

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 May 2014

CASE NO.: 2013-STA-00024

In the Matter of:

CLAYTON JEWETT,
Complainant,

v.

HOLLAND ENTERPRISES, INC.,
Respondent.

DECISION AND ORDER
DENYING WHISTLEBLOWER COMPLAINT

This case involves a complaint under the employee protection provision of the Surface Transportation Assistance Act (“STAA”), 49 U.S.C. § 31105, and its implementing regulations found at 29 C.F.R. Parts 18 at 1978. The STAA regulatory framework includes regulations promulgated by the Department of Transportation, Federal Motor Carrier Safety Administration relating to the driving of commercial motor vehicles appearing at 49 C.F.R. Part 392.

A formal hearing occurred on August 14, 2013, in Long Beach, California. Paul Taylor, Attorney at Law, represented Complainant. Benjamin Thomas, Attorney at Law, represented Respondent. At hearing, Complainant’s exhibits (“CX”) 1 to 9 were admitted into evidence, as were Respondent exhibits (“RX”) 1 to 5, and 7 to 9. TR at 6, 8, 84-85, 241. Complainant and Respondent submitted simultaneous closing briefs, marked respectively as ALJX 3 and ALJX 4, on October 30, 2013, thereby closing the record.

Complainant contends that he was terminated from Respondent after engaging in protected activity by refusing to accept a load to haul in his commercial truck when he was overly tired and sick, and after he told Respondent he had a medical condition and was going to the hospital. Respondent argues, however, that Complainant’s termination had nothing to do with his medical condition, but instead related only to threats he made to the Vice President of the company on the telephone that he felt like “shooting someone” when he returned to Respondent’s home base. Respondent argues that the decision to terminate was made before Complainant made Respondent aware of his medical condition.

For the reasons explained below, I find that Respondent terminated Complainant because of his threatening conduct and not due to any protected activity. Therefore, I deny Complainant’s request for relief under the STAA.

I. Issues in Dispute

1. Did Complainant engage in protected activity under 49 U.S.C. § 31105(a)(1)(A)(i) when he filed complaints with Respondent related to violations of 49 U.S.C. § 392.3;
2. Did Complainant engage in protected activity under 49 U.S.C. § 31105(a)(1)(B) when he refused to operate a commercial motor vehicle due to illness and an impairment in March 2012;
3. Were Complainant's protected activities a contributing factor in Respondent's decision to discharge him;
4. Are Respondents able to show by clear and convincing evidence that they fired Complainant in the absence of his protected activity;
5. Are Brad Schemel and Karla Bancroft individually liable under the statute for their roles in terminating Complainant?

II. Factual Findings

1. Respondent is a truck line that operates over 200 commercial trucks in interstate commerce; there are approximately 200 drivers and 40 non-driver staff working at Respondent. TR at 20-22, 37, 44. The company is based in Mapleton, North Dakota, which is near Fargo, ND. TR at 36.
2. Complainant worked for Respondent as a truck driver from January 24, 2011, until his termination on April 9, 2012. RX 2 at 1; CX 1 at 1; TR at 22. His employment report lists two accidents: one, on August 5, 2011, in Kansas City, Missouri, where he was hit while moving and was listed as non-preventable, and another on November 10, 2011, in San Antonio, Texas, where he hit something while backing up and it was listed as preventable. *Id.* at 3. He earned \$36,794.09 in 2011 at Respondent, and in 2012, he earned \$11,328.63. CX 2.
3. Complainant has been a truck driver for over 15 years and holds a commercial license, with endorsements for Hazmat, airbrake, double and triple trailer, and tanker; he has driven over 1.25 million miles. TR at 133-135. He enjoyed working for the company the first year; the people were friendly, it paid well and the equipment was nice. TR at 139.
4. Karla Bancroft has worked at Respondent for five years and has been the Safety Director since 2012. TR at 68, 78. As Safety Director, she maintains compliance with DOT regulations, hires and fires drivers, takes disciplinary action when necessary, and conducts education of the drivers on safety and other responsibilities. TR at 79. According to Ms. Bancroft, Respondent utilizes the services of Hire Right, a company that maintains truck driver employment records, known as DAC reports; Respondent utilizes the company to help when hiring drivers to verify experience, any accidents, and problems with alcohol or drugs. TR at 68-69. She has been in the trucking industry for over 25 years and DAC reports are used by many companies all over the United States. TR at 69. Respondent reported to Hire Right that

Complainant was not eligible for rehire with Respondent after his termination. TR at 70; CX 1 at 1-2.

5. Ms. Bancroft assembled a list of emails, text messages and other communications between Respondent and Complainant from March 16 to April 9, 2012. RX 2 at 4-5; see RX 3, CX 3. She assembled the information by obtaining a running a history of Complainant's truck number, and included everything from the QualComm system, which is the truck's computer messaging system. TR at 26-27, 73, 76-77. The email messages and QualComm times are all in central time, and there is a 2 hour difference between central time and Henderson, Nevada and California. TR at 46.

March 19 -- Return to Work Incident

6. Complainant was scheduled to return to work on March 19, 2012, after he had been off work for a week on his honeymoon vacation. TR at 142. On March 16, 2012, at 1:11¹ p.m., Complainant sent an email message to Kelsey Herron, a dispatcher at Respondent, inquiring about a load for Monday, March 19. CX 3 at 1. Ms. Herron replied immediately that she had a load for him leaving from Irvine, California on Monday. *Id.* Ms. Herron sent the load information on March 16, 2012, at 4:32 p.m.

7. Ms. Herron sent Complainant an email message on March 19, 2012, at 11:52 a.m. asking him what time he was leaving to pick up his load. CX 3 at 2. Complainant replied at 2:12 p.m. that he had not received the load information, and had been checking the QualComm every two hours but got no information. *Id.* at 2. Ms. Herron immediately replied that she sent the information on Friday (March 16) and he could have sent her a message from the truck and she would have replied and resent the information. *Id.* at 2. She resent the information at 2:14 p.m., sent a follow up message at 3:07 p.m. and then canceled Complainant on the load at 3:24 p.m.; Respondent had to send another driver on short notice. RX 2 at 5; CX 3 at 3. At 3:26 p.m., she sent a message to Complainant that he was to meet another driver in Fontana, California, and take his load to Georgia. CX 3 at 3. Complainant did not respond to any messages after he sent the message to Ms. Herron at 2:12 p.m.

8. Ruth Holland is a driver services representative for Respondent, and handles issues with drivers such as low miles, too much time off, special needs or other issues the drivers might be having. TR at 72. On March 19, 2012, at 4:44 p.m., Ms. Holland, who had been copied on the earlier messages involving Complainant, sent a message to Ms. Herron saying that Complainant should be put on probation because he did not come off "home time" leave when scheduled, which according to Ms. Holland, he never does and she has talked to him about his miles a "few time now" [*sic*] and he always has "some excuse or another." CX 3 at 3. Ms. Herron replied at 4:47 p.m. that she had not been able to reach Complainant for a few hours regarding the load to Georgia. *Id.* Respondent decided to put him on probation after that incident. RX 2 at 5.

¹ The actual times that messages were sent are important to understanding the events in this case.

9. Respondent issued a probationary notice to Complainant dated March 19, 2012, and signed by Employer on March 30, 2012, but he never received it because “driver won’t respond.” RX 4; TR at 205. The notice placed Complainant on probation for 90 days for excessive late deliveries and negligence due to not following instructions, and said he could be terminated if he received any new violations in that time period. *Id.* This was consistent with Respondent’s probationary policy as explained in the Respondent’s Driver Handbook. RX 8 at 95. According to the notice, on February 1, 2012, he had a confirmed load, but did not leave his house or respond timely; on February 13, 2012, he was late loading; on March 19, 2012, he was notified of a load on Friday (March 16), but he hadn’t left his house on Monday and claimed to have been checking QualComm all weekend but didn’t see the load information. *Id.* The plan was for him to communicate and leave his house when scheduled. *Id.* Complainant was never told he was on probation. TR at 205. In a declaration to OSHA, Ms. Bancroft said Complainant was late or not showing up to pick up loads on eleven occasions. RX 2 at 1.

10. On March 21, 2012, at 8:45 a.m., Denzil Edie, who is Respondent’s Safety Coordinator, sent a message to Complainant directing him to call Mr. Edie right away. CX 3 at 4; TR at 113. The note said Complainant was going to be put on probation for late loads and not coming out of the house timely. *Id.* The note indicated that Respondent had attempted to contact Complainant for his signature on the probation warning form, but they were not able to reach him and could not get his signature on the form. CX 3 at 4. According to Ms. Bancroft, she added this note later when she was compiling the information for the OSHA investigation. TR at 85; *see* RX 4.

11. Complainant responded via QualComm on March 21, 2012, at 9:43 a.m. that his cell phone had “crashed” on Monday (March 19) and had not been working. CX 3 at 4. He was trying to get it fixed, and he had been really sick, including vomiting and diarrhea. *Id.* at 4-5; TR at 163-164. Complainant said that he was tired of “walking on egg shells and looking like a complete ass every time [he] come back to work.” [*sic*] *Id.* at 5. He explained that he had been awake and in his truck since 3:00 a.m. on Monday, but had not received any load information. *Id.* He said he would be ready to go by Monday afternoon, but had to handle it that way “because of beeing [*sic*] out of the service area with Verizon.” CX 3 at 5. The portion of Complainant’s phone records that were provided show that he was making and receiving phone calls on March 15, 16, 18, 19, 20 and 21, 2012. CX 9 at 3.

12. Mr. Edie sent another message to Complainant on March 22, 2012, at 8:30 a.m., telling him that he had to call with a fax number or he would not be dispatched on another load. CX 3 at 5. Complainant was sent another load request on March 22, 2012, at 2:52 p.m. and 3:31 pm., and was sent another message to call Mr. Edie right away at 3:18 pm. CX 3 at 5-7.

13. Complainant replied on March 22 at 4:38 p.m. that he still did not have a working phone and asked whether Denzil still needed him to call and, if so, he needed an after-hours phone number. CX 3 at 8. He also reported problems with QualComm not “waking him up.” *Id.* Mr. Edie replied at 4:49 p.m. with his cell phone number and stated that he needed a fax number for the next day. *Id.* Complainant gave a fax number on March 23, 2012, at 1:05 p.m. that did not work. CX 3 at 8. Complainant’s phone records show that he was making and receiving calls on March 21, 22 and 23. CX 9.

March 30 -- Threats By Telephone Incident

14. On March 29 at 4:38 p.m., Complainant was dispatched to pick up a load on March 30 in the City of Industry, California. RX 2 at 1; CX 3 at 10. On March 30 at 6:12 a.m., Complainant typed on the QualComm that he was not going to make the load because he had not “had any descent [*sic*] sleep” since he had been at Versacold, the company where he had delivered his last load, for 24 hours. CX 3 at 12. He explained why he thought he could not make the trip, including traffic and distance, and he did not want to be late and be a work-in again. CX 3 at 12. He inquired whether he should get a different load, but said it was “not my fault.” *Id.* In the message, he said he was “trashed” and “hungry.” *Id.* Complainant agreed that there were no other references to being ill or fatigued in the records between March 21 and March 30, and there was no mention of heart conditions until 11:18 a.m. on March 30. TR at 207-209. Complainant did not indicate he was medically incapable of picking up a load, but the load was canceled anyway and he was sent a different load. TR at 64-65.

15. On March 30, at 7:15 a.m., Ruth Holland replied that he did not have the option to refuse a load at Respondent, and he should be fine to make the Los Angeles area load. CX 3 at 12. Ms. Bancroft did not agree that a driver does not have the option to refuse a load, and gave an example of a driver who didn’t have the hours available to drive. TR at 70. Mr. Schemel also did not agree with Ms. Holland about not having the ability to refuse a load, and said it would depend. TR at 61. At 8:30 a.m., Ms. Herron told Complainant to start heading to the L.A. area and she would advise him shortly. CX 3 at 12. At 8:40 a.m., Mr. Edie sent a message to Complainant to call him right away and provide him with a fax number. *Id.* at 13. At 8:51 a.m., just a few minutes before Mr. Schemel talked to Complainant about bringing his truck to the Minnesota area, Complainant acknowledged the pre-plan dispatch to City of Industry that he had been sent at 8:30 a.m., and said he was on his way. TR at 40; RX 3 at 13. The load to the City of Industry was canceled at 9:08 a.m., with a note that he would be sent a different load. CX 3 at 13.

16. Bradley Schemel has worked for Respondent for 13 years and has been Vice President for 2 years, and oversees the day-to-day operations of the company. TR at 20-22, 37, 44. Mr. Schemel did not recall any interactions with Complainant before the March 30 phone call at 9:15 a.m., when Complainant called him because he was concerned about being terminated. TR at 44, 47; RX 2 at 6. During the phone call, Complainant threatened Mr. Schemel, which he documented verbatim. TR at 48. According to Mr. Schemel, Complainant said, “If you’re bringing me through the yard to terminate me, you’d better have a cop onsite, because I’m going to feel like shooting somebody.” TR at 29. Complainant made the threat right after Mr. Schemel told him he was being put on a pre-planned load from Lemoore, California to Rice, Minnesota. TR at 29. The plan was to have Complainant come to Respondent and meet in-person, which Mr. Schemel had told him before the threat was made. TR at 51. When Complainant was assigned the load, there was no intent to fire him; the decision would have been made after the in person meeting with Complainant at the company headquarters. TR at 52.

17. When the call ended, Mr. Schemel called Ms. Bancroft, who told him to document the threat in an email, which he sent at 9:27 a.m. TR at 50. He followed up with a face-to-face meeting with Ms. Bancroft where they both agreed to terminate Complainant. TR at 50. Mr. Schemel considered Complainant's threat to be serious and thought Complainant posed a risk to the safety of the company employees in the Mapleton office, but he did not call the police in Henderson, Nevada or Apple Valley, California because, "I wasn't in Henderson to be shot. I was in Fargo." TR at 33, 37, 53. Mr. Schemel said he decided to terminate Complainant immediately after the threats, and it had nothing to do with his later transmission about having chest pains; the decision to terminate him had already been made before the message was received. TR at 52, 57. Complainant would have been terminated even if he had not complained of chest pains. TR at 58.

18. Ms. Bancroft confirmed that she had talked to Mr. Schemel on the telephone, and she told him to send her an email while his conversation with Complainant was fresh in his mind. TR at 90. On March 30, 2012, at 9:27 a.m., Ms. Bancroft received the email she requested from Mr. Schemel where he documented the 9:15 a.m. call with Complainant, who was concerned about being fired. CX 3 at 13. According to Mr. Schemel's email, he discussed Complainant's performance and the comments in his profile. *Id.* Complainant did not feel the late pickups and deliveries were his entire fault, but acknowledged he was not innocent in the matter either. *Id.* Complainant was worried about being fired when her returned to the work yard in North Dakota and would be stranded with his wife. *Id.* According to Mr. Schemel's email, Complainant made threatening statements and said that a cop would be needed in Fargo when he goes through there because "he feels like shooting somebody." *Id.* at 13. She printed the email and went to Mr. Schemel's office to discuss the threat, which she believed should be taken seriously; she was scared and shocked by his statement and was concerned he would follow through with the threat. TR at 90-92. Mr. Schemel and Ms. Bancroft decided to terminate his employment. TR at 91. Ms. Bancroft did not have any information about his health condition when the decision to terminate him was made, but even if she had, she would have still fired him for the threat; the only consideration for termination was the threat made by Complainant. TR at 93, 99.

19. On March 30, 2012, at 9:40 a.m., Ms. Bancroft entered a note in the computer stating that she had met with Mr. Schemel and they had decided to terminate Complainant due to threatening statements and they would have a sheriff on hand when Complainant came to the company. CX 3 at 15.

20. On March 30, 2012, at 11:18 a.m., Complainant sent a QualComm message to Respondent that said:

YOU WAKE ME UP AFTER 24 HRS OF LITTLE SLEEP, YOU HARASS ME, YOU ALL PUSH ME. NO ONE CARES OR LISTEN OR GIVE A SHIT, ITS ALL MY FAULT, I STOP AT THE TA FOR A DRINK BECAUSE THERE ISN'T SHIT AT VERSACOLD, CANT EVEN TAKE MY DOG TO THE BATHROOM...YOU ARE ALL OVER MY ASS WHEN YOU GIVE ME A LOAD IN CA WITH NO TIME TO STARE, YOU ALL KNOW THAT, IM GOING TO THE HOSPITAL, HAVING CHEST PAINS, THX TO ALL OF THIS COMPANY BULLSHIT FOR CARING FOR UR DRIVERS...[sic].

CX 3 at 16. At 11:21 a.m. he sent another message: “AND IM NOT IN VEGAS. GET UR FACTS RIGHT, IM OUT IN THE MIDDLE OF THE DESERT...THX.” CX 3 at 16.

21. On March 30, 2012, at 12:27 p.m. Complainant was notified through the QualComm of a trip from Lemoore, California, to Rice, Minnesota, which was the trip Mr. Schemel had told him about during the phone call at 9:15 a.m. that morning. TR at 22, 26, 29-30; CX 3 at 16. Complainant had been assigned to two “pre-planned” loads, one to Rice, Minnesota and one from the City of Industry to Grandview, Washington, but he was ultimately placed on the load to Rice, Minnesota. TR at 32. At 2:41 p.m., Mr. Schemel left Complainant a voicemail and a QualComm message about the load to Minnesota. CX 3 at 17. It was Respondent’s intention to terminate Complainant’s employment on his return from that trip. RX 2 at 7.

22. Mr. Schemel had suspicions about Complainant’s chest pains because they were made after he expressed concerns about employment status, and after he made threats, which was an attempt to salvage his job. TR at 56. Once he made the complaints of chest pains, he drove three hours, pulling a trailer, to go to a hospital. *Id.* According to truck records, Complainant started driving from 25 miles SW of Henderson, Nevada, at 11:21 a.m. and logged off at 2:53 p.m. at 2 miles SE of Apple Valley, CA, which reflects “[a]most three hours of driving in order to get to parents home before going to the hospital.” CX 3 at 16.

March 30 -- Hospital in Apple Valley

23. Complainant was seen at St. Mary Medical Center in Apple Valley, California, on March 30, 2012, complaining of chest pains and shortness of breath. CX 4 at 1; CX 5. He was admitted at 5:03 p.m., discharged at 11:20 p.m., and left the hospital at 11:56 p.m. or 12:02 a.m. CX 4 at 1, 5, 8. He reported to the doctor that he had been having chest pain for two weeks. *Id.* at 3, 4. When he left, he was given a note to be off work for 4 days, and a second note on April 4, 2012, to be off until May 7, 2012. CX 5, 6. Complainant sent a message on March 31, 2012, at 9:33 a.m. that he had just got out of the hospital ER after going there the day before, and was pulled off work for 4 days until he can see his doctor. CX 3 at 17; RX 2 at 7. At 10:21 a.m., someone at Respondent responded that the message was received and he was canceled from his loads. *Id.* at 17-18. The note from Complainant’s doctor taking him off work until May 7, 2012, was received at Respondent on April 5, 2012. CX 3 at 18.

24. On April 4, 2012, Steve Holland, who is a dispatcher for Respondent, spoke to Complainant for about 10 minutes. TR at 165. Complainant said his doctor put him out of service for 30 more days. Mr. Holland said the truck cannot sit that long, and Complainant said he understood and would clean it out. They did not tell Complainant that someone was already enroute to pick up the truck; “We did not want a scene so we chose to not say anything until after the truck was picked up.” CX 3 at 18. It was not unusual to withhold notice of termination until the equipment was returned so that it wouldn’t be damaged or left in a bad area where it could be damaged. TR at 98-99. Complainant’s truck and trailer, valued at close to \$200,000, were picked up on April 5. RX 2 at 7; TR at 99. When the truck was being picked up in Apple Valley, Complainant had not been notified that he was terminated. TR at 42, 97. When Respondent sent someone to get the truck, they didn’t contact law enforcement because

Complainant had not been told yet that he was terminated; he was told they were picking up the truck because he was going to be off for 30 days. TR at 34, 42.

25. On April 9, 2012, Ms. Bancroft spoke to Complainant by telephone and terminated his employment because of the threatening comments he made to Mr. Schemel on March 30, 2012. CX 3 at 18; RX 2 at 7; TR at 38, 42, 80, 96-97. Prior to April 9, she had made one attempt to call him, but he didn't respond so she waited until he called the company. TR at 98.

Denzil Edie

26. Mr. Edie has been a Safety Coordinator for Respondent for 12 years, and his boss is Ms. Bancroft and Mr. Schemel. TR at 113-114. He is responsible for deciding what information goes on the DAC report when a driver leaves Respondent. TR at 114. He called Complainant on March 26, March 30, and April 2 and 3 to sign a warning letter for late loads; at hearing he denied calling on April 4 though at his deposition he said he had. TR at 116, 122-123. Mr. Edie was made aware that Complainant was being fired on the day the decision was made, but still attempted to contact him to put him on probation. TR at 130-131. It was never made clear why Mr. Edie continued to contact Complainant to put him on probation after he was aware he would be terminated.

Complainant's Testimony

27. Complainant believes the communication information assembled by Ms. Bancroft is not complete. He says he sent a Qualcomm message that he was shut down due to weather when he was at a rest stop near Amarillo, Texas that is not in the log prepared by Ms. Bancroft. TR at 146-147. He claims to have called the office on March 21 and spoke to Becky, who works in the Safety Department, in response to the messages to call Mr. Edie because Mr. Edie was not in the office. RX 3 at 5; TR at 149-150. Becky allegedly said they were worried that the load would be late, but Complainant says they knew it would be late since he picked it up late; she also said he did not need to speak to Mr. Edie because she would make a note of his call in the computer. TR at 150, 242. He alleged that those messages were also not included.

28. Complainant said he arrived late to unload his trailer at Versacold in Henderson, NV, on March 29, so he had to wait while he was worked-in and unloaded. TR at 162-163. He received new load information while he was waiting to be unloaded, but he never sent confirmation. TR at 162-163. The load was from City of Industry, California, to Arlington, Texas. *Id.* According to Complainant, he had not had any sleep when received the dispatch, but he replied, "I haven't even gotten unloaded yet." TR at 163. He said he had been up for over 24 hours after dropping the load at Versacold. TR at 163-164. On March 30, he sent a message that he was empty at 5:38 a.m., and asked for extra pay at 6:01 a.m. because he had been there so long. TR at 164; *see* CX 3 at 11-12. He did not think he could drive to City of Industry because he was fatigued and had been up too long, but felt like he had to because Ruth Holland sent a message saying he did not have the right to refuse a load, and it was only a 5.5 hour drive; if he drove, he said he would have been awake over 29 hours. TR at 166. According to Complainant, he was beginning to have symptoms of a heart attack and he was scared; he had tightness in his

chest, double vision, and he couldn't breathe, had nausea, was vomiting, and had heavy fatigue and tingling in his hands. TR at 167.

29. Complainant says he had several conversations with Mr. Schemel on March 30, the first at 7:15 a.m. Pacific time when he called to talk to a supervisor. TR at 169-171. He also talked to Ms. Bancroft and Ms. Herron. TR at 171. According to Complainant, Ms. Bancroft told him she didn't want to listen and that he should talk to Mr. Schemel. TR at 172. He did not know who Mr. Schemel was and he was transferred to him after about two minutes of being on hold. TR at 173. He told Mr. Schemel he was having heart attack symptoms, but Mr. Schemel ignored that and talked about his late loads. TR at 174. Complainant asked if he was being fired. TR at 174-175. Mr. Schemel also said he would talk to Ms. Herron about her professionalism. TR at 175. According to Complainant, in the earlier conversation, he said to Mr. Schemel that Mr. Schemel didn't listen and he was pissed off and in a Bonnie and Clyde situation. TR at 182. He never said he would shoot anyone, and he was never told about a pre-plan to Rice, Minnesota. TR at 183.

30. Complainant said he did not go to the hospital in Henderson, Nevada because there was no secure place to park his truck, and he didn't know if there were doctors in Henderson. TR at 178. The message that he was getting "fucking tired of this shit" is incomplete; the real message included a statement that, "I'm going to the hospital, to an emergency room, I've had enough." TR at 178-179. He said he was "pissed off" and on the verge of collapsing. TR at 180. He pulled off in Jean, Nevada, which was about 15 miles south of Las Vegas, and talked to Mr. Schemel again after he called Complainant. TR at 180. Complainant first testified that he pulled off the road to speak to Mr. Schemel, and then said he talked to Mr. Schemel while driving. TR at 180-181. Complainant thought he was being talked to like a child by Mr. Schemel, so he told Mr. Schemel to talk to him like an employee before telling him he was going to the hospital. His wife was in the truck with him. TR at 182. He continued driving to get to a hospital with a place to park his truck. TR at 184. He went to his parent's house, secured the truck and his wife drove him to the hospital. TR at 185. He talked to Ms. Bancroft on April 9 and she said he was fired, but never told him why. TR at 196. He also had a voicemail from Mr. Schemel on March 30, saying it was all water under the bridge. TR at 198.

OSHA Report

31. The OSHA report was admitted into evidence. RX 1. The information Complainant gave to OSHA contradicted his trial testimony. The report from OSHA stated, "Although Complainant did not admit this to OSHA, evidence from the unemployment hearing indicated Complainant stated that he did say 'there would need to be a cop present to keep the peace' due to friction, but did not say because he felt like shooting someone." RX 1 at 2. Over objection, I am accepting this as impeachment of Complainant's trial testimony.²

² The evidence is double hearsay. It appears in a report prepared by OSHA, and reflects comments made by Complainant to EDD. This evidence corroborates what Mr. Schemel said, and is an inconsistent statement from Complainant's hearing testimony. 29 C.F.R. § 18.801(d) (not hearsay because it is a prior statement or admission of the witness), § 18.803(a)(8)(public record); *see also* § 18.805 (hearsay within hearsay); § 18.1005 (public records). I find that evidence meets the exceptions for hearsay and is admissible impeachment evidence.

Complainant's Cell Phone Records

32. Complainant provided portions of his cell phone records for phone number 760-220-7943, from March 15 to April 4, 2012, but only pages 6, 7 and 8 of 9 total pages of the bill, and April 5 to April 29, 2012, but only pages 4 and 5 of 7 total pages of the bill. CX 9. Complainant said that all early morning calls were business related because no one else called him so early. TR at 236. The call times for Nevada and California are Pacific time. Respondent's after-hours toll free phone number is 800-800-2635. RX 8 at 82,

33. Complainant highlighted phone calls to his voicemail number 000-000-0086 on March 19 at 10:20 a.m., and three calls at 5:17 p.m., March 20 at 7:11 a.m., March 21 at 8:08 a.m., and March 22 at 4:17. CX 9 at 3. He made a toll free call to Respondent on March 22 at 11:17 a.m. from Amarillo, TX, March 23 at 10:06 a.m. from Mulberry, AR, March 27 at 1:34 p.m. from Sayre, OK, March 29 at 3:00 and 3:20 p.m. from Henderson, NV, and March 30 at 6:16, 6:17, and 6:53 a.m. (24 minutes long) all from Henderson, NV. *Id.* at 3-4. On March 25 at 9:11 and 9:20 a.m., he called a Fargo phone number 701-371-3068 from Dublin, GA, and at 9:25 and 9:35 a.m. he received calls from the same number while in Dublin, GA. CX 9 at 3.

34. On March 30, he highlighted calls to his voice mail from Henderson, NV, at 6:15, 6:47, and 6:50 a.m., from Jean, NV, at 9:07 and 9:08 a.m., and Apple Valley, CA at 12:38 p.m. Pacific time. CX 9 at 4. On March 30, 2012, he also received a call while in Las Vegas, NV from an unavailable number. *Id.* On March 31, 2012, at 12:06 p.m. he received an incoming call from an unidentified number while he was in Apple Valley, California. CX 9 at 4. On April 1, at 2:23 p.m., April 2 at 8:58 and 8:59 a.m., and April 3 at 8:49 a.m. and 3:18 p.m., he highlighted calls to his voice mail. *Id.* at 5. On April 4 at 7:00 a.m., he highlighted a received call from an unavailable number, and at 3:26 p.m., he highlighted a call to Respondent on the 800 number. CX 9 at 5.

Respondent's Rebuttal to Complainant's Testimony

35. Mr. Schemel denied having more than one conversation with Complainant on March 30, and denied saying that he knew who Complainant was when he called the morning of March 30. TR at 249. Mr. Schemel said he did call Complainant later in the day and left a voice mail as documented in the records. TR at 251; RX 3 at 17. Complainant never told Mr. Schemel he was having health problems on the morning of March 30. If he had, Mr. Schemel would have made arrangements to get medical help, and it also did not make sense for him to be driving while having a heart attack, particularly with the value of the truck. TR at 250. Ms. Bancroft also denied having a conversation with Complainant on March 30 where she allegedly told him it was out of her hands. TR at 245. She doesn't recall having any phone call with Complainant, but if she had, she would have documented it and it wasn't documented. TR at 246.

III. Legal Background, Analysis and Conclusions

As set forth below, the following conclusions of law are based on analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. 29 C.F.R. §§ 18.57, 1978.107. In deciding this matter, the administrative law judge is entitled to weigh the

evidence, draw inferences from it, and assess the credibility of witnesses. *See Germann v. Calmat Co.*, ARB No. 99-114, slip op. at 8 (ARB Aug. 1, 2002); 29 C.F.R. § 18.29.

A. Legal Framework

In order to prove a violation of the STAA, Complainant must demonstrate by a preponderance of the evidence that: (1) he engaged in protected activity under the STAA; (2) the Respondent was aware of the protected activity; (3) he experienced some form of adverse action; and (4) the protected activity was a “contributing factor” to the adverse action that was suffered. 29 C.F.R. § 1978.109(a); *Williams v. Domino’s Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011); *see Halgrimson v. Contract Transp. Servs.*, ARB No. 09-103, slip op. at 3 (ARB Mar. 24, 2011); *Fleeman v. Neb. Pork Partners*, No. 09-059, slip op. at 3-4 (ARB May 28, 2010).³ 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.

If Complainant meets his burden, the Respondent may avoid liability if it “demonstrates by clear and convincing evidence” that it would have taken the same adverse action regardless of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(b); *Williams*, ARB No. 09-092, slip op. at 6. “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Id.*, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 14 (ARB Jan. 31, 2006).

B. Credibility Determinations

The witnesses who testified at the hearing contradicted each other. On crucial testimony, Mr. Schemel and Ms. Bancroft offered completely different opinions than those of Complainant. Someone was less truthful than the others because the events could not have happened both ways. When I evaluate the credibility of the witnesses, their demeanor while testifying, and what they said in light of the other evidence in the case, I find that Mr. Schemel and Ms. Bancroft were more credible than Complainant, and where their testimony conflicts, I believe them over Complainant.

First, Mr. Schemel testified in a forthright manner. He had good recall of what occurred, and his recitation of events is supported by the timing of emails he sent which corroborate his testimony. F.F. ¶¶ 16, 17, 35. Mr. Schemel did not have any interactions with Complainant until the morning of March 30 when Complainant called to talk to a supervisor about possibly losing his job, and Complainant also said he had no idea who Mr. Schemel was before he talked to him. F.F. ¶¶ 16, 29. The call from Complainant to a supervisor makes sense since he had been dodging Denzil Edie for a few days and likely suspected he was in trouble. Further, Mr. Schemel sent an email to Ms. Bancroft almost immediately after the phone call with Complainant ended, and Mr. Schemel said he wrote the email verbatim as to what Complainant had said. F.F. ¶¶ 17-18. Mr. Schemel and Ms. Bancroft met within minutes of the exchange and decided to fire Complainant for the threatening conduct. F.F. ¶¶ 17-19. I believe Mr. Schemel’s

³ *Fleeman* relies on the term “motivating factor” in determining whether a claimant’s engaging in protected activity caused him or her to suffer adverse action. This language was replaced in the new regulations with the phrase “contributing factor.” 29 C.F.R. § 1978.109(a).

version of what occurred over Complainant's because he was more credible, testified in a more forthright and direct manner, and his testimony was supported by the other evidence in the case, including the email chain and testimony from Ms. Bancroft. In addition, Mr. Schemel was quite credible when he flat out denied the contradictory testimony by Complainant about what occurred.

Further, Ms. Bancroft corroborated the testimony of Mr. Schemel. Ms. Bancroft was not as impressive of a witness as was Mr. Schemel; she appeared more nervous and her recall of the time frame was not as comprehensive as Mr. Schemel. Nevertheless, I believed her testimony about what occurred on the morning of March 30, and how the events transpired to the point that they decided to fire Complainant over his threats. Her testimony that she was genuinely afraid and concerned that Complainant would come and shoot people at the worksite in North Dakota was particularly believable. F.F. ¶ 18. While her testimony was not as impressive as Mr. Schemel, she was still very credible, recalled the events well, and testified credibly about her involvement in placing (or attempting to place) Complainant on probation, the events leading up to the decision to terminate him, and what occurred when she actually fired him. F.F. ¶¶ 18-19, 35. She was also credible when she denied Complainant's testimony about speaking to him on March 30 and saying it was out of her hands. F.F. ¶ 35. When her testimony is considered in light of Mr. Schemel's and in light of the rest of the evidence, it is apparent that her testimony is more credible than Complainant's.

That is not to say there were not some concerns with her conduct and recall. For example, she is Respondent's Safety Director and compiled the email, text and QualComm information that forms the basis for much of the trial testimony and evidence. However, she admitted that she added a note to a record when she compiled the information, for which she offered an explanation, and she compiled the information into a timeline of events, rather than printing each message separately and letting the documents speak for themselves. Neither of these two concerns impacted her believability. F.F. ¶¶ 5, 10. Her testimony was credible and supported by the other evidence in the matter as well. However, had she printed rather than compiled the information, or at least offered the actual documents in addition to her timeline, then she would not have left herself open to criticism and contradictory testimony from Complainant that she left out messages or edited them. F.F. ¶¶ 27, 30. Because I do not believe Complainant's version of events, I find that Ms. Bancroft's explanations and document production were done in good faith and did not otherwise negatively impact her credibility.

I do not believe Complainant's recitation of events and where his testimony and that of Mr. Schemel or Ms. Bancroft contradict, I believe Mr. Schemel and Ms. Bancroft over Complainant. Complainant's inability to receive messages on the QualComm and his inability to contact Respondent about his assignment when he returned from his honeymoon vacation is simply not credible. It makes no sense that Respondent, whose business depends on timely picking up items and delivering them, would not have gone out of its way to make sure Complainant had the load information. Complainant's testimony and message to Respondent that he had been up since 3a.m. in the truck waiting for a message about where to pick up his load is just not believable, particularly in light of Ms. Herron's information to the contrary, his apparent history of coming off "home time" late, and Complainant's own lack of diligence in contacting Respondent about his assignment. F.F. ¶¶ 6-13. Complainant could have called

Respondent and asked about the status of the load rather than sit and wait for hours. He had the after-hours phone numbers and was adept at contacting Respondent. Once communication began again on March 19, Complainant only kept in sporadic contact with Respondent. F.F. ¶¶ 7-8. I do not believe it was Respondent's fault that he was late for the load on March 19.

Similarly, I did not believe him when he said his cell phone allegedly "crashed." F.F. ¶¶ 11-13. The evidence shows that he was making and receiving calls during all relevant periods, and it belies common sense that he could not have found a cell phone service center in California, Texas, Georgia, or Nevada if in fact his cell phone was not working. Further, his wife was in his truck with him, and while there was no testimony about whether she had a cell phone, it seems odd that she would not also have a cell phone that he could use, or that Complainant could not contact Respondent via his QualComm, or stop at the many truck stops across the United States and make a phone call from a pay phone. Complainant was simply not credible regarding his ability to use the cell phone, and he appeared to use the cell phone allegedly crashing as an excuse to prevent contacting Respondent and hearing that he had violated the rules. Complainant alleges that he called and spoke to someone named Becky, rather than asking for Mr. Edie, who had been messaging him. F.F. ¶ 27. Complainant references the phone call, but there were no work logs showing the call. Complainant's testimony about this was also not credible. Mr. Edie had been doggedly trying to contact Complainant, and even gave him an after-hours contact phone number, but when Complainant called, he did not ask for Mr. Edie, and instead spoke to someone else about what Mr. Edie might have wanted. It defies common sense to think that Becky was not aware that Complainant was going to be put on probation and would not advise him of that fact or put him in touch with Mr. Edie. F.F. ¶¶ 10, 12, 13, 26. Again, it just does not make sense in light of the evidence in this matter. In addition, his cell phone records show calls were made and received during the period he alleges it crashed. F.F. ¶¶ 32-34.

The most incredible and unbelievable testimony, however, concerns the day of March 30 and how he drove over three hours from the area of Las Vegas, Nevada to Apple Valley, California while he was allegedly experiencing chest pains and thought he was having a heart attack. F.F. ¶¶ 22-24, 28-30. I find that he only alleged these events after his conversation with Mr. Schemel where he threatened violence when he returned to the North Dakota home base. F.F. ¶ 16. Mr. Schemel had dispatched him on a pre-plan to near Respondent's headquarter and Complainant knew something was up. His alleged medical condition arose after that conversation, not before, and still he continued to drive his truck. Prior to that, he never complained of health issues and only one time over a seven day period referenced vomiting and diarrhea. F.F. ¶ 14. I also do not accept that his explanation that he did not seek immediate medical help at a hospital in Las Vegas because he was worried about where he might park his truck, particularly if he truly believed he was in the midst of a medical emergency. In addition, I find Mr. Schemel more credible regarding the threat of violence rather than Complainant saying it was an alleged "Bonnie and Clyde" situation. His wife was in the truck with him, and he was concerned about leaving them stranded in North Dakota if he got fired. The distinction between the implied Bonnie and Clyde threat and the direct threat to have a police officer on hand because he felt like shooting someone is too subtle a distinction to make a difference -- both implied violence and either should have concerned Respondent. Of course, the story of Bonnie

and Clyde's violence is well-documented in American History.⁴ In addition, Complainant chose not to call his wife as a witness, who would be a logical and percipient witness to the conversations and events. I believe Mr. Schemel's testimony that Complainant said he felt like shooting someone, which is corroborated by his email and the testimony from Ms. Bancroft that Complainant threatened violence when he returned to Respondent's home base. Complainant's trial testimony is also contradicted by statement in the OSHA report. F.F. ¶ 31.

Furthermore, Complainant drove over three hours from Nevada to California driving a commercial truck and trailer while allegedly experiencing a severe medical condition. His conduct placed the public at greater risk, not Respondent's. Complainant offered explanation that he was concerned about parking or leaving the truck unattended does not make sense, and when compared with the timing of events as documented in this case, it shows that he is being less than truthful. When he arrived back in the Apple Valley area, he did not immediately go to the hospital, but instead waited over two additional hours before his wife took him to the hospital. F.F. ¶¶ 23, 34. His cell phone records show a phone call in Apple Valley, California, his hometown, at 12:38 p.m. Pacific Time. F.F. ¶ 34. He did not go to the hospital until 5:00 p.m. Pacific Time. F.F. ¶ 23. He left a message for Respondent the next day at 9:33 a.m. saying that he just got out of the hospital, when the records show he was discharged at 11:20 p.m. and left the hospital by midnight. F.F. ¶ 23. When Complainant's behavior the day of March 30 is considered in view of the entirety of the evidence, I do not find it credible. He drove home because he knew he had threatened Respondent and would likely lose his job. He was not compelled to drive and was not otherwise worried about parking his truck over getting medical help. Respondent's evidence is more compelling than Complainant's evidence and testimony.

That is not to say that there are some anomalies in the record that are worthy of note. However, when examined in light of all the evidence, including the truck retrieval on April 5, Respondent's chronology and explanation of events makes logical sense. Complainant had custody of a work truck valued at close to \$200,000 and Respondents were concerned about getting that back before telling him that he was fired. F.F. ¶¶ 24-25. Further, Mr. Edie learned Complainant was being terminated the day it was decided, but continued to contact Complainant about his probation even after he learned that he would be terminated. F.F. ¶ 26. This was really never explained in the testimony, but overall, it does not affect my opinion that the Respondent's evidence is much more persuasive, makes more logical sense, and is corroborated by the other evidence and testimony, over Complainant's testimony, which appears to be self-serving and unsupported by common sense and the documented phone records and other communication between the parties.

Overall, I find Respondent's witnesses more credible and their testimony more believable than Complainant. Based upon the evidence and credibility of the witnesses, I find that Complainant threatened violence before he complained about his heart condition. The rest of the matter is evaluated in that light.

⁴ See http://en.wikipedia.org/wiki/Bonnie_and_Clyde (last visited 5/27/2014).

C. Protected Activity

1. 49 U.S.C.A. § 31105(a)(1)(A)(i)

Complainant alleges that he engaged in protected activity within the meaning of 49 U.S.C.A. § 31105(a)(1)(A)(i) when, on or about March 22, he reported to dispatchers that he was feeling nausea and had diarrhea when driving his truck. ALJX 3 at 3. Complainant alleges that he made a number of internal complaints to Respondent that he could not safely operate his commercial truck due to his physical condition. ALJX 3 at 3. Complainant also alleges that on March 30, he complained to dispatchers that he was not feeling well and had not slept. He alleges he told Ms. Bancroft the same thing on March 30 at 7:30 a.m., and Mr. Schemel the same thing at 9:18 a.m., including that he needed to go to a hospital. He alleges that he sent QualComm messages at 11:12 a.m. and 11:18 a.m. that he was going to the hospital, and alleges he told Mr. Schemel again that he was going to the hospital later in the afternoon on March 30 by phone when he was in Jean, Nevada. ALJX 3 at 3-4. As explained in the credibility determinations, I believe Respondent's witnesses over Complainant.

Under 49 U.S.C.A. § 31105(a)(1)(A), “[a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because (i) the employee, . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.” 49 U.S.C.A. § 31105(a)(1)(A). *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, slip op. at 4 (ARB Mar. 27, 2012). Under 49 C.F.R. § 392.3, “no driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.”

Under the complaint clause of STAA, the complainant must at least be acting on a reasonable belief regarding the existence of a safety violation, and would have to prove that a person with his expertise and knowledge would have a “reasonable belief” that Respondent was in violation of the regulations and would reasonably lead to a belief that the truck was not in good operating order and safe to drive. *Calhoun v. United Parcel Service*, ARB No 04-108, slip op. at 11 (ARB Sept. 14, 2007). Driving under protest is not the same as refusing to drive. *Calhoun*, ARB No. 04-108, slip op. at 12, citing *Zurenda v. J & R Plumbing & Hearing Co., Inc.*, ARB 98-088 (ARB June 12, 1998) (STAA does not permit conditional or implied refusals to drive).

Although it is not necessary that a complaint expressly cite the specific motor vehicle standard which it is alleged has been violated, the complaint must “relate” to a violation of a commercial motor vehicle safety standard. *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, slip op. at 4 (ARB Mar. 27, 2012); *Calhoun*, slip op. at 14. While internal complaints about violations of commercial motor vehicle regulations may be oral, informal, or unofficial, they

must be communicated to management and cannot be implied. *Ulrich*, ARB No. 11-016, slip op. at 4. For a finding of protected activity under the complaint clause of the STAA, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation. *Id.*

Here, I do not find Complainant's allegations on March 22 and March 30 to be protected activities. Regarding the March 22 alleged complaint, which appears to reference Complainant's QualComm message on March 21 at 9:43 a.m. that he had been sick with nausea and diarrhea, Complaint did not indicate in any manner that he could not drive the truck or was too ill to operate the vehicle safely. *See* F.F. ¶¶ 11, 28. The message is part of an explanatory message about why he was not communicating and why he was late on a dispatch when returning from vacation; he was not relating it to a safety violation. The evidence showed that Complainant may have been complaining generally, but he did not reasonably believe that it was related to a violation of a commercial vehicle standard, and the manner in which it was conveyed shows that he did not reasonably believe he was communicating about the existence of a safety violation. Instead, he was offering his observations in defense of his conduct. Further, the March 21 message was not communicated to management, but was instead sent internally to dispatch. While managers may at times read the communications, the evidence did not establish that sending a message via QualComm was in fact communicating a message to a manager. In this matter, I find that Complainant did not engage in protected conduct on March 21 and 22, and even if he had, it did not relate to a violation of commercial vehicle safety and it was not communicated to management. Further, I find that a reasonable driver in these circumstances would not view his complaint as reasonably reporting a violation of commercial trucking standards. The gravity of the alleged nausea and diarrhea does not implicate the commercial vehicle regulations.

Regarding the March 30 alleged protected activity, I similarly do not find any protected activity. First, I do not find Complainant credible and believe the testimony of Ms. Bancroft and Mr. Schemel over his testimony. I find that Complainant did not contact Ms. Bancroft at 7:30 on March 30 and complain to her about any illness or the need to go to the hospital. Complainant's cell phone records do not reflect such a call, and Ms. Bancroft did not remember it occurring and said if it had, she would have documented it in the system, which she did not. F.F. ¶ 35. Second, I believe the testimony of Mr. Schemel over that of Complainant about what occurred during his phone conversation. I find that Complainant threatened violence if he were being brought to North Dakota to be terminated. F.F. ¶ 35. The evidence supports Mr. Schemel, including Complainant's assertion that he only said it was a Bonnie and Clyde situation over a more overt threat, but as stated, I do not find that credible. I do not believe that Complainant said anything to Mr. Schemel about being too ill to drive or needing to go to the hospital during the morning conversation. Mr. Schemel was credible and forthright, and his testimony was corroborated by the other evidence in the matter. Further, the nature of his Complainant's complaint was equivocal. He never said on March 30 that he had been awake for 24 hours, but instead said he had little sleep. F.F. ¶ 20. He certainly never said he was ill to the point that he could not drive or it would be unsafe for him to drive, and it is not incumbent upon Respondent to read between the lines. He acknowledged the load to City of Industry without elaborating or objecting that he was too tired or too ill, or that he was having chest pains, and could not drive. At trial he said he had been awake for over 24 hours, but that was not what appears in the

documented messages at the time the event took place. He did not directly say that he could not drive, but instead said he had been held over at the unload location and was tired.

Finally, the QualComm message that he was going to the hospital with chest pains, was clearly sent after the decision had been made to terminate him for the threat. As previously discussed, I believe Mr. Schemel and Ms. Bancroft over Complainant on this point. Importantly, he was near a major city -- Las Vegas, Nevada -- but continued to drive his truck over three additional hours while allegedly experiencing chest pains. When he got home, he waited before he went to the hospital. No one from Employer told him to drive. If he were credibly in the midst of a medical emergency, it makes more sense that he would have stopped and called for help. The excuse that he could not safely park his truck is simply not believable. Furthermore, I do not believe that a reasonable driver in the same circumstance would have acted the same way or believed the same thing. Complainant did not reasonably believe he was complaining about a violation of the safety truck regulations, but instead was covering for his own inappropriate behavior.

Furthermore, Complainant never refused to drive his truck, and he never communicated his alleged illness to anyone who was responsible for his termination. I found Mr. Schemel and Ms. Bancroft to be more credible when they denied he ever mentioned his health to them, and it was insufficient to tell the dispatchers. Just as importantly, he never conveyed that he was not feeling well to the dispatchers in a manner that they would take it as a refusal to drive or notification of fatigue or illness that implicated the federal regulations. Another driver in his same situation would not believe he was complaining about violating the regulations based upon the manner and equivocal nature of his alleged complaints.

Thus, I do not find that he was impaired due to fatigue, illness or any other cause, and I do not find that Respondent required him to operate his vehicle. In order to show protected activity, Complainant must reasonably believe that Respondent was engaged in a safety violation. There was nothing about the situation he made known to Respondent that could reasonably be interpreted as reporting a violation of a safety regulation. Thus, I do not find that Complainant has shown that he engaged in protected activity or that his complaints were related to a perceived violation of commercial vehicle safety standards.

2. 49 U.S.C.A. § 31105(a)(1)(B)

Complainant also alleges protected activity pursuant to 49 U.S.C.A. § 31105(a)(1)(B) on March 30 and 31 when he complained that he was not feeling well, and was having symptoms of a heart attack, but continued to drive his truck. ALJX 3 at 5. He alleges that he refused to drive from Henderson, Nevada, to City of Industry, California, and Henderson to Rice, Minnesota on March 31, which were protected activities under 49 U.S.C.A. § 31105(a)(1)(B), and were based upon a reasonable apprehension that operation of his truck would pose a risk of serious injury to Complainant or the public. ALJX 3 at 5-6. He argues that but for his refusal to drive, a violation of 49 C.F.R. § 392.3 would have occurred. ALJX 3 at 6. Complainant also argues that he is entitled to the protection of 49 U.S.C. § 31105(a)(1)(B)(ii) because he sought correction of the unsafe condition required by 49 U.S.C. § 31105(b)(2) by providing information to his employer that his physical condition rendered him unsafe to drive. ALJX 3 at 7. Even though he drove his

truck to his parent's home, he argues he is still entitled to the protection of 49 U.S.C. § 31105(a)(1)(B). ALJX 3 at 8.

Under 49 U.S.C.A. § 31105(a)(1)(B), an employee engages in protected activity if the employee refuses to operate a vehicle because (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (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. 49 U.S.C. § 31105(a)(1)(B). This section contains both an "actual violation prong" and a "reasonable apprehension prong," either of which may constitute protected activity. *Roadway Express, Inc. v. ARB*, 116 Fed. Appx 674, 676 (6th Cir. 2004). Under the actual violation prong, a refusal to drive must be rooted in an actual violation of "a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). Under the second prong, known as the "because" clause, there must be "a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." *Id.* § 31105(a)(1)(B)(ii); see *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 77 n.1 (2d Cir. 1994). The "because" clause has an additional requirement that "the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 U.S.C. § 31105(a)(2). This same subsection further defines "reasonable apprehension" as existing "only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety condition establishes a real danger or accident, injury, or serious impairment to health." *Id.*

This clause of the STAA generally provides broader protection to an employee as it does not require the occurrence of an actual violation. *Yellow Freight Sys.*, 38 F.3d at 82-83. Nevertheless, a court must be mindful of instances whereby an employee attempts to utilize this provision as a means to justify bad-faith refusals to drive. See *LeBlanc v. Fogleman Truck Lines*, No. 89-STA-8, slip op. at 3-6 (Sec'y Dec. 20, 1989), *aff'd sub nom. Fogleman Truck Lines v. Dole*, 931 F.2d 890 (5th Cir. 1991). See *Byrd v. Consol. Motor Freight*, ARB No. 98-064, slip op. at 7 (ARB May 5, 1998) (finding employee's failure to take steps to minimize or attempt to eliminate perceived safety risk supported finding of no reasonable apprehension under 49 U.S.C. § 31105(a)(1)(B)(ii)); *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, slip op. at 5-6 n.4 (ARB July 31, 2003) (finding no protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii) when reasonable apprehension was based on complainant's characterization of events, which were not credible).

Here, I do not find any evidence that Complainant engaged in any protected activity under the STAA. There was no credible evidence that he believed there was an actual violation of commercial vehicle standards. He never actually refused to drive, but instead generally complained about being tired and not wanting to have another late load. He never reported his health in any manner that would have given notice of problem until after the decision to terminate him had been made. Further, there was no actual violation of any regulations by Respondent, and it never asked him to drive. Ruth Holland said he cannot refuse a load, but she is not management, and Mr. Schemel and Ms. Bancroft did not agree with her statement. F.F. ¶ 25. Complainant had no reasonable belief that his driving violated the regulations or statute. No other driver in the same situation would have believed he was unsafe or incapable of driving. It

was not until after the threats and the decision to terminate him had been made that he complained about heart problems. Regarding the second alleged protected activity, there was never a refusal to drive made by Complainant. He did not want a new load, but he never said he would not drive, and in fact did not go to the hospital until many hours after he complained of chest pains. There was also no indication that Complainant had a reasonable apprehension of serious injury, nor is there any indication that Complainant sought to remedy the problem. I also incorporate the discussion of the reasons that I do not find any protected activity under 49 U.S.C.A. § 31105(a)(1)(A) into the rationale for not finding any protected activity under 49 U.S.C.A. § 31105(a)(1)(B), which overlap. Finally, because I do not find Complainant credible, I do not accept his characterization and timeline of events. *See Wrobel*, ARB 01-091, slip op. at 3.

Complainant's complaints were not reasonably related to any perceived violation of any safety standards or regulations, and no reasonable driver in the same circumstances would understand it that way. Further, Complainant never sought any correction of any alleged activity. Thus, I do not find Complainant met his burden to establish protected activity.

D. Adverse Action

Assuming *arguendo* that he had satisfied the requirement that he engaged in protected activity, then his termination would be the adverse action to his conduct. Since he was never actually placed on probation or was never notified that he was on probation, his probation status was not an adverse action.

E. Contributing Factor

If Complainant makes out a case of protected activity and shows an adverse action, the Complainant must show that his protected activity was a contributing factor in his discharge. Assuming he had shown protected activity, then his complaint would still fail.

As a general rule, temporal proximity is sufficient to raise the inference that a respondent's adverse actions were taken in retaliation for a complainant's protected activities. *Riess v. Nucor Corp.-Vulcraft-Tex., Inc.*, ARB No. 08-137, slip op. at 5 (ARB Nov. 30, 2010). Upon this showing, the burden shifts to respondent to produce evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant may rebut that showing with proof that the proffered reason was not the true reason for the adverse action, and was only a "pretext" for illicit motives. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). However, while the burden of production shifts, the burden of proof always remains with the employee. *See generally Berry v. Stevinson Chevrolet*, 74 F.3d 980, 985-86 (10th Cir. 1996).

Here, the proximity in time of Complainant's alleged protected activity and his termination weigh in his favor -- he was terminated within two weeks of the March 30 incident. Nevertheless, since I do not find Complainant credible, I would not have found him entitled to the benefit of the proximity finding. Even if the evidence had raised an inference of retaliation, Respondent presented legitimate, non-discriminatory reasons for the termination. Complainant

threatened the vice-president of the company that he would do harm when he came through the home base and that Employer should have a police officer on hand. F.F. ¶ 16. In addition, the most persuasive and credible evidence and testimony showed that the decision to terminate him had been made before he discussed his health condition. F.F. ¶¶ 16-19. Employer established both through Mr. Schemel and Ms. Bancroft that they would have fired him regardless of his health complaints because they treated his threat as serious and were worried for the safety of its employees. F.F. ¶¶ 16-18. Here, Complainant does not benefit from the temporal proximity of the event. Even if he did, however, I would have found that Employer produced sufficient evidence to rebut any inference of discrimination that might have arisen due to the proximity of the alleged activity and his termination. Moreover, Complainant offered no evidence from which a finding of pretext could be made.

Therefore, I would have found that Employer presented a legitimate, nondiscriminatory reason for the adverse actions. Complainant offered no reasonable explanation that it was pretextual or that it was done to cover for an adverse action is retaliation for engaging in protected activity. *Calhoun*, ARB No. 04-108, slip op. at 13.

F. Respondent's Clear and Convincing Evidence

Although Complainant failed to prove his case by showing any protected activity or that it was a contributing factor in his termination, this analysis is nevertheless performed in light of the arguments made in the post-hearing briefs. If an employee meets the burden of demonstrating protected activity was a contributing factor in his or her suffering adverse action, an employer may nevertheless relieve itself of liability by demonstrating "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity or the perception thereof." 29 C.F.R. § 1978.109(b). Clear and convincing standard is evidence that is "highly probable or reasonably certain." *Williams*, ARB No. 09-092, slip op. at 6.

In this case, I would have found that Respondent's evidence to be more persuasive and more compelling. Complainant was having issues by staying off the road too long and not returning to work when he was supposed to. Employer reviewed his conduct and decided to place him on probation. Mr. Edie attempted to reach Complainant a number of times in order to tell him, but Complainant, apparently wise to the reasons Mr. Edie was trying to reach him, contacted Mr. Schemel and in the course of a conversation about whether he was being fired, said Employer should have a police officer on site when he arrives because he felt like shooting someone. F.F. ¶¶ 16-17. Employer decided at that time to terminate him. F.F. ¶¶ 16-19. That was before Complainant ever mentioned a heart condition, or, as incredible as it sounds, decided to drive his truck an additional three hours before seeking assistance for a medical condition because he wasn't sure where to park safely. Further, his wife did not immediately take him to the hospital when he arrived home, but waited a couple more hours before taking him to the emergency room. F.F. ¶¶ 23, 34. Complainant's explanation is incredible and not believable. I would have found that if Complainant proved that he engaged in protected activity, Employer has countered that with clear and convincing evidence that his termination had nothing to do with any protected activity.

F. Damages

As Complainant has both failed to prove his case under STAA, he is not entitled to any relief. Even if he had, Respondent has demonstrated by clear and convincing evidence it would have terminated Complainant's employment regardless of any protected activity. Thus, under either scenario, Complainant is not entitled to any relief. Consequently, the issue of damages is not addressed.

G. Conclusion

For the reasons discussed above, because I find that Complainant did not engage in protected activity under the STAA, Complainant's request for relief under the STAA is denied. Even if he had engaged in protected activity, his STAA complaint would still fail.

Accordingly, Complainant's request for relief under the STAA is denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

San Francisco, California

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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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).