr. Becker had an intermediate level of experience, however: he had enough experience to know what a kingpin was, the symptoms of its malfunctioning, and the risks that a damaged kingpin posed, but not enough experience to approach that of a professional mechanic.

C. Respondent's One-Day Suspension of Mr. Becker Was an Adverse Action

Adverse actions under the STAA have been interpreted broadly by DOL: a 2010 regulation, promulgated after *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), states that "[i]t is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee" because the employee has engaged in a protected activity. 29 C.F.R. §§ 1978(b), (c). *See In re Strohl v. YRC*, ARB No. 10-116, ALJ No. 2010-STA-035, slip op. at *3-4 (ARB Aug. 12, 2011) (finding that the regulation superseded ARB precedent that defined an adverse action more narrowly). This broad definition of an adverse action includes suspensions from work, even short-term suspensions.

Here it is undisputed that Mr. Becker suffered *some* adverse action on November 30, 2010, but the parties disagree about what that action was. The Prosecuting Party argues that Respondent terminated Mr. Becker's employment. (*See* Prosecuting Party Pre-Hearing Br. at 21-22). Respondent argues that Mr. Becker was "sent home," *i.e.*, suspended, for a single day. (*See* Resp't Trial Br. at 12-13). The Prosecuting Party bears the burden of demonstrating the alleged adverse action by a preponderance of the evidence. I find that it has failed to carry its burden of demonstrating that Mr. Becker was terminated, and that it has only shown that Mr. Becker was suspended on November 30, 2010 for the remainder of that day.

The Prosecuting Party makes several arguments to support its contention that Mr. Becker was terminated. First, it states that Mr. Smith became irate and yelled to Mr. Becker to "get out," that he was "done" and that he said "bye-bye" to Mr. Becker. This behavior, however, is as compatible with a short-term suspension as it is with a termination. The words themselves, though dismissive, do not carry the tone of finality inherent in a termination. Furthermore, on the preceding day, Mr. Smith had become comparably angry, cursed at Mr. Becker and Mr. Schulz, and similarly told Mr. Becker that he was to follow orders or not come to work. Yet this incident was not intended to be a termination, nor did Mr. Becker interpret it as one. Therefore the Prosecuting Party does not carry its burden with this evidence alone.

Second, the Prosecuting Party argues that Mr. Smith hired a replacement for Mr. Becker, David Smith. This argument is belied by the record: although the employment application David Smith submitted to Respondent lists his first available day as December 1, 2010, David Smith's first recorded day of work for Respondent was in fact November 30—Mr. Becker's last day. (DOL EX-120). The Prosecuting Party noted during its direct examination of Mr. Smith that the record of David Smith's work on November 30 is handwritten and that the first machine-stamped date is December 1. The record demonstrates, however, that handwritten timecards were common in Respondent's shop (Mr. Becker testified that fifty-eight percent of his own timecards were handwritten and not machine-stamped). In fact, a subsequent day of work from the same timecard is handwritten, not machine-stamped. Clearly Respondent could not have hired David Smith to replace Mr. Becker before Mr. Becker was terminated. (The Prosecuting Party does not suggest, and there is no evidence to indicate, that Respondent hired David Smith because it anticipated terminating Mr. Becker.) Furthermore, Mr. Smith testified credibly that David Smith had worked for the company part-time since the spring of 2010, and though he performed the same functions as Mr. Becker, that he was not hired as a replacement. Mr. Becker testified that he was responsible for training new employees, that he did not meet David Smith on November

30, and that Mr. Smith was not hiring new employees at that time; however, I find it more likely that Mr. Becker was simply not privy not to the decision to hire David Smith, and did not notice his presence on what was a hectic day. Thus, David Smith's hiring does not evidence Mr. Becker's termination.

Third, and most convincingly, the Prosecuting Party points to the fact that Mr. Becker was told to leave Respondent's equipment (including a company vehicle, cellphone, and keys) at the shop on the morning of November 30, and that Mr. Smith called Mr. Becker later that day to request that Mr. Becker return Respondent's equipment. Mr. Becker stated that Mr. Smith asked for the return of the cellphone and keys, and Mr. Smith stated at his deposition that he called Mr. Becker to ask that he "return his stuff," though at the hearing he stated he could not remember if he had left a message asking for the equipment's return. In any case, the implication is clear: why did Mr. Smith tell Mr. Becker to leave Respondent's equipment at the shop, and possibly call Mr. Becker to ask him to return equipment, if he expected Mr. Becker to return to work the following day?

Mr. Smith provided two possible answers, though neither is compelling. First, he testified that he had acted rashly "in the heat of the moment." But Mr. Smith could have terminated Mr. Becker rashly and thereby still effected the termination. Furthermore, there is evidence that Mr. Smith called Mr. Becker later on November 30—*i.e.*, after the moment had passed—to ask that Mr. Becker to return the equipment. Second, Mr. Smith suggested that asking for the return of the company vehicle was a disciplinary action not tantamount to termination: that it was not "necessary" for Mr. Becker to drive the vehicle home if he was suspended. This explanation may hold for the vehicle, and even for the return of the company, both of which could be considered revocable privileges of employment, but it does not hold for the return of Respondent's keys. If Mr. Becker was expected to return the next day, then there would be no need for the keys to be returned.

Yet I reject a finding that Mr. Smith did in fact terminate Mr. Becker, because I find both witnesses' credibility dubious. Both Mr. Becker's and Mr. Smith's accounts hinge on their subjective interpretation of the events of November 30, and thus their credibility is paramount to determining whether Mr. Becker was terminated. The Prosecuting Party and Counsel for Respondent, however, both successfully impeached the credibility of the other's witness.

Mr. Becker's credibility was impeached, first, by other witnesses' contradictory testimony as to collateral matters: his description of the Beres's Builder's job was contradicted by Mr. Loomans's and Mr. Smith's testimony; his description of his reputation as an employee for Respondent was contradicted by Mr. Brown's and Mr. Smith's testimony; and his description of his subsequent employment with Rodriguez Landscaping was contradicted by Mr. Rodriguez's testimony. The testimony of these witnesses regarding collateral matters casts doubt on Mr. Becker's version of the events of November 30.

More significantly, Mr. Becker was impeached by the inconsistency between a statement he made to Mr. Mullins and his testimony at the hearing. In the prior statement, Mr. Becker stated that he did not believe he was terminated on November 30. At the hearing, he stated that he believed that he had been terminated, but that he hoped Mr. Smith would reconsider the termination. The inconsistency between these statements severely damages Mr. Becker's credibility.

Mr. Smith was impeached by inconsistencies between his testimony at the hearing, the Joint Stipulations, and his own prior statements. Specifically, Mr. Smith's statement to Mr. Mullins that a replacement kingpin was available on November 29 is inconsistent with Respondent's subsequent stipulation that the part needed to be ordered; Mr. Smith's deposition testimony that two mechanics told Mr. Becker that the truck was safe to drive is inconsistent with his hearing testimony that no such statements and were made; and Mr. Smith has at different times testified differently regarding the certainty with which Mr. Schulz diagnosed the TopKick's mechanical problems.

Simply put, I find neither Mr. Becker's nor Mr. Smith's testimony about the events of November 30 credible because each of these witness's testimony was successfully impeached by the adverse party.

On the other hand, I find that the testimony of Mr. Carillo, Mr. Becker's former coworker, is extremely credible, and accordingly I give it far greater weight than I give either Mr. Becker's or Mr. Smith's testimony concerning the events of November 30. Mr. Carillo unequivocally stated that Mr. Smith told Mr. Becker to "go home *for the day*" (emphasis added). Mr. Carillo's subsequent statement that Mr. Becker was "done" as Respondent's employee is not inconsistent: an employee can be "done" with a job by being fired or by quitting, and Mr. Becker may have quit his employment after the one-day suspension. Mr. Carillo also testified that at an earlier unemployment compensation hearing, he stated that Mr. Becker "quit" his employment with Respondent. Furthermore, there is no evidence that Mr. Carillo was biased in favor of Mr. Smith, as he is no longer employed by Respondent. Although Mr. Carillo only testified briefly, I find his testimony to be dispositive, and I fully credit his account that Mr. Smith sent Mr. Becker home for the day on November 30. Accordingly, I find that Mr. Becker's subsequent absence from Respondent's shop signaled to Mr. Smith that Mr. Becker had in fact quit his employment.

On balance, the evidence does not demonstrate that Mr. Smith terminated Mr. Becker; Mr. Smith's demand that Mr. Becker return Respondent's equipment must be understood in the context of the evidence taken as a whole. Two possible explanations for Mr. Smith's request immediately present themselves: he asked that the equipment be returned as a punishment, and included the keys in his request without carefully considering the implication. Alternatively, Mr. Becker quit after being suspended for a single day, and he returned some of the equipment because he no longer considered himself to be an employee; if so, then it is understandable that Mr. Smith could reasonably request that an ex-employee return the remainder Respondent's equipment. A third, hybrid explanation might be that Mr. Smith, in asking that Mr. Becker "leave his shit" at Respondent's shop, referred only to the return of Respondent's truck (a punitive measure), and that Mr. Becker's voluntary return of the additional equipment effected his resignation. I note that these are merely hypotheses. What is most important to note is that the totality of the evidence, in light of the parties' successful impeachment of two key witnesses, does not support a finding of termination, regardless of the riddle of Mr. Smith's demand Respondent's equipment be returned.

D. Mr. Becker's Protected Activities Were a Contributing Factor in His Suspension

The Prosecuting Party has demonstrated, by a preponderance of the evidence, that Mr. Becker's protected activities contributed to his suspension. A contributing factor is "any factor

which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams*, ARB 09-092, slip op. at 6.

Here there is direct evidence that Mr. Smith retaliated against Mr. Becker because Mr. Becker refused to drive the TopKick, as he believed it was unsafe: Mr. Smith repeatedly insisted that Mr. Becker drive the vehicle, and when he repeatedly refused to do so, Mr. Smith told him to leave Respondent's shop.

There is also indirect evidence that Mr. Becker's complaint about the vehicle's lack of registration contributed to his suspension. The ARB has held that "temporal proximity" between a protected activity and an adverse action can indirectly evidence a causal link:

> One of the common sources of indirect evidence is "temporal proximity" between the protected activity and the adverse action. While not dispositive, the closer the temporal proximity is, the stronger the inference of a causal connection. This indirect or circumstantial evidence can establish a causal connection between the protected activity and adverse acts.

Warren, ARB No. 10-092, slip op. at 11 (*citing Reiss v. Nucor Corp*., ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010)). Here the adverse action occurred immediately after Mr. Becker complained about the registration status. Accordingly, based on the temporal proximity, I find that Mr. Becker has demonstrated that his complaint about the registration status were a contributing factor in his suspension.

E. Respondent Has Not Shown that It Would Have Suspended Mr. Becker Absent his Protected Activities

Respondent has not shown by clear and convincing evidence that it would have suspended Mr. Becker absent his protected activity—indeed, Respondent has not presented *any* evidence to rebut the Prosecuting Party's argument that an adverse action was taken because of Mr. Becker's protected activity, and has instead focused its arguments on the Act's protected activity and adverse action prongs. Thus Mr. Becker is entitled to damages for his suspension.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO DAMAGES

A. Mr. Becker Is Entitled to One Day's Back Pay in Compensatory Damages

Because Respondent violated the Act, Mr. Becker is entitled to compensatory damages, "calculated in accordance with the make-whole remedial scheme embodied in" Title VII of the Civil Rights Act of 1964. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA 030, slip op. at *4 (ARB Mar. 31, 2005). As discussed above, Mr. Becker was wrongfully suspended on November 30, 2010. Mr. Becker earned twenty dollars an hour. (J. Stips. at 2, no. 10). Thus he is entitled to one-hundred and sixty dollars, *i.e.*, eight hours' back pay.

B. Mr. Becker Is Entitled to Two Thousand Dollars in Punitive Damages

Under 49 U.S.C. § 31105(b)(3)(C), a successful complainant may be entitled to punitive damages "in an amount not to exceed $250,000." The statute does not specify the standard under which an ALJ may award punitive damages, but the ARB has held that damages may be awarded hen a respondent has demonstrated a "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Youngermann v. UPS, Inc.*, ARB NO. 11-056, ALJ No. 2010-STA 47, slip op. at 4-5 (ARB Feb. 27, 2013). Thus the standard for punitive damages has two prongs: respondent must have shown a reckless or callous disregard of plaintiff's rights, and must have intentionally violated the law.

The Prosecuting Party did intentionally violate federal law when it failed to register the TopKick, as it was aware of vehicle registration statutes and the consequence of violating them: it had been issued at least three tickets for violations of the registration statute. I find that Respondent also showed a reckless and callous disregard for Complainant's rights. Mr. Becker enjoyed the right to complain about the TopKick's lack of registration and the right to refuse to drive the vehicle, and Respondent recklessly and callously disregarded those rights by ordering Mr. Becker home on November 30, 2010. Mr. Smith's disregard for his employee's rights is heightened by Mr. Smith yelling and cursing at Mr. Becker and refusing to give him the opportunity to drive another vehicle. Moreover, Mr. Smith engaged in these wrongful acts in front of other employees, raising the possibility that those other employees would be deterred from exercising their own rights under the STAA. On the other hand, Mr. Smith did not terminate Mr. Becker, but instead suspended him for a single day, a much less severe disciplinary sanction than termination. On these facts, I find it appropriate to award Mr. Becker punitive damages in the amount of two thousand dollars.

C. The Prosecuting Party and Complainant Are Entitled to Injunctive Relief

The Prosecuting Party has asked for injunctive relief in the form of the expungement of references to the protected activity and adverse action from Mr. Becker's personnel file, the posting of OSHA whistleblower rights in Respondent's workplace, and the provision of a neutral and non-disparaging employment reference. I have the discretion to grant the relief sought. *Shield v. James Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-022, slip. op. at 13-14 FN 61 (ARB Nov. 30, 2009) (citing cases).

I grant the first two forms of injunctive relief totally, and I grant the third form in part. In providing any employment reference concerning Mr. Becker, Respondent may not refer to Mr. Becker's protected activity or the adverse action Mr. Becker suffered because of it. Accordingly, any employment reference Respondent provides Mr. Becker will be neutral and non-disparaging concerning Mr. Becker's protected activity and the adverse action he suffered because of it for the simple reason that such employment reference will not mention either Mr. Becker's protected activity or the adverse action he suffered as a result of it. Otherwise, Respondent may follow its normal procedures when providing an employment reference concerning Mr. Becker.

CONCLUSION

Mr. Becker engaged in protected activities on November 29 and 30, 2010, when he complained about Respondent's vehicle's lack of registration and when he refused to drive a commercial motor vehicle he reasonably believed was unsafe. On November 30, Mr. Becker suffered an adverse employment action—a day's suspension—and his protected activities were a contributing factor in Respondent's decision to take that action. There is no evidence that Respondent would have suspended Mr. Becker absent his protected activities. Thus, Mr. Becker is entitled to compensatory damages in the amount of one-hundred and sixty dollars. Because Respondent also demonstrated a reckless and callous disregard for Mr. Becker's rights as well as intent to violate the law, I also award Mr. Becker two thousand dollars in punitive damages. Finally, Mr. Becker is entitled to certain forms of injunctive relief described above.

SO ORDERED.

Digitally signed by PAUL R. ALMANZA
DN: CN=PAUL R. ALMANZA, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).