U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 23 July 2015

OALJ CASE NO.: 2013-STA-00028

In the Matter of:

KEVIN LAMLEY,
Complainant,

vs.

JYNX EXPRESS, LLC.,
WILLIAM BRAINERD, and
ELIZABETH BRAINERD
Respondents.

Appearances: Paul O. Taylor, Esquire
For the Complainant

Paula J. Quillin, Esquire
Adam P. Montessi, Esquire
For the Respondents

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case was brought under the whistleblower protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "Act"). Kevin Lamley ("Complainant") complains that Jynx Express, LLC, William Brainerd, and Elizabeth Brainerd ("Respondents") violated the STAA when they "blacklisted" him in the trucking industry by placing negative information on his Drive-a-Check ("DAC") report in retaliation for repeated safety complaints and his ultimate refusal to drive his tractor-trailer because of safety concerns. This claim was initiated with the Office of Administrative Law Judges ("OALJ") on March 15, 2013, when the Complainant objected to the Secretary's findings as presented by the Regional Supervisory Investigator for the Occupational Safety & Health Administration ("OSHA"). (Complainant's Exhibit ("CX") 13, p. 68.)

For the reasons set forth below, the Complainant's complaint for unlawful retaliation under the STAA is DISMISSED.

I. PROCEDURAL BACKGROUND

This case began on November 15, 2012, when Complainant filed a complaint through counsel with OSHA. (CX 12, pp. 56-65; Respondents' Exhibit ("RX") U, p. 222-30.) OSHA issued its findings on March 15, 2013. It found that "there was insufficient evidence to demonstrate Complainant was blacklisted in reprisal for refusing an unsafe dispatch. The information Complainant asserted was preventing him from obtaining employment was not in the DAC report. The evidence demonstrated Complainant was not prevented from gainful employment due to the DAC report, relative to his employment with Respondent." (CX 13, pp. 70-74; RX W, 277-81.) Complainant objected to these findings the same day, and this case was docketed with OALJ for a *de novo* hearing. (CX 13, p. 68.)

On June 25, 2013, Complainant filed a Motion to Compel Discovery and Deem Certain Facts as Conclusively Established due to Respondents' failure to respond to discovery. On June 26, 2013, Respondents' Counsel filed a Notice of Appearance. I held a telephonic conference on June 28, 2013, and, given that Respondents had just secured counsel in this matter, adjusted the discovery and pre-hearing schedule.

Respondents filed a Motion for Summary Decision on July 1, 2013, arguing that the complaint was time-barred. They argued that Complainant did not comply with STAA requirement that a complaint be filed "with the Secretary of Labor not later than 180 days after the alleged violation occurred," noting that 690 days elapsed from the date of the alleged violation, December 27, 2010, to his filing of the instant complaint, November 15, 2012. (49 U.S.C. § 31105(b)(1).) Respondents further argued that Complainant could have discovered the alleged violation through due diligence and it should have been apparent to a similarly situated individual with a reasonably prudent regard for his rights. On July 16, 2013, I issued an Order Denying Motion for Summary Decision.

The hearing began on July 23, 2013, in Oklahoma City, Oklahoma. (Hearing Transcript ("HT"), p. 4). I heard testimony that day from Respondent William Brainerd, Complainant, Bruce Johnson, and Lisa Shepherd. (*Id.* at 45, 113, 179, 195.) At the beginning of the hearing I admitted CX 1-6 and 9-13 and RX A, C-O, Q, T-U, W, Y, and AA-BB into evidence. (*Id.* at 12, 18, 24, 32-33.) I admitted CX 8 and RX Z into evidence later in the hearing. (*Id.* at 181, 249.) RX V and RX X were withdrawn and I excluded RX B, RX R, and RX S. (*Id.* at 21, 30-32.) During the hearing it became apparent that another day would be required to finish the case and, after conferring with the Parties, I scheduled a second hearing for August 26, 2013, also in Oklahoma City, Oklahoma. (*Id.* at 254.) On the second day of the hearing I heard testimony from Respondent Elizabeth Brainerd and Complainant in rebuttal. (*Id.* at 261, 346.) I also admitted CX 7 into evidence and excluded RX P. (*Id.* at 353, 357.)[1] The record, then, includes

[1] Both Complainant's and Respondents' Exhibits are paginated sequentially and I refer to these numbers instead of any number internal to the exhibit. Due to various exhibits being withdrawn or excluded, Respondents' Exhibits have page number gaps. The only exception is RX BB, which was marked at the hearing and is not paginated sequentially or internally. For RX BB I use page numbers starting with '1' and continuing as if it were paginated.

the following exhibits: CX 1-13, RX A, RX C-O, RX Q, RX T-U, RX W, RX Y-Z, and RX AA-BB.

On the second day of the hearing the Parties informed me that there were errors in the transcript for the first day of the hearing. I directed the Parties to confer and then file an errata sheet. (HT, pp. 359-60) Respondent filed the Joint Errata Sheet for Hearing Transcript on November 12, 2013, and I made the requested changes in the official transcript. Respondents' Closing Brief ("RCB") was received on October 28, 2013. The Complainant's Closing Argument ("CCA") was received on October 29th.

II. STIPULATIONS

The Parties agreed to the following stipulations at the hearing:

1. Kevin Lamley, the Complainant, resides at RR1 Box 1983, Boley, Oklahoma 74829. (HT, p. 5.)
2. From September 2010 through December 2010 Complainant personally operated commercial vehicles with a gross vehicle weight rating of 80,000 pounds or more on the highways in interstate commerce for Jynx Express. Complainant was not a member of a labor union and his work was not subject to the terms of a collective bargaining agreement. (*Id.* at 5-6.)
3. On or about November 16, 2010, Complainant's tractor-trailer set was inspected in Illinois. The inspecting officer cited Complainant due to issues relating to the vehicle's brakes and tires. (*Id.* at 6.)
4. On or about December 1, 2010, the Complainant was subjected to a DOT Level 3 inspection by the New Mexico Department of Public Safety ("DPS"). The New Mexico DPS issued the Complainant a citation for failing to retain his driver logs for the seven previous days. (*Id.* at 9.)
5. On or about December 21, 2010, Complainant's truck was inspected by a vehicle inspector at a weigh station in the State of Arkansas. The inspector issued a citation for issues with the vehicle's brakes, headlight, and tires. (*Id.* at 6)
6. On December 27, 2010, Complainant and Jynx Express terminated their contract.
7. Complainant worked for various companies as a truck driver from January 2011 through June 2012. (*Id.*)
8. In June 2012, Complainant began the process of disputing with HireRight the information that Jynx Express had placed on his DAC report. (*Id.*)
9. HireRight is a consumer reporting agency subject to the Fair Credit Reporting Act. A HireRight employment history report, aka a DAC report, may contain the truck driver's employment history, drug and alcohol testing information, and driving record information. It is utilized by some trucking companies to report information on truck drivers and by trucking companies to obtain information to assist them in making the decision whether to hire a truck driver and in complying with 49 C.F.R. Section 291.23(c). (*Id.* at 6-7)
10. The Complainant was an employee of Jynx Express as defined by the STAA. (*Id.* at 10.)

11. JYNX Express was an employer as defined by the STAA. (*Id.*)

III. ISSUES

The issues to be decided in this case are:

1. Did the Complainant engage in activity protection by the whistleblower protection provisions of the Surface Transportation Assistance Act? (*Id.* at 5.)
2. If the Complainant engaged in protected activity, were the Respondents aware of his protected activity? (*Id.*)
3. If the Complainant engaged in protected activity, did Respondents retaliate against the Complainant for his protected activity? (*Id.*)
4. If Respondents did retaliate against him, what relief is the Complainant entitled to? (*Id.*)
5. Are William Brainerd and Elizabeth Brainerd liable if the Complainant was retaliated against? (*Id.*)

IV. SUMMARY OF FACTS

A. Complainant's History to September 2010

Complainant was born in 1966. (RX E, p. 32.) Before becoming a truck driver he spent 23 years working in construction. (HT, p. 117.) From April 1996 to November 2006 he was self-employed as the owner/operator of "Affordable Handyman Service," specializing in full renovations and rehabs. (RX E, p. 39; RX Z, p. 297.) Between 2000 and 2003 he also worked for Expressway doing "recovery/rescue, roll back, repos." (RX E, p. 39.) He earned his license to operate Commercial Motor Vehicles ("CMV") from the State of Missouri and started driving trucks in 2006.[2] (*Id.* at 34; RX Z, p. 305.) He estimated that he has driven about 500,000 miles since becoming a truck driver. (HT, p. 116.)

Complainant's first trucking job was with Swift, where he worked from November 2006 to August 2007. (CX 3, p. 6, RX E, p. 39; RX Z, p. 296.)[3] Swift reported to DAC that he resigned or terminated his lease, that he had a satisfactory record, and that review would be required before rehiring him. (CX 3, p. 6). He left because he was offered more money and miles elsewhere. (RX E, p. 39; RX Z, p. 296.) He was in one accident while he was at Swift, the only accident in a CMV reported in his record. His DAC report indicates that this occurred in Winchester, Virginia, on August 13, 2007, and it is described only as "backing." (CX 3, p. 6.)

[2] At the hearing Complainant testified that he had been driving trucks for 5 years, which would date the beginning of his employment as a truck driver to 2008, not 2006. (HT, p. 114.) On his job applications in evidence he lists 2006 as the first year he has experience in the industry and his DAC report lists truck driving jobs beginning in 2006. It isn't clear if Complainant was mistaken at the hearing as to when he began trucking or if he was implicitly eliminating post-2006 time in which he did not drive trucks. But he also testified that he had only had a commercial license for the last five years. (*Id.*) This alternative dating is also consistent with his testimony regarding 23 years in construction, as other evidence suggests that he could not have been working until 1985. (RX E, p. 37.) It is possible that he worked in construction and in trucking for a time, but this would still not explain his statement in 2013 that he had only been a truck driver for five years.

[3] There are multiple DAC reports in the record. When referring to information from the report that is consistent in all of the reports, I refer to report at CX 3, pp. 4-22.

According to Complainant's application to Respondents, there was no accident. Rather, another driver falsely claimed that he had backed into that driver's truck while he was parking. Swift told him to report the accident in order to avoid a potential hit and run charge and to list the damages at $1.00. (RX E, p. 36.)

From September to December 2007 Complainant worked for JB Hunt Transport. He quit because he was again offered more money and miles elsewhere. JB Hunt indicated to DAC only that review was required before they would re-employ him. (CX 3, p. 8; RX E, p. 38; RX Z, p. 296.) He worked for Celadon Trucking Services between from January through April 2008. A satisfactory work record was reported, but a review would be required before rehire. (CX 3, p. 9.) His explanation for leaving was that he "went back to reefer." (RX E, p. 38; RX Z, p. 296.)

Complainant's next job was with Stevens Transport driving refrigerated trailers over the road. He only stayed in this position until May 2008. Stevens Transport reported to DAC that he had a late pickup or delivery and that he quit while under load and left his CMV at a company terminal without notice. He was not eligible for rehire. (CX 3, 10.) In his application with Respondents, Complainant explained that he had a family medical emergency and attempted to relay the load to another driver but was "sabotaged" by the company. They wouldn't cooperate with him, so he delivered his truck to a company terminal with enough time for them to reassign the load for on-time delivery. He represented that a DAC rebuttal was pending. (RX E, p. 38.)

Complainant began working for CRST Expedited in May 2008 and stayed there over a year, until June 2009. In this time he had a satisfactory work record, but review would be required before CRST Malone rehired him. (CX 3, p. 12.) In September 2008 he got a speeding ticket in California for going 64 in a 55 zone, his only speeding ticket in a CMV. (RX E, p. 34.) He next transferred to driving flatbed trucks with CRST Malone, but left this position in August 2009. Again he had a satisfactory work record, but a review would be required before he would be rehired. (CX 3, p. 14.) On his later job applications he stated that he left because his pay was unreasonable. (RX E, p. 37; RX Z, p. 295.)

In August 2009 Complainant moved from Missouri to Boley, Oklahoma. (RX E, p. 32) He began driving for Land Span Inc. in September 2009, but resigned in November 2009. (CX 3, p. 15.) He claimed that he left because the truck was always in the shop and there was poor maintenance. (RX E, p. 37; RX Z, p. 294.) According to his job applications, he began working for Jones Motor Company, Inc. in December 2009. His DAC, however, reflects that he did not begin until February 2010. It also indicates a satisfactory work record, but with review required before rehire. The applications and DAC agree that he resigned in May of 2010, and he explained in his job applications that the owner of the truck lost the contract with Jones. (CX 3, p. 17; RX E, p. 37; RX Z, p. 294.)

Complainant's next job was with Oklahoma Fuel Transit, but this only lasted from June to July 2010 because the owner of the truck lost a major contract. (RX E, p. 37; RX Z, p. 294.) He moved to OSF Inc. in July on a lease-purchase contract, but left in August because he didn't like his pay. (RX E, p. 37; RX Z, p. 293.) He worked for Melton Truck Lines between August and September of 2010. No reason for leaving was given. (RX Z, p. 293.)

B. Complainant's Hiring by Respondents in September 2010

Complainant applied to be an independent contractor for Respondents on September 2010. (HT, p. 275.) Respondent Jynx Express, LLC ("Jynx") was a trucking company owned and operated by Respondents William and Elizabeth Brainerd. Though a legally separate entity, its Department of Transportation ("DOT") operating authority came through William Brainerd individually.[4] (*Id.* at 45-47, 328.) Mr. Brainerd also uses the trade name "Jynx Leasing" and operates J.R. Roustabout under the corporate shield of Jynx Express, LLC. (*Id.* at 46-48.) Additionally, he does business using the trade names "Jynx Express" and "J.R. Roustabout," which are both distinct from Jynx Express, LLC. (*Id.* at 47-48, 89-90; CX 7, p. 47.) Though the LLC still exists, sometime in 2011 he began operating using the two trade names. "J.R. Roustabout" is used in oil related business. (HT, pp. 109-110.) Jynx Express, LLC operated around 30 trucks at one time, but in the period Complainant was with them, had only five or six trucks on the road. It had a staff of three: William and Elizabeth Brainerd and Cassie Hill (who is not a party to this action). Mr. Brainerd explained that they were downsizing at the time and trying to sell off their trucks. (HT, pp. 53-54.) Elizabeth Brainerd worked as the office manager, doing the payroll and hiring, as well as dispatching the trucks. (*Id.* at 261.) They now operate a construction company as Jynx Express and do not run trucks. (*Id.* at 328.)

Complainant found an advertisement on Craigslist for a lease-purchase of a truck and contacted Respondent William Brainerd at the number provided. Complainant was interested in lease-purchase because by owning his own truck he could get better pay and hours, and lease-purchase is a way to gain ownership of a truck. (HT, pp. 116-17.) Mr. Brainerd wanted to meet him in person, so he went to Respondents' place of business and met both Mr. and Mrs. Brainerd, as well as a secretary. (*Id.* at 118.) Mr. Brainerd testified that he reviewed Complainant's DAC report as part of the hiring process, but that besides a positive drug/alcohol test, there was nothing in DAC reports that would rule out a candidate. (*Id.* at 49.) He saw from the application that Complainant was disputing his DAC report. (*Id.* at 94.) He noticed some negative information about Complainant on his DAC report, in particular that he had a pattern of only staying with a company two or three months, but was willing to hire him as an independent contractor because he believes in giving people second chances. (*Id.* at 91.)

When Complainant arrived at Respondents' place of business he was shown the trucks available and focused on a 2007 Freightliner because the other one he saw had been in a wreck and was then rebuilt. He inspected the truck and found a broken windshield, worn tires (less than 2/32" tread depth), and some other problems he couldn't remember at the hearing. He submitted a list to Mr. Brainerd, who promised to have them fixed. (*Id.* at 119-22.) Complainant testified that the windshield was fixed before he took the truck out but that Mr. Brainerd told him that they would fix the tires after Complainant started making some money and that Respondents would pay for the tires. (*Id.* at 123.) After discussing the work arrangement, he accepted the deal and began work within a week. (*Id.* at 118, 120.)

[4] Later, however, Mr. Brainerd testified that Jynx Express LLC had its own DOT operating rights. (HT, p. 90.) He appears to be confused on this point. All of the citations for Complainant received show that he was operating with the DOT number and MC number for Mr. Brainerd individually, which was also used for Jynx Express and J.R. Roustabout: DOT# 1960199 and MC #695222. (CX 7, p. 45; CX 9, p. 53; CX 11; p. 55.)

Complainant's first day with Respondents was September 21, 2010, which is also the date of his official application. (RX A, p. 1; RX E, p. 31.) On that day he signed a number of documents, including an affidavit that he was an independent contractor for workers' compensation purposes. (RX C, pp. 6-7.) He also signed an acknowledgement that he received Respondents' Handbook, in which he is referred to as an at-will employee. (RX D, p. 8.) For the sole purpose of this action under the STAA, his employment status has been determined by stipulation. (HT, p. 10.) He also acknowledged receiving a handbook for drivers, DOT material, and Respondents' drug and alcohol policy. (RX D, pp. 9-12, 23.) He consented to a drug and alcohol screening, which he passed. (*Id.* at 13; RX E, p. 35.) Finally, Complainant acknowledged receiving Respondents' Safety Policy. (RX D, 30; HT, p. 276.)

The actual lease contract and/or other agreements specifying the exact financial arrangement between Complainant and Respondents is not in evidence. Based on the testimony and payroll records, however, its general structure can be determined. As Respondent William Brainerd described the arrangement, he personally had a lease-purchase agreement with Complainant for the truck.[5] Jynx Express, LLC had a contract with Complainant to operate and haul freight for them. And the trailer used by Complainant was leased from Jynx Leasing. (HT, pp. 48-49, 89.) Complainant became responsible for truck maintenance and compliance with DOT regulations. The trailer, however, remained the property of Respondents, and they retained responsibility for its maintenance and DOT compliance. (HT, pp. 98-99.) Complainant agreed that he was responsible for repairs on the truck, but not the trailer. (*Id.* at 216.) The beginning date of the lease was September 21, 2010, and the projected end date was April 21, 2013. (RX N, p. 161.) He paid a $2000 deposit on the truck, which was deducted from the first four weeks of his pay at $500 per week. (*Id.* at 161-64.) He then began making lease payments of $400 per week, which were scheduled to continue for two and half years.[6] (*Id.* at 165.)

Per their arrangement, Respondents dispatched Complainant on various loads. Of the gross revenue on each load, Complainant was allocated 75%. Respondents received 25%, 19% directly to Jynx Express LLC and 6% allocated as lease payment for the trailer. (RX N, 161; *cf.* HT, pp. 215-16.) Insurance of $175 per week was automatically deducted, as were incidental costs, like tags. (*Id.* at 161-62.) The costs of repairs were deducted as well. (*E.g. id.* at 166.) Various additions could be made, (*e.g. id.* at 171), and drivers would receive safety bonuses if they passed their DOT inspections. (HT, pp. 275-76.)

EFS Transportation Services provided Respondents with fuel cards and transchecks. (HT, p. 283.) Drivers were given an EFS card that could be used to purchase fuel and get advances. (HT, pp. 82-84.) To help them out when they were on the road, drivers could draw $50 a day for up to $250 a week on the card in advances. The costs of the fuel and advances, along with service fees, would be deducted from their weekly settlements. (*Id.* at 318-19.) Respondents would sometimes authorize EFS transchecks to drivers, often to cover repairs that were needed on the road. (HT, pp. 83-84.) These would also be deducted from the weekly

[5] Either under his own name or under his trade name of Jynx Leasing—the testimony isn't clear here.

[6] Without the actual documentation the exact arrangement is opaque. In any case, however it was accomplished contractually, the Parties seem to agree that Complainant was responsible for the truck maintenance and Respondents were responsible for the trailer maintenance.

settlement check. After all of the various additions[7] and deductions from Complainant's 75%, he would get his settlement. If it was a negative balance it would carry over to the next week. (*See generally* RX N.)

Respondent William Brainerd testified that he did not have a proper repair shop and used a variety of different shops around Tulsa and Oklahoma City. He preferred not to have his equipment serviced at Tulsa Freightliner or anywhere in Tulsa. Trucks and trailers were usually repaired wherever they were when the need arose. Brake work was generally done at the closest recognizable service center. (HT, pp. 63-64.) Drivers were responsible for paying for repairs for the truck (though Respondents advanced them money) and Respondents were responsible for repairs to the trailer. Generally Mr. Brainerd wanted the driver to get an estimate on larger repairs for the trailer before approving them. (HT, pp. 102-04.) If needed, they would have repairs made immediately, but limited non-out-of-service violations would wait until the next service period. (*Id.* at 106.) They kept tires at their terminal, but would authorize drivers to replace tires on the road as needed. (*Id.* at 107-08.)

Elizabeth Brainerd testified that on-road repairs, which would be funded through EFS, were authorized by her or Cassie Hill. (*Id.* at 265.) The driver was supposed to go to a shop and tell them what needed to be done and then arrange with them to have a transcheck made out for the correct amount. (*Id.* at 282-83.) She added that ultimately it was the driver's responsibility to set up and get the repairs on the trucks and trailers out on the road. Drivers bore the cost for truck repairs while Respondents paid for trailer repairs. (*Id.* at 269-70.) But since Respondents couldn't fix the trailers while they are out on the road, drivers were supposed to arrange for repairs. They would then authorize a check to cover the expense. (HT, p. 335.) Respondents did not want drivers using unsafe vehicles and any safety violation by one of their drivers went on their record as well. That is why they had monetary incentives for safety and would give their drivers advances while they were on the road to cover repairs. (*Id.* at 279.)

C. Employment to December 20, 2010

Complainant's mandatory DOT Driver's Daily Logs begin on September 21, 2010, and indicate that he picked up the truck on September 22nd and was first dispatched on September 23rd. (RX L, pp. 50-52.) Logs are in evidence through November 30th. No defects are reported in the truck or trailer on any of the log sheets. On each, Complainant checked boxes indicating that both were in satisfactory condition and then signed his name. (*Id.* at 49-117; RX H, 42-43; HT, pp. 223-26.) Complainant claimed that Respondents forced him to falsify his logs and would not accept them unless they indicated there were no defects. (HT, p. 221.) There are no logs in evidence for December 2010. Respondents claimed that Complainant never turned them in. (*Id.* at 278-79.) Complainant claimed that they were in the possession of Respondents. He also claimed that, contrary to what he had done on all previous logs, he had reported defects in his equipment on the December logs that are missing. (*Id.* at 243-44.)

Complainant testified that he drove on the tires he had wanted replaced until they blew out on the Kansas Turnpike. He said that he had requested several times that they be fixed prior

[7] Complainant sometimes received additions for "Fuel Surcharge (ADD)" and "Tarp Add." (*E.g.* RX N, p. 166.) The record is unclear as to what exactly these are for and how they are computed.

to this. (HT, p. 123.) He claimed that Mr. Brainerd told him that they would fix the tires when he got back to the terminal, but then didn't have the tires at the terminal when he got there. Complainant said that after the blow out he requested that the other ones be replaced as well and refused to accept used tires in place of those that blew out. Respondents sent roadside assistance out with the new tires for the truck, but Complainant averred that he was charged for the replacement. (*Id.* at 124-25.) Complainant testified that he and Mr. Brainerd argued almost daily about the tires on the truck and getting them replaced. (*Id.* at 125.) They also argued about tires Complainant believed needed to be replaced on the trailer. He testified that he was told that they would only replace these tires when he was at the terminal in Kiefer, Oklahoma, but then they wouldn't route him through there. (*Id.* at 126.)

Complainant's settlement statement for the week ending October 8, 2010, indicates that he was charged a total of $489.17 for repairs. But it also shows that he was credited $200 for "Tire bill." (RX N, p. 163.) During the week ending October 29th he was charged $255.91 for preventative maintenance. (*Id.* at 166). Preventative maintenance is a general category that is used for maintenance that prevents future problems, e.g. oil changes and tune-ups. The driver is supposed to arrange for the needed maintenance and then Respondents would front the money through EFS, deducting it later in the settlement statement. (HT, pp. 269-70, 280-82; RX M.) On November 1st a $500 transcheck was authorized for Complainant, though based on his settlement statement, this appears to have been for fuel that he didn't pay for using his fuel card. (RX M, pp. 159-60; RX N, p. 167.)

On November 3, 2010, Complainant had a Level 3 driver only inspection in Kansas. No violations were discovered. (RX G, p. 41; *see also* RX Z, p. 325.) Level 3 inspections are only of the driver, Level 2 inspections include a visual inspection of the truck, and Level 1 inspections are the most thorough, in which the inspector also goes underneath the truck to do a full examination. Some violations are out-of-service violations, meaning that the truck cannot be operated until the violation is remedied, while less serious violations are noted, but do not require correction before the truck can be operated. (HT, pp. 61-62, 76-80, 140-41.)

On November 4, 2010, a $100 transcheck was authorized for Complainant, with a notation of "Level 3 Insp." (RX M, p. 156.) It does not appear on the settlement statement for that week. (RX N, p. 167.) A transcheck for $150 was authorized on the 6th and noted as an advance on top of the $50 advance he was able to draw on his fuel card. (RX M, p. 155.) Complainant received another Level 3 inspection on November 10th, this time in Nebraska. Again there were no violations. (RX Z, p. 325.) Another $100 transcheck was authorized for him on November 13, noted only as "Do not charge."[8] (RX M, p. 150.) In addition, for the week ending November 12th miscellaneous additions of $175.45 for "non factor" appear on Complainant's settlement sheet.[9] (RX N, p. 168.)

The Illinois State Police conducted a full Level 1 inspection of Complainant on November 16, 2010. (CX 9, p. 53; RX I, pp. 44-45.) He testified that on the 16th he went through a scale and was waived to go on. But since he was so frustrated with Respondents'

[8] The best explanation in the evidence for these checks is that they were safety bonuses given after Complainant passed an inspection. (*See* HT, 275-76.)

[9] Complainant's settlement statement for the week ending November 19th shows a miscellaneous charge for "Fuel 11/11" and a credit of $100 for "non factor." (RX N, p. 169.)

unwillingness to authorize the necessary repairs, he pulled over and asked for the most thorough inspection, believing that this would settle the ongoing argument with Mr. Brainerd and require Respondents to do the maintenance he wanted. (*Id.* at 128-29.) He told the officer that he was concerned about the trailer, not the tractor. (*Id.* at 130.)

He received four violations, two for the tractor and two for the trailer. The inspector noted violations on the tractor for "Inadequate brakes for safe stopping, left steer, cracked brake pad" and "Tire-other tread depth less than 2/32 of inch, 3rd axle inside tire."[10] The trailer received violations for "Clamp or Roto type brakes out-of adjustment" and "CMV manufactured after 10/19/94 has an automatic airbrake adjustment system that fails to compensate for wear." (CX 9, p. 53; RX I, pp. 44-45.) Complainant testified that he was surprised about the violations on the tractor. (HT, p. 131.) The report listed no defects with the trailer tires, even though Complainant stated that he specifically asked the officer to inspect the trailer. Complainant testified that the officer told him orally that they needed to be replaced. (*Id.* at 131, 217)

None of these violations were out-of-service violations, meaning that the truck was not deemed too unsafe to operate. (CX 9, p. 53; RX I, p. 44; *see also, e.g.*, HT, p. 315.) Rather, an examination report was issued noting the defects and Respondents were asked to sign and return the form within 15 days.[11] Complainant was given a stop card and written warning—there was no citation. (CX 9, p. 53; RX I, pp. 44-45; HT, pp. 219-20.) Complainant testified that when he informed Mr. Brainerd on the phone about the inspection he was told that DOT didn't know what they were talking about.[12] (HT, pp. 132-33.)

Repairs were completed on November 20, 2010, at a Travel Centers of America in Council Bluffs, IA, within the 15 days referenced on the report. (HT, 218-19.) Complainant had the brake pad crack fixed, which was authorized by Mr. Brainerd, had a tire repaired, and had a tire replaced using a spare he had bought from a Swift driver. (*Id.* at 133-34.) He claimed that Mr. Brainerd wouldn't authorize additional repairs. (*Id.* at 133-35.) Per the receipt, the technician replaced the left front brake pads, mounted a spare left right inside tire and repaired the left right outside tire. (CX 10, p. 54; RX J, p. 46.) The total cost was $259.89, a transcheck for that amount was authorized by Respondents, and Complainant was billed for that amount on his next settlement statement. (*Id.*; RX M, p. 144; RX N, p. 171.)

The technician also noted that "Company policy is we do not adjust automatic slack adjusters unless we are servicing brakes." (CX 10, p. 54; RX J, p. 46.) Complainant testified that he believed this referred to Jynx policy, though Elizabeth Brainerd testified that there was no such policy, and that instead the repair shop refused to adjust the automatic slack adjuster because of its policy. (HT, pp. 135-36, 219, 323-24.) The logic and grammar of the statement

[10] Complainant wasn't sure if his tires blew before or after this inspection. Initially he testified that the inspection came later (HT, p. 125), which would mean that the tire defects noted here related to other tires on the tractor trailer. Later he testified that he thought the blown out tires weren't replaced until after the inspection. (*Id.* at 128.) Given the objective evidence, the former sequence makes the most sense.

[11] Per the language on the report, there was no need to certify that the repairs had been completed for non-out-of-service violations: "If your driver or vehicle was placed out of service, please verify the out of service violations noted on this report have been corrected. A copy of this form must be returned or faxed to the following address within 15 days." (CX 9, p. 53; RX I, pp. 44-45.)

[12] Though the Illinois State Police, not the DOT, conducted the inspection.

supports Respondents' understanding of this point (the technician uses 'we') and I find that TravelCenters of America refused to complete the adjustment, not that Respondents refused to allow them to do it.

In any case, the technician did not adjust the brakes on the trailer. In order to work on the brakes one must be a certified brake inspector. Mr. Brainerd is such an inspector, but Complainant is not, so he could not service the brakes on the truck or trailer himself. (HT, pp. 80-81.) Elizabeth Brainerd admitted that she did not know if the repairs were completed, stating that though they bore the cost of trailer repairs, it was really the driver's responsibility to set them up and make sure that they are done.[13] (*Id.* at 269-70.)

Complainant testified that at this point he was having daily arguments with Mr. Brainerd about the replacement of tires on the trailer and truck, repairs, air leaks, the brake adjusters, and repairs generally. (HT, pp. 136-38.) He stated that he was always told that the trailer repairs wouldn't be done until he got back to the shop, where Mr. Brainerd did the repairs himself. (*Id.* at 138.) Neither Mr. nor Mrs. Brainerd testified to any such reports or disputes.

On December 1, 2010, Complainant had a Level 3 inspection in New Mexico. He was placed out-of-service for "failing to retain previous 7 days records of duty status did not print the logs sheets for 12-24-2010 till time of inspection." (RX F, p. 40.) Based on the date of inspection, the reference should have been to November 24, 2010. Complainant's failure seems to have been to not print out his computerized logs. Respondents signed and returned the report on December 8th, certifying that the violation had been corrected. (*Id.*) Complainant later disputed the violation and it was overturned. (HT, p. 222.) A "PSP Detailed Report" pulled in July of 2011 shows that it was removed from his record. (RX Z, pp. 324-25.)

Transchecks for $550, plus the processing fee, were authorized for Complainant on December 6th and 14th. (RX M, pp. 126, 135.) They were then billed to Complainant in his next settlement statements as fuel that he had not put on his fuel card. (RX N, pp. 172-73.) Complainant testified that in addition to his daily complaints about safety and maintenance, he also had several disputes about the amount of his settlements. (HT, p. 152.) Lisa Shepherd, Complainant's good friend/neighbor/bookkeeper, requested his payroll documents from Respondents on December 17th. (RX A, p. 1.)

D. Last Week of Work: December 20, 2010 to December 27, 2010

On December 20, 2010, Complainant was in Richmond, Virginia, where he bought $499 of fuel and got a $50 advance. (RX M, p. 124.) He was dispatched on a load from Chester, Virginia to Ft. Worth, Texas. (RX N, p. 174.) On December 21st he received a full Level 1 inspection in Arkansas. (CX 11, p. 55; RX K, 47-48.) Again, he testified that he was waived through a weigh station but pulled over anyway and, as he recalled at the hearing, told the officer "that my company continues to make me run this truck with the faulty equipment. The brakes cannot be adjusted. He refuses to fix them. I've got tires that are almost bald and every time I ask him to get it fixed, they won't do it. Could I get a Level 1 inspection." (HT, pp. 138-39.)

[13] A complaint to the DOT filed by Lisa Shepherd in January of 2011 suggests that after TravelCenters America refused to do the adjustment, Complainant did (or at least attempt to do) so himself. (CX 8, p. 52.)

Six violations were noted, three on the truck and three on the trailer. None of the violations were out-of-service violations and no citation was issued. Violations on the truck were "Clamp or Roto type brake out-of-adjustment on #4 axle left side," "CMV manufactured after 10/19/94 has an automatic airbrake adjustment system that fails to compensate for wear," and "Inoperable right head light."[14] "Tire-ply or belt material exposed on the #4 axle right side inside tire," "Tire ply or belt material exposed on #4 axle left side, inside tire," and "Air leaking from where the air relay valve near compressor between the #4 and #5 axle." The motor carrier had 15 days to certify that the violations had been corrected. (CX 11, p. 55; RX K, 47-48.)

The report appears to contain an error or mistaken notation. As Mr. Brainerd testified, the brake problems referencing unit 1, the truck, would actually have referred to unit 2, the trailer, given the reference to the #4 axle. He explained that there was really only one problem here and the second violation was just an explanation of the first. (*Id.* at 62-64.) Complainant agreed that the brake problems related to the trailer. (*Id.* at 145.) It is essentially the same violation that was noted in the November 16th inspection. The last violation is hard to make sense of because there are no compressors on trailers, so it is unclear what the inspector found or where he found it. Mr. Brainerd testified, however, that an air leak in a brake system is never good. (*Id.* at 65-66.) Based on the report and testimony, I find that two of the trailer tires were in violation of DOT regulations and the slack adjuster on the #4 axle, on the trailer, was again in violation of DOT regulations. There was an additional problem with an air leak, though the evidence is insufficient to demonstrate what exactly this problem was and where it was located.

After receiving the inspection in Arkansas, Complainant testified that he scanned and emailed the report to Respondents and then talked to Mr. Brainerd, who told him to bring the truck to the yard. (HT, pp. 141-42.) Complainant continued to Ft. Worth, finishing his route and making the delivery. He then took a load from Denton, Texas to Oklahoma City, Oklahoma (167 miles). (RX N, p. 174.) In his initial complaint, Complainant alleged that Respondents terminated him on December 21, 2010. (CX 12, p. 62.) At the hearing Complainant testified that he returned to the terminal in Kiefer on the 21st after he dropped off his load.[15] (HT, pp. 143-44.) He claimed that he told Mr. Brainerd that the trailer "needed to be fixed or I wasn't going to operate the truck no more" and that "I would not pull another load until the trailer was repaired." (HT, p. 144.) Mr. Brainerd allegedly replied that he wasn't going to repair it and that he could find another driver for the truck. (*Id.* at 144.)

On December 22nd Complainant got a $50 advance on his settlement in Oklahoma City. (RX M, p. 119.) He testified that Respondent William Brainerd told him to come to the terminal in Kiefer. (HT, p. 148.) Elizabeth Brainerd testified that he didn't come to the yard until the 23rd, and that it was only at that point that they discovered the Arkansas inspection report. (*Id.* at 268, 287.) Though there is disagreement regarding exactly when Complainant came to the yard and how many times he came to the yard, resolving the matter is not essential. The important facts here are that after Complainant's inspection in Arkansas, he finished his load, took another

[14] The headlight was fixed onsite. (HT, p. 145.)

[15] It is quite likely that Complainant is confused on the dates here. The inspection ended at 3:15 pm on the 21st, after which he would have to have driven to Ft. Worth, dropped his load off, driven to Denton to get another load, driven to Oklahoma City and dropped off that load, and then driven to Kiefer. It is implausible that this all happened on the 21st.

load, and then at some point arrived in Respondents' yard. He alleges that at this time he refused to drive the tractor-trailer, or haul any more loads, until the necessary repairs were made.

The Parties agree that on December 23, 2010, Complainant was put on probation, though they disagree as to the circumstances. The probation notice is written on the bottom of the last page of what appears to be a safety agreement that had been signed by Complainant and William Brainerd on December 22, 2010.[16] The notice reads: "30 day probation for failing to keep truck in DOT condition 12-23-10. Next inspection within 45 days or no later than 2-1-2011 or no dispatch!" It is signed by both William Brainerd and Complainant. (RX Q, 189.)

Complainant testified that he took his truck home after he stopped at the terminal on the evening of the 21st because he was hoping to get repairs over the weekend. He thought that he returned to the yard on both the 22nd and 23rd. On the 22nd he signed the top portion of the probation notice and Mr. Brainerd inspected the truck. On the 23rd he signed the bottom portion that put him on probation. He testified that he did not have a problem with this, even though the tractor was in DOT compliance and the remaining problems were on the trailer. (HT, pp. 147-49.) He claimed that on one of these days he again told Mr. Brainerd that he would not pull more loads until the other problems on the trailer were fixed, but was informed again that he could be replaced. (*Id.* at 150.) He clarified that he believed the truck was safe to drive, but was refusing to pull loads in the trailer because it was unsafe. (*Id.* at 227, 244-45.)

William Brainerd testified that after Complainant came to the office with the Arkansas citation and a truck that needed repair, they arranged to have his windshield repaired on the 26th, after Complainant picked up a dispatch, and then gave him two replacement tires for the trailer and a $600 EFS check that he was instructed to use to get the truck serviced.[17] (HT, pp. 111-12.) Earlier he had stated that this money was for the brake adjustment violation on the trailer, though he also testified that he would defer fixing small brake adjustment problems until service was due. (*Id.* at 104, 107.) Per the report, they had 15 days to fix the problems. (*Id.* at 99.)

Elizabeth Brainerd could not remember when the necessary repairs were made but she recalled that when Complainant arrived they noticed that the front of his truck "was messed up and there was a couple of trailer tires that had flat marks on them." Complainant said he had attempted, but failed, to avoid a deer. (HT, pp. 269, 288.) His truck was filthy and because he had not turned his Arkansas citation or logs in as he was supposed to, they decided to terminate him. After they did so, she testified that Complainant begged to be hired back and promised to fix the truck and get it in DOT compliance. They agreed to do so, but put him on probation. (*Id.* at. 289.) Next he said he would get his truck washed and then they gave him two tires for the trailer and agreed to advance him $500 to do the necessary repairs and take care of preventative maintenance. (*Id.* at 290.) This testimony is consistent with her January 6, 2011, email in which she writes that they pointed out damaged trailer wheels to Complainant on December 23rd. (RX A, p. 2.) Complainant, however, denied that Respondents ever gave him any tires for truck or

[16] Only the last page is in evidence. Assuming the dating is correct, this would tend to show that Complainant visited the yard on both the 22nd and 23rd (though it is of course possible it was signed elsewhere or separately by the Parties). As explained above, the distances involved make it highly unlikely that Complainant visited the yard on the 21st, 22nd, and 23rd.

[17] This is the only reference to a problem with the windshield at this time.

trailer. (HT, p. 242.) He also denied that he was ever fired or asked for his job back.[18] (*Id.* at 350.)

On December 23rd Complainant drew a $50 advance in Oklahoma City. A transcheck for $63.50 was also authorized for him to get a truck wash. (RX M, p. 121.) On Christmas he got another $50 advance in Oklahoma City. On the 26th Complainant got $100.07 of fuel and a $50 advance in Okemah, Oklahoma. (*Id.* at 122.) A transcheck for $500 was also authorized that day to Complainant. The EFS statement contains a written note indicating that this was for "PM/Repairs." (*Id.* at 123; *see also* RX A, p. 2.) Complainant, however, initially testified that this was a check for back-pay related to discrepancies he had found in his paychecks but that it did not resolve all of the problems. (HT, pp. 152, 155-56.) He added that $500 wouldn't have been enough for the tires he needed and was too much for a new slack adjuster. (*Id.* at 247.) When called in rebuttal on the second day of the hearing, however, he testified that this money was actually for repairs to the truck and that he used it to change the oil, buy a used tire, buy a hub cap, and take care of other odds and ends on the truck. He claimed he left receipts in the truck when Respondents took it. (*Id.* at 348-50.)

Complainant testified that he was not dispatched at all between the 21st and 26th of December. (HT, p. 150.) But asked by his counsel why he was getting fuel in Oklahoma City on the 22nd and 23rd Complainant responded that he was hauling short loads. (*Id.* at 154.) The EFS statements, in fact, do not show that he was buying fuel on those days—they show that he got advances on those days in Oklahoma City and fuel on the 26th in Okemah—but it is clear that he was driving in Oklahoma City on both the 22nd and 23rd. (RX M, pp. 119-23.) Elizabeth Brainerd testified, however, that if he was hauling short loads on these days, he wasn't doing so for Jynx Express, LLC. (HT, p. 333.) Complainant stated that he brought the truck and trailer home on the 23rd and started to do some maintenance. He repaired wheel seals that were bad and that he had verbally complained to Mr. Brainerd about and then he tried to fix the air lines. He did not touch the brakes because he is not certified. (*Id.* at 157.) He testified that he did not drive the truck on December 26th, but had no explanation for why the EFS statement showed him getting fuel for the truck on that day. (*Id.* at 237-38.) In later questioning by his Counsel, however, he remembered that he had driven the truck, but not the trailer, to get parts for the trailer on December 26th and had fueled up then. (*Id.* at 246.)

Elizabeth Brainerd testified that when they put him on probation they had a load scheduled for him after Christmas. (HT, p. 293.) Mr. Brainerd thought this was for the 26th. He admitted that he was supposed to certify that repairs had been made before Complainant was dispatched but had not done so. He added, however, that the violations in the report would not have made the truck unsafe, as they were not the more serious out-of-service violations. (HT, pp. 62-63.) Ms. Brainerd testified that the dispatch was for the 27th but that the broker called them at 10:30 in the morning asking where their driver was. They called Complainant and he said he wasn't feeling well and wasn't ready to go out that day. She asked him if he wanted a load for the next day, and he requested an AM load. She booked a load for the 28th and informed Complainant of his dispatch. At 11:00 she received a call from the broker, informing her that Complainant had called directly and said he wasn't picking up the load and that he quit. She

[18] Though Respondents account better accords with Complainants original complaint alleging he was fired on December 21st. (CX 12, p. 62.)

tried to reach Complaint to figure out what was going on, but he never answered. She told her husband about the situation and they decided to go find Complainant and figure out what was going on. (HT, pp. 293-95.)

E. Separation: December 27, 2010

The Parties agree on very little regarding the events surrounding their separation. What is certain, however, is that it was not amicable and required the intervention of law enforcement. It also led to the negative posting on Complainant's DAC report, the alleged retaliatory action in this case. On December 27, 2010, Respondents went to Complainant's residence to inquire about the truck. A third gentleman was with them and Mr. Brainerd was carrying a weapon. An argument ensued and a Sheriff's deputy and then the Sheriff were called to diffuse the situation. Respondent William Brainerd and Complainant eventually agreed to cancel the lease and someone dictated the following note to Elizabeth Brainerd, who hand wrote it: "Mutual Cancellation of Lease. Keven [sic] Lamley brought Truck back to yard with equipment in good condition. Dac will not reflect any negative report on Truck or Driver." (CX 4, p. 38.) Respondent William Brainerd and Complainant signed it. The Sheriff witnessed it and signed as well. (*Id.*) Respondents then took physical possession of the truck.

1. Complainant's Version

Complainant testified that he was not dispatched on December 27th. (HT, 151.) Rather, Mr. Brainerd called him and asked if he was ready to start taking loads. He told Mr. Brainerd that he wasn't going to take any more loads until the trailer was fixed. Mr. Brainerd hung up on him. (*Id.* at 158.) Four hours later Mr. and Ms. Brainerd showed up at his house with another gentlemen who "was very aggressive trying to start fights with me." (*Id.*) Complainant was next door at Ms. Shepherd's house at the time and she retrieved him. He was confused as to why they were there. Mr. Brainerd tried to crawl into his truck and Complainant shut the door on him. Mr. Brainerd then pulled a gun and put it in his face, telling him that they were taking the truck and that he didn't work for them anymore. Complainant told them they weren't taking the truck and that he still had all of his stuff in it, including his binders and chains. (*Id.* at 158-60.)

Complainant testified that he didn't remember all of the details as to what happened next, but that eventually the Sheriff came after Ms. Shepherd called him and that the Sheriff disarmed Mr. Brainerd. The Sheriff told him that he wouldn't make him surrender the truck because the Brainerds had no paperwork on it. Complainant testified that he was compliant with his lease at the time. (*Id.* at 160-61.) He clarified later that there was no physical disarming or altercation between Mr. Brainerd and the Sheriff. (*Id.* at 230.) He recalled that Ms. Brainerd threatened to "trash" his DAC and end his career and then that Mr. Brainerd told him that if he gave the truck back, nothing bad would go on his DAC. He told Mr. Brainerd that if he would sign a paper to that effect in front of the Sheriff, then he would let them take the truck. They agreed, and Mr. Brainerd dictated the note. Then he, Mr. Brainerd, and the Sheriff signed it. Complainant testified that nothing in the note was a lie. (*Id.* at 161-62.) He admitted that he did not return the equipment to Respondents' terminal, as required in the lease, but testified that he had no opportunity to do so and that Mr. Brainerd had dictated that part of the note. (*Id.* at 232-33, 247.)

2. Lisa Shepherd's Version

Lisa Shepherd testified that on the morning of the 27th she overhead a phone conversation between Complainant and Respondents. They were arguing, which she stated was not unusual. She recalled that the conversation was in reference to a load that morning and that Complainant said he couldn't go out because he wasn't finished repairing the hub. (*Id.* at 201-02.) She claimed that this was not a dispatch because Complainant always wrote down the details on a dispatch and did not do so then. (*Id.* at 208.) Later someone beat on her door. When she answered she saw the Brainerds and "a big guy in coveralls." She was scared. Complainant went to talk to them while she called the police. (*Id.* at 202-03.) She saw William Brainerd crawl up into the truck and Complainant pull him down, after which Mr. Brainerd reached under his coat to get a pistol. She stayed inside with her children while a deputy and then the Sheriff defused the situation. Mr. Brainerd took the truck away and hit her mailbox on the way off the property. (*Id.* at 203-04.)

3. Respondent William Brainerd's Version

Respondent William Brainerd testified that they had unsuccessfully dispatched Complainant on December 26th and 27th and then went to find him because he wasn't returning phone calls. (HT, pp. 84-85.) He never did dispatching, but knew that Complainant had refused dispatches. (*Id.* at 97, 111-12.) They didn't know where he lived so they went to the post office to find an address. While there they met a gentleman who knew where the truck was, and they paid him $20 to show them. The gentleman stayed in the car while they spoke with Complainant. (HT, pp. 58-59.) His wife wrote their agreement down and Complainant dictated the language. He did not agree with anything that was written. Beyond the signatures it was all a lie. But he signed it anyway and then took the truck and trailer with him. (HT, pp. 56-58.) He did some quick repairs to make the truck operable and then drove the truck away himself. He believed, at the time, that the necessary repairs to the brakes and tires had been done, but did not inspect the truck before driving away. He admitted that this was a violation of regulations and stated that he "would take any penalties associated with that." (*Id.* at 82, 86-87.)

Later he explained that he signed the document and left without doing the full inspection because he was afraid for his safety and just wanted to do what was necessary to get the truck and get off of Complainant's property. He immediately went to a fuel station and inspected the truck, at which time he discovered that the repairs that they had given Complainant the tires and EFS check for had not been completed. (HT, pp. 96-97.)

4. Respondent Elizabeth Brainerd's Version

Respondent Elizabeth Brainerd testified that they found Complainant with the help of an older gentleman they met at the post office who knew where the truck was located. He agreed to go with them, but said he wouldn't leave the vehicle because he didn't want any trouble. (*Id.* at 295.) There was no one in the yard and William Brainerd climbed onto the truck and honked the horn. Lisa Shepherd came out and then went to get Complainant. When Complainant was asked what was going on he just said that he quit. They told Complainant that he should have called them to tell them he was tired of the work and wanted to quit and informed him that they would be taking the truck since quitting under dispatch was a violation of his lease. (*Id.* at 295-96.)

According to Ms. Brainerd, Complainant then threatened to call the police and William Brainerd agreed to call them. When the deputy arrived, Mr. Brainerd informed him that he carried a concealed weapon. Mr. Brainerd put it in the vehicle at the request of the deputy. Eventually the deputy called the Sheriff and the Sheriff was able to resolve the situation. (*Id.* 296-97.) The result was the written agreement, though in fact Complainant had not returned the equipment to the yard and it was not in good condition. (*Id.* at 297-98.) The note was dictated by Complainant and was signed under duress. (*Id.* at 330.) Complainant also removed their tarps, chains, and binders from the truck before they took possession. And though Complainant had gotten a $500 advance check for repairs, none had been done. (*Id.* at 298.)

F. The DAC Report

On December 27, 2010, HireRight received a report about Complainant from Jynx Express. The report contained eight items that reflect poorly on Complainant: that he left due to repossession/default and that his work record included equipment loss, late pick up/delivery, quit under dispatch, company policy violation, unsatisfactory safety record, unauthorized equipment use, and unauthorized use of company funds. (CX 3, p. 19.)

Respondent William Brainerd testified that he did not make the report and that he had no idea who entered the information, though he allowed that it must have been someone at the company. (HT, p. 52.) On the second day of the hearing Respondent Elizabeth Brainerd admitted that she made the report on the 27th, though she insisted that she did so without the knowledge or permission of her husband. (*Id.* at 262-63). She claimed that she always submits these reports, and that the information she puts in them is always true. (*Id.* at 271-72.) She submitted this report in her capacity as manager and testified that it was all true. (*Id.* at 299.) Complainant disputes the truth of all eight negative items in the report.

1. Reason for Leaving: Repossession/Lease Default

The DAC report indicates that Complainant had left after repossession and lease default. (*Id.*) The December 27, 2010, agreement written by Elizabeth Brainerd and signed by William Brainerd and Complainant is titled "Mutual Cancellation of Lease." (CX 4, p. 38.) Complainant testified that he was compliant with his lease when the truck was taken. (HT, pp. 160-61.) Elizabeth Brainerd testified that quitting under dispatch was a breach of the lease, and that constituted a default, after which they repossessed the truck. (*Id*. at 296.) Both Mr. and Ms. Brainerd testified that everything stated in the agreement of December 27, 2010 is a lie. (*Id.* at 57, 297-98.)

2. Work Record: Equipment Loss

Elizabeth Brainerd testified that she reported equipment loss because Complainant took chains, binders, and tarps from the truck and that by the terms of the agreement these remain their property until the driver completes the lease. (HT, p. 299.) Later she admitted that it was possible that Complainant had bought the chains and binders himself, but she knew that the tarps were theirs because they had the logo of an out of business company from which they bought all of their tarps. (*Id.* at 309.) Complainant testified there was no equipment loss and that the things he took from the truck belonged to him. (*Id.* at 169, 349.)

3. Work Record: Late Pick Up/Delivery

Ms. Brainerd stated that she always reports when drivers have late pick-ups or deliveries, and that Complainant wasn't the only one to have such problems. She remembered a few times when Complainant had been late, though she didn't check to verify this, instead reporting just based on her general knowledge. (*Id.* at 299, 310.) Complainant disagreed, testifying that he never had any late pickups or deliveries. (*Id.* at 169.)

4. Work Record: Quit Under Dispatch

This notation means that the driver was given a load to pick up, but quit before doing so. Mr. Brainerd agreed that this was negative information. (HT, p. 75.) Respondents argue that this is true because Complainant was dispatched on the 27th, refused to pick up the load or communicate with them, and then quit through the broker and in the ensuing confrontation at Complainant's residence. (*Id.* at 300.) Complainant testified that he did not quit under dispatch. (*Id.* at 169.) He claims he was fired because he refused to drive the truck when it was unsafe.

5. Work Record: Company Policy Violation

Respondent Elizabeth Brainerd stated that Complainant violated company policy related to inspecting and maintaining his brakes, as set forth in the Safety Policy he signed. (HT, p. 277-79). When asked specifically about her DAC entry, she stated that she was also referring to his failure to keep accurate records, turning in falsified logs, and not doing his pre-trip inspections or lying about them. (*Id.* at 300-01.) But she admitted that she didn't know he had falsified his logs until after she submitted the report. (*Id.* at 312.) She claimed that she always reported company policy violations on DAC. (*Id.* at 343-44.) Complainant stated that he had never, to his knowledge, violated any company policies and that he had never been told by anyone that he had done so. (*Id.* at 170.)

6. Work Record: Unsatisfactory Safety Record

Elizabeth Brainerd included this notation because Complainant had received three safety violations in a little over a month. (*Id.* at 301.) Complainant denied having an unsatisfactory safety record. (*Id.* at 170.)

7. Work Record: Unauthorized Equipment Use

Elizabeth Brainerd testified that Complainant had engaged in unauthorized equipment use for the same reason he was responsible for loss of equipment, because he had removed their equipment from the truck before Respondents were allowed to take possession of it. (*Id.* at 301.) Complainant claimed that he had never engaged in any equipment use that was unauthorized. (*Id.* at 170.)

8. Work Record: Unauthorized Use of Company Funds

This was reported because Complainant had received a $500 advance for use on repairs and maintenance but hadn't completed any repairs. (*Id.* at 302.) Elizabeth Brainerd testified that she had no receipts for repairs and the vehicle did not look like it had been repaired. (*Id.* at 298.)

She was humiliated by this, she related, because they had given him another chance when he begged for his job back, but then he abused the situation by getting them to advance him money for repairs that he didn't get done. (*Id.* at 300.) She admitted later that he could have changed the oil on his own. (*Id.* at 309.) Complainant denied any unauthorized use of company funds. (*Id.* at 170.) He testified that he completed maintenance on the truck. (*Id.* at 241-42.) And he said that he left the receipts on the dash when Respondents took the truck. (*Id.* at 350.)

G. Post-Separation to Complainant's Discovery of his DAC Report

Separation did not bring an end to the disputes between Complainant and Respondents. On January 6, 2011, Complainant sent an email to Jynx Express' account claiming he was owed $3,300 for his deposit, a credit on tires, and services rendered. He notified them that he intended to file a Mechanic's and Materialman's Lien unless they settled this amount promptly. (RX A, p. 3.) Elizabeth Brainerd responded the same day through that account, agreeing that the lease was mutually cancelled on December 27th, but disputing any amount owed and instead informing Complainant that he had a negative balance of $887.22. She also informed him that per the lease agreement he was not entitled to a return of the deposit, that they would be seeking recovery fees, would be charging him for a tarp and other items he had wrongfully appropriated, and would be charging him for required repairs to the truck due to his lack of maintenance. (*Id.* at 1-2.) He replied the next day to the Jynx Express e-mail account and William Brainerd's e-mail account demanding all contracts related to his truck, all billing receipts on these contracts, all of his payroll records, all of the records associated with his EFS card, all of the checks charged to his EFS account, all cancelled payroll checks, and all repair receipts. (*Id.* at 1.) He didn't address the specific allegations made by Elizabeth Brainerd and didn't bring up safety disputes or concerns. (*Id.*; HT, pp. 305-06.)

Respondents' position is clearest in the last settlement statement for Complainant. After removing the regular deductions for insurance and the truck lease payment, Respondents deduct $503.70 for EFS transchecks, $66.20 for the truck wash, and $205.47 for fuel and advances. These correspond exactly to amounts Complainant drew in the prior week, plus service fees from EFS. Next they add a $1,200.00 charge for tires, a $2,000.00 penalty for lease cancellation, $920.76 for "Detroit Engine" and $2,000.00 for "KenWorth." (RX N, p. 175.) On top of this, Complainant would be forfeiting his $2,000.00 security deposit. All told, Respondents calculated that Complainant had a negative balance of $7,471.13. *Id.* The record contains no more information on the financial dispute between Complainant and Respondents.

On January 24, 2011, Lisa Shepherd filed an online complaint with DOT against Respondent William Brainerd, alleging that he did not "perform proper inspection, repair and maintenance." The substance of the complaint focused on Mr. Brainerd's inspection practices, averring that he was licensed to inspect equipment but certified equipment without doing proper inspections because he refused to get dirty. The Illinois and Arkansas inspection reports were attached, along with the repair bill from Iowa. The particular issue referenced in the complaint is the brakes, which it stated had not been repaired when the equipment was taken back by Respondents. The included comment relates that "these are the only verifiable incidents we have in our records that we can locate at this time. We were, however, witness and privy to many more incidents. Mr. Brainerd regularly disreguards [sic] the law and requirements of the DOT as it suites [sic] him. Much of his equipment runs with dangerous faults. The evidence is also in

his safety score."[19] (CX 8, p. 52.) There is no record of any further action related to the complaint.

At the hearing Complainant testified that after he left Jynx Express he worked "odd and end jobs, whatever I could get a hold of" and that he worked locally doing some short haul and oil field driving. (HT, p. 162.) Complainant began working for Hobby Lobby in February 2011. He left in May 2011, and on a latter application only gave as a reason for leaving "will explain." (RX Z, p. 292.) On May 9, 2011, Miller Truck Lines requested Complainant's "Transportation Employment History" from HireRight. (RX AA, p. 355.) On May 10, 2011, Celadon Trucking Services requested the same information. (*Id.* at 354.) He started working for Celadon at some point in May, but left in July 2011 because of "no money." (RX Z, p. 292.) He applied to the Taylor Companies on July 7, 2011, though he was actually employed by a contractor, Rick Lawrence. (RX Z, pp. 287, 289.) On his application to Taylor he stated he left Jynx because of "corrupt business practices, charges pending." (*Id.* at 293.) As part of the hiring process Taylor pulled his "DAC Employment History" from HireRight. (RX AA, p. 353.) He was hired, and began working for them on July 14, 2011, in a regional position through an independent contractor, driving a tanker truck with hazardous materials. (CX 3, p. 21.; RX Z, p. 286.)

Taylor and Complainant separated on October 3, 2011. Taylor's report to HireRight indicated that he was discharged and listed his work record as "other." (CX 3, p. 21.) Internal records indicated that he was dismissed because of a bad attitude and being hard on the equipment. They also indicate that there had been customer complaints about Complainant that contributed to his discharge. (RX Z, 286.) Bruce Johnson, a safety manager for Gibson energy, testified that Taylor pulled Complainant's DAC and it was sufficient to qualify him to drive under their authority, but that his actual employer was Rick Lawrence, who made the hiring and firing decisions. (*Id.* at pp. 180, 182-89.) He verified the documentation of Complainant's reason for dismissal, but admitted that he had no personal knowledge of this and that the decision to dismiss Complainant was made by his direct employer. (*Id.*)

Until June of 2012 Complainant worked locally, but then decided to seek work over the road because he needed more money. (HT, pp. 162-63.) Lisa Shepherd explained that before then he wanted to stay local to build up his home and property. (*Id.* at 213.) In June 2012 he began pursuing over the road positions again and responded to an advertisement for Riverside Transport by recruiter Travis Overton. He testified that the job paid $.42/mile with a guarantee of 2,500 miles a week, he applied online, and that Mr. Overton told him that everything looked good but that he needed to pull his DAC report. (*Id.* at 163-64.) Mr. Overton and Riverside Transport requested Complainant's DAC on June 22, 2012. (CX 3, p. 4; RX AA, p. 357.) It was received on the 25th. (CX 3, p. 4.)

On the morning of June 27th Mr. Overton emailed Complainant stating only that "[a]fter further consideration I regret to inform you that we are not going to be able to offer you employment at this time. We appreciate your time and wish you the best." (CX 1, p. 2.) Complainant testified that Mr. Overton verbally told him that it was the information from Jynx in

[19] It is unclear what this refers to. The only safety record in evidence for Respondents reports that between 7/16/11 and 7/16/13 there were 5 driver inspections with 1 out-of-service violation and 3 vehicle inspections with no out-of-service violations. (CX 7, pp. 47-48.)

his DAC report that prevented his hire. (HT, p. 167.) An hour and a half after Mr. Overton's rejection email, Complainant requested that they send him a copy of his DAC report. Mr. Overton sent it to him that afternoon. (CX 1, p. 1.) Complainant then gained actual knowledge of what Respondents had reported. (HT, pp. 168-69.) He hadn't ordered his DAC report before this because every time he looked into it the charge was $39.95 and he had no reason to think there was anything bad in it. Before June 2012 he didn't have trouble getting a job because everything he was doing was local, regional, or oilfield. (*Id.* at 169; *see also id.* at 235-36.)

H. The Road to the Current Dispute

The next day, June 28, 2012, Complainant emailed Mr. Overton again, referring to Jynx as his "nightmare job that comes back to bite me" and asserting that the contractor of Taylor he worked for had been ripping drivers off and that the contractor's lease had been terminated because of the way he was treating his drivers. (CX 1, p. 1.) He testified that he included comments about Taylor in the email only because he had mentioned it in an earlier e-mail to Mr. Overton. Complainant maintained that it was only the information from Jynx that prevented him from getting the position. (HT, pp.233-34.) In his reply email, Mr. Overton only tersely suggested contacting DAC services to dispute the report. (CX 1, p. 1)

Complainant immediately began the process of disputing his DAC report. That afternoon he sent Brittany Leigh, a Consumer Care Representative at HireRight, a copy of the lease cancellation that he and Mr. Brainerd had signed on December 27, 2010, and received a confirmation that it had been attached to the dispute he had initiated. (CX 2, p.3; *see also* HT, pp. 170-71.) Also on the 28th, Complainant submitted a long complaint against Respondents to the DOT.[20] He alleged that Respondents kept his truck and trailer in poor repair despite his wishes. He also argued that repairs were delayed until he could be routed through the shop, but then they wouldn't route him there, resulting in no repairs being made. It echoes Lisa Shepherd's complaints about Mr. Brainerd doing his own inspections poorly. Complainant continued to detail what he thought were financial irregularities in his pay. He alleged that he was forced to violate hours' regulations and that Respondents hid this by using EFS checks to pay for gas instead of the cards.[21] Finally, he claimed that Mr. Brainerd put the truck out-of-service for no reason while ignoring problems with the trailer, then reversed himself and told him that if he didn't want to drive the truck and trailer he would find someone else. (CX 8, p. 51.)

On June 29, 2012, HireRight sent a letter to Jynx Express notifying it that Complainant was disputing his DAC report and asking for documentation or details on the items in dispute. The following are listed as in dispute: 1) Repossession/Lease Default, 2) Equipment Loss, 3) Late Pick Up/Delivery, 4) Company Policy Violation, 5) Unsatisfactory Safety Record, 6) Unauthorized Equipment Use, and 7) Unauthorized use of Company Funds. The back of letter indicated that if the information could not be timely verified, it would be removed. (RX BB, p.

[20] The exhibit itself is a print out of a web confirmation and does not identify the exact date or who it was submitted to. Complainant's pre-hearing statement identifies the document as submitted to the Department of Transportation on June 28, 2012.

[21] Per the complaint, this was done to avoid leaving a paper trail. As discussed above, there are several instances in which Complainant was issued an EFS check for fuel. But such checks do leave a paper trail, and so the alleged scheme doesn't quite make sense, or at least hasn't been fully explained. In any event, whether or not Respondents engaged in this practice is not an issue in this case.

1; *see also* HT, pp. 272-73.) Not listed is the report that Complainant quit under dispatch, though Complainant maintained that he disputed this as well. (HT, p. 347.) Elizabeth Brainerd never responded to the letter because she thought everything she had reported was true and didn't read the second page. This was the first time a driver had disputed anything she had reported in a DAC. (HT, pp. 273, 326-28; RX BB, p. 2)

On July 27, 2012, Complainant received a letter from HireRight stating that neither Jynx Express nor Taylor Gas Liquids LLC had responded to his disputes and so the information had been suppressed. It added that if the employers did respond and there were changes in the report, HireRight would contact him. (CX 3, p. 23.) Mr. Johnson explained that Taylor did not rebut Complainant's dispute because they did not have enough time. (HT, p. 190.) In its letter to Complainant, HireRight attached his current reports for the two employers. The Jynx Express report included a note that "[w]ork record, eligibility for re-hire, reason for leaving, accident information, and drug/alcohol information cannot be reported on the above driver because the providing company is no longer an active participant in the index." (CX 3, p. 24.) Mr. Brainerd testified that they stopped participating in DAC about six months after Complainant left. (HT, p. 98.) Ms. Brainerd, who handled their interactions with HireRight, stated that they stopped participating in July 2012, a year and a half after Complainant was separated. (*Id.* at 274.)

Through the rest of 2012 and into 2013 Complainant continued to look for employment as an over the road driver. (*See* CX 6.)[22] In 2012 he also worked for Casey's Oil Express LLC, where he earned $31,824.08 while classified as a non-employee. (CX 5, p. 39.) He testified that he earned about $10,000-$15,000 of that after he was denied the job with Riverside. (HT, p. 172.) He earned about $2,500 from Casey's Oil Express in 2013. (*Id.* at 236.) Ms. Shepherd stated that he and "Casey" had suspended his work there because he didn't want to work on a particular contract anymore, but with the understanding that he might return if the company had a different contract. (*Id.* at 209-10.) At the time of the hearing Complainant was a company driver and had earned $3,500 in the previous month and a half. He testified that he had suffered financially and emotionally from his lost opportunities, including harm caused by his inability to support Ms. Shepherd's children. (*Id.* at 174-75.) Ms. Shepherd testified that she had noticed emotional changes and stated that he was "still struggling to get his life back." (*Id.* at 204-05.)

Complainant filed his complaint in this action with OSHA on November 15, 2012. (CX 12, pp. 56-65; RX U, pp. 222-30.) Respondents were notified shortly thereafter. They had not been participating in DAC for a time because they were in the construction business now and not trucking. But they re-enrolled when they received notice of Complainant's allegations and decided to fight him on their own. (HT, p. 329.) William Brainerd pulled Complainant's DAC on December 7, 2012. (*Id.* at 71; CX 3, pp. 25-37; RX T, pp. 210-21.) At the hearing he claimed to do so under the permission granted by Complainant in his September 2010 employment application. Despite the fact that the application authorized inquiries "as may be necessary in arriving at an employment decision" and no employment decision was pending regarding Complainant in December 2012, Mr. Brainerd stated that he interpreted the application to give him the right to pull DAC on Complainant at any time he wished. (HT, pp. 71-73.)

[22] CX 6 contains some records of job inquiries or applications, though it only provides email headings, in several instances just showing that Ms. Shepherd had forwarded a Craigslist advertisement to Complainant. Complainant testified that these were all jobs that he had applied to but that had turned him down. (HT, pp. 250-53.) Ms. Shepherd also testified that Complainant applied to numerous jobs in this period. (HT, p. 204.)

Respondent's entry for Complainant on this DAC contains just the general information about the type of job, an indication that he was not eligible for rehire, and a work record notation of "Quit Under Dispatch." (CX 3, p. 34; RX T, p. 219.) Elizabeth Brainerd testified that since the initial report on December 27, 2010, Respondents made no changes to Complainant's DAC report. (HT, pp. 263, 272.)

On March 15, 2013, OSHA issued findings that there was no reasonable cause to find a violation, which the Complainant objected to, leading to the current proceedings before me. (CX 13, pp. 68-74; RX W, pp. 277-81.)

V. CREDIBILITY DETERMINATIONS

Though it is not required, the ARB has stated its preference that Administrative Law Judges ("ALJ") "delineate the specific credibility determinations for each witness." *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008, slip op. at 10 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

A. The Credibility of Bruce Johnson

Bruce Johnson testified via telephone on the first day of the hearing. He is a safety manager for Gibson Energy, and in that capacity keeps and maintains records on truck drivers who operate under the DOT authority of Taylor Propane and Gas. (HT, p. 180.) Complainant drove, for a time, under Taylor's DOT authority and Mr. Johnson testified as to the circumstances of his departure, the use of DAC reports in the hiring process, and the reason why Taylor did not respond to Complainant's dispute of its DAC entry. (*Id.* at 180-87.)

Though I found Mr. Johnson's testimony credible within the scope of his knowledge, I attach little probative value to his testimony because of the limits of that scope. First, Mr. Johnson never interacted with Complainant and all of his knowledge concerning the circumstances of Complainant's termination from Taylor came from company records. (*Id.* at 189.) On this point, the records can speak for themselves. In addition, Complainant's employer was Rick Lawrence, who held a contract with Taylor. Though the drivers in Mr. Lawrence's employ drove under Taylor's DOT authority, Mr. Lawrence conducted his own hiring and managed his own personnel. (*Id.* at 188-89.) As became clear at the end of Mr. Johnson's testimony, Taylor had only minimum qualification standards for drivers, not hiring standards. (*Id.* at 194.) This is an important qualification on Mr. Johnson's testimony concerning the import of the negative information on Complainant's DAC for prospective employers.

B. The Credibility of Lisa Shepherd

Complainant testified that Ms. Shepherd is his next door neighbor and bookkeeper and that he sometimes parked the truck at her house. (HT, pp. 159-60.) He clarified that they are not romantically involved and are just good friends, but that he tries to help support her children.

(*Id.* at 174-75.) Ms. Shepherd testified that they were co-drivers and friends for years. Now she doesn't drive but stays at home with her children and takes care of Complainant's books and errands. Complainant helps her out financially and takes a great interest in her children. (*Id.* at 197-200.) He provides parental guidance and instruction to her children at home. She testified that he doesn't buy food for them, except for occasional barbeques, but that he does support them financially when he can. (*Id.*)

I find, however, that neither Complainant nor Ms. Shepherd was fully forthright about the nature of their relationship. In his application to Taylor, Complainant listed Ms. Shepherd as his personal reference and emergency contact person. In the statement of their relationship he wrote "Girlfriend." (RX Z, 291.) When he enrolled in an insurance program for occupational accidents while with Taylor he designated Ms. Shepherd as the beneficiary, again stating that she was his girlfriend. (*Id.* at 331.) Moreover, on cross-examination Ms. Shepherd testified that she met Complainant after he became a truck driver and that she stopped driving trucks in 2010 because "Mr. Lamley was offering to assist me to come home to my children and live on our property together." (HT, pp. 207, 210.)

The nature of relationships certainly can change, but the evidence shows that Ms. Shepherd is not just a neighbor who became a good friend and bookkeeper. Rather, Complainant moved from Missouri to Oklahoma so that he could live on the same property (either with or next door to her) and help her with her children, financially and parentally.

I find that Ms. Shepherd is of questionable credibility. Evidence regarding the nature of their relationship shows that she is far from an independent witness. Her testimony showed a deep devotion to Complainant in blaming employers for *all* of his career moves, extending well beyond anything at issue in this case.[23] Moreover, Ms. Shepherd and Complainant attempted to conceal and downplay the nature of their relationship, apparently in an effort to bolster her credibility. Ms. Shepherd's part in this raises a general question about her credibility.

C. The Complainant's Credibility

In this case, I find the Complainant to be of highly questionable credibility. When his testimony is confirmed by independent evidence I find it valuable. Otherwise I treat it with suspicion. This conclusion flows from contradictions in his testimony, independent disconfirmation of some of his claims, the implausibility of some of his accounts, and a suspicious failure to provide objective corroborating evidence where one would expect such evidence would be available.

The credence of Complainant's testimony on the dispositive issues of this case will be discussed more fully below. Here I consider only the more general reasons to question his credibility. First, as discussed above, Complainant attempted to disguise and minimize the nature of his relationship to Ms. Shepherd, seemingly in an attempt to bolster the trustworthiness

[23] Asked by Respondents' Counsel why Complainant changed jobs so much she replied: "Some of them were thieves. Some of them wouldn't load us out. Land Span left us sitting in the shop all the time. CRST kept cutting our contracts and burning our connections in the industry with our shippers." She continued, "Stevens Transport should have a lawsuit on them." (HT, pp. 211-12.) The list of grievances on Complainant's behalf ended only when Complainant's counsel, not the questioner, intervened and instructed her to just answer the question.

of her testimony by making her appear to be an independent witness. His testimony, in particular, that they were not romantically involved was either an outright lie or a deliberate deception as to their history. (*Id.* at 174-75.)

Second, his testimony was highly implausible at several points. He testified that he twice was waived through weigh stations but then pulled over and asked for a full Level 1 inspection. (*Id.* at 129, 139.) He testified that he had been seeking repairs for the trailer tires and that he told the inspector that he was worried about the trailer, not the tractor. (*Id.* at 126-28, 130.) Yet the citation he was given has two violations for the tractor and two for the trailer. And these trailer violations were interrelated. (CX 9.) Crucially, no tire problems with the trailer appear on the report. The Complainant testified that the officer told him verbally that they needed to be fixed. (HT, p. 131.) It is certainly plausible that an inspecting officer might give a verbal warning in lieu of a written report or citation. But here this makes no sense as per Complainant's account he was *seeking* a written report on the trailer tires. His testimony here just doesn't add up.

Complainant testified that Respondents would not repair items while he was on the road but would only do so in Kiefer and yet wouldn't route him through Kiefer. Respondents denied this. The evidence, here, tends to show that Complainant was lying or mistaken, undermining his credibility. His settlement statement for the week ending October 8, 2010, shows charges for $489.17 in maintenance and a $200 credit for a tire bill. (RX N, 163.) On the statement for October 29th another $255.91 is billed. (*Id.* at 166.) Respondents advanced him the money for the repairs in Iowa. (*Id.* at 171.) And by Respondents' account as well as Complainant's last account, they readily advanced him $500 during his last week of work to perform maintenance. (HT, pp. 111-12, 290, 348-50.)

During the second Level 1 inspection tire violations on the trailer were reported. (CX 11.) But contrary to Complainant's assertions about their reluctance to complete repairs, Ms. Brainerd testified that they immediately gave him two tires for the trailer so that the problem could be fixed. (HT, p. 290.) Complainant denied this. (*Id.* p. 242.) There is evidence that immediately after the separation Respondents were claiming $1200 for tires they had given Complainant. (RX N, p. 175.) This shows two things: 1) there is contemporaneous evidence that Complainant's testimony about the tires is incorrect and 2) there is evidence that when faced with a documented safety violation on the trailer, Respondents responded quickly, contrary to Complainant's account. Both points weigh against Complainant's credibility.

The EFS statements in RX M provide evidence about the sorts of repairs that other drivers were getting in November and December of 2010. On November 7th a $500 transcheck was authorized for driver Harris, who the day before, at least, had been in Oklahoma City. (RX M, pp. 154-55.) On November 13th a $350 transcheck notated as "PM" was authorized for Harris, who was in Barstow, California based on the fuel card records. (*Id.* at 150-51.) Driver Vincent received authorization for a $450 transcheck the same day. (*Id.* at 150.) Vincent was authorized for a $618.57 transcheck on November 14th annotated with "starter" when he was in LaSalle, Illinois. (*Id.* at 149.) A $150 transcheck was authorized for Harris on November 19th. (*Id.* at 146.) A $500 transcheck was authorized for him the next day. (*Id.* at 144.) Vincent was authorized for a $200 transcheck on the 20th as well and, the day before at least, had been in Joplin, Missouri. (*Id.* at 145-46.) On November 29th Harris was authorized for a $500 transcheck. He was in Mitchell, South Dakota the next day. (*Id.* at 139-40.) And on December

26, 2010, the same day Complainant was authorized to draw a $500 transcheck for "PM/Repairs," driver Harris was authorized for $265.60 for preventative maintenance as well. (*Id.* at 123.)

This evidence is of limited probative value. Many of the transactions using transchecks are not annotated and EX M doesn't include the transaction statements for every day—only the statements for days on which Complainant has some transaction (usually fuel/advances). And there is no way to discern the maintenance needs of the drivers in this period. That being said, the evidence is more consistent with Respondents' testimony about their repair practices than Complainant's regarding repairs. Other drivers were authorized to draw money, seemingly for repairs, and often while on the road. While not enough to show a strict policy followed to the letter, the evidence is indicative of a general practice at odds with Complainant's testimony, undermining his credibility.

Complainant's testimony about the circumstances of his probation is difficult to believe. He testified that he received the violation report in Arkansas on purpose and then, after delivering two loads, went to Respondents' terminal and refused to deliver more loads until the problem was fixed. (HT, pp 141-44.) He acknowledged signing a safety policy on the 22nd. And then he acknowledged signing a form that put him on probation on the 23rd. (*Id.* at 147-49.) This is odd. If he was the one concerned about safety, why was he signing a form that put him on probation for safety problems? It is possible, of course, that this was an ingenious attempt to punish Complainant for his safety concerns. But if so, why is there no indication that Complainant ever protested the action? Less than a week later he claimed that he was bravely refusing to pick up loads again due to these safety concerns, which would cost him his job. Yet here he meekly signed a form acknowledging his probation for safety problems. Complainant's account is logically consistent, but it is hard to make sense of in the arc of his story.

Another implausible event in Complainant's account concerns the events of December 27th. He claimed that Respondents showed up on his property with a third, aggressive individual and that Mr. Brainerd pulled a gun on him and threatened him. (*Id.* at 158-60.) The Sheriff was called. Yet Mr. Brainerd was not arrested and not charged with anything. The Sheriff didn't even make him leave the property. Instead he helped to negotiate an arrangement wherein Mr. Brainerd left with the truck—even though he had no papers with him that showed his right to take it. (*Id.* at 160-61.) If Complainant is telling the truth about Mr. Brainerd's behavior, the Sheriff is behaving in an exceedingly odd fashion. I find it more likely that Complainant is considerably exaggerating these events.

Another concern for Complainant's credibility is his failure to submit corroborating evidence when one would expect him to do so. He claims to have applied to many jobs after he discovered his DAC report. But instead of submitting the applications, confirmation of applications, or the rejection letters, his evidence only contains the headings of emails such that it is impossible to see what the emails actually said. (CX 6.) This is strange—if he is in possession of all of the email headings then presumably he has the body of the emails as well, which would actually provide the necessary evidence. Complainant also testified that the job with Riverside guaranteed 2500 miles a week at 42 cents a mile. (HT, pp. 163-64.) But he did not provide any evidence to confirm this, for instance, a job advertisement. And he testified that he had essentially secured the job but was told that he couldn't be hired because of his DAC and

specifically because of the information on the DAC from Jynx and not any of the other negative information in the file. (*Id.* at 167.) Mr. Overton's emails corroborate none of this. (CX 1.) Instead Complainant only presents his testimony.

Furthermore, Complainant's testimony was inconsistent at several important points. He originally stated that when he had his truck repaired at TravelCenters of America in Council Bluffs, Iowa it was William Brainerd who prevented the repair of the brake adjustments on the trailer and that a note was made to that effect on the receipt. (HT, p. 135.) The note reads, "Company policy is we do not adjust automatic slack adjusters unless we are servicing brakes." (CX 10, p. 54; RX J, p. 46.) Grammatically this would refer to the policy of TravelCenters of America, not to that of Respondents, as Ms. Brainerd testified. (HT, pp. 323-24.) Despite his earlier testimony, on cross-examination he simply admitted that the note referred to TravelCenters of America policy, not something Mr. Brainerd had required. (*Id.* at 135-36.) This isn't a trivial inconsistency—under Complainant's first testimony the note would be written evidence of Respondent's refusal to repair a problem. But when pressed about the plausibility of his testimony, he just completely changed that testimony.

More inconsistency and uncertainty surrounds Complainant's activities between December 23rd and 26th. Complainant's exact story has narrowed from the assertion in his complaint that he refused to drive after December 21st. (RX U, pp. 11, 20.) Now he claims that he only refused to haul loads in his trailer. (HT, pp. 226-27.) Asked why EFS card statements show him in Oklahoma City on both the 22nd and 23rd, however, he stated that he ran short loads. (HT, p. 154; RX M, pp. 119-21.) Ms. Brainerd testified that it was not for Respondents. (HT, p. 333.) This is mysterious. Who was he running loads for? Was he using Respondents' trailer? Was Complainant just confused at the hearing? If he was using the supposedly unsafe trailer on these days, his case is somewhat undermined. His testimony on the point was brief, but it raises troubling questions about his activities during the last week of his employment as well as a red flag about his credibility.

And there is more inconsistency concerning December 26th. EFS shows that he purchased gas in Okemah, Oklahoma. (RX M, p. 123.) Complainant testified that he did not drive his truck on that date and could not explain the fuel charge. (HT, p. 229.) Later in his testimony, however, he changed his story, now asserting in the light of the inconsistency that he had gone to get parts for the trailer on the 26th. (*Id.* at 241.) The hearing took place over two and a half years after the events in question and some dulling of memory is to be expected. But these are important points, not trivial mistakes. They go to the veracity of his claim that he was refusing to haul loads for safety reasons. And they relate to his activities in the factually most important time of this case. At the worst, Complainant was untruthful in his testimony and narrowed his complaint and shifted his story to attempt to get around evidence of his deception. At the best, Complainant has a very poor memory of the events during the critical week. In either case, there is a problem for his credibility.

In addition, Complainant testified that he didn't work on the brakes on the trailer because he is not licensed as a brake inspector and so is not authorized to do so. (*Id.* at 157.) Yet, in Ms. Shepherd's January 24, 2011, online complaint to the DOT, one specific issue that is raised is that Mr. Brainerd only thought that the trailer brakes needed readjusting and that Complainant

was forced to readjust the brakes himself. (CX 8, p. 52.) Unless Ms. Shepherd was lying, and it is unclear why she would have, Complainant, contrary to his testimony, did work on the brakes.

Finally and most troublingly, Complainant gave two entirely different accounts of the $500 EFS check that he drew on December 26th. (RX M, p. 123.) The EFS statement is annotated to reflect that this was for preventative maintenance and repairs, and this is consistent with the testimony of both Respondents and the email exchanges between the Parties in early January 2011. (*Id.*; HT, pp. 111-12, 290; RX A, p. 2.) On the first day of the hearing Complainant testified that this was related to a dispute over pay and they reimbursed him for part of what he was owed. (HT, pp. 152, 155-56.) On the second day of the hearing, however, his testimony completely changed. Now he claimed that the money was for repairs to the truck, agreeing with Respondents' claim, but that he had actually completed those repairs, disagreeing with Respondents' claim. (HT, pp. 348-50.) This would seem to make his case better. It would keep the dispute focused on safety instead of money. And by asserting that he made repairs, he would still avoid the charge of misuse of company funds.

The problem, however, is that it is a massive alteration of his testimony. The purpose of the $500 advance is a very important issue in this case. It goes to the truth of the report on Complainant's DAC that he misused company funds, and it is important evidence concerning the safety concerns of both Complainant and Respondents. One of Complainant's stories has to be incorrect, and he showed no apparent difficulty remembering the purpose of the $500 in either telling. It is an important event, and it is unlikely he would just forget the matter. His two incompatible accounts, both given under oath, raise a large problem for his credibility generally.

For all of these reasons I find that Complainant's credibility is highly questionable in this case and that his testimony must be very critically examined when it is not supported by corroborating evidence.

D. The Credibility of Respondent William Brainerd

I also find that the credibility of Respondent William Brainerd is somewhat questionable. Though his testimony seemed forthright and was mostly coherent, several points raise problems for trusting it completely.

Mr. Brainerd testified that he did not place the negative information in Complainant's DAC report and that he did not know who did. He admitted that the company put it on there, but denied any knowledge of who at the company had done so. (HT, p. 52.) On the second day of the hearing, however, Ms. Brainerd, his wife, readily testified that she had placed the negative information on Complainant's DAC report. (*Id.* at 262-63.) I find Mr. Brainerd's testimony that he never knew this implausible. Jynx Express only had three employees (plus 5-6 drivers working as independent contractors) at the relevant time: Mr. and Mrs. Brainerd and Cassie Hill, who worked as a secretary. (*Id.* at 54.) It is unlikely that Mr. Brainerd had absolutely no idea who posted the report and highly implausible that as this case progressed he never learned that his wife posted the information. When notified of this proceeding Respondents took it quite seriously, deciding to fight the complaint on their own in front of OSHA, hiring counsel for the proceeding before me, and taking the step of re-enrolling in DAC just so they could get a copy of

Complainant's report. (HT, p. 329.) It stretches the imagination that Mr. Brainerd was ambivalent about who posted the information in question and never learned it was his wife.

Mr. Brainerd also appeared either deceptive or confused about the business structure he has been using and who/what held the operating rights. Complainant worked for Jynx Express, LLC. William Brainerd testified that he uses various trade names: "Jynx Express," "J.R. Roustabout," and "Jynx Leasing." (*Id.* at 45-47.) There is nothing wrong with the use of trade names or various business entities. The problem, however, is that Mr. Brainerd seemed confused or deceptive at times as to which ones played which roles and how they related to each other. For example, he stated that "J.R. Roustabout is a different company, but under the corporate shield of Jynx Express." (*Id.* at 46.) He didn't specify whether this was Jynx Express, LLC or William Brainerd d.b.a. Jynx Express. And in neither case is it clear what his statement means, since he testified just minutes later that J.R. Roustabout was a name that he, William Brainerd, used in doing business. (*Id.* at 47.) Later he suggested that he and some family members decided they didn't want to operate as a LLC and so dropped it (though the LLC still exists) from the name and began operating as Jynx Express. (*Id.* at 109-10.) But if this is correct, it is unclear how "Jynx Express" is just a trade name of William Brainerd alone.

Mr. Brainerd also seemed confused as to who/what held the DOT operating rights. Initially he admitted that he held them, and that Jynx Express LLC derived those rights from him. (*Id.* at 47.) Later, however, he averred that Jynx Express LLC had its own operating rights. (*Id.* at 90.) One or the other must be false. The evidence shows that Complainant was operating using the DOT operating rights of William Brainerd—his inspections on record refer to DOT # 1960199 and MC # 695222 which are held by William Brainerd and are now used by Jynx Express and J.R. Roustabout. (CX 7, p. 45; CX 9, p. 53; CX 11, p. 55.) But Mr. Brainerd was either confused or deceptive about this point.[24]

Mr. Brainerd also gave incorrect testimony about when they opted out of HireRight and the DAC reports. He claimed they stopped participating six months after Complainant left. (HT, p. 98.) But Mr. Overton was able to pull Jynx's information regarding Complainant in June of 2012, a year and a half after he stopped working for Respondents. (CX 3, p. 4.) The evidence shows that Ms. Brainerd handled most of the interactions with DAC, (HT, pp. 73, 261-62.), and this is not a crucial factual point, but the error is fairly large, and suggests that Mr. Brainerd's historical memory is not entirely trustworthy.

In addition, Mr. Brainerd's account of the events of December 27, 2010, is not entirely plausible. In his telling they were concerned about what was going on with Complainant and so went to find him and learn more. They had no intention of taking possession of the truck. (*Id.* at 84-85.) Yet all three of the others present testified that Mr. Brainerd climbed up into the truck, either to retrieve items or to honk the horn to get Complainant's attention. (*Id.* at 158-59, 203-04, 295-96.) Lisa Sheppard testified that someone beat on her door as well. (*Id.* at 202.) Ms. Brainerd testified that Mr. Brainerd climbed into the truck to honk the horn in lieu of knocking on the door. (*Id.* at 295-96.) Whichever account one believes, this was not a friendly visit to check on Complainant. There is no version in which Mr. Brainerd calmly knocks on the door.

[24] Moreover, if Jynx Express LLC actually did/does have its own DOT operating rights, why wasn't Complainant operating under them? Who were his contracts with?

Mr. Brainerd may be truthful in stating that he didn't originally intend to take the truck. But if so, that intention changed quickly, and in any case his description of the event implausibly minimizes how confrontational and hostile it was.

The last question concerning Mr. Brainerd's credibility is his testimony related to the DAC report he pulled in December 2012. (*Id.* at 71; CX 3, pp. 25-37; RX T, pp. 210-21.) At the hearing he claimed to do so under the permission granted by Complainant in his September 2010 employment application. Despite the fact that the application authorized inquiries "as may be necessary in arriving at an employment decision" and no employment decision was pending regarding Complainant in December 2012, Mr. Brainerd stated that he interpreted the application to give him the right to pull DAC on Complainant at any time he wished. (HT, pp. 71-73.)

This is a patently unreasonable understanding of his authority. Mr. Brainerd did not testify that he had forgotten the language that limited his authorization to situations where the information was needed for an employment decision. Rather, he claimed that even though that was his authority and no employment decision was pending, he nonetheless had a perpetual authority to pull DAC reports on a person once he or she signed the form when applying for a job. No reasonable person could think this, and his testimony on the point displays post hoc special pleading to excuse a wrongful act, pulling the DAC report without proper authorization.

None of these issues is absolutely central to this case, but together they raise a credibility question regarding Mr. Brainerd. I attach some credence to his testimony, but to reach firm conclusions on its basis, additional support from other evidence is necessary.

E. Respondent Elizabeth Brainerd's Credibility

Respondent Elizabeth Brainerd testified on the second day of the hearing. Of the witnesses, she appeared to have the fullest and most coherent memory of the chain of events in this case. While I find her testimony to be generally credible, there are genuine questions about her credibility and hence I treat it with care, trusting it fully only when corroborating evidence can be found. Three particular credibility questions arise for Ms. Brainerd.

First, I find her testimony that she never told her husband about entering a DAC report about Complainant implausible for the same reasons stated above. It is unlikely that Ms. Brainerd hid the information from her husband up to the hearing but then had a change of heart and quickly volunteered it. Rather, this seems to be a changed strategy decided upon by Respondents between the hearing dates.

Second, Ms. Brainerd's testimony about the later dispute over the DAC report was implausible as well. She received a letter from HireRight on June 29, 2012, asking her to verify the report and send documentation or details. (RX BB, p. 1.) Asked at the hearing why she didn't respond to the letter she replied, "I didn't want to dispute it because everything I put on Mr. Lamley's DAC was correct." (HT, p. 273.) Pressed by Complainant's Counsel, she claimed that she didn't read the second page of the letter, which specified that if there was not verification the information would be deleted. She explained that she was unfamiliar with the process because no other drivers had disputed her entries about them. (*Id.* at 326-27; RX BB, p. 2.) Even crediting this testimony, her earlier claim is not believable. The first page of the letter

clearly specifies that the Complainant has disputed the items listed. It instructs the recipient to verify the information provided and then contact HireRight. It gives the recipient a definite response date. And it states, in bold, "HireRight requires documentation or details for each disputed item." (RX BB, p. 1.) No reasonable person could conclude from this that no response was needed or that if she thought everything she had submitted was true she shouldn't respond. The first page of the letter clearly stated the opposite.

Finally, Ms. Brainerd's behavior on December 27, 2010, was deceitful. The Parties agree, at the least, that Ms. Brainerd wrote out the text of an agreement that specified explicitly that negative information would not be placed on Complainant's DAC report, that Complainant and Mr. Brainerd signed the agreement, that the Sheriff witnessed and signed the agreement, and that the agreement resolved the immediate dispute, allowing Respondents to leave Complainant's property in possession of the truck. Nonetheless, that evening Ms. Brainerd reported negative information on Complainant's DAC report—exactly what they had just promised not to do.

Respondents have offered a number of excuses for her deceitful actions.[25] For one, they represent that since Mr. Brainerd signed the agreement, Ms. Brainerd was under no obligation. (RCB, p. 20.) This is silly. Ms. Brainerd acknowledged that she submitted information in her capacity as an employee of Jynx Express LLC. (HT, p. 299.) Mr. Brainerd signed the agreement in the same manner. There is some uncertainty as to the exact business structures that Respondents use in their various endeavors, but it is plain that Respondents cannot avoid agreements by simply proclaiming that when in breach, they can opt to put on a different hat, acting individually or as a particular business entity to suit their whims and interests.

Second, Respondents argue that they were not bound by the agreement because there were falsities in it. (RCB, pp. 9, 20). Exactly how much was false is disputed, but all agree, at least, that the truck was not returned to Respondents' yard even though the agreement represents otherwise. Respondents claim this means that Complainant did not uphold his part of the agreement, leaving Ms. Brainerd free to breach it. (*Id.*) Relatedly, Respondents allege that the agreement was not binding since it was signed under duress while Complainant held the truck hostage. (*Id.* at 20).

These claims are unconvincing. Respondents received a great benefit from signing the agreement—Complainant dropped his objection to their taking the truck off his property. There is no evidence that would indicate that they had any paperwork that entitled them to take the truck that day. Complainant was current on his lease payments (they were automatically deducted from his settlement). There is a dispute about whether Complainant had breached the lease, but in any case Respondents lacked the legal documentation that would have entitled them to the property. (*See* HT, pp. 160-61.) If they had this, the Sheriff would simply have let them take the truck.

When Mr. Brainerd signed the agreement he did so knowing that at least some of what it represented was false. He did so anyway. In context this is understandable—what Complainant

[25] In addition to those discussed, Respondents offer a passing illusion to the proposition that the FMCSRs and Fair Credit Reporting Act required them to submit the truthful information to the report. (RCB, p. 10.) No citations are provided. And in any case, the requirements would seem to be that they submit *truthful* information *if* they submit information—not that they have a legal obligation to submit information to HireRight.

was bargaining for was silence regarding his time with Respondents—for protection from future damages to his career and finances due to negative reports from Respondents. The agreement that falsely represented the exact circumstances of their separation was his assurance of this. And he wrongly assumed that if the Sheriff witnessed and signed it, Respondents would honor it.

The fact of the matter is that Respondents arrived at Complainant's place of residence unannounced and armed. Mr. Brainerd climbed, uninvited, onto Complainant's truck. Complainant may have breached his lease agreement, but Respondents had no right to resort to self-help to recover the property outside of the legal process. Respondents wanted to take the truck. Complainant would not let them, and absent paperwork the Sheriff would not force Complainant to surrender the property. That could have been the end of the matter.

Instead they reached a deal, mediated by the Sheriff, each side getting part of what they wanted in exchange for giving something up. Complainant got assurances about how his time with Respondents would be represented to future potential employers. He gave up physical possession of the truck, the only leverage he had against Respondents in seeking money he thought he was owed. Respondents gave up their right to attempt to ruin Complainant's future career, even if doing so only would have involved reporting the truth. But in exchange they got possession of the truck. There was no duress here. Complainant was not holding anything hostage—he had a right to retain possession of the truck until Respondents went through the proper legal channels, and I find it disturbing that Respondents would characterize his reluctance to surrender his leased property in these circumstances as hostage taking. (RCB, p. 20.)

This is not a contract action and I reach no conclusions as to whether there was a legally binding contract or whether it was breached. My purpose is narrower: the only question is whether or not Ms. Brainerd behaved deceitfully in this instance. I find that she did. Respondent's excuses for her behavior all come down to an assertion that Complainant should not have trusted what Respondents would agree to and have witnessed by a Sheriff—hardly a convincing excuse when evaluating Ms. Brainerd's credibility. Her behavior is relevant to the current matter only insofar as it reflects poorly on her credibility generally. And I find that her behavior, coupled with her implausible testimony on other points, raises a legitimate credibility question. Hence, though I generally treat Ms. Brainerd's testimony favorably, I am hesitant to do so when there is no independent evidence that corroborates, to some degree, claims that are material to the disposition of this case.

VI. LEGAL ANALYSIS AND FINDINGS

Complainant and Respondents have myriad factual disputes. And there are any number of legal claims that one or the other might have brought against the other based on those factual disagreements. Complainant, however, chose to bring a claim under the Surface Transportation Assistance Act. This narrows the legal and factual questions greatly—I need only make determinations regarding the particular dispositive issues in the STAA claim and thus do not address tangential factual and legal disputes. Such disputes belong in another forum.

A. The Legal Framework of an STAA Claim

The Surface Transportation Assistance Act of 1982, 49 U.S.C § 31105,[26] "prohibits an employer from discharging, disciplining, or discriminating against an employee-operator of a commercial motor vehicle 'regarding pay, terms, or privileges of employment' because the employee has engaged in certain protected activity." *Clark v. Hamilton Haulers, LLC,* ARB Case No. 13-023, ALJ Case No. 2011-STA-007, slip op. at 3 (ARB May 29, 2014) (quoting 49 U.S.C § 31105(a)(1)). The employee protection provisions of the STAA were enacted to encourage employees in the transportation industry to report noncompliance with applicable safety regulations governing commercial motor vehicles. *Brock v. Roadway Express, Inc*., 481 U.S. 252, 255-58 (1987). In the STAA Congress sought "to combat the increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents on America's highways." *Yellow Freight Sys., Inc., v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993). In particular, "Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations. *Brock*, 481 U.S. at 258 (citing 128 Cong. Rec. 32698 (1982) (remarks of Sen. Percy); *id.* at 32509-10 (remarks of Sen. Danforth)).

To accomplish that purpose, the STAA provides that:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because—(A) (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 … (B) 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 or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a); *see also Calhoun v. U.S. Dept. of Labor*, 576 F.3d 201, 208 (4th Cir. 2009); *Leach v. Basin W., Inc*., ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 3 (ARB July 31, 2003). The STAA also contains protections against retaliation for correctly reporting hours of duty, cooperating with a safety or security investigation by the DOT, Department of Homeland Security, or National Transportation Safety Board, and furnishing information to authorities regarding an incident in connection to commercial motor vehicle transportation that resulted in injury, death, or damage to property. 49 U.S.C. § 31105(a)(1)(C)-(E).

Congress amended the STAA, effective August 3, 2007, as part of the Implementing Recommendations of the 9/11 Commission Act of 2007. *See* Public Law 110-53, 121 Stat. 266. The amendment added protection for complaints or refusals to drive based on a violation of security regulations or vehicle security conditions and also required that complaints initiated

[26] Section 405 of the STAA was originally codified at 49 U.S.C. § 2305, but it was re-numbered to 49 U.S.C. § 31105 in 1994.

under the STAA be governed the burden of proof set forth by 42 U.S.C. § 42121(b), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). 49 U.S.C. § 31105(b). As the ARB has recently pointed out, the AIR 21 burden of proof is considerably less stringent than the familiar burdens of proof in Title VII cases that in the past governed actions under the STAA. *Powers v. Union Pac. R.R. Co.*, ARB Case No. 13-034, ALJ Case No. 2010-FRS-030, slip op. at 10-12 (ARB Apr. 21, 2015); *see also Beatty v. Inman Trucking Mgmt., Inc.*, ARB Case No. 13-039, ALJ Case Nos. 2008-STA-020, 2008-STA-020, slip op. at 7-11 (ARB May 13, 2014); *Arjuno v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d. Cir. 2013); *Formella v. United States Dep't of Labor*, 628 F.3d 381, 389 (7th Cir. 2010).

Under the current STAA, "a complainant must prove by a preponderance of evidence that: (1) he engaged in protected activity, (2) he was subjected to an adverse employment action, and (3) the protected activity was a contributing factor in the adverse action." *Clark*, ARB Case No. 13-023 at 3-4 (citing *Salata v. City Concrete, LLC*, ARB Case Nos. 08-101, 09-104; ALJ Case Nos. 2008-STA-12, -041; slip op. at 9 (ARB Sept. 15, 2011)); *see also Ferguson v. New Prime, Inc.*, ARB Case No. 10-075, ALJ Case No. 2009-STA-047, slip op. at 3 (ARB Aug. 31, 2011); *Williams v. Domino's Pizza*, ARB Case No. 09-092, ALJ Case No. 2008-STA-052, slip op. at 5-6 (Jan. 31, 2011). Some of the case law includes an additional required showing: that the respondent had knowledge of the protected activity. *See, e.g., Williams*, ARB Case No. 09-092 at 5-6; *Riess v. Nucor Corp.*, ARB Case No. 08-137, ALJ Case No. 2008-STA-011, slip op. at 4 (ARB Nov. 30, 2010). Though this fourth element makes things more explicit, it does not change the required showings—the complainant cannot succeed in showing that the protected activity was a contributing factor in the adverse action if he cannot show that the employer had knowledge of the protected activity. If a complainant makes these showings, a respondent is liable unless it can show by clear and convincing evidence that it would have taken the adverse action even if the employee had not engaged in protected activity. *Clark*, ARB Case No. 13-023 at 4; *Ferguson*, ARB Case No. 10-075 at 4; *Williams*, ARB Case No. 09-092 at 5-6.

Hence, as amended, the STAA sets up a two-part burden shifting test in place of the three part burden shifting process in Title VII cases and pre-amendment STAA cases. *See Beatty*, ARB Case No. 13-039 at 10. Under the *McDonnell Douglas* framework, in Title VII cases the employee must make out a *prima facie* case of discrimination/retaliation. Then the burden shifts to the employer to offer a legitimate non-discriminatory reason for the adverse action. If it does so, then the presumption of discrimination disappears, and the employee must prove his case by a preponderance of the evidence. *Powers*, ABR Case No. 13-034, slip op. at 11 (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)). The two-part AIR 21 burden shifting framework is tougher on employers because the employee only needs to show that the protected activity was a contributing factor in the adverse employment action and to rebut the employer must show that it would have taken the action anyway by a higher standard of proof, clear and convincing evidence. 49 U.S.C. § 42121(b)(2)(B); *Powers*, ABR Case No. 13-034, slip op. 11-12; *Beatty*, ARB Case No. 13-039 at 7-11.

The ARB has explained that 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 Case No. 09-092 at 6 (quoting *Sievers v. Alaska Airlines, Inc.*, ARB Case No. 05-109, ALJ Case No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30. 2008)). This can be shown directly via a "smoking gun" or indirectly via an inference, e.g. by showing that the proffered

reason for the adverse action is pretext. *Id.* (citing *Riess v. Nucor Corp.*, ARB Case No. 08-137, ALJ Case No. 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010)). "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 Case No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31 2006.)); *see also Beatty*, ARB Case No. 13-039 at 9.

So under the STAA, a complainant need only show that his protected activity tended to affect, somehow, the decision to take the adverse action and to rebut the respondent must show that it is highly probable or reasonably certain that the same action would have been taken absent the protected activity. Nonetheless, the complainant still has the burden of showing the elements of his case by a preponderance of the evidence—*that* he engaged in protected activity, *that* an adverse employment action was taken against him, and *that* his protected activity was a contributing factor in the adverse employment action. *Ferguson*, ARB Case No. 10-075 at 3; *Williams*, ARB Case No. 09-092 at 6; *Fleeman v. Neb. Pork Partners*, ARB Case Nos. 09-059, 09-096; ALJ Case No. 2008-STA-015, slip op. at 3-4 (ARB May 28, 2010).

If a complainant is successful in a STAA action, the Secretary may order abatement of the violation, reinstatement (where appropriate), back pay with interest, other compensatory damages, and special damages. 49 U.S.C. § 31105(b)(3)(A). These damages "are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress." *Ferguson*, ARB Case No. 10-075 at 7 (citing *Smith v. Lake City Enters., Inc.*, ARB Case Nos. 09-033, 08-091; ALJ Case No. 2006-STA-032 (ARB Sept. 24, 2010)). Successful complainants are entitled to be restored to the same or a similar position that they would have occupied but for the discrimination. Where reinstatement is impractical, front pay is available. *Fleeman*, ARB Case Nos. 09-059, 09-096 at 6-7; *Williams*, ARB Case No. 09-092 at 10 (citing *Dale v. Step 1 Stairworks, Inc.*, ARB Case No. 04-003, ALJ Case No. 2002-STA-030, slip op. at 4-5 (ARB Mar. 31, 2005)). Reasonable attorney's fees and litigation costs may be assessed as well. 49 U.S.C. § 31105(b)(3)(A)-(B). Finally, a violation of the STAA may lead to punitive damages, capped at $250,000. 49 U.S.C. § 31105(b)(3)(C). Punitive damages penalize outrageous conduct by a respondent and are appropriate when there has been intentional violation of federal law or reckless or callous disregard for the complainant's rights under the STAA. *Ferguson*, ARB Case No. 10-075 at 8 (citing *Smith v. Wade*, 461 U.S. 30 (1983); RESTATEMENT (SECOND) OF TORTS § 908(1) (1979)); *see also Youngermann v. United Parcel Service, Inc.*, ARB Case No. 11-056, ALJ Case No. 2010-STA-047, slip op. at 4-8 (Feb. 27, 2013).

B. Notice

The STAA requires that a complainant file the complaint with OSHA no later than 180 after the alleged adverse employment action. 49 U.S.C. § 31105(b)(1). The alleged adverse action in this case occurred on December 27, 2010. The complaint was not filed until November 15, 2012, well past the 180 day limit. Respondents filed a Motion for Summary Decision on July 1, 2013, arguing that the complaint was time-barred. On July 16, 2013, I issued an Order Denying Motion for Summary Decision. I ruled that the time limit was properly tolled because Complainant did not have actual knowledge of the adverse action and had no reason to suspect that there was negative information in his DAC report.

Respondents devote over a quarter of the argument in their Closing Brief to re-arguing the notice issue. (RCB, pp. 15-23.) Yet no new evidence was introduced at the hearing that established that Complainant either did know about the negative DAC information or that a reasonable employee in Complainant's position would have independently checked his DAC report. The closest thing to important new evidence was the testimony by Complainant that Ms. Brainerd had threatened to "trash" his DAC. (HT, pp. 161-62.) But this changes little—it was the impetus for Complainant to get assurances from Respondents that they would not file negative information on the DAC. (*Id.*) He received such assurances in exchange for letting them take possession of his truck. In retrospect he was wrong to rely on Respondents' agreement, but it was certainly reasonable for him to think that Respondents would adhere to an agreement that was witnessed by law enforcement. Complainant should not be punished now for not realizing then just how dishonest Respondents were in this matter.

Indeed, the only really new information, as opposed to argument, that is included is a citation to the results of an internet search offered to show that the fact that drivers may get yearly free copies of their DAC report is common knowledge in the trucking industry. (*Id.* at 19.) Even if the results of an internet search could show that conclusion, the contents of the worldwide web, as a general matter, are not in evidence. If Respondents wished to introduce such evidence, it should have been done at the hearing so that Complainant could contest its admissibility and offer rebuttals or argument concerning it. Quite simply: Respondents may not seek to establish a fact relevant in this case—here that the DAC reports are available at no cost is a matter of general knowledge—by conducting their own internet research and then casually citing to it in their Closing Brief.[27]

Respondents' argument is essentially the same as in the Motion for Summary Judgment. They do not allege that Complainant actually knew about the information in his DAC report but argue that the adverse action would have been apparent to a similarly situated person with a reasonably prudent regard for his rights. (Respondents' Closing Brief, p. 17 (citing *Pantanizopoulos v. Tennessee Valley Authority*, ARB Case No. 97-023, ALJ Case No. 1996-ERA-015 (Oct. 20, 1997)). To reach their conclusion, however, Respondents argue that Complainant, individually, displays great concern about his DAC and is more interested in its contents than would normally be expected. This incorrectly builds Complainant's particular regard for his rights into his objective situation. Respondents cannot argue that someone with an abnormally high regard for his rights (here related to the content of his DAC report), which they aver Complainant has, would have sought out the contents of his DAC report in Complainant's factual situation. The uncontroverted facts in this case show that in exchange for letting Respondents take the truck Complainant received a written promise from Respondents witnessed and signed by the local Sheriff that they would not report negative information on his DAC report. Until his application to Riverside, Complainant did not have difficulty finding the sort of employment he sought. In these circumstances, a person with a reasonably prudent regard for his rights would not have thought it necessary to procure his DAC report.

[27] Respondents also use independent internet research in an attempt to establish the variety of products sold by Freightliner and the size and geographic scope of Celadon Trucking. (RCB, p. 26.) Again, if Respondents wish to rely on facts of this nature they need to introduce them into evidence. As a general matter, in their closing briefs parties may not use independent internet research to show facts not in evidence.

I have already ruled on the issue of notice as presented in Respondents' Motion for Summary Judgment. The evidence has not significantly altered the factual terrain pertaining to this issue. Respondents merely make the same arguments again—indeed at times simply copying their earlier motion verbatim and changing citations and the organization of paragraphs. (Respondents' Closing Brief, pp. 15-23; Respondents' Motion for Summary Decision and Brief in Support, pp. 2-6.) Clearly, Respondents do not agree with my earlier ruling, but as they have given no substantive new reason to alter it, my earlier findings on notice remain unchanged.

C. Legal Analysis of Complainant's Theory and Respondents' Controversions

In order to determine what issues of fact must be decided it will be helpful to first determine and examine Complainant's legal theory and isolate Respondents' points of controversion to that theory.

1. Protected Activity

Complainant alleges three varieties of protected activity. First, he claims that he engaged in a number of safety complaints related to the condition of his trailer, as protected by 49 U.S.C. § 31105(a)(1)(A). (CCA, pp. 2-11.) Protected complaints may be internal. *Williams*, ARB Case No. 09-092 at 7 (citing *Goggin v. Administrative Review Bd.*, No. 97-4340, 1999 VL 68694 (6th Cir. Jan. 15, 1999)); *Clean Harbors Envt'l. Servs., Inc. v. Herman*, 246 F.3d 12 (1st Cir. 1998); *Doyle v. Rich Transp., Inc.*, 1993-STA-017 (Sec'y Apr. 1, 1994); *Juarez v. Ready Trucking Co.*, 1986-STA-027 (Sec'y July 7, 1988)). Under the STAA a complaint is filed if it is made to a supervisor. *Cefalu v. Roadway Express, Inc.*, ARB Case Nos. 04-103, 04-161; ALJ Case No. 2003-STA 55, slip op. at 6 (ARB Jan. 31, 2006); *Harrison v. Roadway Express, Inc.*, ARB Case No. 00-048, ALJ Case No. 1999-STA-37, slip op. at 6 (ARB Dec. 31, 2002). To be protected, a complaint does not need to be correct and the complainant has no burden to prove that there has been an actual safety violation. *Yellow Freight Systems*, 954 F.2d at 357. Instead, a complainant must only show that the complaint related to a reasonably perceived violation of a safety regulation. *Id.*; *Urlich v. Swift Transp. Corp.*, ARB Case No. 11-016, ALJ Case No. 2010-STA-41, slip op. at 4 (ARB Mar. 27, 2012); *see also Gaines v. K-Five Constr. Corp.*, 742 F.3d 256, 267-68 (7th Cir. 2014); *Guay v. Burford's Tree Surgeon's, Inc.*, ARB Case No. 06-131, ALJ Case No. 2005-STA-045, slip op. at 6-8 (ARB June 30, 2008). This turns on whether a reasonable truck driver would perceive a violation of a safety regulation because of the subject of the complaint. *Calhoun v. United Parcel Serv.*, ARB Case No. 04-108, ALJ Case No. 2002-STA-31, slip op. at 11 (ARB Sept. 14, 2007), *aff'd* 576 F.3d 201 (4th Cir. 2009).

Second, Complainant asserts that he refused to drive because doing so would violate Federal Motor Safety Regulations, as protected by 49 U.S.C. § 31105(a)(1)(B)(i). (CCA, pp. 11-12.) This provision protects employees who refuse to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B). Contrary to the other clauses at issue, a reasonable belief does not suffice to invoke protection—a complainant must show that an *actual* violation would have occurred if he or she had operated the vehicle. *Shields v. James E. Owen Trucking Co., Inc.*, ARB Case No. 08-021, ALJ Case No. 2007-STA-22, slip op. at 6-9 (ARB Nov. 30, 2009); *Koch Foods v. Sec'y United States DOL*, 712 F.3d 476, 478 (11th Cir. 2013). A complainant need not show, however, that the violation would have rendered the CMV unsafe in

the particular circumstances. The out-of-service criteria are not relevant to the determination if a refusal to drive is protected under this provision. *Roberts v. Marshall Durbin Co.*, ARB Case Nos. 03-071, 03-095; ALJ Case No. 02-STA-35 (ARB Aug. 6, 2004) (finding that complainant's refusal to drive because the windshield wipers were not DOT compliant was protected even though he was only asked to drive nine miles to the facility where the wipers would be repaired on a sunny day with no threat of rain); *see also Youngermann v. United Parcel Serv.*, ARB Case No. 11-056, ALJ Case No. 2010-STA-047 (ARB Feb. 27, 2013).

Finally, Complainant alleges that he engaged in protected activity specified in 49 U.S.C. § 31105(a)(1)(B)(ii) when he refused to drive due to the condition of his trailer. (CCA, pp. 12-13.) This provision protects employees who refuse to operate a vehicle because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or concern." 49 U.S.C. § 31105(a)(1)(B)(ii). 49 U.S.C. § 31105(a)(2) clarifies this provision: "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 be protected, the employee's apprehension must be objectively reasonable. *Roberts*, ARB Case Nos. 03-071, 03-095 at 14-15; *Dalton v. Copart, Inc.*, ARB Case No. 01-020, ALJ Case No. 1999-STA-46, slip op. at 7 (ARB July 19, 2001). And the apprehension must be reasonable solely on the basis of information available to the employee at the time of refusal. *Roberts*, ARB Case Nos. 03-071, 03-095 at 14-15; *Helgren v. Minn. Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 00-STA-55, slip op. at 5 (ARB July 31, 2003). In addition, "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). To qualify as protected activity under this or the prior provision, the driver must actually have refused to drive the vehicle. *Calhoun v. United States DOL*, 576 F.3d 201, 209-10 (4th Cir. 2009) (finding that there is no protected activity if the employee actually drives, even if under protest).

As a legal matter, however, it is unclear that Complainant has established that his refusal was protected by this last provision. Though testimony was introduced relating to potential safety hazards because of the defects in the trailer, the fact of the matter remains that Complainant was given a full Level 1 inspection in Arkansas on December 21, 2010, and was permitted to keep driving. Several regulatory violations were noted, but he was merely given a "fix-it" ticket with 15 days allowed to complete the repairs. (CX 11, p. 55) Given the condition of the truck and trailer on December 21st, the authorities determined that it was safe for Complainant to continue driving. If they did not, Complainant would have been placed out-of-service. If the authorities deemed it acceptable to keep driving, how can Complainant have had a reasonable belief that continuing to drive the tractor-trailer posed a real danger of accident, injury, or serious impairment to health? And what changed between December 21st and 27th in the condition of the vehicle that made it now made it objectively reasonable for Complainant to believe that the condition of the vehicle posed a danger of serious injury to him or the public?

Respondents do not raise this issue, and in the end it is immaterial. Complainant's theory here is that he refused to drive because he believed that serious injury could result from the particular defects noted in the violation report. And it is uncontroverted that not all of those defects had been fixed. So regardless of whether or not his refusal was based on a reasonable apprehension of serious injury to himself or the public, it would have been protected activity if

premised on a violation of DOT regulations. To put the point differently, in the particular contours of this case, to show protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii) Complainant must show protected activity under 49 U.S.C. § 31105(a)(1)(B)(i). But the latter protected activity is independently sufficient to sustain his legal claim. Per his account, his apprehension of danger was based on the violations, and there is no dispute that there were in fact violations.[28] The factual issue will be whether he actually refused to drive for that reason.

There is an additional problem with Complainant's legal theory. In its present form, his claim is that he refused to haul loads. (HT, pp. 227, 244-45.) The STAA, however, does not protect the refusal to haul loads. It protects the refusal to operate a CMV. 49 U.S.C. § 31105(a)(1)(B). Whether or not Complainant was hauling cargo, the trailer was not in compliance with DOT regulations and, per his account, unsafe. A refusal to haul loads makes more sense as economic coercion than as a stand on safety.[29] And there is no protected activity under § 31105(a)(1)(B) if, in fact, the employee operates the CMV. *Calhoun*, 576 F.3d at 209-10; *Calhoun*, ARB Case No. 04-108 at 5-6.

Since even by his account he drove the CMV after his alleged refusals to haul loads until the repairs were made on December 21st-23rd, here there is no such protected activity. The legal question is close regarding his alleged refusal on December 27th, since he did not ever operate the CMV again after that alleged refusal. But, again, the refusal to haul loads is not protected activity under the STAA. If he refused to haul loads but was still willing to operate the CMV, there was no protected activity. Charitably his claimed refusal can be understood as protected activity in that by refusing to haul loads he was essentially refusing to operate the CMV, and in fact never drove it again because Respondents took it. The question below, then, will be whether or not his account of that day has been established by a preponderance of the evidence.

Though Complainant has asserted protected activity under three categories, factually his alleged protected activity encompasses one story arc: in his short employment with Respondents there were continuing and escalating safety and repair problems that resulted in him orally complaining to Respondents, twice seeking rigorous inspections, and ultimately refusing to drive until the trailer was repaired. Respondents challenge this account as a whole—arguing that Complainant engaged in no protected activity, that the dispute is really about money, and that the separation occurred when he quit under dispatch. (RCB, pp. 1, 8-9, 28-30.)

[28] The two clauses come apart in cases where it turns out there were no regulatory violations and yet the driver may still have a reasonable *belief* that operating the vehicle poses a real danger of accident, injury, or serious impairment to health. And they come apart in cases like *Roberts*, ARB Case Nos. 03-071, 03-095, discussed above, where there is a violation of DOT regulations but no danger in operating the vehicle in the particular circumstances of the case.

[29] Given the apparent nature of Complainant's contract, it would not be a particularly effective form of coercion, as it would simply push him into a financial hole. But Complainant and Respondents disputed the nature of that contract and Complainant seems to have believed that he was being cheated in the settlement statements.

2. Adverse Action and Causation[30]

To prevail, Complainant next must show that there was adverse action taken against him. Here that action is the negative information posted on his DAC report, which Complainant has alleged constitutes blacklisting him in the industry. (CCA, p. 16; RX U, pp. 227-28.) In his Closing Argument, Complainant several times indicates that his alleged dismissal from employment is an adverse action at issue. (CCA, pp. 2, 22.) This is a mistake. While discharge (if it occurred, a fact still in dispute) would be an adverse action, Complainant did not satisfy the 180 notice requirement in relation to that adverse action and so he cannot prevail here on that basis. The only adverse action Complainant can seek compensation for in this action is the placement of negative information on his DAC Report.

The Administrative Review Board ("ARB") has stated that "blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment." *Pickett v. Tennessee Valley Auth.*, ARB Case Nos. 02-056, 02-059; ALJ Case No. 2001-ALJ-018, slip op. at 5 (ARB Nov. 28, 2003). And it has held that blacklisting can constitute an adverse action for the purposes of a STAA claim. *Murphy v. Atlas Motor Coaches, Inc.*, ARB Case No. 05-055, ALJ Case No. 2004-STA-036 (ARB July 31, 2006). Finally, the ARB has held that placing negative information on a DAC report can constitute blacklisting. *Beatty v. Inman Trucking Mgmt., Inc.*, ARB Case No. 11-021, ALJ Case Nos. 2008-STA-020, 2008-STA-021 (ARB June 28, 2012) To succeed in a blacklisting complaint regarding a DAC report, Complainant need not demonstrate that he did lose an employment opportunity due to the negative information, but only that the Respondents' "statement 'had a tendency to impede and interfere with [Complainant's] employment opportunities.'" *Id.* at 6 (quoting *Ass't Sec'y v. Freightway Corp.*, Case No. 1993-STA-016, slip op. at 3 (Sec'y Dec. 7, 1994)).

Respondents do not deny that they placed the information on the DAC. But they argue that it is not an adverse action because it is all true. (RCB, pp. 31-32.) In support of this proposition they cite to a footnote of an ARB decision, *Israel v. Schneider Nat'l. Carriers, Inc.*, ARB Case No. 09-115, ALJ No. 2005-STA-051, slip op. at 7 n.6 (ARB Nov. 17, 2011), that endorses the ALJ's conclusion that the negative information filed on the DAC "did not constitute an adverse action because it did not contain false information as Israel alleged" by simply concluding that "[t]he ALJ's findings of fact are supported by substantial evidence on the record considered as a whole and his legal conclusions are fully in accordance with applicable law." *Id.*

Israel, however, does not stand for a general rule that any true information on a DAC report cannot, as a matter of law, constitute adverse action. Importantly, the ARB did not discuss, at all, the legal reasoning of the ALJ. And factually *Israel* is very different from the present case. For one, in *Israel* the DAC report was submitted a month after separation, not hours later. *Id.* And the only negative information it reflected was just that Israel had resigned/quit or terminated his lease and had violated a company policy. *Id.* In fact, Israel had been terminated/deemed to have resigned because of a failure to communicate with the company

[30] Though the Parties discuss whether or not Respondents knew about Complainant's protected activity, I decline to discuss it separately here—in this case, with a very small employer, whether or not Respondents knew is largely a function of whether or not Complainant engaged in any protected activity. The allegations of protected activity are such that if true, Respondents would have known about the protected activity.

for an extended period of time while on medical leave and for failing to return his keys to his truck upon request. *Id.* at 3. Simply put, the DAC report was a quite friendly interpretation of the course of events, which is far from the case here, whether or not the information is true.

The ALJ's underlying Proposed Decision and Order in *Israel* provides fuller context to the ARB's endorsement. Mr. Israel had objected specifically to the notation in the report that said he violated company policy.[31] The ALJ determined that this report was true *and* that Complainant had failed to show how a valid report could have negatively affected his employment prospects.[32] *Israel v. Schneider Nat'l. Carriers, Inc.*, ALJ No. 2005-STA-051, slip op. at 17 (ALJ June 29, 2009). This ARB endorsed reasoning does not sustain the general legal proposition that placing true information in a DAC report, in any circumstances, cannot constitute an adverse action. Notably, ARB cases that more fully discuss whether information placed on a DAC report is an adverse action do not consider whether or not the information in the report is true in that part of the analysis. *E.g. Beatty*, ARB Case No. 11-021; *Canter v. Maverick Transp., LLC*, ARB Case No. 11-012, ALJ Case No. 2009-STA-054 (ARB June 27, 2012).

Complainant treats the contention that everything Respondents' reported was true as an argument that would tend to show either that Complainant's protected activity was not a contributing factor in placing the information or that Respondents would have placed the information on the report in any case.[33] (CCA, pp. 18-23.) This is the more natural place for this contention—the information was placed on Complainant's activity because it was true and they always reported true information. Respondents would urge that its truth coupled with their common practice shows that any protected activity was not a contributing factor or that they would have taken the same action even if there had been no protected activity.

What is clear is that the Parties dispute whether or not the information placed on Complainant's DAC report is true. Where, legally, this dispute is relevant could matter a great deal. For one, if the truth of the information and Respondents' practices in reporting true information is properly considered in the context of Complainant's showing of contributing factor, it would not need to be as persuasive as it would in the context of Respondents' showing

[31] Israel's more serious objection was to a perceived notation that he had been involved in an accident "that produced unintended injury, death, and property damage." In fact the report indicated no accidents and the language he objected to was boilerplate instructions on what *should* be reported that he had misinterpreted.

[32] The full extent of the ALJ's discussion is as follows: "Complainant suggests that Respondent's completion of a DAC report (RCX 1) constitutes an adverse action. Complainant argues that Respondent provided false information that affects Complainant's future employment prospects. Complainant maintains that Respondent falsely claimed that he violated company policy. I continue to accord full credibility to the testimony of Jefferson and Collar that they expected Complainant to communicate with management, and his failure to do so violated company policy. However, Complainant fails to establish how the reporting of that valid information affected his potential for employment. The report reflects that Complainant's employment with Respondent ended because he "resigned/quit or driver terminated lease", and not because of any violation of company policy. In addition, the report reflects that 0 accidents and no accident/incident information were recorded. I disagree with Complainant's characterization of the language of the DAC report that states 'was involved in an occurrence or act that produced unintended injury, death and property damage'. What Complainant perceived as a report of an accident/incident is actually a description of what sort of accident/incident should be reported on the DAC report. I find that the DAC report does not represent an adverse action. I note that the report was originally made in September, 2005."

[33] This is where the ARB discusses the contention that the DAC report merely reflected accurate, relevant information about the Complainant in *Canter*, ARB Case No. 11-012 at 5.

by clear and convincing evidence that they would have taken the same action despite the protected activity. *See Powers*, ABR Case No. 13-034, slip op. at 10-12. And if Respondents are correct in their legal contention, the truth of the DAC report would be an absolute defense—since it would not be adverse action, there would be no consideration of the protected activity even contributed to the decision to report that information.

I have found that the contested question bears more naturally on causation, not adverse action, and that Respondents' cited authority does not establish their contention. And given the temporal proximity and substance of his story, if Complainant succeeds in showing protected activity, then the contributing factor analysis follows as a matter of course. The particular question, then, would be whether Respondents have established by clear and convincing evidence that they would have made the DAC report regardless of the protected activity via their evidence of the truth of their allegations and their common reporting practices. As a threshold matter, in any case, I would need to determine if, in fact, all of the information on the DAC report was true. And as will be evident below, exact determination of how this factual issue affects the legal analysis is not necessary. I discuss it here only because it is important to understand which particular factual disputes between the Parties (among the many) are relevant to the STAA claim and how those disputes might bear on the legal analysis.

The Parties also dispute, more directly, whether or not the alleged protected activity was a contributory factor in the decision to take the alleged adverse action and whether Respondents would have taken the same action in any event. (CCA, pp. 15-23; RCB, pp. 34-35.) Respondents' brief argument on this point, however, turns on the claim that the dispute between the Parties was about pay and Ms. Brainerd thought Complainant was a thief because he pocketed the $500 advance and stripped the truck of parts and equipment. (RCB, p. 34.) This, however, presumes that the dispute was about pay, a matter that is in contention and relates back to the initial dispute about whether Complainant actually engaged in any protected activity.

D. Did Complainant Engage in Protected Activity?

The crucial issue in this case is the threshold factual question: did Complainant engage in any protected activity? If he did, much of his case simply falls into place—though there are a number of remaining questions that need to be addressed (whether the DAC report was true and if that is a defense here, the amount, if any, of damages, and the individual liability of the Brainerds), these are relatively minor compared to this central point in dispute. If, on the other hand, he did not engage in protected activity then his claim under the STAA must be dismissed.

Complainant testified that he made almost daily complaints to Respondents about repairs that were needed. (HT, pp. 136-38.). Neither of the Respondents testified to such contact. Indeed Ms. Brainerd testified that they didn't even know about the Arkansas violation report until Complainant returned to the yard several days later. (*Id.* at 287.) And she testified that she never received an email from Complainant about safety issues. (*Id.* at 338.) Complainant admitted that he knew how to email Respondents and did so for other things, but could not recall emailing them about repairs or safety. (*Id.* at 224-25.) Complainant asserts that their relationship ended because he refused to drive an unsafe truck and trailer. (*Id.* at 144.) Elizabeth Brainerd directly contradicted this, stating that Complainant never refused to drive a tractor or trailer because it was unsafe. (*Id.* at 275.)

Complainant has the burden of showing by a preponderance of the evidence that he engaged in protected activity. I found earlier that Complainant's credibility is highly questionable and that in order to reach firm conclusions based on his testimony, corroboration by independent evidence is necessary. For the reasons set forth below, I find that Complainant has failed to show by a preponderance of the evidence that he engaged in any protected activity. As such, there is no need to consider any further issues.

Complainant alleges that he made a long series of safety complaints to the Respondents. (HT, pp. 136-38.) Yet no documentary evidence was provided to substantiate *any* such complaints. This is highly suspicious. Complainant testified that his complaints were always oral, but also admitted that he knew how to email respondents. (*Id.* at 224-25.) After separation he was careful to correspond with Respondents via email, thereby creating a record of the communication. (RX A.) Complainant testified that he scanned and emailed his inspection reports to Respondents. (HT, pp. 132, 141-42). Yet even here, when his supposed oral safety complaints were being vindicated by the authorities, he apparently declined to make any written safety complaints. Naturally one would expect some reiteration of the complaints he had been making or at least a written reference to them. Nothing has been produced to show even this.

The record contains DOT Driver's Daily Logs for Complainant's time with Respondents through the end of November 2010. Since on each date the driver is supposed to inspect the CMV at the beginning and end of the work day and note safety defects, this would be where one would expect to find at least some indication that Complainant was worried about safety. Yet each day he certifies that the CMV is in satisfactory condition. (RX L.) Complainant provides an excuse, claiming that he was forced to falsify all of his logs. (HT, p. 221.) No evidence beyond his testimony supports the contention that Respondents were engaged in a concerted scheme to falsify trucking logs. The December logs are missing, each Party asserting they were last in possession of the other. Yet Complainant testified that these would have provided the needed documentary verification of his claim to have been making regular safety complaints, because in December he refused to keep going along with Respondents' scheme to falsify the logs. (*Id.* at 243-44, 278-79.) I do not find Complainant believable on this point.

Complainant can produce no evidence to substantiate his claim that he made safety complaints. He has an unsubstantiated story that he was told to falsify the Daily Logs to explain away the conspicuous absence of any safety issues from the Daily Logs he filled out that are in evidence. Yet he conveniently claims that he did document safety issues in the Daily Logs that are missing. If Complainant's story of Respondents' falsification is true for the logs through November, it remained so in December. There is no reason Complainant would suddenly start documenting his complaints. The relevant difference, at this point, is only that the logs through November are in evidence while the logs for December are not, so testimony regarding their content cannot be verified. The logs in evidence show that Complainant was not documenting any safety concerns despite his duty to do so. I do not credit Complainant's assertion that he inexplicably started doing so in December.

Complainant's story of escalating safety complaints reaches a key point on November 16, 2010—by his account this is when he ceases just making internal complaints and starts to involve the authorities. Yet as explained above, his account of the Level 1 inspection on that date is highly suspect. He claims to have asked for it and is focused on the wheels he believes to

be defective. Yet the report doesn't mention the wheels on the trailer at all, instead finding a slack adjuster defect on the trailer, wheel problems on the truck, and a cracked brake pad on the truck. (CX 9.) Per his account, the defects in the truck surprised him and he received an oral warning about the trailer tires. (HT, p. 131.) This doesn't add up. If he asked for the inspection so that he could get documentation of the defects he wanted fixed, why would the officer give him only an oral warning about the trailer tires that he now claims he wanted fixed? Since his concern was about the tires, it would have made more sense for him to insist that the officer include the verbal warning in the written report.

After the first inspection Complainant avers that he continues to engage in constant oral safety complaints, none of which are substantiated in the record. This continues to the December 21st inspection, which Complainant again testified that he requested in an attempt to force Respondents to fix the trailer. (*Id.* at 136-39.) This is a perplexing move—his claimed first attempt to use an inspection to force repairs had backfired spectacularly: it harmed his safety record, turned up defects in the tractor he had to pay for, and did nothing, per his account, to have the repairs done. Why would he make the same move again?

Complainant continued to drive his CMV immediately after the inspection. Why would he do so? If he was so concerned about safety and wanted to force repairs through documentation, he had everything he needed. Instead he testified that he emailed the inspection report to Respondents—without including any documentable safety complaints in the email—and then continued on to Fort Worth. (*Id.* at 141-42.) The evidence shows that not only did he complete this route, but he then accepted another dispatch, in a truck and trailer he now claims he believed too unsafe to operate, and drove an additional 167 miles. (RX N, p. 174.)

By his account his protected activity takes a new level on December 21st, as he reports that he refuses to drive his CMV, or use the trailer, or deliver any loads unless the safety problems he complains of are fixed. (HT, p. 144.) Exactly what he refused to do has shifted as this case has developed and countervailing evidence comes to light. First he claimed to refuse to drive. (RX U, p. 225.) But when evidence emerged showing that this couldn't be right, since he was driving, his story changed, so that now he claims that he was refusing to take any loads. (HT, pp. 227, 244-45.) Even this is suspect, as Complainant testified he was still hauling short loads in the week before his separation. (*Id.* at 154.)

I have determined that both Respondents have legitimate credibility questions. Nonetheless their account of the period preceding separation makes more sense. In their telling, safety wasn't an issue between them and Complainant until he returned to the yard on December 22nd and they learned of the latest failed inspection. (HT, p. 268.) This was the third safety violation of Complainant in a little over a month.[34] Safety violations reflect poorly on them as well, and so it is reasonable that they would be disturbed by this pattern. (*Id.* at 279.)

The general business practices of Respondents appear to have given drivers a great deal of latitude and responsibility. Per their arrangement, drivers were responsible for maintaining their tractors. Respondents aided only in advancing them money which was then deducted from the driver's settlements. And even for trailer repairs, Respondents seem to have relied on their

[34] That one would be later overturned is immaterial, since the issue is what Respondents believed at the time.

drivers to set up or take care of all of the necessary work. The *only* difference, it appears, was that they were obligated to cover the cost of the repairs.[35] (*Id.* at 269-70, 279, 282-83.)

And as discussed in detail above, the EFS records in evidence show a general practice of having drivers set up their own repairs wherever they were and sending or advancing them the necessary money with EFS checks. (*See* RX M.) Moreover, Ms. Brainerd's claim that they gave safety bonuses to their drivers, (HT, p. 279), is corroborated by two $100 transchecks Complainant received immediately after he passed his Level 3 inspections that were annotated "Level 3 insp." And "Do not charge" and do not appear in his settlement statements. (RX M, pp. 150, 156; RX N, pp. 167-68.) This is significant because it provides independent evidence bolstering Respondents' representation of their practices regarding safety and repairs and because it is so inconsistent with Complainant's representations of the situation. If Respondents were cheating their drivers, bullying them, and indifferent to safety concerns, it would be entirely out of character for them to be giving money away to their drivers when they passed inspections.

Respondents testified that they were shocked by the condition of Complainant's CMV and upset that he was continually receiving safety violations. (*Id.* at 288-89.) This makes sense—they managed a small fleet in a bare-bones operation, relying on their drivers for maintenance and repairs. (*Id.* at 53-54.) They claim to have decided to terminate Complainant's lease because of the safety violations, but relented upon Complainant's pleading and promise to bring the CMV into compliance and decided instead to put him on probation. (*Id.* at 288-89.)

Complainant denies this chain of events, but the objective evidence establishes that Complainant was put on probation on December 23, 2010. (RX Q, p. 189.) As discussed above, on his account, this is very hard to understand. If he was taking a bold stand on safety and refusing to take loads until the trailer repairs were completed, why would he meekly acquiesce to a probation period that referenced *his* failure to maintain a safe and compliant CMV? He has a potential answer, that he was afraid for his job, but this doesn't accord with his claim to be threatening to leave the job at the same time. It is possible that William Brainerd bullied Complainant into signing the probation form. And it is possible that Complainant was taking a brave stand on safety by refusing to haul loads until the problems on the trailer were fixed. But it is quite unlikely that both of these things were going on at the same time.

The evidence fits well with Respondents' account. They relied almost entirely on drivers to maintain the CMVs and set up repairs. (*Id.* at 269-70, 335.) This is borne out by the EFS records showing that drivers, including Complainant were authorized to use EFS checks at various locales to pay for repairs. (*See generally* RX M.) When they found out this reliance was misplaced, they took remedial action, eventually deciding to put Complainant on probation for failure to maintain his CMV and requiring that he pass his next inspections. (RX Q, p. 189.) And Complainant *originally* alleged that he was fired by Respondents on the 21st, which accords with their claim that they fired him but then relented and put him on probation. (CX 12, p. 62.)

[35] It isn't clear from the evidence that they actually did so. Complainant was credited at one point for the costs of a tire bill, likely related to the blow-out he testified to, but the amount of deductions from the settlements seems to have been a matter of contention between the Parties. There may be a legitimate grievance here, but that is not a matter to be determined in this action.

The evidence also shows that Complainant was authorized to get a truck wash and to get a $500 EFS check. (RX M, pp. 121, 123.) Respondents, and Complainant in one iteration of his account, testified that this was for repairs. (HT, pp. 111-12, 290, 348-50) And the EFS statement is notated linking the advance to repairs and preventative maintenance. (RX M, p. 123.) Respondents also testified that they gave Complainant two tires, which were to be used to remedy the tire defects found on the trailer in the December 21st inspection. (HT, p. 111-12, 290.) This is corroborated by the last settlement statement for Complainant produced shortly thereafter, which makes contemporaneous reference to these tires. (RX N, p. 175.)

Respondents were financially responsible for repairs to the trailer but relied on the driver to make or arrange those repairs. (HT, p. 335.) Given this policy, it makes sense that they would authorize the check and leave it to Complainant to take care of the problems. Complainant testified that a slack adjuster, which would have apparently resolved the brake defect in the trailer, only would cost around $100. (*Id.* at 247.) The tires he was given. The $500 EFS check would have sufficed to cover the cost of the slack adjuster, any cost of installation, and any other preventative maintenance needed to get the CMV in compliance and in good shape, as Respondents were requiring Complainant to do per the terms of his probation. (RX Q, p. 189.)

Complainant's account of the purpose of the $500 is blatantly inconsistent, first it was in partial settlement of his pay dispute and then it was for repairs. (HT, pp. 154, 155-56, 348.) When pressed on which repairs the money was meant to cover, Complainant was non-specific, speaking of "stuff that was needed for the truck" and "odds and ends that was [sic] needed for the truck"—but careful not to admit that it was for defects on the trailer. (*Id.* at 348.) Yet per his account, the tractor was in compliance and only the trailer had problems (which is why he was only refusing to haul loads, not drive his tractor). (*Id.* at 244-45.) But then what could the money have been for if not the trailer? His testimony that it would have been too much for the slack adjuster but too little for the tires is belied by the evidence that he had been *given* the tires already. And the amount makes perfect sense assuming that he was told to get the repaired parts for the trailer, have them installed, and then do other preventative maintenance to get his CMV in compliance and good repair.

This understanding of the situation also accords well with the events of December 27th. Everyone agrees that Respondents drove some distance to Complainant's place of residence and ended up leaving with the CMV. But per Complainant's story, he hadn't been dispatched, was still in communication, and had only told Mr. Brainerd that he wasn't ready to roll and wouldn't drive until the repairs were completed. (*Id.* at 151, 158.) It would be quite odd for Respondents to then show up at Complainant's residence totally unexpected and take the truck.

Doing so would be entirely sensible, however, and consistent with Respondents version of the events. They had placed Complainant on probation for failure to maintain his CMV, given him two tires to fix problems on the trailer, and agreed to authorize a $500 EFS check to cover repairs and preventative maintenance. (*Id.* at 111-12, 289-90; RX M, p. 123; RX Q, p. 189.) They had scheduled no dispatches for him until the 27th, giving him time to make the repairs. (HT, p. 293.) But then they heard from the broker, not Complainant, that he failed to make his dispatch. (*Id.*) Reaching him they learn he is not feeling well but will take a dispatch the next day. (*Id.*) This is arranged, but then that broker calls and tells them that Complainant had cancelled with him. Complainant ceases answering his phone. (*Id.* at 293-94.) While some of

their actions were unreasonable on December 27th, the general reaction of deciding to drive some distance to figure out what was going on and secure property they were leasing to Complainant is entirely reasonable.

There is no "smoking gun" in this case—given the evidence, it is within the realm of possibility that Complainant is correct. And I have found no witness entirely credible. But for Complainant to be correct, a number of counterintuitive inferences must be drawn from the evidence. Indeed, one would have to believe that Respondents are somewhat diabolical and extraordinarily clever at covering their tracks. Per Complainant's story, Respondents are recklessly indifferent to safety, refusing to make needed repairs (even when the driver would bear the cost), manipulating the logs, wielding enormous power over their drivers, and somehow getting Complainant to sign a form putting him on probation for non-compliance with DOT regulations immediately after Complainant was threatening to cease driving for non-compliance with DOT regulations. Nothing in the evidence bears this out. Nor does the content and manner of their testimony. Indeed it points to the opposite conclusion—that Respondents exercised too little control over their drivers and relied too much on them to ensure DOT compliance.

On the best reading of the evidence, Complainant's grievance was about money and had nothing to do with safety. First, on December 17th Lisa Shepherd requested payroll documents from Respondents, showing that leading up to the separation money was an issue for Complainant. (RX A, p. 1) Second, the objective evidence we have from after the dispute makes no reference to safety concerns. It is all about money. (*Id.* at 1-3.) Complainant may have had less reason to raise safety complaints in these emails, but if his departure had been based solely on his refusal to drive an unsafe CMV, it is odd that this isn't even mentioned or referenced. This is especially significant given that Ms. Brainerd's email had raised claims specifically related to their characterization of the events of December 27th and asked that Complainant to send documents to dispute anything in their claim. (*Id.* at 1-2.) His reply asked only for copies of all records related to his assigned CMV. (*Id.* at 1.)

Moreover, understanding Complainant's grievance as financial fits his employment history. Whether or not it is normal to change jobs frequently in the trucking industry, Complainant's employment history shows that he often moves onto different opportunities and that most of the time he does so due to unhappiness with his pay. Leading up to his hire with Respondents he left CRST Malone after three months because he thought his pay was unreasonable, spent three months at Land Span and then left because the truck was always in the shop, worked for Jones Motor Company for roughly four months and Oklahoma Transit for two months leaving both because a contract was lost, spent one or two months with OSF Inc. before he left because he didn't like his pay, and then spent roughly a month with Melton Truck Lines. Next he spent three months with Respondents, a relatively normal period of time for him to stay with an employer before moving on. (CX 3, pp. 12-17; RX E, pp. 32-37; RX Z, pp. 293-95.)

Safety complaints are first broached as an issue in Lisa Shepherd's January 24, 2011, online grievance filed with the DOT—nearly a month after separation and two and a half weeks after the post-separation emails about money. (CX 8, p. 52.) But importantly, the issues that she raises are different from those that Complainant now alleges were central to his employment and separation. The complaint expounds mainly on the allegation that Mr. Brainerd conducts insufficient inspections and won't accept the counsel of others. (*Id.*)

The first time Complainant makes a verifiable safety complaint himself is immediately after he discovers that Respondents placed negative information on his DAC report. (*Id.* at 50-51.) In it Complainant reiterates Ms. Shepherd's allegations about poor inspection practices (in several different ways), alleges that Respondents will only do repairs at their terminal but then won't route drivers through the terminal, and raises complaints about his pay. (*Id.*) Though these are closer to the allegations that form the heart of the current dispute in that various safety complaints are alluded to, there is still no mention of any refusal to drive or purposefully getting level one inspections. This is very suspicious, since Complaint discusses the inspections and his last week of work. (*Id.*) The timing is more suspicious still. The whole arc of Complainant's story of varieties of protected activity begins with unverified safety complaints and leads to a final stand on safety, refusing to haul loads until the trailer is made safe. It ends when the Respondents show up and take the CMV. Yet Complainant doesn't take the time to actually file a complaint himself with the DOT until a year and a half later, immediately after he learns that Respondents have taken actions that hurt his job prospects. This appears more like vengeance than genuine concern—they harmed him, and so he'll make trouble for them with the DOT.

Complainant makes much of the fact that Respondents did not specifically deny all protected activity. (CCA, pp. 14-15.) This is correct—for some reason Respondents' Counsel did not take Respondents through every allegation of protected activity and get a clear denial on the record. But their testimony did contradict the pertinent specifics of his story. When asked, together, whether Complainant approached him for new tires and if he then sought an estimate, Mr. Brainerd answered negatively. (HT, p. 104.) Ms. Brainerd testified that they did not even know about the Arkansas citation until Complainant returned to the yard. (*Id.* at 287.) She specifically denied that Complainant ever refused to drive his CMV because of a safety concern. (*Id.* at 275.) And she could recall no email contact related to repairs or any safety concern or complaint. (*Id.* at 224-25.) More importantly, Complainant's allegations of protected activity fall into a broad story arc about his employment with Respondents. And Respondents' accounts of that relationship are, as a whole, widely at variance with Complainant's.

Most importantly, the burden of proof is Complainant's, not Respondents'. And this is the crux of the matter. Complainant must present evidence that establishes by a preponderance of the evidence that he engaged in protected activity. His proof of protected activity is solely his testimony and his story is implausible in the face of the documentary evidence. Independent evidence fails to corroborate his testimony that he made safety complaints or that he refused to operate his CMV because it was in violation of DOT regulations or was a safety danger to the public or himself. Above, I found him not to be independently credible. His testimony alone in the face of the other evidence, then, cannot sustain his burden. Complaint has hence failed to show by a preponderance of the evidence that he engaged in protected activity.

VII. CONCLUSION

In sum: in order to sustain a complaint under the STAA Complainant must show by a preponderance of the evidence that he engaged in protected activity, that Respondents took an adverse action against him, and that his protected activity was a contributing factor in the taking of the adverse action. Complainant has alleged three varieties of protected activity. But I find that he has failed to establish by a preponderance of the evidence that he made safety complaints, as protected by 49 U.S.C. § 31105(a)(1)(A), that he refused to operate his CMV because of DOT

violations, as protected by 49 U.S.C. § 31105(a)(1)(B)(i), or that he refused to operate his CMV because he had a reasonable apprehension of serious injury to himself or the public because of the condition of his CMV, as protected by 49 U.S.C. § 31105(a)(1)(B)(ii).

VIII. **ORDER**

The Complainant's November 15, 2012, complaint is DISMISSED.

Digitally signed by Jennifer Gee
DN: CN=Jennifer Gee, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

JENNIFER GEE
Administrative Law Judge

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).