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Issue Date: 12 October 2017

CASE NO. 2013-STA-00012

In the Matter of:

JUAN NEVAREZ,
Complainant,

v.

WERNER ENTERPRISES, INC.,
Respondent.

Before: Richard M. Clark
Administrative Law Judge

DECISION AND ORDER AFTER REMAND DENYING WHISTLEBLOWER COMPLAINT

This matter arises under the employee protection provisions of 49 U.S.C. § 31105 of the Surface Transportation Assistance Act of 1982 (the "STAA") and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978. A formal hearing following remand from the Administrative Review Board ("ARB") occurred on March 16, 2017, in Las Vegas, Nevada. Attorney Brian Ramsey represented Juan Nevarez ("Complainant" or "Nevarez"). Attorney Katherine Parks represented Werner Enterprises ("Respondent" or "Werner").

The initial hearing in this matter occurred on June 18, 2013, and I issued a Decision and Order denying Complainant's complaint on November 15, 2013. *Nevarez v. Werner Enterprises*, OALJ No. 2013-STA-00012 (OALJ Nov. 15, 2013) ("ALJ D&O"). On appeal, ARB issued a Decision and Order of Remand on October 30, 2015. *Nevarez v. Werner Enterprises*, ARB No. 14-010, OALJ No. 2013-STA-012 (ARB Oct. 30, 2015) ("ARB D&O").

At the hearing on remand, I admitted Joint exhibits ("JX") 201 through 212; Complainant's Exhibits ("CX") 1 through 5, and 7 through 9, 10a through 10i, 11, 11a,[1] 12.5, 12.6, and 13 through 22 (including 15A, which is a DVD of CX 12.5, 12.6, 13, 14, 15); and Respondent's Exhibits ("RX") 1 through 26[2] and 301 through 308. Hearing Transcript from March 16, 2017 ("TR2"[3]) at 6-7, 9, 11,

[1] CX 1 through 10i (including 10a through 10i) are Complainant's exhibits admitted at the initial hearing. CX 11 is a letter from Complainant accompanying a DVD disc that was submitted after the hearing. CX 11a is the DVD disc. Both were admitted in the November 15, 2013 ALJ D&O.
[2] RX 1 through 26 are Respondent's admitted exhibits at the initial hearing.

13, 230-231. Complainant also filed a statement of damages at the hearing on remand, which is marked as Administrative Law Exhibit ("ALJX") 1, and on March 29, 2017, filed an Amended Statement of Damages, which is marked as ALJX 1A. TR2 at 5. Complainant seeks a back pay award of either $173,298 or $119,444, based upon the two conflicting pay rates testified to at hearing, in addition to attorney's fees and costs.[4] ALJX 1A at 1. Respondent filed its post-hearing brief on June 12, 2017 (marked as ALJX 2) and Complainant filed his post-hearing brief on June 15, 2017 (marked as ALJX 3). Respondent submitted a permissible reply brief on June 27, 2017, ALJX 4, and Complainant filed a reply on June 30, 2017, ALJX 5.

As discussed below, I find that Complainant failed to show by a preponderance of the evidence that his protected activity was a contributing factor in the adverse personnel actions taken against him by Respondent. Therefore, I denied Complainant's request for relief.

I. ISSUES PREVIOUSLY DETERMINED

The following issues were previously determined in this matter:

1. Complainant engaged in protected activity within the meaning of the STAA when he refused to drive a Hazmat load on June 18, 2011, because he was not qualified to operate a vehicle carrying hazardous materials. ALJ D&O at 8, *affirmed in* ARB D&O at 9.
2. Respondent knew that Complainant engaged in the protected activity. ALJ D&O at 8.[5]
3. Complainant suffered an adverse action when he was terminated on or about June 21, 2011, and when Respondent refused to pay for Complainant's lodging on the night of June 18, 2011. ARB D&O at 11, 13.

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[3] To differentiate between the two hearing transcripts, I will refer to the original hearing transcript from June 18, 2013, as "TR1" and the hearing transcript from March 16, 2017, as "TR2."

[4] In the pre-hearing order, the statement of issues included whether Complainant was entitled to approximately $200,000 in damages. This amount appears to have been based on the earlier calculation of damages in ALJX 1 and included attorney's fees and costs.

[5] The original D&O stated, "By refusing to operate Respondent's vehicle out of fear the operation would violate a United States standard related to commercial motor vehicle safety, and expressing this concern to Respondent, Complainant has presented sufficient evidence to establish that he engaged in protected activity under STAA and Respondent was aware of his concerns." ALJ D&O at 8. This finding was not examined by the ARB on appeal. There is ARB authority suggesting that "knowledge" is not an element of whistleblower actions at an ALJ hearing, only a requirement necessary to raise an inference for an OSHA investigation. *See Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-042, slip op. at 2, n.3 (Feb. 18, 2016). However, the employer's knowledge "might be implicit in the causation requirement." *Id.* The original finding in the ALJ D&O did not examine Respondent's awareness of the protected activity as part of the causation element, as no adverse actions were found to have occurred and thus causation was not analyzed. Respondent argued in its closing brief that "one of the issues in this case, as it has always been, is that there is no evidence whatsoever that anyone associated with Werner Enterprises ever perceived the incident of June 18, 2011, to have involved 'protected activity.'" ALJX 2 at 5. Complainant did not address this argument in its reply brief. As discussed below, I find that Complainant did not prove his case under the STAA and deny relief, but the issue of knowledge did not play a central role in the ultimate result.

II. ISSUES IN DISPUTE

The matter presents the following disputed issues:

1. Has Complainant shown by a preponderance of the evidence that the protected activity was a contributing factor in the adverse actions? 29 C.F.R. § 1978.109(a).
2. If Complainant establishes the elements of his claim by a preponderance of the evidence, then has Respondent established by clear and convincing evidence that it would have taken the same adverse actions in the absence of Complainant's protected activity? 29 C.F.R. § 1978.109(b)(1).
3. If Complainant prevails, is he entitled to back pay damages, attorney's fees and costs, and any other relief provided by 29 C.F.R. § 24.109(d)(1), including punitive damages?

III. STIPULATIONS

The parties agreed to the following stipulated facts at the hearing on remand:

1. Complainant began working for Respondent on or about March 19, 2011.
2. On the night of June 18, 2011, Complainant contacted Respondent's Safety Hotline and was instructed to call the police.
3. On the night of June 18, 2011, Complainant contacted the police and the police responded and accompanied Complainant to the truck, where he collected his personal belongings.
4. Complainant spent the night at a Super 8 Motel in Kingdom City, Missouri, on June 18, 2011.
5. One Star Trucking hired Complainant during the first week of August 2011.
6. Complainant worked for One Star Trucking for five weeks.
7. After Complainant resigned his employment with One Star Trucking, he was hired by Sunset Pacific Trucking.
8. Don Fischer was a Fleet Manager for Respondent in June 2011.

TR2 at 13-14.

IV. SUMMARY OF THE ARB'S DECISION AND ORDER OF REMAND

On appeal, the ARB summarized the facts of the case, made various findings, and directed that certain issues be considered on remand. In order to provide a background for the ARB's findings, the ARB's recitation of the facts is repeated below, absent the ARB's footnotes[6]:

> Werner Enterprises (also referred to as "Werner" or "Respondent") hired Nevarez as a truck driver in March of 2011, and he began driving for Werner in May, upon completion of required training.

[6] These facts are taken from the ARB's D&O, slip op. at 2-6. While the ARB's footnotes are omitted, I have added footnotes where needed to provide any necessary clarification.

As discussed more fully below, on June 21, 2011, a manager for Werner Enterprises informed Nevarez that his actions immediately following events occurring on June 18 and 19, 2011, had led to management's conclusion that Nevarez had voluntarily quit his job. To place into context those events, it is necessary to recount certain incidents involving Nevarez's employment leading up to June 18 and 19. From June 3, 2011, to June 14, 2011, two events occurred about which the facts are disputed. Nevarez claimed that on June 3, 2011, he refused to drive his truck for safety reasons because it did not have panel lighting or an air brake warning, while Werner Enterprises claimed that Nevarez abandoned his truck and could not be reached for several days. Respondent decided that Nevarez voluntarily quit in this instance, and then it rehired him on June 13, 2011. In a second instance, on June 14, 2011, Respondent took Nevarez out of work for disputed reasons. Nevarez claimed that he did not feel safe to drive with his co-driver because his co-driver could not pass a safety test, while Respondent asserted that Nevarez was unable to get along with his co-driver.

On June 16, 2011, Nevarez returned to work. He took a bus from Fontana, California, to Indianapolis, Indiana, to meet up with Manuel Menchaca, his newly-assigned co-driver. Nevarez stayed in a hotel that Werner Enterprises paid for (with a credit card over the phone) and met with Menchaca the following day, June 17th.

After Nevarez and Menchaca started their trip on June 18, 2011, at 11:27 a.m., Respondent advised Menchaca, via a Qualcomm message: "You are under a 'customer watch load.' On time delivery critical. Any delays or questions, contact DSP ASAP." That same day, at 5:32 p.m., dispatch requested information on whether Menchaca and Nevarez would be on time, and Menchaca, responded with a "Y."

At some point on June 18th, Menchaca, who was driving at the time, picked up a hazardous material load. When Menchaca reached his maximum allowable hours of driving later that day, and attempted to turn driving responsibility over to Nevarez, Nevarez informed Menchaca that he did not have a Hazmat certification that would permit him to operate a vehicle carrying hazardous materials. At around 10:26 p.m. Menchaca notified Werner Enterprises dispatch that Nevarez did not have Hazmat certification.[7] He indicated that he would have to shut down for the night, and requested that dispatch please advise.

A Werner Enterprises incident report indicates that Nevarez called Werner's dispatch "hot-line" at 10:45 p.m. and stated that Menchaca had threatened him. There is a significant evidentiary dispute (that the ALJ did not satisfactorily reconcile) about who at Werner Enterprises talked to Nevarez the night of June 18, 2011. Nevarez testified that he spoke to Thomas Henley, Werner's off-hours supervisor,

[7] The ARB said that, "[g]iven that Nevarez noted on his employment application that he did not have a Hazmat certification, Respondent was surely aware of this at the time Nevarez was assigned as co-driver on the truck with Menchaca," noting that I found "Respondent knew that Complainant did not have the proper Hazmat certification." ARB D&O at 3, n.7 (citing ALJ D&O at 8). However, the ARB vacated the previous finding "that it was not uncommon to have non-Hazmat drivers on a Hazmat load…." *Id.*, citing ALJ D&O at 4.

and that Henley told Nevarez to go to a motel and call in the morning, and to pay for the motel with an EFS check[8] that Henley authorized for $100. Respondent asserted at the hearing before the ALJ (in its opening statement and through the testimony of Harold Montgomery, a Werner dispatch "hotline" specialist) that Nevarez talked to Montgomery; that Montgomery told Nevarez to go to a hotel and call him back; but that because Nevarez never called him back he was unable to pay for the motel room with a company credit card that night. However, Montgomery's testimony is contradicted by his attestation to [the Occupational Safety and Health Administration ("OSHA")] under penalty of perjury, dated September 24, 2012, in which he stated that he did not talk to Nevarez on June 18 or 19; that Nevarez instead talked to Henley during this time.[9] Joseph Nanasy, Werner's Manager of Safety (Hotline)/Safety Specialist, also submitted a declaration indicating that Nevarez had talked to Henley. Henley, on the other hand, testified that he had no recollection of having talked to Nevarez.[10]

In any event, whomever Nevarez spoke with at dispatch advised him to call 911 and request police assistance, which Nevarez did while remaining in a gas station. Upon the arrival of the police, Nevarez returned to the truck to retrieve his personal items, whereupon he retired for the night at a local motel that he paid for with cash from the $100 EFS check that Werner had authorized.

At 12:28 a.m. the morning of June 19th, Montgomery wrote to Menchaca, "Manuel, this is Harold in safety – call me at [***-***-****], concerns your co-driver." At 1:00 a.m., dispatch wrote to Menchaca stating: "show u 2 hrs early as of now, why do you say [load] will be over 2 days late?"; to which Menchaca responded: "My co-driver doesn't have hazmat. And he got off the truck an hour ago. So I'm solo as of now."[11]

The morning of June 19, 2011, Nevarez made several phone calls to Werner Enterprises. Not able to reach anyone, he left phone messages. After checking out of the motel shortly before noon, Nevarez continued making calls to Werner Enterprises from the motel lobby and leaving messages. The only person at Werner Enterprises that Nevarez reached was a Werner safety hotline dispatcher named Linda, who unsuccessfully attempted to connect him to the safety department, informing Nevarez that she "[could] not get them to answer their phone . . . ." In Nevarez's calls with Linda, he informed her that he was heading to the bus station

[8] An EFS check is a company-approved advance on a driver's paycheck that a driver can receive while on the road upon authorization by a company dispatcher. ARB D&O at 2, n.10, citing ALJ D&O at 4.

[9] Mr. Montgomery's declaration to OSHA was not presented by either party as evidence at the hearing. The OSHA declaration was attached to a Motion for Summary Decision filed by Respondent on March 15, 2013. Neither party requested that the prior declaration be considered as evidence or even as part of the hearing record, and it is unclear upon what basis the ARB found that the OSHA declaration was properly before me at the hearing.

[10] The ARB found Werner's version of events that it expected Nevarez to stay in the hotel both Saturday and Sunday night "somewhat incredible," and directed that if I credit it on remand, "it must be explained." ARB D&O at 4, n.15. This is discussed below.

[11] The ARB directed me on remand to address the issue of whether the Hazmat load could have been delivered on time without Complainant driving because if the load could not have been delivered on time, "the inference may arise that Werner expected Nevarez to drive the Hazmat load illegally and did not expect him to refuse to do so." ARB D&O at 5, n.17.

> because he felt he must return home to Las Vegas since he did not "have money for hotels and meals," and had no assurance of reimbursement from Werner Enterprises.
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> At 2:00 p.m. on June 19, Werner Enterprises noted on the incident report (RX 7) that Nevarez would be leaving on a bus home.[12] Nevarez left on the bus seven hours later, at 9:05 p.m., after having charged $214 on his personal Visa card for the bus ticket. The next day, June 20, Werner's team development manager, "J.D.," called Nevarez while he was still on the bus, approximately halfway home to Las Vegas, to inform him that Respondent had another trucking assignment for him and that he should return to Missouri to meet the new truck. Nevarez claims that J.D. was not willing to authorize payment for his return to Missouri. The call was inexplicably disconnected, and Nevarez continued his journey home. Neither J.D. nor Nevarez called the other back that day. Nevarez arrived in Las Vegas the next day, June 21, 2011. A few days later, Nevarez spoke by phone with J.D., who informed him that Werner Enterprises believed that he had voluntarily quit. An entry made on June 21st in the incident report indicates that Nevarez had voluntarily quit.

ARB D&O at 2-6.

The ARB affirmed the finding that Complainant proved by a preponderance of the evidence that he engaged in protected activity under the STAA when he refused to drive the Hazmat load on June 18, 2011, because he was not qualified to operate a vehicle carrying hazardous materials. ARB D&O at 9, n.38. However, the ARB found that substantial evidence did not support the finding that Complainant voluntarily quit his employment. The ARB concluded that "uncontroverted evidence of record…indicates that Respondent *believed* that [Complainant] quit, interpreting his decision to return home [on June 19, 2011] as a voluntary resignation." *Id.* at 10 (emphasis in original). Under ARB precedent, "where an employee has not actually resigned, 'an employer who decided to interpret an employee's actions as a [voluntary] quit or resignation has in fact decided to discharge that employee.'" *Id.* at 11, citing *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019, slip op. at 6 (ARB Sept. 30, 2010). Based upon this evidence, the ARB held that Respondent subjected Complainant to an adverse employment action as a matter of law. *Id.* at 11.

In addition, the ARB held that Respondent engaged in an adverse personnel action against Complainant by "effectively withholding payment for his lodging," reversing my earlier determination that Complainant did not show that Respondent failed to cover his living expenses

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[12] The ARB included the following footnote here:

> It is perplexing that someone at Werner Enterprises would note on the incident report that Werner Enterprises knew at 2:00 p.m. on Sunday, June 19, that Nevarez planned to take a bus home but that no one at Werner Enterprises would call Nevarez on that day to tell him not to take the bus and to wait for another truck, if in fact, that is what Werner Enterprises wanted Nevarez to do. It is especially perplexing given that the incident report indicates that Nevarez was to call dispatch on Monday, and that he would be staying in a motel until then, although there is no evidence of record indicating that anyone with Werner informed Nevarez about this. The incident report indicates that Respondent had seven hours after dispatch recorded actual notice of Nevarez's intent to return home to contact Nevarez before his bus left. It is inexplicable that someone at dispatch would fail to do so when company dispatch records indicate that Werner's dispatch office was actively working that day.

while awaiting a new driving assignment and that this action therefore did not constitute an adverse personnel action. ARB D&O at 10, n.46, 11-12. At the first hearing, Respondent's witness and safety hotline specialist Harold Montgomery testified that he spoke with Complainant on the night of June 18, 2011, and told Complainant to go to a hotel and call him back, but that because Complainant never called him back he was unable to pay for the hotel with a company credit card that night. ALJ D&O at 4; ARB D&O at 4. The ARB found that Mr. Montgomery's testimony lacked credibility because it was inconsistent with his previous statement under oath to OSHA, and that this earlier statement was consistent with other witnesses' testimony.[13] ARB D&O at 12. In addition, the ARB found that "the mere fact that Nevarez was authorized by dispatch to advance to himself cash for his lodging from his wages through use of an EFS check belies any intent on the part of Respondent to pay for Nevarez's lodging." *Id.* at 12-13. Therefore, the ARB found that "[w]hether intentional or not, Respondent's withholding of payment, where company policy provided for such payment, subjected Nevarez to adverse personnel action." *Id.* at 13.

The ARB directed that a number of determinations be made on remand. First, whether Complainant can prove by a preponderance of the evidence that the STAA-protected activity in which he engaged was a contributing factor in the adverse personnel action Respondent took against him and, if so, whether Respondent can nevertheless show by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.[14] ARB D&O at 13.

Second, the ARB rejected the previous credibility findings and directed that the inconsistent and conflicting testimony of Respondent's witnesses be examined to resolve evidentiary questions such as whether Complainant spoke to Montgomery on the evening of June 18, 2011. ARB D&O at 14-15.

Third, the ARB directed that the evidence surrounding the two prior June incidents (on June 3 and June 14, 2011) between Complainant and Respondent be further developed. As described by the ARB, on June 3, 2011, Complainant reported safety concerns to Respondent about the truck he was driving, but Complainant alleged Respondent was not willing to fix the truck, and he therefore refused to continue driving the truck, which Respondent interpreted as a "voluntary quit." ARB D&O at 16. On June 14, 2011, upon his return to work, Complainant was removed from his assigned driving team. *Id.* Complainant alleged it was because of a complaint he raised about being coerced into falsifying a safety test for his co-driver, while Respondent alleges Complainant was taken off the team because he could not get along with his co-driver. *Id.* Complainant alleges these incidents colored his discharge as a result of the June 18-19 incident, and that had he been allowed to fully develop the issues, it would have demonstrated that he was justified in the action he took on June 19th. *Id.* at 17.

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[13] Because Mr. Montgomery's OSHA statement was not part of the hearing record, it was not considered when determining his credibility at the first hearing.

[14] Regarding causation, the ARB directed me to *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014) and *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015). ARB D&O at 13. However, since the ARB's Decision in this matter, the ARB decided *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-00154 (Sept. 30, 2016). In *Palmer*, the ARB overturned the *Fordham* decision and noted that it vacated *Powers* in May 2016. Therefore, the "contributing factor" standard of causation will be analyzed according to the standards explained by the ARB in *Palmer*.

The ARB found these incidents should be further developed for a number of reasons. First, the development of the record about these incidents "may, or may not, result in the crediting of one party's testimony over that of the other." ARB D&O at 14. Second, the incident may be relevant to the causation analysis or Respondent's affirmative defense. The ARB stated:

> [T]he preceding incidents may prove relevant to Nevarez's proof that his protected activity of June 18-19 was a contributing factor in his discharge. Perhaps more importantly, the evidence pertaining to these prior incidents may shed light on Respondent's practice in dealing with similar occurrences to that in which Nevarez engaged on June 18 and 19, and thus of relevance to Respondent's proof that it would have taken the same adverse action against Nevarez even if he had not engaged in the protected activity.

Id. The ARB noted, however, that "[it was] not interpreting Nevarez's complaint of retaliatory discharge to encompass protected activity beyond his refusal to drive on June 18th." *Id.* at 18. It also made clear that it was not "prejudging the relevancy" of the prior incidents, only pointing out that they had "*potential* relevance to Nevarez's proof of causation and, in turn, Respondent's rebuttal proof" and that they therefore deserved "closer scrutiny on remand." *Id.*

Finally, the ARB noted that on remand, evidentiary issues involving a number of documents Complainant requested from Respondent needed to be resolved. ARB D&O at 18. Regarding this direction, at the pre-hearing conference the parties indicated they had considered and addressed the discovery issues noted by the ARB and agreed that all discovery issues mentioned by the ARB had been resolved. I confirmed this agreement in an order following pre-hearing conferenced issued on March 8, 2017, which the parties confirmed at the hearing. TR2 at 5. Therefore, I find that the evidentiary issues have been resolved.

V. FACTUAL FINDINGS

Background

1. Respondent hired Complainant as truck driver in March 2011, and at the time he had a commercial driver's license, but no Hazmat endorsement. TR1 42; TR2 at 25; RX 14 at 3; ALJ D&O at 3.[15] After being hired, Complainant worked with a trainer for about two and a half months, and in May 2011 he completed Respondent's training program and became a qualified driver. TR2 at 61; RX 1; ALJ D&O at 3. Complainant described the work he did for Respondent as "long-haul driving," which required a sleeper berth on the trucks. TR2 at 100-101. Since Complainant preferred to drive alone instead of with a co-driver, he was initially assigned to his own truck. TR1 42; ALJ D&O at 3.

Prior June Incidents

2. The first truck Complainant was assigned to on his own was out of Phoenix, Arizona and registered as truck number 51216. TR2 at 61. He was assigned to drive the truck to Las Vegas,

[15] The ARB did not vacate the previous D&O in its entirety; where the findings on remand are consistent with the previous D&O and not in conflict with the ARB's remand order, I have cited to the previous ALJ D&O in addition to the record.

Nevada, where he was to hand off the trailer to another driver to take to Salt Lake City. *Id.* at 63. When he picked up the truck in Phoenix on May 17, 2011, he noted that the truck was dirty, the provided mattress was dirty, and that there was a broken/loose panel in the interior. TR2 at 132-133; RX 19. He wrote on the inspection report that he was "afraid to catch a disease!" and that the truck was "filthy, filthy, filthy." RX 19. Complainant took a number of pictures of the truck after "they refused to clean it," although he never provided the pictures to Respondent. TR2 at 135, 138; TR1 at 114. Complainant tried to explain that he took the pictures of the truck because he did not want to be responsible for the state of the truck. TR2 at 136. He did not notice that the interior panel lights did not work until it was dark, when he was in a suburb of Phoenix. *Id.* at 139.

3. Complainant said he reported safety issues with truck number 51216 via telephone and Qualcomm, Respondent's computer communication system. TR2 at 26-27. He did not remember who specifically he spoke with on the phone, but he normally spoke with J.D., who was Respondent's team development manager and the person at Werner who assigned Complainant to loads. *Id.* at 27-28. Complainant said via Qualcomm that he had informed J.D., as well as Dan Fischer, a dispatcher, and John Davis, who was the general manager of the yard in Phoenix, about the safety issues. TR2 at 64; TR1 at 40. However, from May 17, 2011, to May 25, 2011, there were no messages via Qualcomm regarding the safety or cleanliness of the truck from Complainant or Respondent. JX211 at 1035-1047. On May 25, 2011, at 12:49 p.m., Complainant sent an "over the road maintenance request" via Qualcomm that stated the panel lights and instrument gages did not work, that the interior was "filthy," and that there was no mattress. TR2 at 142-143; JX 211 at 1047; TR1 40, 43; *see* CX 10(a)-(i); ALJ D&O at 3. At 12:51 p.m. the same day, the truck's Qualcomm system received a message stating that the maintenance request was approved and that the breakdown department would contact Complainant soon. JX 211 at 1048. Later in the afternoon, Complainant received a Qualcomm message that the vendor had been contacted, and provided a reference number, but that to get a mattress he would have to go to a terminal. *Id.* At 4:10 p.m., Complainant sent a message via Qualcomm that the truck was unsafe because the instrument lights did not work, and repeated the assertion that the interior was "filthy" and in need of a new mattress.[16] TR2 at 31; JX 211 at 1048-1049. He stated that these issues need to be fixed before assigning him a new load, and he provided his phone number, stating that he was available as soon as he was provided a clean and safe truck. JX 211 at 1049. At 4:13 p.m., Complainant sent a message stating, "please provide directions/info for cleaning and fixing," and the return message, also at 4:13 p.m., was "am aware." *Id.* After he handed off the trailer to the other driver in Las Vegas at a yard owned by Respondent, Complainant refused to drive the truck until Respondent fixed the alleged safety defects. TR2 at 64. Complainant drove the truck prior to refusing to drive it even though he recognized the safety issues because he needed to keep his job, and Complainant claimed Respondent would not provide a "clean truck and a safe truck." *Id.* at 143-144.

4. On June 1, 2011, a supervisor instructed Complainant to take the truck to the Freightliner dealership in Las Vegas to get it fixed.[17] TR2 at 33-34; JX 211 at 1051. Complainant

[16] At the hearing on remand, Complainant also stated that "the emergency brakes, the warning wouldn't work. That's lethal. I mean how can you brake without operating brakes?" TR2 at 31. After questioning, Complainant admitted that the complaint about the brakes was not on the Qualcomm messages. *Id.* at 32. Complainant made a similar complaint during the first hearing – that the truck had "no air brakes warning," TR1 at 40, – but it is not elsewhere in the record.

[17] It is unclear where the truck was between May 25, 2011, and June 1, 2011, however Respondent asserts that Complainant ceased driving truck number 51216 on May 25, 2011. ALJX 4 at 4. If Complainant had left the truck at the yard owned by Respondent, it is unclear how he would have seen the June 1, 2011 Qualcomm message instructing him to take the truck to the dealership, although he testified that he was communicating with Respondent by phone.

dropped off the truck at the Freightliner dealership, and did not believe he was abandoning the truck, as that would have been "a killer" for his career. TR2 at 36. However, Complainant testified at the initial hearing that he told J.D. that "if [he] was not going to get a truck, a safe truck, that [he] was going to be forced to look for another drive." TR1 at 43. He said he was "communicating constantly" with J.D., but that J.D. would not do anything. *Id.* As of June 2, 2011, the truck's Qualcomm system registered as "asleep." JX 210 at 1026; TR2 at 39-40. At some date that is not clear from the record, Complainant was told that he had voluntarily quit. TR1 at 43. A status worksheet prepared by a Werner employee on June 3, 2011, listed "voluntary quit" under the "event type," with a reason of "no communication." RX 2. The status worksheet stated that Complainant left the truck at the dealer in Las Vegas, and that he had not made contact with dispatch for several days. *Id.* The worksheet stated that he was offered a new truck and given a teammate but that Complainant did not respond and his teammate could not make contact. *Id.* The June 3, 2011 worksheet also included charges for truck cleaning and line haul charges, which were assessed on Complainant's June 30, 2011 paycheck. *Id.*; *see* F.F. ¶ 23.

5. At the initial hearing, Complainant stated that J.D. tried to team him up with someone named Francisco, and that Complainant called Francisco to tell him that he did not want to team up with other drivers, and that Francisco said he did not want to team up with any drivers either, and that he was quitting anyway. TR1 at 42-43. Also at the initial hearing, Complainant stated that after he was "communicating constantly" with J.D., "all of a sudden I call, and I had voluntary quit." *Id.* at 43. After that, Respondent offered to "start all over" with him, and because he needed the experience, Complainant started working for them again in Fontana, California. *Id.* at 44. However, at the hearing on remand, Complainant testified that Respondent instructed Complainant to go to Fontana, California, and did not inform Complainant that he had been terminated. TR2 at 36. He testified at the second hearing that when he arrived in Fontana, he discovered that he needed to be rehired, and asserted that no one ever told him he had been terminated. *Id.* at 36, 40-41, 65-66. I find the version of events Complainant described in the first hearing as more plausible – that he did not want to work with a co-driver and that he called and found out Respondent considered him to have voluntarily quit due to lack of communication. First, the earlier testimony was closer in time to the actual events. Second, Complainant's testimony at the first hearing regarding this incident is more consistent with the record (*i.e.*, he talked about being offered a new team driver (Francisco), which is alluded to in the status worksheet on June 3, 2011).

6. Complainant filled out a telephone application and employment history form on June 8, 2011, and further employment forms on June 10, 2011, which showed that he had worked for Respondent from March 2011 to May 2011. TR2 at 41, 45; RX 3; RX 20. Under "reason for leaving," he wrote "long wait for truck." RX 20 at 2. Complainant clarified at the hearing that he "had to put something. They told me that I had quit." TR2 at 208-209. On June 10, 2011, Complainant acknowledged receiving Respondent's Driver Handbook, a Federal Motor Carrier Policy Regulation Pocketbook, and the Federal Guide to Hazardous Materials. TR2 at 22-24; RX 23; JX 212. Complainant attended an orientation, but he was not paid for the time he spent

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TR1 at 43; TR2 at 39. From the Qualcomm messages, it does not appear that the truck was in operation between May 25, 2011, and June 1, 2011, when Complainant took the truck to the dealership, and that it was likely left at Respondent's yard during this time. *See* JX 211 at 1049-1051. The timeline is difficult to determine, and when Complainant was questioned about the timeline, he answered more than once, "It's in the Qualcomm." TR2 at 64.

attending this orientation, although he had been paid for a previous orientation he attended. TR2 at 46. He was unsure how long the orientation lasted.[18] *Id.* at 158.

7. After Complainant completed the orientation, he was assigned to truck number 51768 on June 13, 2011. TR2 at 45, 52; RX 4; RX 13 at 1.[19] Complainant was "forced" to team up with Antonio Mendoza on the new truck assignment. TR2 at 53, 151; ALJ D&O at 3. Complainant only wanted to work with his friend Reuben, and if he could not work with Reuben he wanted to drive alone. TR1 at 59; ALJ D&O at 3. Complainant told J.D. he did not want to be teamed up, but J.D. told him that he would only be assigned a load if he teamed up. TR2 at 151-152; TR1 at 44-45. At the first hearing, Complainant alleged that Mr. Mendoza could not pass a safety test, and that "they told [Complainant] to help him to pass the test" which he considered "not legal." TR1 at 46; ALJ D&O at 3. At the hearing on remand, Complainant explained that he and Mr. Mendoza had a disagreement, and that Mr. Mendoza refused to help him and called him a "rookie." TR2 at 153-154. Complainant told Mr. Mendoza that if he would not help him, then they could not work together, after which Mr. Mendoza took his belongings and went to sleep in the truck terminal. *Id.* Complainant alleged that the next morning, Respondent "took the truck away from [him]." *Id.* at 155. However, the Qualcomm messages show that on the morning of June 14, 2011, Complainant told Respondent he "couldn't work with Antonio." RX 13 at 11. Dispatch then responded, and asked where Mr. Mendoza was, to which Complainant replied he was at the terminal in Fontana. *Id.* Dispatch then told Complainant to call J.D., who planned to give truck 51768 to Mr. Mendoza and send Complainant to truck 53501 with a new partner (Manuel Menchaca). *Id.* at 11-12. A status worksheet dated June 14, 2011, shows that Complainant was on a "break from [the] road" because he "can't get along with his co-driver." CX 22. There was no mention at the hearing on remand of any safety test that Mr. Mendoza could not pass.

June 18, 2011 Incident and Aftermath

8. On Thursday, June 16, 2011, Respondent sent Complainant to San Bernardino, where he took a bus to Indianapolis to meet up with his new co-driver, Manuel Menchaca, who was a driver-trainer but not a management-level employee. TR2 at 59, 66; RX 13 at 164; TR1 81; ALJ D&O at 3. Complainant spent the night in Indianapolis to wait for Mr. Menchaca in a hotel paid for by Respondent. TR1 at 60; ALJ D&O at 3. He and Mr. Menchaca were assigned to truck number 53501. TR2 at 57-58; RX 6. Complainant arrived at the truck location and logged into the Qualcomm messaging system onboard on June 17, 2011. TR2 at 68; RX 13 at 29. At 11:27 a.m. on June 18, 2011, truck 53501 received a message via the Qualcomm stating that they were under a "customer watch load" and that on-time delivery was "critical." RX 13 at 194. The message instructed the drivers to contact dispatch "ASAP" if there were any delays or questions. *Id.* At 5:33 p.m. on June 18, 2011, Mr. Menchaca picked up a load containing hazardous materials while Complainant was in the sleeper berth. TR2 at 78, 80; RX 13 at 197.

9. Mr. Menchaca stopped driving when they reached a gas station in Kingdom City, Missouri late in the evening on Saturday, June 18, 2011, because he had reached the legal limit for the number of hours he could drive. TR2 at 78-79; TR1 60-61, 86-87; ALJ D&O at 3. Complainant

[18] Complainant described the orientation as lasting either one or two days, but during his deposition stated it may have lasted four or five hours or a whole day, but that he was unsure. TR2 at 46, 158, 201.

[19] Complainant's employee number was 482273. TR2 at 52. The printout of the Qualcomm messages for truck 51768 shows that Complainant checked in on the truck's Qualcomm system on June 13, 2011, at 2:41 p.m. RX 13 at 1.

went to take over the driving, and when he examined the bill of lading he discovered that the load contained hazardous materials, which he was not certified to drive. TR2 at 78, 82; JX 208. At this point, an altercation with Mr. Menchaca occurred. TR2 at 118-119. According to Complainant, Mr. Menchaca instructed Complainant to drive, but Complainant refused because he did not have the proper certification. TR1at 28; ALJ D&O at 4. The two drivers argued, and Mr. Menchaca began yelling and swearing at Complainant and demanding that he drive the truck, to the point that Complainant said he feared for his life. CX 12.5[20]; TR1 28-29; ALJ D&O at 4. Complainant stated that Mr. Menchaca had designated leave in California that he wanted to get to "no matter what." TR1 at 30; *see* RX 13 at 141. Complainant said that after the altercation, Mr. Menchaca sent a message via the Qualcomm at 10:26 p.m. that Complainant did not have a Hazmat endorsement and that he would have to "shut down for the night." RX 13 at 202. The dispatch responded at 10:28 p.m. with "k," which appears to be acknowledging the message. *Id.* No one besides Mr. Menchaca ever told Complainant to drive the Hazmat load himself. TR2 at 120-121; TR1 at 68. Complainant testified that the Hazmat load was to be delivered to California, and that every 11 hours they would have to switch drivers, and he therefore questioned why he was put on a Hazmat load in the first place. TR1 at 68, 72.

10. At 10:34 p.m., the log was corrected for Complainant's employee I.D. number to reflect that he did not drive. RX 13 at 203. At 12:28 a.m., the truck received a message via Qualcomm: "Manuel – this is Harold in Safety – call me at [number] concerns your co drv." *Id.* At 1:00 a.m., Mr. Menchaca received the following message: "show u 2 hrs early as of now, why do you say [load] will be over 2 days late?" RX 13 at 204. Mr. Menchaca replied that his co-driver did not have the Hazmat endorsement and that he "got off the truck about an hour ago. So I'm solo as of now." *Id.* The dispatch replied, "where did he go? And what is his employee number?" Mr. Menchaca gave dispatch Complainant's employee number and said he did not know where he went, just that he got off the truck. *Id.* at 204-205.

11. Complainant left the cab after the altercation with Mr. Menchaca and went to the truck stop/gas station store to call Respondent. TR1 at 30; TR2 at 120; ALJ D&O at 4. Complainant recorded the call and believed he talked with "Dan," (it is unclear on the recording) who told him to call the police to help him get his things from the truck, which he did, and a police officer later escorted Complainant to the truck to collect his things. CX 12.5; TR1 at 30-31. During the recorded call, Complainant never mentioned to the Werner representative that he refused to drive the Hazmat load, only that Mr. Menchaca had threatened him and that he did not want to go back to the truck. CX 12.5. Complainant then called Respondent back, although a record of this call was not provided, and he testified at the first hearing that he spoke with Thomas Henley, who told him to withdraw money from an EFS check to pay for a hotel.[21] TR1 at 31. Complainant said

[20] CX 12.5 (provided on disc labeled CX 15A) is a recording of Complainant reporting Mr. Menchaca's threatening behavior to Respondent. After hanging up with Respondent, Complainant then called the police (at the direction of Respondent's employee), which is also recorded. The time of the recording is labeled 20:51, which is 8:51 p.m. This conflicts with the other evidence that suggests that the altercation was closer to 10:00 or 11:00 p.m. *See* RX 13 at 202 (Mr. Menchaca's Qualcomm message that Complainant did not have a Hazmat endorsement), RX 6 (incident report listing incident as happening around 10:45 p.m.). I do not find it material if the altercation happened closer to 8:00 p.m. or 11:00 p.m., but to the extent it matters, I find there is more evidentiary support that the altercation happened later in the evening.

[21] At the hearing on remand, Complainant did not specify who at the company told him to go to a hotel, but someone did instruct him to go a hotel and call J.D. in the morning. TR2 at 120. Similarly, he could not remember who authorized the EFS check, but testified that it was either Mr. Montgomery or Mr. Henley. *Id.* at 85. Mr. Montgomery

that Respondent's counsel informed him that he spoke with Mr. Henley, because he did not "have names" since when he was on the phone he did not have anything to write with to take notes. *Id.* at 31-32. Respondent, through who was presumably Mr. Henley (as discussed later), told Complainant to call in the morning for an assignment. TR2 at 89, 120.

12. At the initial hearing, it appeared that the EFS check was taken out of Complainant's future pay, as it was described as an advance on a driver's paycheck. TR1 at 94; ARB D&O at 2, n.10, citing ALJ D&O at 4. At the first hearing, Complainant testified that he told Mr. Henley he thought Respondent should pay for the hotel, but Mr. Henley told him to pay with the check, and that the check took money "from [Complainant's] account." TR1 at 31. Complainant also testified that Respondent refused to pay for the hotel "from day one." *Id.* at 66. However, on remand, Complainant testified that Respondent paid for his hotel on June 18, 2011. TR2 at 85-87, 89. Complainant clarified that there are four different types of EFS checks, and that he cashed the EFS check at Respondent's expense. *Id.* at 85-87. Despite this testimony, which I attempted to clarify,[22] the record reflects that $101.45 was deducted from Complainant's June 23, 2011 paycheck, as this amount is listed under the "Advance" section with a date of "6/18." RX 15 at 10. The "advance" was then listed under "deductions." *Id.* Confusingly, the pay statement lists Complainant's gross earnings as $232.66 and the total deductions as $207.41 (which includes the $101.45 advance), but the total earnings is listed as $0. *See id.* Regardless, the evidence and record shows that Complainant paid for his lodging on June 18, 2011, out of his June 23, 2011 paycheck, and that Respondent did not pay for his hotel, despite Complainant's testimony to the contrary at the hearing on remand.

13. Mr. Harold Montgomery, employed in Respondent's safety hotline department, testified at the first hearing, but not at the hearing on remand. TR1 at 75-76. Mr. Montgomery testified that he prepared a report at the time of the incident using information dictated by the driver. TR1 80; RX 7.[23] The "Complaint and Incident Report" dated June 18, 2011, states that it was "reported by H. Montgomery" and "reviewed by J. Nanasy." RX 7. Mr. Montgomery said that it is typical to pay for motels over the phone with a credit card in these situations. TR1 82, 87; ALJ D&O at 4. Mr. Montgomery testified that he spoke with Complainant on the night of June 18, 2011, around 11:00 p.m., and that Complainant never called him back to have him authorize payment for the hotel. TR1 at 80-83. However, in his sworn statement to OSHA, he stated the following:

> I did not speak with [Complainant] on June 18, 2011, or June 19, 2011. I did speak with Manuel Manchaca [sic] on June 19, 2011 and recall him saying that the Police had responded and stood by the truck as the personal belonging[s] were taken from the truck. I learned that Manuel said that he and [Complainant] had a conflict. I also

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testified that he did not authorize the check and did not know who did, but that it was usually dispatch who approved the checks. TR1 at 89, 94-95; ALJ D&O at 4. Complainant did not record the call where Respondent authorized the check and instructed him to call J.D. in the morning.

[22] After Complainant testified that Respondent paid for his hotel, I asked Complainant: "Okay. Mr. Nevarez, I have to ask this question. So, Werner Enterprises paid for your hotel the first night, June 18?" to which he responded: "Correct." TR2 at 89.

[23] At the first hearing, the copy of Respondent's exhibits provided to the ALJ were out of order (specifically RX 5, 6, 7, and 8). TR1 at 77-79. Respondent's counsel provided the ALJ with her copy of the exhibits at the end of the hearing. *Id.* at 79, 132. However, the mistake was repeated at the hearing on remand. Therefore, citations to Respondent's original hearing exhibits (RX 1 through 26) are based on the original copy provided after the first hearing, not on the copy of the original exhibits provided for the hearing on remand.

> learned from a report that [Complainant] had said that he was threatened by Mr. Manchaca and he would not return to the truck assigned and was told to call 911…I did learn that Mr. Manchaca was a driver and trainer responsible for the Hazmat load and [Complainant] was not a driver of the load. It was apparent that [Complainant] had spoken with Mr. Thomas Henly [sic] on June 18, 2011 but not with me. I did not inform [Complainant] of his status as a driver as Mr. Henly [sic] said that [Complainant] would be in the motel room until driver operations would contact him. I did not receive a call from [Complainant] indicating that he needed money and transportation on June 19, 2011.

CX 17.[24] According to Mr. Montgomery, there were no issues at all with the truck stopping while the Hazmat driver got his hours back. TR1 at 84-85; ALJ D&O at 4. When there is only one driver who is Hazmat-endorsed, he drives his hours, takes the required break, and then gets back behind the wheel. TR1 at 83. The other, non-Hazmat-endorsed driver "cannot touch that load at all." *Id.* Neither Mr. Montgomery nor Mr. Henley ever told Complainant to drive the truck without a Hazmat endorsement, although neither are dispatchers. TR1 83, 100; ALJ D&O at 4. Respondent did not address Mr. Montgomery's contradictory statements at the hearing on remand, despite the ARB's explicit mention of it. Given the evidence of record, I find it more likely than not that Mr. Montgomery and Mr. Henley both spoke with Complainant on June 18, 2011, despite Mr. Montgomery's contradictory OSHA statement. Mr. Montgomery was a safety hotline specialist and was listed as the author of the incident report. RX 7. It stands to reason that he answered Complainant's call to the safety hotline and reported Complainant's call about Mr. Menchaca's threatening behavior. The record indicates that Mr. Montgomery also spoke with Mr. Menchaca, *see* F.F. ¶ 10 ("Harold in Safety" requested via the Qualcomm that Mr. Menchaca call him). I also find that when Complainant called back after retrieving his belongings from the truck, he most likely spoke with Mr. Henley, who authorized the EFS check, and not Mr. Montgomery. *See* F.F. ¶ 16.

14. Thomas Henley, an off-hours operations supervisor for Respondent, also testified at the first hearing and provided a statement to OSHA. TR1 at 96; CX 16. At the hearing, he testified that he did not remember speaking with Complainant on June 18 or June 19, 2011. TR1 at 98. In his OSHA statement, he said he did not recall receiving notice of a conflict between Complainant and Mr. Menchaca, and did "not recall making any input into this matter." CX 16. Mr. Henley "[did] not recall" speaking to Complainant or informing him to wait in a motel on June 18, 2011. *Id.* Mr. Henley noted that "[t]he incident report suggests that I advised Mr. Nanasy or Mr. Mon[t]gomery on what should be the normal placement of [Complainant] on Monday with assignments," but stated that he "[did] not recall speaking to either safety specialists about this situation involving [Complainant]." *Id.* Mr. Henley stated that normal procedure would be for the company to pay for the motel and that if Complainant had spoken with him and explained the situation, he "probably would have authorized his stay in a motel and tried to get more resolution." *Id.* At the hearing, Mr. Henley testified that he did not have any record of Complainant calling dispatch on June 18 or June 19, but that he also did not check for a record. TR1 at 107.

15. Joseph Nanasy, a manager of safety hotline/safety specialist for Respondent provided a statement to OSHA. RX 8. He stated that he did not work weekends and that he learned of the altercation between Complainant and Mr. Menchaca on June 21, 2011, at

[24] Although not part of the original hearing exhibits, Mr. Montgomery's and Mr. Henley's statements to OSHA were admitted into evidence at the hearing on remand.

approximately 11:00 p.m., when he read the incident report. *Id.* Mr. Nanasy believed that Complainant was instructed by Mr. Henley to go to a hotel and to call in for a truck assignment. *Id.* Mr. Nanasy stated that he "learned that [Complainant] took a bus home on June 19, 2011 and call the Hotline at 1400 hours [to] say that he had quit his position." *Id.* Mr. Nanasy stated that he believed that Complainant "could have stayed in the motel until Monday (June 21, 2011) as he was told to remain there until directions from operations but [Complainant] took another option and departed to home." *Id.*

16. The incident report describing the altercation between Complainant and Mr. Menchaca on June 18, 2011, was logged at 11:00 p.m., with the incident reported as happening at 10:45 p.m. RX 7. In the "description of incident/complaint," the report stated that Complainant called and informed Respondent that Mr. Menchaca threated his life, and that Complainant was inside a truck stop and refused to go back to the truck. *Id.* The author of this portion of the incident report wrote that he told Complainant to call 911 and ask the police to help him get his stuff from the truck.[25] *Id.* The report continued, "Waiting for him to call back." The next section of the report, titled "driver's response" states that Mr. Menchaca called and said he and Complainant had been "having disagreements for some time now." *Id.* Mr. Menchaca said that he told Complainant he would have to stop at a weigh station with the Hazmat load, and that Complainant replied that he did not have a Hazmat endorsement. *Id.* Mr. Menchaca said that Complainant "started to tell him that he was tired of having disagreements with him" and that "one thing lead [sic] to another and [Complainant] took his lap top and left the truck." *Id.* In the "comments/disposition" section of the incident report, it was noted that "Thomas Henley – said that [Complainant] will have to call truck assignments on Monday. He will be in motel until then." *Id.* Under "other information" are two notations: on June 19, 2011, a note at 14:00 that Complainant was taking a bus home, and on June 21, 2011, the note "JNANASY OMANE: [Complainant] AS VQ." RX 7; TR2 at 162-163.

17. Complainant checked into a Super 8 motel on the night of June 18, 2011, roughly two to three hours after the altercation with Mr. Menchaca and paid $69.05 for the room using the EFS check. TR1at 63; CX 1; ALJ D&O at 4. Complainant also had about $20-$30 dollars cash. TR1 at 32. The next morning, Sunday, June 19, 2011, Complainant attempted to get in touch with someone at Werner's dispatch starting around 8:00 a.m. to inform them that he needed more funds to pay for lodging. TR2 at 87-88; TR1 at 63. Complainant stated he had another EFS check that he needed someone at Werner to authorize.[26] TR2 at 165-166. He spoke with someone named Linda in the safety department but not someone in dispatch. *Id.* at 90. He checked out of the hotel around 11:00 a.m. or noon, and continued calling Respondent in the lobby of the hotel. TR1 at 63-64. After he made "many" attempts to contact the correct person to find out what he should do, he decided to record the calls. TR2 at 90; ALJ D&O at 5. Complainant filmed three phone calls of himself attempting to reach Respondent by phone using the camera on his laptop computer. CX 11, 11a, 12.6, 12, 13; ALJ D&O at 5. Complainant made the first filmed call at 10:29 a.m., and he left a message for J.D. CX 12.6. He said his "payment situation was not the best" and that he did not have a place to go. *Id.* He said was "stuck" there and had "no choice but to contact OSHA," and

[25] As I found that Complainant most likely spoke to Mr. Montgomery when he first called the hotline, F.F. ¶ 13, it is presumed that he authored this portion of the report.

[26] Complainant later testified that he wanted Respondent to authorize the second EFS check, but that "they wouldn't" and that "they would not authorize anymore." TR2 at 166, 202-203. However, this is not an accurate statement because it was not that Respondent "wouldn't" authorize the check, but that Complainant could not contact anyone in dispatch.

that he would try to get home somehow. *Id.* The next filmed call is labeled at 10:31 a.m., and he got ahold of Linda in the safety department. CX 12. He told Linda he contacted dispatch and they were not answering, and that he left four messages for J.D., but that he could not stay at the hotel because he had no money. *Id.* Linda tried to transfer him but the phone just rang for 11 minutes. *Id.* The last filmed call was at 11:57 a.m., and Complainant spoke with Linda, who said she could not get in contact with dispatch either. CX 13. He told her that the phone at dispatch just "rang and rang" and that he was going to catch a bus because otherwise he would have to sleep on the street. *Id.* She apologized and said she could also not get dispatch to answer their phones. *Id.*

18. Complainant had a Visa card, but could not afford to pay for his lodging with his own funds without putting himself "in serious trouble." TR2 at 88. He believed he had a choice: he could either stay in Kingdom City, Missouri, or pay for a bus ride home, but not both, because if he had stayed there he would have run out of money. *Id.* at 88-89. At the hearing on remand, Complainant admitted that it would have been cheaper to stay at the hotel one more night, but that "it's like a wife waiting for another beating before leaving the husband." *Id.* at 92. He told Respondent that unless he heard back from anyone, he was going to take a bus home that evening. *Id.* at 89. He never heard back from anyone working for Respondent, and Respondent never told him to stay more than one night in Kingdom City, only to call them on the morning of June 19, 2011. *Id.* at 89, 91. After an hour and a half of waiting in the lobby, he went to the truck stop. TR1 at 64. He also never submitted the hotel receipt to Respondent for reimbursement.[27] TR2 at 66-67.

19. Complainant took a cab from Kingdom City to the bus station in Colombia, Missouri, where he used his Visa card to buy a Greyhound bus ticket to Las Vegas that cost $214. TR2 at 91; CX 2; ALJ D&O at 5. At 9:05 p.m. on June 19, Complainant boarded a Greyhound bus bound for his home in Las Vegas, Nevada where he was due to arrive on June 21, 2011, at 2:30 a.m. CX 2; ALJ D&O at 5. Complainant never asked Respondent to pay for his bus ticket, although he said he asked J.D. about a reimbursement when he spoke with him. TR2 at 96; TR1 at 67. On Monday, June 20, 2011, while he was on the bus in the Colorado mountains, Complainant received a phone call from J.D., who told him to return to Missouri to be assigned a new load. TR2 at 93, 166; TR1 at 33; ALJ D&O at 5. However, Complainant stated that Respondent was not willing to pay for the bus ticket back to Missouri, although he admitted that the line was breaking up and he only "started to try to find out if [J.D.] was willing to pay for [the ticket]."[28] TR2 at 94; TR1 at 34. The call was cut off because the signal was lost. TR2 at 95. At the hearing on remand, Complainant read the account he gave at his deposition of how he felt about returning to Columbia, Missouri. *Id.* at 203-204. Complainant stated that "[J.D.] told me to go back to Columbia. And I don't see any other reason to go back anywhere, other than getting a load, which to begin with I should have – they should have answered the phone or offered me some type of lodging or something, which was not the case." *Id.* at 204.

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[27] At the first hearing, Respondent's counsel asked Complainant if he would agree that Respondent did not refuse to reimburse Complainant for the hotel bill. TR1 at 66. Complainant responded:

> I agree on that part, but I disagree since they made me withdraw money from my pocket to pay for it. And then when I asked for them – I asked for reimbursement, they said, "No. You quit. You" – like – I don't remember the exact words, but they did refuse. I never – even – in fact, had I present [sic] the receipt, or whatever, to them, it would have taken days. I was already on my way back.

Id. at 66-67. This exchange demonstrates how Complainant often contradicted himself and why his testimony must be read very carefully to determine its meaning and accuracy.

[28] At the first hearing, Complainant stated at one point that J.D. told him to "walk back to Missouri." TR1 at 65.

20. Complainant arrived home in Las Vegas on June 21, 2011. TR1 at 38; ALJ D&O at 5. A status worksheet prepared by fleet manager Don Fisher dated June 21, 2011, stated that Complainant had "voluntary quit," and listed the reason as "career change." RX 9; stipulation ¶ 8. Under "explanation," it stated "trucking wasn't for him he never pulled a load under [internal code]." RX 9. Complainant spoke with J.D. on or about June 21, 2011,[29] although he could not remember if J.D. called him or if he called J.D. TR2 at 95, 97, 169-170. At the hearing on remand, Complainant first testified that he called Respondent; however, at his deposition in May 2013, he stated that he was "pretty sure" J.D. called him.[30] *Id.* at 97, 169. However, he generally did not remember. At the initial hearing in June 2013, Complainant testified that he thought he called J.D., stating "I knew that I didn't have a job since I didn't – I didn't want to – to talk or go back from Colorado…." TR1 at 38.

21. At the hearing on remand, Complainant testified that when he spoke with J.D., he found out that Respondent believed he had voluntarily quit. TR2 at 95. Complainant stated he "was willing to work with [Respondent]" if it "would allow [him] a truck." *Id.* at 96. Complainant objected to the characterization that he had voluntarily quit and did not remember Respondent offering to reemploy him after it considered him to have voluntarily quit. *Id.* at 96-98. However, he stated that he did not recall the conversation since it had been such a long time. *Id.* at 97-98. At the first hearing, Complainant stated that Respondent has a "habit" of considering drivers to have voluntarily quit when they "don't do things their way, whether legal or illegal." TR1 at 34. Other than his statement, there was no evidence about how Respondent interacted with other drivers.

22. Complainant recorded two more calls he made to Respondent on June 21, 2011. In the first call, he stated that he spoke with J.D. a few minutes prior and that the fact that Mr. Menchaca "threatened his life" was a "joke" to Respondent, and that he needed to know "what was going on" because he knew "it will not be a joke for OSHA and the Department of Transportation."[31] CX 14. However, the call was disconnected. *Id.* In the second call, Complainant spoke with two different Werner employees. CX 15. He described the incident with Mr. Menchaca and mentioned that he refused to drive because he did not have a Hazmat endorsement, and said that Respondent put him in a hotel for one night, but that the next day he could only get in touch with Linda in "driver relations." *Id.* He said he "had to go somewhere because he would be homeless." *Id.* He had found out that he was considered to have voluntarily quit, and wanted to know if there was something he could do internally, or if he had to go to a government agency. *Id.* He said he did not quit, but that he "had to go somewhere." *Id.* He mentioned being part of a protected class due to national origin. *Id.* He wanted to know what action Respondent was going to take against Mr. Menchaca, and how he would be compensated for time lost and the expenses incurred, although he did not specify what expenses. *Id.* He was transferred to a different employee, who said he could not help but that Complainant would have to talk to his dispatcher or his dispatcher's supervisor. *Id.* Complainant said he talked to J.D. but since the employee was not going to help him, he would "speak with government agencies." *Id.*

[29] Complainant testified that he did not speak with anyone who worked for Respondent for "several days," after returning to Las Vegas. TR2 at 95. However, two of his recorded conversations in which he speaks with Werner employees are dated June 21, 2011. *See* CX 14, 15. Given Complainant's poor memory, I find that Complainant spoke with J.D. on or about June 21, 2011, instead of "several days" afterward.

[30] Complainant testified that he thought he spoke to "Bert," but that he did not remember his name. TR2 at 97.

[31] This is also the only recorded call where Complainant informed the listener that he was recording the call.

23. Complainant's last paycheck from Respondent dated June 30, 2011, had a number of deductions for tractor cleaning, truck hauling, and "airfare."[32] TR2 at 98-100; CX 3; RX 15 at 11; TR1 48-50; ALJ D&O at 5. These deductions match the amounts charged for tractor cleaning and line-haul[33] that were assessed in the June 3, 2011 status worksheet. TR2 at 212-214; RX 2; *see also* CX 19 (showing expenses entered in system on June 3, June 8, and June 13, 2011). Complainant claimed he tried to ask for reimbursement for expenses, but he did not remember who he spoke with, although he testified at the first hearing that when he spoke with J.D. soon after the Kingdom City incident and asked for reimbursement of these fees, J.D. refused. TR2 at 123-124; TR1 66; ALJ D&O at 5. Mr. Henley explained that he believed the line haul and tractor cleaning charges in question were related to Complainant's previous incidents with truck 51216, not the incident in Kingdom City, Missouri. TR1 99-100, 102, 105; ALJ D&O at 5. He also clarified that the airfare charge was a mistake and should have been labeled bus fare, and that it was for the bus ticket from Las Vegas to San Bernardino. TR1 98-99, 104; ALJ D&O at 5. Steve Tisinger, an employee of Respondent responsible for driver payroll, also testified that a deduction from a check for "airfare tickets" can be used for any kind of travel. TR2 at 213-214.

Complainant's Subsequent Employment and Wage Evidence

24. During the first week of August 2011, Complainant found another job with One Star Trucking based out of Kermit, Texas. TR2 at 103; RX 10; ALJ D&O at 6. Complainant described this work as different from his work with Respondent, because the driving had a smaller radius (50 miles versus over 100 miles), and the loads were mostly picked up and delivered around Kermit, Texas. TR2 at 103. He worked six days a week and picked up the truck every morning and returned it every night; this differed from the procedure when working for Respondent, where he kept the truck overnight. *Id.* at 103-104, 192. He had to rent a motel room at night because there was "nowhere to live" in Kermit. *Id.* at 104. He worked for One Star Trucking for roughly five weeks, but left because first, his family was in Las Vegas and second, there was no place to live in Kermit or the surrounding areas and the hotel cost about $200 to $250 per week. TR2 at 105, 186; TR1 at 51. Complainant claimed he looked in magazines for places to live, drove around, and worked with realtors, although he could not remember their names. TR2 at 186-187.

25. After he worked for One Star Trucking, he worked for Sunset Pacific in California, where he drove trucks similar to those he drove for Respondent.[34] TR2 at 105-106. However, he only worked for Sunset Pacific for a few weeks because he was not getting paid. *Id.* at 107. Complainant explained that Sunset Pacific hired owner/operators, who, according to Sunset Pacific, were responsible for paying truck drivers like Complainant. *Id.* Complainant looked for the owner/operator a "couple times" who was supposed to pay him, but he was not successful in collecting his wages. *Id.* at 107-108. He also claimed that the truck provided by Sunset Pacific was "a piece of trash," and took pictures of the truck. *Id.* at 189-191.

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[32] Contrary to Complainant's argument in his closing brief, these charges were entered before Complainant was discharged on June 21, 2011, and therefore are not "retroactive" charges. *See* ALJX 3 at 14, CX 19.

[33] "Line haul" refers to reclaiming a truck when it is left somewhere. TR1 at 99.

[34] An employment verification form shows that Respondent sent employment verification forms to a company called Mission Expedited Freight on August 8, 2011, and to Sunset Pacific Trucking on October 11, 2011. RX 11, RX 12. Complainant did not testify regarding any employment at Mission Expedited Freight, but it appears from the timeline that the form provided to Mission Expedited Freight would have been sent prior to the date Complainant quit working for One Star Trucking. *See also* CX 21, a "HireRight" report of Complainant's employment history.

26. Complainant looked for trucking jobs after he quit working for Sunset Pacific, but could not find any trucking jobs so he started working at Golden Gate Casino.[35] TR2 at 108; TR1 at 55; ALJ D&O at 6. At Golden Gate Casino, he earned $11,852.42. JX 201; CX 8; TR2 at 183. He eventually got a job working at the Golden Nugget, where he earned $38,105.95 in wages and tips in 2013. TR2 at 109, 184; JX 202. He continued to look for trucking jobs while he worked at the casinos although he was "not proud of going company to company" and continued looking for employment by "asking his friends." TR2 at 109. He could not provide the names of the trucking companies with whom he applied for jobs. *Id.* at 177. Upon further questioning, Complainant stated that he "probably" applied for other trucking positions, or at least one, after he started working for the Golden Nugget, but he did not remember the names, and he did not keep any copies of any job applications from this time. *Id.* He made $35,627.77 in 2014, JX 203, $31583.32 in 2015, JX 204, and $30,483.85 in 2016, JX 205.

27. Complainant worked briefly for a trucking company in Oregon, but the trucks were flatbeds that required additional training. TR2 at 110. Around September or October of 2016, Complainant found another trucking job, but they provided him a "defective" truck, and he looked for another job. *Id.* at 110-112. He found another job in January 2017 with A-Vega Transport, which he was working for at the time of the hearing on remand as a company driver. *Id.* at 111-112. He had not worked for 10 days because the truck he had "was a mess," but once he gets a new truck, he will be doing work similar to the work he was doing for Respondent. *Id.* at 112.

28. In November 2013, Complainant suffered from a heart attack that he blamed on the smoke at the casinos, and he has been in and out of hospitals. TR2 at 172. He was taking medications, although he stopped taking them when he left his casino job because he saw a "big improvement." *Id.* at 174. He did not know if the medications he was taking would disqualify him with respect to a medical examining required by the Department of Transportation. *Id.* at 176.

29. Steve Tisinger, Senior Director of Accounting Administration for Respondent, testified at the hearing on remand. TR2 at 210-211. As part of his job, he prepares quarterly reports that include reports on the average weekly wages for drivers working for Respondent. *Id.* at 211. For the period of the second quarter of 2011 through the end of 2016, the average weekly wage of team drivers was $890.71. *Id.* at 211-212. Complainant testified at the first hearing that he would make approximately $1,080 per week, which was based on making 30 cents per mile and driving 600 miles per day. TR1 at 52-54; CX 7.

VI. ANALYSIS

The following conclusions of law are based on analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. 5 U.S.C. § 556(d); 29 C.F.R. § 1978.109. In deciding this matter, the administrative law judge ("ALJ") is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. 29 C.F.R. § 18.12; *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 8 (ARB Aug. 1, 2002).

[35] Complainant did not clarify how long he looked for trucking jobs before he began working at the Golden Gate Casino. TR2 at 108-109.

A. Credibility Determinations

1. Complainant

In the initial D&O I found that Complainant lacked credibility and gave his testimony less weight than Mr. Montgomery's and Mr. Henley's. On remand, I again find that Complainant lacks credibility, although I do not necessarily find him less credible than Mr. Montgomery and Mr. Henley (see below).

Initially, at the hearing on remand, Complainant repeatedly could not remember details and was vague in his description of the timeline of events. *See, e.g.*, F.F. ¶¶ 3, 4, 6, 11, 20, 21, 24. While I do not think Complainant was intentionally attempting to deceive, it is difficult to afford his recollections much weight when he was so unsure of material details, such as who he spoke with or when he spoke with them, especially when it concerns details central to the resolution of the claim, such as when he spoke with J.D. about the end of his employment. *See* F.F. ¶ 20. He also testified that after his heart attack he "lost a lot of information and a lot of stuff I don't remember." TR2 at 177-178. However, he also had some trouble remembering details at the first hearing. *See* TR1 at 37, 44, 61, 71.

I also find that Complainant is prone to exaggeration and mischaracterizing events. For example, Complainant initially stated that when J.D. called him when he was on the bus in Colorado, that Respondent was not willing to pay for the bus ticket back to Missouri. F.F. ¶ 19. However, at the hearing on remand, he stated that the signal was not clear and he only "started to try to find out if [J.D.] was willing to pay for [the ticket.]" *Id.* I cannot fully credit his characterization that Respondent would not pay if he never had the chance to actually ask. He also testified that Respondent wanted him to walk back from Colorado to Missouri, F.F. ¶ 19, n.28, which is clearly an exaggeration, and complained that he would have been "homeless" or sleeping on the street in Missouri, and that is why he went home, which is also an exaggeration. F.F. ¶¶ 17, 22. When faced with a choice to stay or leave, he obviously could have paid for another night in the $69 hotel with his Visa card, since he spent over $200 on a bus ticket home. F.F. ¶ 19. He also testified at the first hearing that he had "no money for a bus, not even for food," TR1 at 34, when it is evident he at least had money for food, and was able to charge his bus ticket to his credit card. *See* F.F. ¶¶ 17 (he had $20 to $30), 19 (he charged the $214 bus ticket).

In another example, Complainant testified that Respondent "wouldn't" authorize a second EFS check, which is not accurate since the record shows that Complainant could not get ahold of anyone who could authorize a check on the morning of June 19, 2011. *See* F.F. ¶ 17. While the circumstances may have resulted in the same outcome for Complainant – no additional funds via EFS check for the hotel – the characterization is markedly different.

Complainant also stated that he asked for reimbursement of his expenses, while his taped recordings actually reflect that he asked the hotline employees how he would be compensated for his expenses incurred. F.F. ¶ 22. While it is not necessarily inaccurate that he asked for "reimbursement," merely telling a hotline operator that he wanted to know how he would be compensated for his expenses is not quite the same as requesting a reimbursement from someone with the authority to grant it. Complainant said he asked J.D. for reimbursement of his expenses, but none of the calls where he spoke with J.D. are recorded, and as I explain below, Complainant's testimony is not entitled to significant weight where not corroborated elsewhere in the record.

Complainant also argued in his closing statement at the first hearing that Respondent paired him with "a big 300-pound guy," meaning Mr. Menchaca, and that it is "some type of conspiracy" to make Complainant do whatever Respondent wanted. TR1 at 123. There is no basis in the record for this allegation. Overall, these exaggerations, mischaracterizations, and unfounded allegations caution against taking Complainant at his word.

Further, and perhaps more importantly, there were some serious and unexplained inconsistencies in his testimony. First, at the hearing on remand, Complainant directly contradicted his initial testimony that Respondent did not pay for his lodging on June 18, 2011. F.F. ¶¶ 11, 12. At the first hearing, Complainant clearly testified that Respondent did not pay for his lodging on June 18, 2011; at the hearing on remand, he clearly testified to the opposite. While the record, in the form of his pay statements, indicates that the EFS check was deducted from his pay, his completely contradictory statements make it difficult to believe his testimony on matters in general. Complainant also contradicted himself at the second hearing when he asserted that he did not find out Respondent considered him to have voluntarily quit the first time in May 2011 until he arrived in Fontana, California. F.F. ¶ 5. As explained above, the record and Complainant's previous testimony indicate that he found out from J.D. that he was not employed and that Respondent offered to "start all over" with him and sent him to Fontana. *Id.* While the account of when exactly he was informed that he quit is complicated by Complainant's vague timelines and the parties' failure to clarify the record, Complainant's changing story again cautions against affording his testimony much weight. Complainant contradicted himself again when he described the disagreement he had with Antonio Mendoza. F.F. ¶ 7. At the initial hearing, he testified that he refused to drive with him because Respondent told him to help Mr. Mendoza pass a safety test. *Id.* However, on remand, he described a disagreement and that Mr. Mendoza called him a "rookie," but never mentioned a safety test. *Id.* Complainant did not explain this contradiction and it underscores why I viewed his testimony with caution and find it generally unreliable.

There are other smaller inconsistencies in his testimony that, alone, would not affect his credibility; but tend to support affording Complainant little credibility: his allegation that the emergency brakes did not work, when it is not mentioned elsewhere in the record, F.F. ¶ 3, n.16; that he testified that he spoke with J.D. "several days" after he returned to Las Vegas on June 21, but his recordings reflect that he spoke with J.D. on June 21, F.F. ¶ 20, n.29; his statement at the first hearing that he "knew [he] didn't have a job" so he called J.D. when he got back to Las Vegas, compared with his later statement that when he spoke with J.D. he found out that Respondent believed he had voluntarily quit, F.F. ¶¶ 20, 21; and his statements about looking for trucking jobs through friends while working at the casinos, F.F. ¶ 26.

Complainant often appeared impatient, and his demeanor while testifying in both hearings, while not necessarily indicative of a lack of credibility,[36] demonstrates that he viewed the events from a skewed perspective that may have affected his recollections. For example, Complainant repeatedly complained that no action was taken against Mr. Menchaca for threatening him even though there was no evidence of what, if anything, happened with Mr. Menchaca. TR1 at 115; CX 15. In

[36] The ARB noted that I previously found Complainant's credibility colored by his brashness, overwhelming sense of rightness, his lack of listening skills, and demanding demeanor, and that "having emotions or an overwhelming sense of rightness are not necessarily personality traits indicative of untrustworthiness or a lack of credibility. *See* ARB D&O at 16, n.75.

addition, at the first hearing he testified that part of the reason he did not go back to Missouri when J.D. called him on the bus was that Respondent should have offered him a load or lodging, but did not. F.F. ¶ 19. He also said that although it would have been cheaper to stay in the hotel on June 19 rather than taking the bus home, it would be like a beaten wife staying with her husband. F.F. ¶ 18. When he left a message for J.D. on June 19th, he stated that he had "no choice but to contact OSHA," although he had only been unable to contact him for a matter of hours, F.F. ¶ 17. After observing his demeanor and listening to his testimony over two hearings, in combination with the various inconsistencies and exaggerations of his testimony, I find that his attitude toward Respondent and Mr. Menchaca negatively affected the accuracy of his testimony. If his testimony had been consistent, specific, and unexaggerated, his attitude likely would not have been a factor in my credibility determinations. However, when viewing his testimony and the evidence in total, I cannot discount that his impatience and indignation affected the accuracy of his testimony.

For the foregoing reasons, I find Complainant largely not credible and his testimony not entitled to significant weight. Where his testimony is supported elsewhere in the record, I will give it substantial weight as I do not believe he was intentionally trying to deceive, only that his poor memory and penchant for exaggeration make his recollections on the whole unreliable.

2. Respondent's Witnesses

Harold Montgomery

In the hearing on remand, it became apparent for the first time that Mr. Montgomery's testimony at the initial hearing, as previously noted, contradicted his statement to OSHA. F.F. ¶ 13. At the hearing on remand, Complainant offered the declarations of Mr. Montgomery and Mr. Henley that were not in evidence during the first hearing. Respondent offered no explanation for this contradiction, and although Mr. Montgomery testified confidently and clearly at the initial hearing, I find that his earlier contradictory statement to OSHA significantly detracts from his credibility. In his OSHA statement, Mr. Montgomery asserted that he never spoke to Complainant on June 18 or June 19, however he is listed as the author of the incident report and is most likely the person who took Complainant's initial call, since Mr. Nanasy stated he did not work on the weekend and Mr. Henley is not a safety hotline specialist. F.F. ¶¶ 14, 15. Therefore, I afford his testimony regarding the June 18, 2011, incident no weight at all. However, his testimony regarding the general practices of Respondent, such as when and how it would pay for lodging and how Hazmat and non-Hazmat drivers would handle a load, is not contradicted in the record and will be afforded significant weight, as will his statements in the incident report.

Thomas Henley

Mr. Henley's testimony was not very helpful as he did not remember many of the consequential details surrounding the events of June 18 and June 19. F.F. ¶ 14. Therefore, I do not find his testimony regarding the events of June 18 and 19 entitled to much weight, and I do not find him more credible than Complainant. However, similarly to Mr. Montgomery, his testimony about Respondent's practices in general is uncontested and, although Mr. Henley's testimony was brief, his statements about the normal procedure regarding paying for lodging is entitled to significant weight.

Steve Tisinger

Mr. Tisinger was a credible witness who testified on subjects within his area of expertise as the senior director of accounting for Respondent. His testimony is entitled to significant weight.

B. Legal Analysis

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C.A. § 31105(a)(1); *see also* 29 C.F.R. § 1978.102(c). The STAA protects an employee who "refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). To prevail under the STAA, Complainant must prove by a preponderance of the evidence that he (1) engaged in protected activity, (2) that there was an adverse employment action taken against the complainant, and (3) that his protected activity was a contributing factor to the adverse personnel action. 29 C.F.R. § 1978.109(a); *Blackie v. Smith Transp., Inc.*, ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 8 (ARB Nov. 29, 2012).

If Complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the adverse personnel action, Respondent may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. 29 C.F.R. § 1978.109(b)(1); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); *see Palmer v. Canadian Nat'l Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017) (clarifying the two-step framework used to evaluated claims based on the AIR 21 standards). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams*, ARB No. 09-092, slip op. at 5, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing Black's Law Dictionary at 577).

1. Complainant engaged in protected activity and Respondent took and adverse action against him

I previously determined that Complainant engaged in protected activity by refusing to drive the Hazmat load because if he had driven the truck, he would have violated an actual standard of the United States related to commercial motor vehicle safety. *See* ALJ D&O at 8, citing 49 C.F.R. §§ 177.816, 397.3. Additionally, the ARB determined that Respondent engaged in adverse personnel actions against Complainant when it did not pay for his lodging on June 18, 2011, and when it considered him to have voluntarily quit on June 21, 2011.[37] ARB D&O at 11, 13.

[37] In his post-hearing and reply brief, Complainant argues for additional protected activity and additional adverse actions. ALJX 3 at 11, 14, ALJX 5 at 6 (the June 3, 2011 incident), ALJX 3 at 13, ALJX 5 at 7 (charges as adverse actions). The ARB made clear in its D&O that it did not interpret Complainant's complaint of retaliatory discharge to encompass protected activity beyond his refusal to drive on June 18, 2011. ARB D&O at 18. Because it was not part of his original complaint, any prior alleged protected activity is not properly before this Office. Complainant may also not allege further adverse actions at this late stage, when the allegations were not presented before OSHA, during the first hearing, or during the prehearing conference. However, even were these additional alleged protected activities and adverse actions properly before me, I find that Complainant has not sufficiently shown that any protected activities contributed

2. The protected activity was not a contributing factor in Complainant's termination

a. *Legal Standard*

Under the STAA, a complainant must prove, "as a fact and by a preponderance of the evidence," that protected activity was a contributing factor in the unfavorable personnel actions taken by his or her employer. *Palmer*, ARB No. 16-035, slip op. at 16. 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 No. 09-092, slip op. at 6; *Blackie*, ARB No. 11-054, slip op. at 9. To rule for an employee at this step, the ALJ must be persuaded that it is more likely than not that the protected activity played any role in the adverse action, and the ALJ may consider any relevant, admissible evidence in making this determination. *Palmer*, ARB No. 16-035, slip op. at 17-18, 52. The ARB has emphasized that the standard is low and "broad and forgiving": The protected activity need only play some role, and even an "[in]significant" or "[in]substantial" role suffices. *Id.* at 53 (citations omitted).

A complainant may establish that the protected activity was a contributing factor by direct or circumstantial evidence. *Blackie*, ARB No. 11-054, slip op. at 9. Circumstantial evidence may include temporal proximity, pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *Id.*, citing *Bechtel v. Competitive Tech., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12 (ARB Sept. 30, 2011). Proving causation through circumstantial evidence "requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee's claim that his protected activity was a contributing factor." *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 11-12 (ARB Nov. 5, 2013).

Generally, "the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation." *Blackie*, ARB No. 11-054, slip op. at 9, citing *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept 26, 2012) ("Temporal proximity is an important part of a case based on circumstantial evidence, often the 'most persuasive factor,'" quoting *Beliveau* v. *U.S. Dep't of Labor*, 170 F.3d 83, 87 (1st Cir. 1999)). However, temporal proximity is not always dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005) ("For example, where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action."). While comparing the "temporal gap" to other cases "can be used as a guideline to determine some general parameters of strong and weak temporal relationships…context matters."[38]

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in any way to any adverse actions taken against him. Complainant's argument that the June 3, 2011, and related charges are relevant to the June 18, 2011 incident is discussed in the body of the opinion.

[38] *See, e.g.*, *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (court of appeals reverses the Secretary for failing to find that a 30-day temporal gap in that case was sufficient to support an inference of retaliation). *See also Goldstein v. Ebasco Constructors, Inc.*, No. 1986-ERA-036, slip op. at 11-12 (Sec'y Apr. 7, 1992), *rev. on other grounds sub nom. Ebasco Constructors, Inc. v. Martin*, 986 F.2d 1419 (5th Cir. 1993) (causation established where seven or eight months elapsed between protected activity and adverse action); *Blackie v. D. Pierce Transportation, Inc.*, ARB No. 13-065, ALJ 2011-STA-055, slip

Franchini, ARB No. 11-006, slip op. at 10. "Determining what, if any, logical inference may be drawn from the temporal relationship….is not a simple and exact science but requires a 'fact intense' analysis," and in evaluating causation, the ALJ should "evaluate the temporal proximity evidence presented by the complainant on the record as a whole, including the nature of the protected activity and the evolution of the unfavorable personnel action." *Id.* at 10-11; *see also Spelson v. United Express Systems*, ARB No. 09-063, ALJ No. 2008-STA-39, slip op. at 3, n.3 (ARB Feb 23, 2011) ("An inference of causation is decisive at the prima facie level of proving a case, but is not dispositive at the merits stage, when a complainant is required to prove each element by a preponderance of the evidence.").

In addition, "the ARB has repeatedly found that protected activity and employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment action in question or the employment action cannot be explained without discussing the protected activity." *Citationshares Management*, ARB No. 12-029, slip op. at 12; *see also Palmer*, ARB No. 16-035, slip op. at 58-59. Therefore, "[w]here protected activity and unfavorable employment actions are inextricably intertwined, causation is established without the need for circumstantial evidence…." *Id.* However, the ARB has not adopted a "pure but-for" causation standard in analyzing whether protected activity was a factor in an adverse personnel action. *DeFrancesco v. Union Railroad Co. [DeFrancesco II]*, ARB No. 13-057, ALJ No. 2009-FRS-9, slip op. at 7 (ARB Sept. 30, 2015).

b. *Contentions of the Parties*

Complainant argues that he has proved by a preponderance of the evidence that "retaliation played some role in [Respondent's] adverse action" and that Respondent "failed to show that it acted only for legitimate reasons." ALJX 3 at 14-15. Complainant contends that the June 3, 2011 incident (characterized as "earlier protected activity"), the charges related to truck 51216 (line haul and cleaning charges), as well as the "retroactive charge for the bus ticket from Fontana to Indianapolis" are "relevant and provide support for the ARB's finding of causation[39] from the June 18, 2011 incident and as contributing factor evidence." ALJX 3 at 14. Complainant also argues that "the inconsistencies that undermine the credibility of Montgomery's hearing testimony…is additional circumstantial evidence of causation." ALJX 3 at 15.

Respondent argues that Complainant has not produced evidence showing that any of the events of June 18, 2011, including his refusal to drive the Hazmat load, contributed to "any actions taken by Werner." ALJX 2 at 2. Respondent argues that the evidence suggests that "logistical issues" and "a breakdown of communication" may have occurred on the weekend of June 18, 2011, but that this conclusion does not suggest that Respondent retaliated against Complainant for any protected activity, and that any communication issues were not related to Complainant's refusal to drive the Hazmat load.[40] *Id.* at 5, 11-12. Respondent maintains that there is no evidence that Respondent perceived the June 18 incident to have anything to do with a safety issue, other than

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op. at 13 (ARB June 17, 2014) (affirming finding of causation where ALJ determined 10 days was evidence of "striking temporal proximity.")

[39] The ARB did not find "causation"; it remanded the matter to determine if the protected activity contributed to the adverse action.

[40] Respondent also argues that Complainant could have called other numbers to get in touch with other Werner representatives since he had the Driver Handbook, but this point was not developed during the hearing. ALJX 2 at 5-6, n.1.

Complainant's personal safety, and that Respondent never instructed Complainant to drive a hazardous load without an endorsement. *Id.* at 6. Respondent argues that Complainant became impatient and left the hotel, and the fact that Respondent contacted him on June 20, 2011, to assign him a load shows it had no "ill will" toward him. *Id.* at 6-7. Respondent also argues that neither of the prior June incidents played any role in the later adverse action. *Id.* at 8-9. Respondent further argues that even if the protected activity were a contributing factor, "the manner in which the events unfolded after June 18, 2011, between Werner and Nevarez would have been exactly the same." *Id.* at 2.

c. *Analysis*

Respondent's Failure to Pay for Lodging

I find no direct evidence that Complainant's refusal to drive the Hazmat load contributed to Respondent's failure to pay for his lodging on June 18, 2011, and Respondent offers no explanation for why it failed to follow its normal procedure of paying for a driver's lodging when he or she is waiting for an assignment. However, as Complainant may show causation through circumstantial evidence, the indirect evidence of causation must be considered. Such evidence may include temporal proximity, pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *Blackie*, ARB No. 11-054, slip op. at 9.

The timeline of events shows that the temporary proximity of the protected activity to the denial of payment for Complainant's hotel creates a strong inference in favor of causation. On the evening of June 18, 2011, Complainant discovered that the load he and Mr. Menchaca were hauling contained hazardous materials and he informed Mr. Menchaca that he could not drive. F.F. ¶ 9. Mr. Menchaca and Complainant got into an altercation between 10:00 p.m. and 10:45 p.m. and Complainant called the Werner safety hotline and spoke with Mr. Montgomery, who advised Complainant to call the police to help him retrieve his things from the truck. F.F. ¶ 11. Complainant called Respondent again later and spoke with Mr. Henley, who authorized an EFS check for Complainant's lodging.[41] *Id.* Therefore, the "temporal gap" regarding the failure to pay for Complainant's lodging was a matter of hours.

Mr. Montgomery and Mr. Henley also conceded that it is Respondent's usual practice to pay for lodging in situations such as the one at hand, and therefore Respondent engaged in an inconsistent application of its policy. F.F. ¶¶ 13, 14. In addition, Mr. Montgomery's contradictory statements are possible evidence of a false explanation for the adverse action taken. He testified that he spoke with Complainant on June 18, but that he could not authorize payment for the hotel because Complainant never called him back, F.F. ¶ 13, but I did not credit this statement. Complainant did call back and speak with Mr. Henley. Mr. Henley offered no explanation for the

[41] The incident report does not indicate when Complainant spoke with Mr. Henley, although the notation that Mr. Henley said Complainant would have to call back appears at the bottom, under "Comments/Disposition." RX 7. Therefore, I infer that Complainant spoke with Mr. Henley after Mr. Montgomery spoke with Mr. Menchaca, thus placing the adverse employment action after it was known to decision makers that Complainant did not have a Hazmat endorsement.

failure to pay for Complainant's lodging, only testifying that he did not recall speaking with Complainant.

However, after considering this evidence, I note the ARB's direction in *Palmer* regarding circumstantial evidence and temporal proximity:

> Key, though [when determining whether protected activity was a contributing factor] is that the ALJ must make a factual determination and must be persuaded—in other words, must believe—that it is more likely than not that the employee's protected activity played some role in the adverse action. So, for example, even though we reject any notion of a per se knowledge/timing rule, an ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted to* infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, before the ALJ can conclude that the employee prevails at step one, the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

Palmer, ARB No. at 56 (citations omitted and emphasis in the original). While the standard is low, Complainant must still prove by a preponderance of the evidence that the protected activity was *a factor*.

Based on the evidence of record, I am not persuaded and do not believe, despite the circumstantial evidence suggesting an inference of causation, that Complainant's protected activity of refusing to drive the Hazmat load had any role in Respondent's failure to pay for his lodging on June 18, 2011. First, during Complainant's initial call to Respondent's safety hotline, Complainant did not mention that he refused to drive the Hazmat load, only that his co-driver threatened his life. F.F. ¶ 11. Mr. Montgomery advised him to call the police, and the incident report noted that Respondent was waiting for Complainant to call back. F.F. ¶¶ 11, 16. While Mr. Menchaca advised dispatch over the Qualcomm that he was shutting down for the night because Complainant did not have a Hazmat endorsement, and Mr. Menchaca also informed Mr. Montgomery over the phone that Complainant did not have a Hazmat endorsement, there is no indication that Complainant or Mr. Menchaca informed anyone who worked for Respondent that Complainant argued specifically over the Hazmat issue. F.F. ¶ 16. The incident report reflects that Mr. Menchaca stated that he and Complainant had been having disagreements, and that "one thing led to another" and that Complainant left the truck. F.F. ¶ 16. This is consistent with Mr. Montgomery's OSHA statement, in which he stated that he learned Mr. Menchaca and Complainant had a "conflict," and that Complainant alleged Mr. Menchaca had threatened him. F.F. ¶ 13. There is no indication that Mr. Henley, who authorized the EFS check, was informed about Complainant's refusal to drive the

Hazmat load. While I previously found that Respondent was aware of Complainant's concerns,[42] there is no evidence that Mr. Henley, as the authorizer of the EFS check, knew specifically about Complainant's refusal to drive.

There was also no evidence of pretense, antagonism or hostility toward Complainant's refusal to drive (apart from Mr. Menchaca, who was not a decision maker or management-level employee), and there was no change in Respondent's attitude toward Complainant after he refused to drive the Hazmat load. The evidence showed that Mr. Henley could not offer an explanation for the failure to pay for Complainant's lodging, but that if he had understood Complainant's situation, he probably would have authorized his lodging and "tried to get more resolution." F.F. ¶ 14. In addition, there was no apparent change in Respondent's attitude toward Complainant. Although it occurred after Respondent failed to pay for his lodging, J.D. offered Complainant a new load on June 20, which belies any hostility or antagonism toward Complainant. Instead, it supports Respondent's contention that it expected to offer Complainant a load on Monday, as noted in the incident report. F.F. ¶ 16. The evidence suggests that there was a miscommunication – Complainant believed he was supposed to call on Sunday, while Respondent believed he was calling on Monday. The evidence does not suggest that Respondent purposefully refused to pay for his lodging due in any part to his protected activity.

Moreover, the prior June incidents show that Respondent previously attempted to accommodate Complainant. First, when he refused to drive truck 51216, Respondent approved his maintenance request and instructed him to take the truck to the dealership for repairs. F.F. ¶¶ 3, 4. While Complainant claims that Respondent refused to fix the truck or provide him with a clean truck, the evidence showed that he was given the opportunity to drive with a co-driver in a new truck. F.F. ¶ 4. However, Complainant did not want to drive with any co-drivers and I find that Complainant likely wanted his own truck on his own terms, and interpreted Respondent's offer of a co-driver as a refusal to provide him with what he wanted. Respondent subsequently agreed to "start all over" with Complainant, rehiring him on June 10, 2011, F.F. ¶ 6, which suggests that any safety complaints Complainant made about truck 51216 did not prejudice Respondent against Complainant; it stands to reason that if Respondent had an issue with its drivers reporting safety issues, it would not have rehired Complainant in June 2011. While circumstantial, the inference follows that Respondent would not have had an issue with Complainant complying with the safety regulations that prohibited him from driving without a hazmat endorsement. Second, when he could not get along with Antonio Mendoza, Respondent tried to accommodate him by reassigning him to a new co-driver. These actions do not suggest animosity toward Complainant, and indicate that, more likely than not, Complainant was a difficult employee to accommodate. While animosity is not required to show causation, *see Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 14 (ARB Oct. 26, 2012), its absence is relevant when considering each piece of circumstantial evidence. *See Citationshares Management, LLC*, ARB No. 12-029, slip op. at 11-12.

I also credit Respondent's contention that it expected Complainant to stay in Kingdom City, Missouri, even though it failed to provide payment for both Saturday and Sunday night. *See* ARB D&O at 4, n.15 ("Given the facts, Werner Enterprises' version of events appears somewhat incredible and if credited by the ALJ, must be explained on remand."). Given the totality of the

[42] "Complainant has presented sufficient evidence to establish that he engaged in protected activity under STAA and Respondent was aware of his concerns." ALJ D&O at 8.

evidence, I find that Respondent's explanation that there were communication and logistical issues plausible. *See* ALJX 2 at 11. Not only could Complainant not get ahold of anyone in dispatch on July 19, but Werner's employee Linda in driver relations also could not get anyone in dispatch to answer their phones. This suggests that dispatch was not dodging Complainant's calls, but was simply suffering from logistical issues, and that when Complainant could not get ahold of anyone by noon, he decided to go home. *See* F.F. ¶ 17 (Complainant called Linda at 11:57 a.m. to let her know he was taking the bus home).

The ARB also wanted to know whether the Hazmat load could have been delivered on time without Complainant driving because if the load could not have been delivered on time, "the inference may arise that Werner expected Nevarez to drive the Hazmat load illegally and did not expect him to refuse to do so." ARB D&O at 5, n.17. The evidence shows that the Hazmat load could not have been delivered on time with just Mr. Menchaca driving. F.F. ¶¶ 9, 10. There was also a message that came in on June 18 about a "customer watch load" and that on time delivery was "critical." F.F. ¶ 8. However, I do not find that this leads to the inference as suggested by the ARB that Respondent intended for Complainant to drive the Hazmat load illegally. Mr. Montgomery testified that there was no problem with Complainant not driving the load, and described the situation where one driver has a Hazmat endorsement and the co-driver does not. F.F. ¶ 13. Although his testimony on other matters is suspect, this statement is not contradicted elsewhere in the record. Further, Complainant testified that he was never pressured to drive the Hazmat load by any decisionmaker, only by Mr. Menchaca who he claimed wanted to get to California for his vacation. F.F. ¶ 9. In recorded calls, Complainant mentioned that he refused to drive the Hazmat load, but no Werner representative ever asked Complainant about the Hazmat load or why he refused to drive. F.F. ¶ 22. While it is curious why Complainant was assigned to a job involving a Hazmat load, it was only one portion of the trip and Complainant drove other loads. I find that the facts do not dictate the inference that Respondent expected Complainant to drive the Hazmat load illegally given the lack of evidence of pressure asserted on Complainant by anyone with authority. It is also not clear from the record whether the message via the Qualcomm about on-time delivery being "critical" was related specifically to the Hazmat load, or referred to one of the other loads Complainant and Mr. Menchaca hauled. The "critical" message came in at 11:27 a.m. on June 18, 2011, and Mr. Menchaca did not pick up the hazardous material load until 5:33 p.m. F.F. ¶ 8. Therefore, based on the record, I do not infer that Respondent expected Complainant to drive the load illegally and did not expect him to refuse to do so.

Overall, while Respondent may have failed to fully explain why it did not pay for Complainant's lodging on June 18, 2011, it is Complainant's burden to prove by a preponderance of the evidence that his refusal to drive the Hazmat load played any role in that failure. I find that the evidence does not show that it is more likely than not that the protected activity played a role.

I also find that Complainant's refusal to drive the Hazmat load was not "inextricably intertwined" with the employment actions because the protected activity did not "directly lead" to the failure to pay for his lodging.

The cases where protected activity has been found to be inextricably intertwined with the employment action are distinguishable. For example, in *DeFrancesco v. Union Railroad Co.*, the protected activity of reporting an injury led the employer to review the employee's records; the employee was then suspended because the employer blamed the employee for the injury. *DeFrancesco v. Union Railroad Co. [DeFrancesco I]*, ARB No. 10-114, ALJ No. 2009-FRS-9, slip op. at 3

(ARB Feb. 29, 2012). In *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-7, slip op. at 4 (ARB June 20, 2012), the employee reported a rule violation and was fired for reporting the violation late. In *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 4 (ARB Oct. 26, 2012), the employee was also fired for an allegedly late reporting of an injury as well as for causing the injury. In *Citationshares Management*, the ARB found that the employee's report of safety concerns was the "sole cause" for the employer's decision to remove the employee from his assignment and call him into a meeting to discuss the safety concerns. ARB No. 12-029, slip op. at 12-13.

Somewhat differently, in *Nagle v. Unified Turbines, Inc.*, ARB No. 13-010, ALJ No. 2009-AIR-24, slip op. at 4 (ARB May 31, 2013), the ARB affirmed the ALJ's finding that there was a "chain of causation" where the complainant reported a co-worker's drug use, which led the co-worker to attack the complainant. This altercation "is what caused [the respondent's owners] to angrily order [the complainant] to leave the premises." *Id.* In *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020 (ARB May 31, 2013) at 6-12, the ARB found that the contributing factor may be shown through a chain of events, and that in *Hutton*, it was "not disputed that the chain of events leading to [the complainant's] termination would not have commenced without [the complainant's] filing of a report of injury." ARB No. 11-091, slip op. at 12. However, as noted earlier, the ARB clarified in *DeFrancesco II* that it has not adopted a pure "but-for" causation standard, and that it found in *DeFrancesco I* that "the protected activity was 'a factor in,' as opposed to a mere fact 'leading to,'" the adverse personnel action. *DeFrancesco II*, ARB No. 13-057, slip op at 7, (citing in part the concurring opinion in *Hutton*, ARB No. 11-091, slip op. at 13-16).

Here, the facts are distinguishable from the "inextricably intertwined" line of cases. It was not lack of a Hazmat certification that started the chain of events that ultimately led to the adverse actions, but Complainant's inability to get along with his co-driver. The record demonstrates that on the night of June 18, 2011, when Complainant realized that the load he and Mr. Menchaca were hauling contained hazardous materials, he told Mr. Menchaca he could not drive, which, in addition to other disagreements the two had been having, resulted in an altercation. F.F. ¶¶ 9, 13. Complainant left the truck and refused to go back to the truck; it was at that point, after leaving the truck because of the issues with his co-driver that he called Respondent, who advised him to call the police to help him retrieve his things. F.F. ¶¶ 9, 11. Complainant then called Respondent back and an EFS check was authorized for his lodging, but Complainant did not mention the Hazmat certification or Complainant's inability to drive. The facts do not demonstrate that Respondent's failure to pay for Complainant's lodging using a credit card had anything to do with the Hazmat issue, only that Complainant left the truck and needed lodging because of the inability of the co-drivers to get along. Mr. Menchaca reported that the two had been "having disagreements for some time." F.F. ¶ 16. There was no evidence that Respondent attempted to persuade Complainant to drive without a Hazmat endorsement, or even discussed his Hazmat endorsement or his inability to drive. It does not follow that Complainant's informing Mr. Menchaca that he would not drive a Hazmat load "directly led" to Respondent's failure to pay for his lodging. Instead, the altercation with Mr. Menchaca led to Complainant leaving the truck, and the record is devoid of any credible or persuasive evidence of what led Respondent to authorize an EFS check instead of paying with a credit card. *See* F.F. ¶¶ 11, 14. Unlike in *Nagle* where the employer became upset with the complainant because of the altercation and ordered him off the premises, here there is no evidence that Respondent's actions were directly caused by Complainant's refusal to drive the truck. No one can remember exactly who authorized the check, though it appears to have been Mr. Henley, but Complainant only testified that Mr. Henley refused to pay and gave no indication that the payment

by EFS check was "triggered" by his protected activity in any way. Therefore, the record does not support the conclusion that Complainant's refusal to drive the truck *directly led* to Respondent's failure to pay for his lodging.

The ARB has described the "inextricably intertwined" theory of causation as a situation where the adverse employment action cannot be discussed without discussing the protected activity. *Citationshares Management*, ARB No. 12-029, slip op. at 12. Here, Respondent failed to pay for Complainant's lodging with a credit card and instead authorized an EFS check. There is no clear reason why, although it could be explained by a failure to communicate. *See* F.F. ¶ 14 (Mr. Henley testified that although he did not remember speaking with Complainant, if Complainant had "explained his situation," he likely would have paid for the lodging). This is distinguishable from the above-mentioned cases, where the protected activity directly led to an adverse action, and it was impossible to explain the employment action without discussing the protected activity. Here, there is not necessarily a link between the two, other than one event (the failure to pay) occurred subsequent to the other (Complainant's refusal to drive). While Complainant's refusal to drive may have been a fact "leading to" his need for lodging and the ultimate failure of Respondent to pay for that lodging, there is no indication that his refusal to drive was "a factor in" Respondent's decision to authorize the EFS check instead of using a credit card to pay for Complainant's lodging. *See DeFrancesco II*, ARB No. 13-057, slip op at 7. Complainant has failed to show by a preponderance of the evidence that his protected activity was a contributing factor in Respondent's failure to pay for his lodging.

Respondent's Termination of Complainant

For the same reasons, I find that Complainant has not shown by a preponderance of the evidence that his refusal to drive the Hazmat load on June 18, 2011, was a contributing factor in his termination on June 21, 2011.[43]

There is no direct evidence that Complainant's refusal to drive the Hazmat load played any role in Respondent's considering him to have voluntarily quit. In evaluating the circumstantial evidence above, I found that the temporal proximity was not a persuasive factor in the causation analysis under the facts of this case. While Complainant refused to drive the Hazmat load on the evening of June 18, 2011, and he was discharged on June 21, 2011, F.F. ¶ 20, unlike the situation with the failure to pay for lodging, there was no evidence of an inconsistent application of Respondent's policies, nor any false explanation for the discharge. There was also no change in Respondent's attitude toward Complainant after the protected activity – indeed, Respondent offered him another load. There was also no antagonism or hostility expressed toward Complainant. And, once again looking at the facts and the record as a whole, I find that the temporal proximity alone does not support the inference that Complainant's refusal to operate the Hazmat truck played any role in his discharge. Other factors and evidence show it is more likely than not that what led to Complainant's termination was solely a lack of communication, followed by Complainant's departure from Missouri and refusal to return to be assigned a new load.

[43] The "inextricably intertwined" causation analysis regarding Respondent's termination of Complainant's employment is the same as the analysis regarding Respondent's failure to pay for Complainant's lodging. There is no indication that Complainant's termination was triggered by his refusal to drive a Hazmat load, or that his refusal to drive on June 18, 2011, was a factor in Respondent's considering Complainant to have voluntarily quit. Respondent considered Complainant to have voluntarily quit after he refused to be assigned a new load on June 21, 2011. F.F. ¶¶ 19, 20.

First, the prior incident on June 3, 2011, showed that Respondent had previously interpreted Complainant's lack of communication as a voluntary quit. F.F. ¶ 4. Therefore, it is reasonable that when Complainant spoke to J.D. on June 20, 2011, and refused to return to Missouri for a load, that Complainant would again interpret this as a voluntary quit, apart from anything that happened over the weekend of June 18-19. Second, the evidence indicates that Respondent expected Complainant to call and be assigned a load on Monday, June 20, 2011. F.F. ¶¶ 15, 16. While Mr. Henley may have told Complainant to call back the next day, which is what Complainant understood he was supposed to do, the record shows that Complainant could not get in touch with Respondent by noon, not that any protected activity contributed to Respondent waiting until Monday to contact Complainant. Third, Complainant testified that he knew he did not have a job because he "didn't want to…talk or go back from Colorado." F.F. ¶ 20.

The ARB suggested that dispatch knew that Complainant was traveling home by bus by 2:00 p.m. on Sunday, and that if it expected him to stay in Missouri, it would have contacted him, ARB D&O at 5, n.21, and noted that it is "inexplicable that someone at dispatch would fail [to contact Complainant before his bus left] when company dispatch records indicate that Werner's dispatch office was actively working that day." I find that the record does not support the ARB's contention that dispatch had knowledge of Complainant's intentions, and I am also not convinced that "dispatch" knew. First, although the ARB described Complainant's calls as to the "dispatch hotline," ARB D&O at 3, the majority, if not all of Complainant's calls appear to have been to the *safety* hotline. This is demonstrated by the fact that both Harold Montgomery and Joseph Nanasy were hotline/safety specialists, not dispatchers, and both wrote notes in the "Complainant and Incident Report." F.F. ¶¶ 13, 15. While I found that on the night of June 18 Complainant talked with Mr. Henley, who was an "operations supervisor," there is no indication that Complainant called a "dispatch hotline." Thomas Henley is also not listed as an author or reviewer of the incident report. *See* RX 7. In addition, when Complainant made the recorded calls on June 19, 2011, he appeared to call the safety hotline again. *See* CX 12, 12.6, 13; F.F. ¶ 17. While he left multiple messages on June 19, 2011, for J.D., his dispatcher, he did not speak with anyone in dispatch. F.F. ¶ 17. The only person he spoke to on June 19 was Linda, who was variously described as part of the safety department, or working in "driver relations." F.F. ¶¶ 17, 22. There is no indication of who wrote the note in the incident report on 2:00 p.m. on Sunday that Complainant was leaving by bus. Given that Complainant was primarily in contact with the safety department, and that the only person he spoke with was Linda, who was not a dispatcher and who could not get dispatch to answer their phones, I do not find that "Respondent had seven hours after dispatch recorded actual notice of Nevarez's intent to return home to contact Nevarez before his bus left." ARB D&O at 5, n.21. While there is no doubt that Complainant called and told someone at Werner that he was leaving, there is nothing in the record that *dispatch* or someone with dispatch's authority to assign Complainant a load, had seven hours of "actual notice."

Given the record as a whole, including the "evolution of the unfavorable personnel action," *Franchini*, ARB No. 11-006, slip op. at 10, I find that Complainant has not shown by a preponderance of the evidence that the protected activity of refusing to drive the Hazmat load on June 18, 2011, played any role in the decision to consider him to have voluntarily quit on June 21, 2011.

Furthermore, even if Complainant had met his burden to show that his refusal to drive the Hazmat load was somehow a contributing factor in Respondent's considering him to have

voluntarily quit, the evidence is clear and convincing that Respondent would have considered him to have voluntarily quit absent the refusal to drive the Hazmat load on June 18, 2011.

To avoid liability where a complainant has established that his or her protected activity was a contributing factor in an unfavorable personnel action, the employer must show by clear and convincing evidence that it would have taken the same personnel action absent the protected activity. 49 U.S.C. § 42121(b) (incorporated into STAA pursuant to 49 U.S.C. § 31105(b)); 29 C.F.R. § 1978.109(b)(1). It is not enough to show that the employee's conduct constituted a legitimate independent reason justifying the adverse personnel action, or that the respondent *could have* taken the personnel action in the absence of the protected activity. *See Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014); *DeFrancesco II*, ARB No. 09-057, slip op.at 13-14; *Pattenaude v. Tri-Am Transport, LLC*, ARB No. 15-007, ALJ No. 2013-STA-37, slip op. at 15-16 (ARB Jan. 12, 2017). "Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain." *DeFrancesco II*, ARB No. 09-057, slip op. at 8. Respondent's affirmative defense "is a fact-intensive assessment that requires a determination, on the record as a whole, how clear and convincing [the respondent's] lawful reasons were [for the unfavorable personnel action]." *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-033, ALJ No. 2014-STA-61, slip op. at 12 (ARB Sept. 27, 2017). Respondent can meet its burden through direct or circumstantial evidence; circumstantial evidence can include evidence of the temporal proximity between the non-protected conduct and the adverse actions, the employee's work record, statements contained in relevant office policies, evidence of other similarly situated employees who suffered the same fate, and the proportional relationship between the adverse actions and the bases for the actions. *Speegle*, slip op. at 11.

Here, the evidence demonstrates that had Complainant remained in Missouri, Respondent would have put him on another truck within two days. *See* F.F. ¶ 16 (Complainant will call on Monday for a truck assignment). Instead, Complainant decided to leave Kingdom City, Missouri on June 19, 2011, and return to Las Vegas. F.F. ¶¶ 18, 19. He then refused to return to Missouri when J.D. contacted him by phone on June 20, 2011, to offer him a load. F.F. ¶ 19. Complainant testified that he did not want to talk or return to Missouri, and that he knew he did not have a job. F.F. ¶¶ 19, 20. Complainant's decision to leave Missouri and not return when J.D. offered him a new load were closer in proximity to his termination than his refusal to drive on June 18. There is no indication that J.D. or Don Fisher had any reaction to Complainant's protected activity in considering him to have voluntarily quit, but only a reaction to the fact that Complainant left Missouri and refused the offer of a new load. In addition, Respondent's employees considered Complainant's decision to leave by bus to be a voluntary quit. Joseph Nanasy stated to OSHA that he understood from the incident report that Complainant had quit when he decided to go home on a bus, and that Complainant could have waited for another assignment but instead he "took another option and departed to home." F.F. ¶ 15. The status worksheet filled out by Don Fisher listed "career change" as the reason for the voluntary quit, and that trucking was not for Complainant because he never hauled a load. F.F. ¶ 20. Respondent had previously considered Complainant to have voluntarily quit when he did not communicate with dispatch for several days, demonstrating that Respondent had the practice of considering drivers to have "voluntarily quit" when they did not contact dispatch, making it reasonable that Respondent would have considered Complainant's direct refusal of a load to also be a "voluntary quit." F.F. ¶ 4. Viewing the record as a whole, it is reasonably certain that Respondent would have considered a driver who left Missouri while Respondent considered him to be awaiting a load assignment, and then refused to return for that load assignment when offered, to have voluntarily quit. Had Complainant met his burden in this

matter, I would have found that the evidence showed that Respondent met its burden by clear and convincing evidence that it would have taken the same personnel action absent the protected activity.

VII. ORDER

For the reasons explained above, I find that Complainant has failed to show by a preponderance of the evidence that any protected activity was a contributing factor in any adverse action taken by Respondent. Therefore, Complainant's request for relief is denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, 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).