



Issue Date: 14 January 2015

Case No. 2013-STA-71

In The Matter Of:

Joe Tocci,
Complainant

v.

Miky Transport,
Respondent

RECOMMENDED DECISION AND ORDER

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

PROCEDURAL BACKGROUND

Joe Tocci (hereinafter “Complainant”) was employed by Miky Transport (hereinafter “Respondent”) from April 2009 until he was terminated on or about February 27, 2013. On February 28, 2013, Mr. Tocci filed a complaint with the Department of Labor’s Office of Occupational Safety and Health Administration (hereinafter “OSHA”), alleging that he had been discriminated against by the Respondent in retaliation for engaging in whistle blowing activities. After conducting an investigation, OSHA issued the findings of the Secretary on August 20, 2013, concluding that Mr. Tocci engaged in protected activity, that the Respondent was aware of his protected activity, and that he had suffered an adverse action when he was fired, but that his protected activity was not a contributing factor in the adverse action.

On September 3, 2013, Mr. Tocci submitted an appeal of that determination with the Office of Administrative Law Judges (hereinafter “OALJ”). The matter was assigned to me, and I held a hearing on April 29, 2014 in Fort Wayne, Indiana.¹ I admitted the following evidence into the record: Complainant’s Exhibits (CX) 1-9, Respondent’s Exhibits (RX) 1; and

¹ Mr. Tocci’s claim was also assigned to Administrative Law Judge Christine L. Kirby, who issued a Notice of Hearing on September 30, 2013 (2013 STA 67). On March 24, 2014, after learning that the same matter had been assigned to me with a different case number, Judge Kirby issued an Order administratively closing her file, and forwarding it to me for consolidation with my claim.

Administrative Law Judge Exhibits (ALJX) 1 and 2. Subsequently, I admitted Complainant's Exhibits 10 – 12, and Respondent's Exhibits 1a, 2, 3, and 6 – 9.

The Complainant and Respondent filed post-hearing briefs on August 12, 2014. The Complainant filed a supplemental brief on December 19, 2014; the Respondent filed a supplemental brief on December 23, 2014. I have based my decision on all of the evidence, the laws and regulations that apply to the issues under adjudication, and the representations of the parties.

EXHIBITS

Complainant's Exhibits

- CX 1** February 28, 2013 email from Mr. Tocci to Tim Crouse, OSHA, forwarding his complaint
- CX 2** April 10, 2013 letter from Mr. Sead Catic to Mr. Crouse in response to Mr. Tocci's allegations
- CX 3** February 18, 2014 letter from Mr. Catic to Paul Taylor, Esq., Mr. Tocci's counsel, to "explain Mr. Joe Tocci case"
- CX 4** Mr. Tocci's 2013 W-2 from Miky Transport Company
- CX 5** Mr. Tocci's 2013 W-2 from Werners Garage Inc.; pay stub from Kenilworth of Indianapolis Inc. for March 23, 2014 to March 29, 2014; pay records from Waypoint Transportation LLC from October 20, 2013 to December 9, 2013
- CX 6** Eyeglass prescription for Mr. Tocci from Rutan Optometry Associates dated November 20, 2012
- CX 7** Mr. Tocci's Objections to the Secretary's Findings, dated September 3, 2013
- CX 8** Resume of Michael D. Millard; Mr. Millard's report dated March 31, 2014
- CX 9** Mr. Tocci's property tax bill from Allen County, paid on September 3, 2013; email correspondence between Mr. Tocci regarding his outstanding mortgage, and an offer from Bullseye Property to sell his vacant property; disconnect warning for utilities on October 3, 2013; Final Notice from Comcast dated October 29, 2013; confirmation of payment of outstanding Verizon Wireless bill from CBE Group dated March 21, 2014; final notice from City water company and receipt for payment, for January 30, 2014 to February 27, 2014.
- CX 10** Declaration of Joseph Tocci with Exhibits A through G
- CX 11** Affidavit by Keith E. Diller

CX 12 Meteorological Records certified by the National Climatic Data Center

Respondents' Exhibits:

RX 1 Mr. Tocci's Driver's Daily Log from February 5, 2013 to February 24, 2013

RX 1a Mr. Tocci's Driver's Daily Logs from January 14, 2014 to February 24, 2013

RX 2 Mr. Tocci's application for employment at Miky Transport, dated December 12, 2012

RX 3 A copy of Mr. Tocci's business card

RX 6 The "Guidelines Contract Agreement" for Miky Transport, setting out employee guidelines on wages, bonuses, and insurance, signed by Mr. Tocci on January 14, 2013

RX 7 The Annual Vehicle Inspection Reports dated March 8, 2012, and February 9, 2013, for Mr. Tocci's tractor

RX 8 NASA chart on phases of the moon from 2001 through 2100

RX 9 Article from "The Blade," August 29, 2012, entitled "Expanded U.S. 24 open today after decades of struggle"

HEARING TESTIMONY

Sead Catic

Mr. Catic is the owner and president of Miky Transport Company (Tr. 31-32). Miky Transport is a motor carrier that hauls freight for shippers and brokers, and operates commercial vehicles on the highways crossing state lines, with a gross vehicle weight rating of 80,000 pounds (Tr. 32). Miky Transport hired Mr. Tocci on January 14, 2013, and fired him on February 27, 2013 (Tr. 32). Mr. Catic testified that he made the decision to fire Mr. Tocci, and he personally fired him.

Mr. Tocci operated a semi-truck tractor, a 2007 Volvo, number 205, for Miky Transport (Tr. 32-33). Mr. Catic testified that he was aware that, before he was fired, Mr. Tocci had complained to John Gotten, the shop supervisor, about the lights on his truck, and that he was not able to see on dark streets (Tr. 33). Mr. Catic acknowledged that there were several things Mr. Tocci did not like about his truck, including the headlights. He also thought there was a problem with the fifth wheel (Tr. 36). Mr. Catic agreed if there was a bad fifth wheel coupling on a truck, it could cause a safety problem (Tr. 37).

Mr. Catic agreed that Mr. Tocci complained to his company about the fifth wheel on his assigned truck tractor, and said it was not providing a good coupling (Tr. 37). He stated that he fixed this problem before he fired Mr. Tocci (Tr. 38).

Mr. Catic stated that Volvo trucks do not have a bright light like other trucks (Tr. 38). He agreed that a person not used to driving Volvo trucks could reasonably believe that the lights on a Volvo truck were defective (Tr. 39).

Mr. Catic was asked about a letter he sent to Mr. Tocci's counsel, stating

We really didn't know what Mr. Tocci really wants from us. To avoid further complications with, and Mr. Tocci's concerns for his safety, and there's nothing we can do to make him safer, we decided to terminate his job with us.

He agreed that this sentence reflected the reason he fired Mr. Tocci (Tr. 39-40). He acknowledged that Mr. Tocci expressed concerns for his safety when he complained to him, and to Emir Rizvic and John Gotten, that he thought there was something wrong with the lights on his truck because they were not illuminating the road in front of him (Tr. 40).

Mr. Catic stated that the ECU (electronic control) light came on just about every week, if there was bad fuel, or a big rain. It was a warning light, and needed to be checked out. Mr. Catic did not know if Mr. Tocci complained about his ECU light being illuminated (Tr. 41).

According to Mr. Catic, his company had 26 or 27 drivers when Mr. Tocci worked there; they have about 42 now. They are hiring people all of the time. They offer workers' compensation insurance (Tr. 41). Their drivers make anywhere from \$15,000 to \$35,000 a year (Tr. 42). They start at 38 cents a mile, which is about what Mr. Tocci made, 30 or 40 cents a mile. He would have received a pay increase after one year, up to 40 cents a mile, if he were running trucks to Canada (Tr. 43). He would get 42 cents a mile if he drove to Canada (Tr. 44).

Mr. Catic stated that he did not fire Mr. Tocci because he was making safety complaints about his truck. He fired him because he wanted too many days off. He stated that he could not afford to have a truck working for seven days, and then parked for six days. According to Mr. Catic, two weeks before Mr. Tocci was fired, Mr. Catic told him to clean out his truck. But Mr. Tocci changed his mind and said he would be ready to work on Monday. Mr. Tocci came back on Monday, but when he got back from the road, he told Mr. Catic that he would be ready to work again in six days. This was why Mr. Catic fired him, not because of the lights on his truck (Tr. 46-47). He told Mr. Tocci to clean his truck, and that he did not need him any more (Tr. 47).

Mr. Catic stated that he did not fire anybody in his company because of complaints about the equipment. He did not understand why he would fire somebody for telling him there was something wrong. He stated that he saw too many accidents with semi-truck drivers, and he did not need his company to be one of them. He did not remember if Mr. Tocci complained to him about the headlights on his truck on the day that he fired him (Tr. 47).

Mr. Catic stated that he had told Mr. Tocci to take his truck for a DOT inspection. If they said the light was okay, there was nothing he could do about it (Tr. 48). He thought that Mr.

Tocci may have asked Emir or somebody else if he could take the truck to the dealership to get the light checked (Tr. 48).

According to Mr. Catic, he told Mr. Tocci that he could not handle “that stuff” anymore. Mr. Tocci had asked him for a temporary job, and he agreed to take him for one month. He fired Mr. Tocci because he could not afford to have the truck sitting for six or seven days; that is what he told Mr. Tocci (Tr. 49). Mr. Tocci did not talk about the lights; Mr. Catic told him he could not handle it anymore, and to pick up his stuff (Tr. 50).

Mr. Catic testified that Mr. Tocci called him on the phone, and the only thing he can remember is that he told Mr. Tocci to get his things out of the truck, he was done (Tr. 52).

Mr. Catic stated that he would never fire anyone for complaining about the safety of his trucks; that is his priority. He thought it was a good thing for someone to tell him if there was something wrong, so they could fix it before the truck went on the road. He wished that every driver would tell him about every small thing, so it could be fixed. He did not need a fatality. The company is his life, and there was nothing in the world he would do to hurt it, or anybody (Tr. 53).

Mr. Catic claimed that if Mr. Tocci was worried that the truck was not safe to drive, he could take it to the first scale house with DOT, who could shut down his company. He did not understand why Mr. Tocci did not take the truck to the DOT (Tr. 54-55). Mr. Catic stated that he did not have a single problem with Mr. Tocci, but when Mr. Tocci told him that he would be ready in six days, and Mr. Catic told him to clean out his stuff, that they could not afford that, and then Mr. Tocci changed his mind, he did not understand (Tr. 55). Mr. Catic thought that his truck was safe on the road, and he could prove it (Tr. 56).

Joseph Tocci

The Complainant, Mr. Joseph A. Tocci, Jr., lives in Fort Wayne, Indiana. He is a high school graduate, and has attended college to study business, hospitality, marketing, and airframe and powerplant mechanics (Tr. 59-60). He has a commercial driver’s license from Indiana, with endorsements for hazardous materials, doubles and triples, and tankers; he also has a motorcycle endorsement (Tr. 60). Mr. Tocci first got a commercial driver’s license in February 2009, but actually started driving trucks in June 1975, when such licenses were not required (Tr. 60-61).

Mr. Tocci first worked in Alaska on the Trans-Alaska Pipeline, for about ten years. He drove a range of trucks, including expediter, pickup, end-dump, dump truck, belly dump, rock buggies, fuelers, and a flatbed semi. One year when work was scarce, he worked in the cannery, sorting salmon eggs (Tr. 61).

Mr. Tocci returned to the lower United States in November 1984. He then spent about 27 years working in information technology, designing, specifying, selling or procuring, installing, maintaining, repairing, and replacing voice and data systems for various companies for the middle business markets (Tr. 62). These are companies with between 50 and 120 employees (Tr. 62). Mr. Tocci was the account executive for AT&T for the Fort Wayne territory from March

1985 to the summer of 1987 (Tr. 62). He was laid off by AT&T, and then hired by a small systems integrator in Schaumburg, Illinois, where he worked for about a year, and then went out on his own as a systems integrator (Tr. 63).

Mr. Tocci stated that he received a call from a former client, asking if he could do a project. Although Mr. Tocci thought the project would last about six months, it ended up being a multi-year retainer. Because it looked like this could be a retirement opportunity, Mr. Tocci established himself as an IT consultant in Fort Wayne, where he had as many as three clients at a time. However, the economy started to wobble in 2007, and things started slowing down. Eventually everything “stopped dead,” and he lost all of his clients. By this time, he was too old to go back into business as a contractor, because he would have to go out on the road as a consultant (Tr. 63).

Mr. Tocci had no income, and decided to go back into trucking. He went to a CDL school in Indianapolis, and got a certificate. He was hired before he left the program by a big trucking company (Tr. 64). He worked for three trucking companies before he went to work for Miky Transport (Tr. 65). He estimated that in his commercial driving career, he had driven about half a million miles; he has not had any DOT chargeable accidents, or moving traffic violations (Tr. 65).

Mr. Tocci had just left his third job in North Dakota. He had been away from home for six months, and felt it was time to get back home. He came back in December, and wanted to find some kind of work to do until the next season started, because he was making pretty good money in North Dakota (Tr. 65). Mr. Tocci was hanging out with other drivers at a mechanic shop for owner-operators, and someone recommended he call Miky Transport. The other driver said that Miky Transport ran a very honest and clean show, and all of the equipment was late model Volvo, which Mr. Tocci knew to be nice equipment. Everyone was making good money (Tr. 66).

Miky Transport was less than a mile away, and Mr. Tocci went over that same day. As soon as he walked into the front office, he said that he was a driver and was looking for work. There were a few guys in the front, and one of them went back to the other offices. Mr. Emir Rizvic came out, and Mr. Tocci handed him his business card, which had all the information a company needed to know (Tr. 67-68, RX 3). He told Mr. Rizvic that his credentials were on the front, and his experience was on the back. Mr. Rizvic said that Mr. Tocci was the kind of driver they could use, and they went into his office and talked. Mr. Tocci thought that Mr. Rizvic liked what he was describing, and Mr. Rizvic gave him an application. Mr. Tocci took it home, and when he brought it back, he told Mr. Rizvic that he was just looking to be a relief driver. He could not work full time, because he had an ongoing project that would last a couple of months. He was just looking for a position that would be a week on and a week off (Tr. 68-69). Mr. Rizvic told him that he would have to look, but he thought he might be able to do that. Mr. Tocci told him that he was planning to take a Christmas holiday in St. Louis, and expected to be back around January 7. Mr. Rizvic told him to call when he got back, and they would see where they would go from there (Tr. 69).

When Mr. Tocci returned in early January, he called and asked for Emir. Mr. Rizvik told him that it looked good, and asked him to come in. Mr. Tocci went in, and did the orientation; Mr. Rizvik gave him the policy manual, and introduced him to the company. He told Mr. Tocci that they normally started their drivers at 34 to 36 cents a mile. Mr. Tocci kind of recoiled, and Mr. Rizvik said that he might be able to get him 38 cents; he would see what he could do (Tr. 69).

It was Mr. Tocci's intention to work as a relief driver only for Miky Transport, and to return to his job in North Dakota in June (Tr. 70-71). On his first cycle out, he had the opportunity to take another look, and everyone was so nice, and he was impressed by his truck. He stated that his truck had difficulties, but every time you start a new job, you need to sort out what is not right about the truck that needs to be fixed for safety (Tr. 71-72). He stated that Miky was very responsive in getting those things sorted out. He felt like things were getting nicer all the time, and was thinking about whether he could afford to stay in Fort Wayne instead of going back to North Dakota (Tr. 72).

Mr. Tocci stated that when he worked on the Trans-Alaska Pipeline, he was a young man, and it was all adventure. But at his age, it was a crazy world. He made good money, fabulous money. But he was in a situation where he liked the guys, and he liked the equipment and work, and thought that maybe it could work to stay in Fort Wayne (Tr. 72).

Mr. Tocci worked for Miky Transport from January 14, 2013 to February 27, 2013 (Tr. 72-73). He was assigned truck number 205. Mr. Tocci stated that he was new to that vintage of Volvo truck; he drove Volvos at CDL school, but they were a previous chassis design. This was a 2007 model year (Tr. 73). Mr. Tocci began to sense that there was something excessively loose about the fifth wheel on his truck (Tr. 74). Whenever he engaged from a stop, there was a lash; he was hypersensitive to this, because he had operated very heavy equipment in very dangerous situations (Tr. 74). He noticed this problem in his second cycle; it became clear (Tr. 74). Mr. Tocci stated that if there was a lash coming from the capture mechanism in the kingpin, it could be ready to fail; if this happens, it is catastrophic (Tr. 75). It will cause the trailer to separate from the tractor. The landing gear drops onto the pavement, and the front half turns into a big bobsled; the wheels in the back behave like a rolling bearing. The trailer can go in any direction, and become a wild missile (Tr. 75).

Mr. Tocci stated that his way of "baselining" his new tractor was to call John Gotten while he was driving and discuss issues that he had identified. If they agreed that it was just an idiosyncrasy and not actually a safety matter, Mr. Tocci would strike it from his list. He relied on Mr. Gotten because he knew the platform, which was new to Mr. Tocci (Tr. 76). When Mr. Tocci talked to him about the fifth wheel, Mr. Gotten agreed that it was important, and stated that he would examine it when Mr. Tocci returned. He asked him questions about how severe it was, and Mr. Tocci told him he could detect a lash, but did not think it was anything imminent (Tr. 76). Miky Transport replaced the fifth wheel.

Mr. Tocci stated that when he came in from a trip, he would park at the terminal and wait for the next dispatch. On his last trip, he went to Kokomo for an auto plant pickup (Tr. 77). The trip began on February 17; the last load he picked up was for delivery in Detroit (Tr. 79). Before

he began this trip, Mr. Tocci had discussed his headlights with John Gotten. He had noticed that the headlights were not quite right. It was obvious that the truck had virtually new plastic, when for a 2007 model, it should have had degradation of the plastic on the system that the bulb mounts into (Tr. 80). He asked Mr. Gotten about the headlights, and told him that they did not seem to be particularly effective on low beam. He asked if there was something he needed to know. Mr. Tocci stated that it was not a problem because he was normally operating in a situation with a lot of ambient light, or streetlights. He rarely drove at night; he tried to pull into a truck stop about 5:00 p.m. to park for the evening (Tr. 81).

Mr. Gotten told Mr. Tocci that it was just Volvos, and they were all like that, the low beams did not work very well, and he did not know why (Tr. 81).

Mr. Tocci made his delivery in Detroit at 1:45 a.m. on February 24, 2013 (Tr. 81). He was late because the pickup was during a three hour shift change, and he had not yet called in when expected for the delivery. Mr. Catic called him while he was on the road leaving Detroit. There was no return load; it was a deadhead run (Tr. 82). The area from Detroit to Toledo, and through Toledo, was metropolitan, and very well illuminated (Tr. 83). When he got west of Toledo, U.S. 24 became rural, all farmland, and a two-lane asphalt road. Sometimes there were shoulders, but they were not really there (Tr. 84). There were not really any towns until New Haven. The road was winding left and right, and now and then a slight hill (Tr. 84).

As Mr. Tocci left Toledo and the ambient light went away, it got darker and darker, with no street lights. He had trouble even making out the stripes on the pavement. He was mystified, and checked his lights, but the switches were definitely on. He thought that the halogens were worn out and not projecting any light (Tr. 85). He looked over the dash and down in front of the truck, and could not make out any light from the truck beyond the lights. He had an orange cast from the marker lights instead of a white light from the headlights. Mr. Tocci did not think he had any illumination for more than ten feet at most in front of the truck. Some of that illumination came from marker lights and the clearance light (Tr. 85).

Mr. Tocci stated that the way the truck worked on high beam was "fabulous." It was like night and day. So he turned on his high beams, and it was "perfect." (Tr. 86). But according to Mr. Tocci, U.S. 24 is notorious for being very dangerous, and many accidents have occurred, usually involving local cars and trucks coming from the Detroit or Toledo area into Fort Wayne, which is a transportation hub (Tr. 86). He stated that it was unsafe to operate on high beams; accidents happen when a passenger car is blinded, because the truck headlights tend to be mounted higher up. If the car driver does not dim his lights, the truck driver can be blinded. So what happens is that there is a tendency for opposing vehicles to use what light they have, which causes head on collisions (Tr. 87).

Mr. Tocci stated that it got to a point where he was meeting traffic, and turning down to low beam, which made him go blind because he dimmed his lights about 50 yards before the oncoming vehicle. Then his eyes were adjusting suddenly, and he was blinded momentarily until the headlights caught his pupils again and they reacted. He was just exhausted. He started thinking about how dangerous it could be (Tr. 87). Mr. Tocci started to look for a safe haven, and pulled over in Napoleon, Ohio, and climbed into the sleeper. When he woke up, it was light

out (Tr. 88). Mr. Tocci fueled up at the Flying J in New Haven, and returned to Fort Wayne (Tr. 89).

Mr. Tocci parked the trailer, and separated from the tractor. He parked the tractor in front of the shop door. It was a Sunday, and he could see that Mr. Gotten was there because his pickup was in the yard. He went in and visited with Mr. Gotten (Tr. 89). Mr. Tocci was tired, and he told Mr. Gotten that he would come back the next day with his list (Tr. 93). Mr. Gotten told him that Mr. Rizvic wanted him to make sure he turned his paperwork in before he went home, so Mr. Tocci went back out to his truck, assembled his paperwork, and turned it in (Tr. 93).

The next day, a Monday, Mr. Tocci went back to get something he left on the truck that he needed for his project (Tr. 93). He parked his pickup in the yard, and went in to speak with Mr. Gotten (Tr. 94). He gave him his usual list, maintenance issues written on a 3 X 5 card, to see what Mr. Gotten wanted him to do about them (Tr. 90). Mr. Tocci checked on the fifth wheel, which had not yet arrived. Mr. Gotten told him that it was not there yet, but he would get it before he was dispatched again (Tr. 90).

Mr. Tocci told Mr. Gotten that he had a torn mud flap, and that the ECM was out; it was resetting as soon as the truck started to roll. He was losing at least 100 miles each time it did that. Mr. Gotten told him that it was a dealer problem, and he did not have the diagnostic for it (Tr. 94). (Tr. 90-91). This caused Mr. Tocci's log record to be out of sync with the truck's odometer (Tr. 91).

Mr. Tocci stated that he told Mr. Gotten that they had to do something about the headlights. He told him that it was scary out there, and he had just come down U.S. 24, and could not see ten feet in front of his bumper (Tr. 91). It was jet black, with no moon (Tr. 92). Mr. Gotten said the same thing as he had before, that it was a Volvo headlight, and they could not do anything with it. It was just the way they were (Tr. 92). Mr. Tocci described how he had to dim the lights, and his eyes were blinded; he told Mr. Gotten that it was scary dangerous, and there had to be something they could do (Tr. 95).

While he and Mr. Gotten were talking, Mr. Rizvik showed up in the shop. Mr. Gotten told Mr. Rizvic that Mr. Tocci was complaining about the headlights. Mr. Rizvik asked what was wrong, and Mr. Tocci said the same thing, that the low beams were so bad he could not see the pavement in front of the tractor, and not the 250 feet of clearance necessary. Mr. Rizvik asked if he used his high beams, and Mr. Tocci told him he did, but as soon as there was oncoming traffic, he had to dim them, which caused him to be blind for a couple of seconds. He stated that he was so exhausted that he pulled over in Napoleon for the night (Tr. 95-96).

Mr. Rizvik told Mr. Tocci that they had talked about this, and that this was the problem with the Volvo. They were unlike every other truck; they have bad low beams. Mr. Tocci just looked at him and said, okay, I understand. He asked Mr. Rizvik to go outside so he could show him another problem he was having (Tr. 96). When they went outside, Mr. Rizvik started talking about the headlights, saying that they were brand new. Mr. Tocci agreed that they had plainly been replaced recently. (Tr. 96).

According to Mr. Tocci, when he first discussed this problem with Mr. Gotten, Mr. Gotten told him the lights were brand new. He asked Mr. Gotten if the headlight bulbs had been replaced, but Mr. Gotten did not know (Tr. 97). Mr. Tocci thought it could be a very inexpensive issue. He explained that an incandescent bulb will degrade with use, and when the illumination falls to about 40 percent, it will collapse and fail. Halogens rely on gas for illumination, and the gas does not evacuate from the bulb. It just gets weaker and weaker. The lights will continue to visibly turn on. If he does a pre-check and turns on the headlights, they will plainly be on, but this does not mean that they cast any light. His truck had halogen headlamps (Tr. 97-98).

According to Mr. Tocci, it was obvious that Mr. Rizvik felt there was nothing anyone could do about the headlights. Mr. Tocci then told Mr. Rizvik about the front suspension on the truck, which was beginning to lose air on the driver's side. This was the first truck Mr. Tocci ever drove with air suspension on the steer axle. He had noticed that when he went in for a break or before he started his new day, he would come out and his truck would be lopsided (Tr. 98-99). He investigated, and found some kind of leak in the front left suspension. While he was driving, the compressor was keeping it inflated, but when he turned the truck off at night, it leaked out (Tr. 99). He stated that leaks never get better, they always get worse. This was part of the same system that operated the brakes, and could become dangerous (Tr. 99). Mr. Tocci stated that a leak could prematurely wear out the compressor, and cause a lot of expense (Tr. 100). The airbrake system was designed so that if there were a complete loss of air, the emergency brakes would engage (Tr. 100-101). If this happens when the truck is moving, they could overheat and cause a fire (Tr. 101). Loss of air pressure can also cause a truck to swing one way and another (Tr. 102). Mr. Tocci stated that if the compressor cannot keep up, and there is no pressure while a truck is moving, it is really dangerous (Tr. 103).

According to Mr. Tocci, Mr. Rizvik argued with him, and said that there was nothing wrong with the suspension. He claimed that it was down on the other side too, and it was normal; when the truck was turned off, it let the air out of the front suspension, and the tractor dropped down (Tr. 103).

Before Mr. Tocci left, Mr. Rizvik told him that he was missing a page from his log; he did not know what day. Mr. Tocci told him that he would call when he got home, and Mr. Rizvik could tell him what day it was, so he could rebuild his log (Tr. 104).

Two days later, Mr. Tocci called in to Miky Transport to get permission to take his truck to the dealership (Tr. 104). He stated that everyone with the authority to fix the problem was telling him that there was no problem with the lights. But he knew he had a problem (Tr. 104). Mr. Tocci thought it was crazy that there was a company belief that all Volvos were like this, and that NHTSA and DOT know about it, as well as all drivers who drive Volvos, and he should just settle down and live with it (Tr. 105). Mr. Tocci wanted to figure out how to fix the problem without red-tagging the truck (Tr. 105). He stated that under the rules, if he knew there was something wrong with the truck, the correct procedure was to take it out of service until it was repaired (Tr. 105).

Mr. Tocci stated that he called on February 27, 2013, and spoke to Mr. Catic (Tr. 105). Mr. Tocci told him that he was calling to get permission to take his truck to the Volvo dealer. When Mr. Catic asked what was wrong, Mr. Tocci told him that there were two things that were really important. The first was that the ECM was resetting itself randomly after he turned the truck off. It reset as soon as he got the tractor rolling; it lost at least 100 miles on the odometer. Mr. Tocci told him that his logs were starting to get goofy (Tr. 106). Mr. Catic did not react, but asked what else was wrong.

Mr. Tocci told Mr. Catic that the headlights were scary dangerous on low beam. He told Mr. Catic that he understood that there might be some issues with the Volvo, but he did not believe that this would ever be tolerated by anybody, and there was plainly a dangerous situation with the headlights on his truck, which he needed to get corrected (Tr. 106). He did not remember if he told Mr. Catic all of the details about his trip down U.S. 24, where it was pitch black and he could not see the pavement. But he intended to convey that this problem presented a dangerous situation (Tr. 107).

According to Mr. Tocci, Mr. Catic was angry, and said there was nothing wrong with the headlights. Mr. Tocci was a little surprised, and told him that he was driving the truck, in pitch dark, and he knew what his eyes could see and what they could not. He asked Mr. Catic if he was second-guessing his judgment about whether the truck was safe at night. Mr. Catic told him that he would personally take the truck to the dealership for a DOT inspection. Mr. Tocci told him that the truck would pass the DOT inspection, because none of the inspections scales were equipped with the instruments to actually measure the luminence of the headlights. The only way to see it would be if you were stopped on a highway at night, and then you could see how far the headlights went (Tr. 107-108).

When he made his complaints to Mr. Catic, Mr. Rizvic, and Mr. Gotten, Mr. Tocci believed that the lights on his truck tractor violated a DOT regulation. That was why he was trying to decide how to get it repaired without red-tagging it (Tr. 108). Mr. Tocci said that Mr. Catic became very angry, and ranted for 20 to 30 seconds (Tr. 108). Mr. Tocci was trying to settle him down, but Mr. Catic was escalating. Finally Mr. Catic stopped, and he said look, that's it, I've had enough, take your stuff off my truck, you're done (Tr. 109). Mr. Tocci understood that he was fired (Tr. 109).

Mr. Tocci stated that he earned \$4,003.62 from Miky Transport in 2013, or an average of \$625 a week (Tr. 109, CX 4). After he left Miky Transport, he had a hard time getting back to work in North Dakota. He finally got an offer in September 2013, and his first day of work was October 9, 2013 (Tr. 110). In between, he worked for a friend who owned a garage, doing general labor and gardening work (Tr. 111). He made a total of \$735.20 at this job (Tr. 112, CX 5).

Mr. Tocci started working on October 9, 2013 for Waypoint Transportation, a crude oil hauler (Tr. 112). He earned \$4,676.51 from October to December 9, 2012, when he resigned, because the equipment was scary (Tr. 113, CX 5). Mr. Tocci said that they had all older equipment, and they never stopped rolling the trucks unless there was a problem that prevented them from going on the batteries to load the trucks (Tr. 113-114).

Mr. Tocci started working for Kenworth of Indianapolis a few months earlier, part-time (Tr. 114). His most recent pay records showed that through March 29, 2013, he earned \$305.76 for one week (Tr. 114-115). He estimated that he made less than \$200 a week at this job (Tr. 115).

Mr. Tocci stated that after he left Miky Transport, he interviewed with local trucking companies, but he did not get a job. He started aggressively trying to find something in North Dakota, but he did not have enough money for a stake to go up there. Mr. Tocci stated that he would have to last for at least a week, and maybe three weeks, on savings, waiting for the first paycheck (Tr. 115). It was very expensive (Tr. 116). Mr. Tocci filled out employment applications online; he did not receive any job offers that he turned down (Tr. 116).

According to Mr. Tocci, he was stunned and shocked when he was fired. It kind of wobbled his world, and it took him a couple of days to get his arms around what had happened. He knew that what he did was a protected act, and he could not believe that the president of that great little company would not know that (Tr. 116). And then the longer he was unable to get hired, the more depressed he came. He was always capable of taking care of himself; he had not filed for unemployment since 1983 or 1984, and he never had food stamps. He was always self-sufficient and expected that he could take care of himself (Tr. 117).

As time went on, it got tougher and tougher, and he got further and further behind on his utilities, and finally he got a notice from his mortgagor that he could not hold out anymore (Tr. 117). He wondered if he would wake up one day in a cardboard box (Tr. 117). He was also worried that Miky might report negative information in the USIS system, a DAC report (Tr. 117).

Mr. Tocci stated that he had a few very dear friends who helped him out by taking him to dinner and buying him things at the store (Tr. 118). Mr. Tocci had been unemployed before, but this time he could not make enough money to even take care of his utilities (Tr. 118). He was back in purgatory again, and could not see a way out until he found another employer (Tr. 118-119). He thought that his job with Miky was so hopeful and positive, and then it turned into a nightmare. His friends were helping him out so he could keep eating; his job at Werners was pure generosity on his friend's part (Tr. 119). Mr. Tocci thought he was lucky to find the job in crude hauling, because Werner was having a hard time finding work for him to do (Tr. 119).

Mr. Tocci explained that he do not go back into IT, because he had found in the 1990s that he had hit "some magic number." He stated that at the age of 41, if you are not in management, you are expendable, and if you are not employed, you will not find a job. There was very little prospect for him getting back into IT, and that is why he went back to school in 1994 to be an aircraft mechanic (Tr. 119-120). By the time he was fired from Miky, his IT skills were gone; he stated that if you stopped working for six months in IT, it would take a year and a half to become current (Tr. 120).

Mr. Tocci identified his vision prescription (CX 6), and stated that when he wears corrective lenses, his vision is 20/20. He was wearing them on the night of February 24 (Tr. 120).

After he was fired from Miky, Mr. Tocci was not able to pay his property taxes, or to keep up with his mortgage payments (Tr. 121). He had owned his home since March 1997. He also fell behind on his gas bill, as well as his cable and water bill (Tr. 122-124).

Mr. Tocci would like to be reinstated at Miky Transport in his previous position. He would also like back pay, compensatory damages for emotional distress and mental pain, and punitive damages (Tr. 124-125). He also wants Miky Transport to pay his attorney fees, and to be required to post a copy of a favorable decision (Tr. 125).

Mr. Tocci acknowledged that Mr. Catic did not ever ask him to do something illegal, or against DOT rules and regulations (Tr. 129). He stated that he signed his logbooks, certifying that his truck was safe on the road, because it was not clear to him that he had a problem with the headlights, for certain, until his last cycle, the last night he drove (Tr. 133). He didn't write anything in his logbooks about the fifth wheel because he did not know for sure until he and Mr. Gotten spoke about it that there was something wrong with the fifth wheel. He stated that he did not put speculations on equipment failure, he put confidence on the equipment failure report (Tr. 133).

In response to Mr. Catic's questions about why he did not write problems on his logbook, so they could go to the shop and try to get it fixed, Mr. Tocci stated that he did not inform Mr. Catic that the truck had a repair need by way of these forms. He did it directly, by using his 3 by 5 cards that he discussed directly with Mr. Gotten (Tr. 134).

Mr. Tocci stated that the problem with the headlights happened before he stopped in Napoleon, Ohio to sleep. He did not write in his logbooks that there was anything wrong with the lights, because he had talked with Mr. Gotten and Mr. Rizvik already about his concern with the headlights. Both times he was told that there would be no repair, because there was nothing wrong with the lights. There was nothing they could do, and it was normal (Tr. 134). Mr. Tocci felt that he had a problem that was approaching a red tag, and he was trying to figure out how to get it fixed without having to red tag the truck, and make them adversaries (Tr. 135). He stated that if a driver does that, he is instantaneously at risk for being terminated. He was trying to figure out a solution without that happening (Tr. 135).

Mr. Tocci stated that although this seemed very personal to Mr. Catic, it was very professional to him. He stated that under the rules, he is responsible for the safety of the public while he is operating the equipment; he is under "intense scrutiny" for every mile. If he runs over someone because Mr. Catic thinks the headlight is completely normal and beyond his ability to repair, and Mr. Tocci has just come out of a DOT inspection, he has no defense against running over that child on the pavement (Tr. 137-138). Mr. Tocci's understanding of the rules is that in the end, he is responsible for the safe operation of the truck, and that means not running over anything on the pavement. When it is pitch dark, without any street lights, he needs illumination. It is dangerous to switch back and forth from high to low beam (Tr. 138).

Mr. Tocci stated that this was

About how I'm being held accountable, professionally, in my community. And I know, because I do the driving, I bring the revenue, I make the business viable because I'm the one who does the payload, I know that that's not going to be possible unless I do it safely. So I'm the one who's on the spot, in - - before the criminal court system.

Tr. 138. According to Mr. Tocci, the question that always arises is whether something was preventable. In this case, they could have changed the light bulb. If something happened, he felt that was what would be discovered, that the bulb was a "tired old halogen." (Tr. 138). He did not think it was credible to claim that there was nothing Mr. Catic could do because it was a factory defect, and yet the NHTSA has never examined and discovered it, despite the fact that it was a 2007 vehicle. Mr. Tocci did a lot of research after talking with Mr. Rizvik on February 25, and discussed the issue with the NHTSA and FMCS (Tr. 139).

Mr. Tocci stated that he went on the NHTSA website, and saw six complaints similar to his; he was the seventh person to make a complaint. There were plainly people having trouble with the VN series Volvo, but there was no credible or professional evidence of a factory defect. There were responses showing how people got around the problem, by pulling the cover off the back of the assembly, and doing a thorough examination (Tr. 139-140). When Mr. Tocci called the factory, Volvo Trucks, they told him to take the truck to the dealer. When he called the dealer, he was told that there was no "trouble with that sort of thing," and told Mr. Tocci to bring it in and they would figure it out (Tr. 140, 143).

To Mr. Tocci, this appeared to be a normal maintenance problem. There was no "trucker's legend" that there was something special about the Volvo.

Mr. Tocci stated that he had been railroaded with false allegations before, and unemployed for two and a half years after being blacklisted (Tr. 140-141). He felt he had to act, in the public interest. He felt that the solution was a simple technical evaluation that could be done at the dealer any day (Tr. 141). He stated that headlamps could lose their effectiveness from UV decay, deterioration of the wiring harness and deterioration of the silver backup (Tr. 142-143).

In his Declaration submitted after the hearing, Mr. Tocci stated that he was mistaken about the name of the route he drove on the evening of February 24, 2013 (CX 10). He pointed to a roadmap and satellite map, showing that US 24 had been re-aligned to a new four lane divided highway; he was on the Old Route 24, a winding two lane road, on that evening. Mr. Tocci stated that he relied on directions from his Garmin, which did not include the update reflecting the changes to US 24.

According to Mr. Tocci, Old Route 24 is a winding two lane highway with no streetlights or shoulders. The visibility was poor that night, and persistent oncoming traffic prevented him from safely using his high beams. Mr. Tocci attached a video he recorded in October 2014 with a dash-mounted camera when he redrove this route.

Mr. Tocci pointed to data from NOAA showing that the sky was overcast on February 24, 2013; he stated that there were no streetlights on Old Route 24, and the overcast cloud conditions obscured the moon and stars.

Mr. Tocci stated that the address he provided on his employment application was a commercial mailbox that he used to ensure the security of his mail while he was away from home.

Mr. Tocci stated that he did not claim he had been “foreclosed upon,” but that he was in arrears on his property taxes, causing the tax authorities to list his home for tax sale, which resulted in his mortgage lender notifying him that he would begin foreclosure proceedings if he did not resume regular payments by April 1, 2014, and the receipt of a solicitation from a distressed property scavenger.

Emir Rizvik

Mr. Rizvik is the Safety Supervisor for Miky Transport Company; he has worked there since 2009 (Tr. 146). He recalled that in February 2013, Mr. Tocci complained to him about the headlamps on his truck (Tr. 146). Mr. Tocci told him he could not see by using his lights at night. Mr. Rizvik went with him to check the lights, and they were perfect, like new (Tr. 147). He told Mr. Tocci that since they changed the style on the Volvo trucks in 2004, the lights were different than what they had before. Even when they were brand new, the vision was a little bit less than it was before (Tr. 147-148). He agreed that he told Mr. Tocci that Volvo trucks had bad lights, and everyone who drove them knew that (Tr. 148). Mr. Rizvik talked with Mr. Catic about Mr. Tocci’s complaints (Tr. 149).

Mr. Tocci did not complain to him about a leak in the air suspension on his truck (Tr. 148).

Mr. Rizvik handles recruiting for Miky Transport. He stated that depending on a driver’s experience, they start them at 38 to 40 cents a mile. One of their drivers can make around \$35,000 a year (Tr. 149).

Mr. Rizvik stated that as soon as Mr. Tocci started, his logs were incomplete. He called Mr. Tocci a few times about this (Tr. 150). Mr. Rizvik did not know why Mr. Catic fired Mr. Tocci (Tr. 151).

Mr. Rizvik stated that Mr. Catic never told him to take an unsafe truck on the road, or ask a driver to something that was not legal. None of the drivers had any problem with him (Tr. 151).

Mr. Rizvik stated that the drivers must report any problems with the truck on their logs as part of their pre and post dispatching. There was nothing written on Mr. Tocci’s logs (Tr. 152).

Mr. Rizvik was asked whether safety problems need to be put on the logbooks, as opposed to another written form. He thought that the problems needed to be reported on the logbooks (Tr. 157).

Michael Millard

Mr. Millard is a Transportation Management Specialist at the U.S. Department of Energy; he also has a consulting business, AWM Associates, LLC (Tr. 160). As a Transportation Specialist, Mr. Millard hires carriers to move commercial freight for the Department of Energy, and he is an expert on Title 39. He has worked for the Department of Energy for 4.5 years. Before that, he worked for the U.S. Department of Transportation as a motor carrier safety specialist in Illinois (Tr. 160). In that job, he conducted compliance reviews of motor carriers, hazardous material shippers, and cargo tank repair facilities, and conducted roadside inspections (Tr. 161). The compliance review was for evaluation of the carriers' compliance with Title 39, as far as CDL, drug and alcohol testing, driver qualification files, insurance, hours of service, maintenance programs, and hazardous materials transport (Tr. 161).

According to Mr. Millard, there are seven levels of roadside inspections. Level one is basically an annual inspection, for checking lights, tires, horns, frames, cargo securement, and driver qualifications. The most thorough level of inspection is level seven, which deals with shipments of radioactive material from coast to coast (Tr. 161-162). Other than that, the highest level is level one. Mr. Millard estimated that he had participated in 500 to 1000 roadside inspections (Tr. 163).

Mr. Millard stated that in a roadside inspection, the headlights are checked primarily for operation, to make sure the high and low beams work. They are not checked to see how well they illuminate the road surface on a dark road at night (Tr. 162). Mr. Millard was a truck driver from 1992 to 1996. He stated that in his experience, a functioning headlamp should illuminate the road on low beam at least a hundred feet or so (Tr. 162). Anything less than that would be unsafe, because you cannot overdrive the headlight. If the braking distance is 250 feet, and you can only see 100 feet, you are overdriving the headlight (Tr. 163).

Mr. Millard stated that systems develop problems, such as the wiring aging and becoming brittle, which impairs the electrical circuits and causes problems with the operation of the lights. The ECM is the electronic control module that controls the engine and emissions to meet EPA standards, and makes sure the truck does not emit fumes. It is connected to the electrical system, so if there is a problem with the ECM, there is probably a problem with the electrical system (Tr. 163-164).

Mr. Millard has inspected vehicles with air suspension systems. He stated that the airbags that attach the axle to the frame of the vehicle are inflated by the air compressor, which also operates the air system used to control the brakes, and things such as the driver's air ride seat and the air horn (Tr. 164). An air leak will not fix itself; it typically becomes worse (Tr. 164). He stated that if the air pressure drops below a certain level, the maxi-cams will stop the vehicle. If the air pressure is not where it should be, it can increase the braking distance, and cause the suspension not to operate normally (Tr. 165). If the air suspension bags collapse while

a driver is driving on the highway due to air loss, the load can shift, and the suspension frame can rub on the tires. If it is discovered in a roadside inspection that the air system has collapsed, it is an out of service violation (Tr. 165). This must be repaired before the vehicle can be moved.

According to Mr. Millard, unless the locking jaws on the kingpin for a fifth wheel are held in place securely, there is a possibility of the trailer coming loose from the tractor (Tr. 166).

Mr. Millard stated that a pretrip inspection is required before a driver operates a vehicle, with a walk around inspection to make sure everything is operational. A post-trip inspection report is also required. Although the daily inspection reports and logs can be combined, they are two separate required forms (Tr. 166).

Mr. Millard stated that the daily vehicle inspection report should list all defects (Tr. 169). He stated that if the lights were not working properly, and there was an air leak and other problems with a truck, but the driver put on the logbook that everything was alright and kept on driving, the driver did not properly note the defects (Tr. 170). The regulations require the driver to note on the post-trip inspection report any defects, for example, marker lights that are not operational, so that they can be repaired (Tr. 171). Any safety defects should be noted.

According to Mr. Millard, the regulations require that the logbooks be kept for six months. The daily vehicle inspection reports only need to be kept for 90 days. If the carrier chooses to use a daily inspection form that is combined with the logbook, there is no penalty, but the carrier is keeping records longer than necessary (Tr. 173). The logbook is used for the hours of service, and the daily vehicle inspection report is a form used to identify defects on the vehicle. If the daily vehicle inspection report does not reflect noted defects, it is a violation of federal regulations (Tr. 174).

Mr. Millard prepared a report for Mr. Tocci's attorney, dated March 31, 2014 (CX 8). The purpose of the report was

To support the allegations made by Mr. Tocci regarding the potentially unsafe actions caused by Miky Transport and the subsequent release from employment of Mr. Tocci

Mr. Millard relied on facts offered by Mr. Tocci in a telephone interview, regarding the headlights on his Volvo truck. Mr. Millard searched the Internet, and found recalls from Volvo relating to electrical components exposed to possible water damage and adequate circuit breakers for lighting systems. He acknowledged that this information did not prove that there were issues with Mr. Tocci's vehicle, but supported claims that there may have been issues with his Volvo.

Mr. Millard stated that he worked as an electronics technician from 1982 – 1992 repairing, maintaining, and installing mainframe computers, and was aware of the conditions that affect electrical/electronic components. He speculated that there were several components that could have affected the illumination of the low beam headlights. He also noted that there is snow and ice in the Midwest, with chemicals and salt used on the highways, which “wreak[s] havoc” on vehicles and causes premature wear and failure of vehicle components. He also

speculated that the dim low beam headlights could have been caused by aged bulbs, poor wiring, aged relays, bad circuit breakers or switches.

Mr. Millard acknowledged that his “opinions” were based on experience and results from an Internet search, and he had not examined the vehicle in question; he could not positively testify as to whether the low beam headlights functioned as required.

John Gotten

Mr. Catic originally planned to call Mr. Gotten as a witness. However, at the hearing, the parties stipulated that if he were called to testify, Mr. Gotten would state that if he told Mr. Catic that something was wrong with one of the trucks, or if a part was bad or needed to be replaced, Mr. Catic’s instructions to him were to fix the problem and take the truck out of service until it could be fixed (Tr. 181, 184). Mr. Gotten would state that Mr. Catic did not want his trucks out on the road unless they were safe (Tr. 182). If Mr. Catic told Mr. Gotten to get something repaired, it would be repaired (Tr. 182).

Volvo Dealership

Mr. Catic originally intended to call Brent, the service manager for Volvo in Fort Wayne, to testify that the Volvo people have kept his trucks in good repair and good working order for ten years. Mr. Tocci stipulated to this, and thus the service manager did not testify (Tr. 177-180).

ISSUES

The issues for decision in this case are:²

1. Whether the Complainant engaged in protected activity as contemplated within the STAA.
2. If so, whether the Respondent had knowledge of this protected activity.
3. Whether the Respondent took adverse action against the Complainant.
4. If so, whether the protected was activity a contributing factor to the adverse action.
5. If so, whether the Respondent has shown by clear and convincing evidence that he would have taken the adverse action notwithstanding the protected activity.

THE SURFACE TRANSPORTATION ASSISTANCE ACT

In passing the Transportation Act, Congress “recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express

² There is no dispute that the Respondent and Mr. Tocci are covered by the Act.

protection against retaliation for reporting these violations.” See *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994) (citations omitted).

As a result, Congress enacted section 405 of the Surface Transportation Assistance Act, 49 U.S.C. § 31105, to protect “employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance.” See *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 255 (1987).

49 U.S.C.A. § 31105(a)(1) (“the Act”), 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. The protected activity includes making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order.” § 31105(a)(1)(A). Internal complaints to management are protected under the Act. *Reed v. National Minerals Corp.*, Case No. 1991-STA-34, (Sec’y., July 24, 1992), slip op. at 4. A “commercial motor vehicle” includes “any self-propelled . . . vehicle used on the highways in commerce principally to transport passengers or cargo” with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. App. § 2301(1).

To prevail under the Act, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sec’y v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003).

*Whether The Complainant Engaged In Activity That Is Protected
Within The Meaning Of The Act*

In this case, Mr. Tocci made a number of complaints during his employment with Miky that he alleges constitute protected activity under the Act. The first is his complaint to Mr. Gotten that the coupling device on his truck was loose, causing him to feel a “lash” when he engaged the truck after a stop. Mr. Tocci stated that this problem did not present an imminent danger; Mr. Gotten told him that he would inspect it, and the fifth wheel was subsequently replaced. Before Mr. Tocci left on his last run, he told Mr. Gotten that the lights on his truck were not particularly effective on low beam.

After his final trip, on February 25, 2013, Mr. Tocci told Mr. Gotten that the Electronic Control Module (ECM) on his truck was not working, which caused the truck to fail to record 100 miles on the odometer each time it reset. When Mr. Rizvik joined their conversation, Mr. Tocci told them about the air leak on the front driver’s side suspension, and complained about his headlights. Mr. Rizvik subsequently conveyed Mr. Tocci’s complaint about his headlights to Mr. Catic. Mr. Tocci did not note any of these problems in his logbook for his last trip.

When Mr. Tocci called in on February 27, 2013, he spoke to Mr. Catic, and told him that his headlights did not illuminate the road at night on low beam, and that his ECM was resetting randomly, causing inaccuracies in his logs. He asked Mr. Catic for permission to take the truck to the dealership to check the lights.

The Respondent argues that Mr. Tocci did not have a reasonable belief that any of these alleged conditions presented a safety problem. The Respondent points out that Mr. Tocci acknowledged his responsibility to record on his daily log any problems on his truck, either before or after his trip, on every dispatch. Mr. Tocci signed all of his daily logs, including his log for his last trip, and never reported any problems with his truck. As Mr. Millard, Mr. Tocci's expert witness, stated, it is important that these records be up to date and accurate, so that the daily vehicle inspection report is not a falsification, or a violation of the law, and so that any defects can be repaired.

But on every logbook sheet for every route he drove, Mr. Tocci certified that: "I detect no defect or deficiency in this motor vehicle as would be likely to affect the safety of its operation or result in its mechanical breakdown." This is the purpose of the logbook sheets – to provide the driver the opportunity to identify any safety issue that he would reasonably believe to affect his vehicle, or violate any safety regulation.

Mr. Tocci's explanation at the hearing was that he was not sure that he had a problem with his truck's headlights until the last night, and he did not want to "speculate" on the logbook. He stated that he did not use his logbook to notify the Respondent that his truck needed "repairs;" he used his 3 by 5 cards, and discussed these issues directly with Mr. Gotten. But Mr. Millard, Mr. Tocci's expert, stated that the daily vehicle inspection report, which is part of the logbook, should include **all** defects; indeed, if a driver signs this report when he believes there actually are defects, the report is a falsified form for which a company could be cited. According to Mr. Millard, the mechanic and the company rely on the report to prevent potentially unsafe vehicles from being dispatched onto the road.

Even if, as Mr. Tocci claimed, it was not clear to him that the headlights were a problem "for certain" until his last driving run on February 24-25, 2013, once he knew "for certain" that the headlights were a problem, Mr. Tocci did not record any problems on his logbook for that run, and affirmatively certified that there were no safety issues with his truck, even though he testified that he believed that the problem with the headlights was a DOT violation.

The Respondent points out Mr. Tocci did not complain after his drive down US 33, a stretch of two lane road without street lights, from St. Mary's, Ohio, to Fort Wayne, Indiana, on January 26, 2013, before he was reprimanded for his incomplete logbooks, and for taking too much time off work. As Mr. Tocci has noted, his logbook reflects that he drove for about 45 minutes from St. Mary's, Ohio to Fort Wayne on this date. There is no evidence in the record to show that he drove on U.S. 33, or that this was a two lane road without streetlights. I find that this particular trip does not shed any light on the issue of the reasonableness of Mr. Tocci's perceptions in the evening and early morning of February 24-25, 2013.³

³ Nor do I accept the Respondent's implication that Mr. Tocci's complaint about his headlights was a calculated response to his reprimands for incomplete logbooks.

The Respondent argues that Mr. Tocci should be estopped from claiming that he had a reasonable belief that the Respondent was engaging in a violation of a motor vehicle safety regulation, because on every logbook sheet he completed, he affirmatively certified that he detected no defect or deficiency in his truck which would be likely to affect the safety of its operation or result in mechanical breakdown, including his final run on February 24, 2013. The Respondent argues that not to hold Mr. Tocci to the contents of these certifications would allow him to benefit from deliberately providing false information to the Respondent, and while Mr. Tocci's defense that he reported safety issues with his 3 by 5 notecards might "have traction" if he had failed to fill out the safety portion of the logbook, it does not matter because he affirmatively marked "no" in the safety section of every single log sheet for every trip, and certified that they were true and accurate. According to the Respondent, either Mr. Tocci intentionally misrepresented the state of his truck in his logbook, or he did not have a reasonable belief that there were any safety issues with his truck.

The Respondent argues that Mr. Tocci acknowledged that the headlights would pass a DOT inspection, both at the hearing, and when he spoke to Mr. Catic on February 27, 2013; in fact, they did pass inspection. According to the Respondent, this is sufficient to dismiss Mr. Tocci's claim – it is inherently contradictory for Mr. Tocci to tell Mr. Catic that the headlights would pass a DOT test on February 27, 2013, and the next day, tell OSHA that he had a reasonable belief of a violation of a motor vehicle safety regulation. Nor did Mr. Tocci take Mr. Catic up on his offer to take the truck to a dealership, despite his claim that the solution was a "simple technical evaluation that can be done at any dealer any day."

Respondent notes that Mr. Tocci claimed that it was not clear to him that there was a problem with his headlights until the night of February 24, 2013, and thus, any "reasonable belief" about a safety issue with the headlights would have been formed during that last drive. The basis for Mr. Tocci's safety complaint is that his headlights allowed him to see no more than ten feet in front of the truck. But by this time, Mr. Tocci had already violated the 14 hour rule on February 23, 2013, as of 11:00 p.m., yet he continued to drive an additional 7 hours, during what he characterized as the "killing time." The Respondent argues that it is "eminently reasonable" that a 60 year old driver who wore glasses, and had been awake for almost 24 hours, would have difficulty seeing after driving for 9 hours in the dark.

Mr. Tocci argues that the Act does not require that he have a reasonable belief that the Respondent was violating a specific DOT regulation. Rather, it is only necessary that his complaint be "related to" reasonably perceived, possible, or potential violations of commercial vehicle safety regulations. I agree with Mr. Tocci, that the headlights on his truck would pass a DOT inspection does not preclude the possibility that Mr. Tocci nevertheless had a reasonable belief that there was a safety issue with respect to the headlights.

It is clear that Mr. Tocci made complaints about the operation of his headlights, to Mr. Gotten, Mr. Rizvik, and Mr. Catic. He commented to Mr. Gotten, before he took his last trip, that his headlights were not quite right, and did not seem to be effective on low beam. Mr. Tocci

again complained about his headlights to Mr. Gotten and Mr. Rizvik after he drove the 110 miles from Detroit, Michigan, to Napoleon, Ohio.

In addition, Mr. Tocci claims that between his conversations with Mr. Gotten and Mr. Rizvik on February 25, 2013, and his phone call to Mr. Catic two days later, he discovered through research that there were other complaints to the NHTSA that the headlights on Volvo trucks did not operate properly when on a low beam setting. By the time he spoke with Mr. Catic, he believed that the headlights violated DOT regulations. When Mr. Catic offered to take the truck to the dealership for a DOT inspection, Mr. Tocci told him that it would pass the DOT inspection. According to Mr. Tocci, as well as Mr. Millard, a DOT inspection checks the mechanical operation of the headlights, but not their luminence, that is, how far they light the road ahead.

At the hearing, and in his brief, Mr. Tocci argues that he believed the operation of his headlights violated DOT regulations. But although he testified at length about the dangers presented by the failure of his headlights to illuminate the road more than ten feet ahead, a situation he claimed to have told Mr. Rizvik and Mr. Catic was “scary dangerous,” and claimed that these headlights violated DOT regulations, Mr. Tocci apparently did not think the situation was serious enough to record it in his logbook; indeed, he affirmatively represented that there were **no** defects that could affect the safe operation of his truck. As Mr. Tocci has pointed out, he is an experienced truck driver, and is familiar with the purpose and requirements of keeping an accurate logbook. His own expert testified about the importance of recording all safety issues in the logbook. Mr. Tocci’s explanation, that he preferred to record his concerns on three by five cards and raise them directly with Mr. Gotten, does not erase his obligation to record these concerns on the document specifically designed for this purpose.

I note that there is no objective evidence in the record to support a conclusion that the headlights on Mr. Tocci’s truck, or on Volvo trucks in general, are deficient, or in violation of any safety regulations. Mr. Millard’s testimony did not support such a conclusion. He testified that, based on his internet search, there were recalls from Volvo relating to electrical components for lighting systems, which supported claims that there “may have” been issues with Mr. Tocci’s Volvo. Relying on his ten years as a computer electronics technician, he also speculated on things that could have affected the illumination of the low beam headlights, including chemicals and salts used on the highway, aged bulbs, poor wiring, aged relays, or bad circuit breakers and switches. Mr. Millard acknowledged that he had not examined the truck, and he could not positively testify as to whether the low beam headlights functioned as required.

On the other hand, Mr. Rizvik, the Safety Supervisor for Respondent, who has actual experience with the repair and maintenance of truck equipment, testified that he checked the headlights on Mr. Tocci’s truck, and they were perfect, like new. Mr. Tocci agreed with Mr. Gotten, who told him that the lights were brand new. There is nothing in the record to substantiate Mr. Tocci’s claim that there have been numerous complaints to the NHSTA about Volvo headlights, or specifically about the operation of the lights on low beam.

I note that Mr. Rizvik and Mr. Catic acknowledged telling Mr. Tocci that Volvo trucks had “bad” lights, and “everybody” who drove them knew that. Mr. Rizvik also agreed that

someone who was not used to driving a Volvo truck could reasonably believe that the lights were defective. According to Mr. Tocci, Mr. Gotten told him that the low beams on the Volvos did not work very well, and that everyone who drove them was familiar with that.

Both sides have submitted weather and other reports on the phase of the moon, and the extent of the cloud cover on the night of February 24, 2013. These reports neither support nor contradict Mr. Tocci's account of the conditions on that evening. What is clear is that Mr. Tocci was driving on a rural, unlit stretch of two lane highway, at night, during what he characterized as the "killing time," and after driving for 14 hours to drop off his load in Detroit.⁴ Under these circumstances, it is not difficult to accept that Mr. Tocci might have problems with the headlights, especially switching from high to low beam with oncoming cars.⁵ Mr. Tocci promptly reported his difficulties with the headlights to Mr. Gotten and Mr. Rizvik, and attempted to research the issue on the internet.

In other words, Mr. Tocci clearly believed that, despite the reassurances from Mr. Rizvik and Mr. Gotten, there were problems with his headlights, based on his experience the night of February 24, 2013, the comments from Mr. Rizvik and Mr. Catic, and his research on the internet. I find that, when Mr. Tocci spoke with Mr. Catic on February 27, 2013, he had a reasonable belief that there was an issue with the safety of his truck headlights, which he communicated to Mr. Catic.⁶

As Mr. Tocci points out in his brief, whether the Respondent thought his complaints were legitimate is irrelevant. The issue is whether Mr. Tocci had a reasonable belief that the operation of his headlights (or any of the other issues he complained about) presented a safety issue.⁷ It is clear that Mr. Tocci did not record any of his complaints in the very document designed for that purpose, his logbook, but it does not automatically follow that he did not have reasonable concerns about the operation of his low beam headlights on February 24, 2013. Mr. Tocci's decision to keep a personal record of his concerns, while affirmatively stating on his logbook that there were no safety issues with his truck, may have, under other circumstances, resulted in

⁴ The Respondent objected to consideration of Exhibits B, C, and E of Mr. Tocci's Declaration, stating that they are hearsay and unreliable. Mr. Tocci claimed that Exhibit B was satellite maps provided by the Ohio Department of Transportation. These maps are not dated or authenticated. Exhibit C is a video Mr. Tocci recorded in October 2014 when he re-drove the Old Route 24 during the daytime. Exhibit E is an email exchange with Mr. Tocci and Garmin Technical Support regarding the update with the US 24 changes in June 2013. These exhibits are hearsay, which is permitted in these proceedings. Regardless of the reliability of these particular exhibits, I accept Mr. Tocci's description of the road he took on February 24, 2013. I also find nothing to suggest that Mr. Tocci knew that there was a newer, alternate route, and deliberately opted to take the old route.

⁵ Although Mr. Tocci discussed what he thought could be problems with the headlights with Mr. Gatten before this trip, this was the first time he had driven for an extended period at night on unlit roads.

⁶ Although Mr. Tocci's failure to record his complaints in the very document designed for that purpose, his logbook, suggests that he did not have a reasonable belief that the headlights presented a safety issue, I accept Mr. Tocci's testimony that he did not want to record his complaints in this document until he was sure that they were a problem.

⁷ Neither of the parties addressed the reasonableness of Mr. Tocci's belief that his complaints about the fifth wheel, the air suspension leak, or the ECM presented safety issues. Mr. Tocci and Mr. Millard discussed how these problems could potentially affect the safe operation of the truck, or result in regulatory violations. But Mr. Tocci does not argue, and there is no evidence to suggest, that his complaints about these issues were a contributing factor in Mr. Catic's decision to fire him.

discipline, including termination. But that decision does not preclude a finding that he had a reasonable belief that the operation of his low beam headlights presented a safety issue.

Based on Mr. Tocci's description of the problems he had with his low beam headlights in the evening and early morning hours of February 24-25, 2013, which I found to be credible, as well as the acknowledgement of Mr. Rizvik and Mr. Catic, who told Mr. Tocci that the Volvo headlights did not operate well on low beam, I find that Mr. Tocci has established that he engaged in protected activity when he complained to Mr. Catic, and to Mr. Rizvik and Mr. Gotten, about the operation of his headlights.

Respondents' Knowledge of the Complainant's Protected Activity

There is no dispute that the Respondent was aware of Mr. Tocci's complaints about his truck. He made these complaints to Mr. Gotten, Mr. Rizvic, and with respect to the headlights and the ECM, Mr. Catic.

Whether the Complainant's Protected Activity was a Contributing Factor in Mr. Catic's Decision to Fire Him

Assuming that Mr. Tocci engaged in protected activity, it is his burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Clark v. Pace Airlines, Inc.*, ARB No. 04-150 (Nov. 30, 2006), slip op. at 11. Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041 (Nov. 30, 2005), slip op. at 9. Where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No 04-056 (Apr. 28, 2006).

Mr. Tocci relies on Mr. Catic's February 18, 2014 letter to Mr. Tocci's attorney "to explain Mr. Joe Tocci case," in which he detailed Mr. Tocci's complaints about the lights on his truck, and stated:

We know that Mr. Tocci is wearing glasses what makes him even harder to see but there was really nothing we can do to make the lights better. We really didn't know what Mr. Tocci really wants from us, to avoid further complications with and Mr. Tocci concerns for his safety and there is nothing we can do to make him safer we decided to terminate his job with us.

(CX 3). Mr. Tocci's argument that this letter "provides direct evidence that Mr. Tocci's protected activity was the only reason for his discharge" is overstated. I note that Mr. Catic participated in these proceedings *pro se*, up until the submission of written briefs. It is also obvious that Mr. Catic is not a native English speaker.

Mr. Catic testified that he could not recall what Mr. Tocci told him on February 27, 2013. He knew that Mr. Tocci had previously complained about his headlights, as well as the fifth wheel. The fifth wheel had been repaired, and the headlights were brand new. Mr. Catic stated that he told Mr. Tocci that he could not handle “it” anymore, and that Mr. Tocci should just get his things and leave. Mr. Tocci argues that because Mr. Catic acknowledged that he had complained to him about the safety of the headlights on his truck, the “logical conclusion” is that Mr. Catic fired him because he was fed up and could not handle Mr. Tocci’s “protected complaints.”

According to Mr. Tocci, when he called to get permission to take his truck to the dealership on February 27, 2013, he spoke with Mr. Catic, and told him that he needed to take the truck in to look at the ECM. When Mr. Tocci told him about the low beam headlights, Mr. Catic told him that there was nothing wrong with his headlights, and that he would personally take it to the dealership for a DOT inspection. Although Mr. Tocci told Mr. Catic that his truck would pass a DOT inspection, Mr. Tocci still believed that the low beam headlights were a safety issue.

Then Mr. Tocci informed Mr. Catic that he would be taking more time off. At this point, Mr. Catic told him that he was done and to clean his things out of his truck. At the hearing, Mr. Catic testified that he did not fire Mr. Tocci because he was making safety complaints about his truck. He fired him because he wanted too many days off. He stated that he could not afford to have a truck working seven days, and parked six days. According to Mr. Catic, two weeks earlier he had told Mr. Tocci to clean his truck out after he asked to take time off, but Mr. Tocci changed his mind and came back to work the following Monday. But when he got back from his most recent trip, Mr. Tocci told Mr. Catic that he would not be ready to drive again for six days. That was why Mr. Catic fired him, not because of the lights.

In his response to the OSHA investigator, Mr. Catic stated that Mr. Tocci took too many days off, submitted incomplete logbook sheets, complained about his job, and created friction with office employees and dispatchers. When Mr. Catic, without benefit of counsel, responded to a letter from Mr. Tocci’s attorney on February 18, 2014, he explained that Mr. Tocci had been hired as a temporary employee for a few months, until he returned to his previous construction job. Mr. Catic stated that Mr. Tocci did not like his hours, and wanted to take many days off as soon as he started working for Miky. In addition, as soon as he started working, Mr. Tocci complained about how Mr. Catic was running his business, implying that he did not know how to do so. Mr. Catic also noted that Mr. Catic complained about his low beam headlights, which were immediately checked by Mr. Gotten and Mr. Rizvic, both of whom determined that they were in good operating condition.⁸

The Respondent argues that even if it were assumed that Mr. Tocci engaged in protected activity, he cannot establish that his complaint about the headlights was a contributing factor to his termination. According to the Respondent, Mr. Tocci spent an “inordinate” amount of time attempting to establish that the headlights on his truck were in poor condition. But he did little to establish that his complaint was a contributing factor in Mr. Catic’s decision to fire him. Indeed, he offered nothing more than his belief that he was fired because of his complaint about his

⁸ Mr. Catic also noted that Mr. Rizvic was a driver for 12 years, operating exclusively Volvo trucks.

headlights. In contrast, however, Mr. Catic testified that safety was a heightened priority for his company. He stated that it is Miky's number one priority, and his employees are encouraged to report perceived safety issues. He submits all of his trucks for DOL safety testing, and had recently replaced the low beam headlights on Mr. Tocci's truck. He also responded in a timely fashion to Mr. Tocci's complaint about the fifth wheel on his truck, and had it replaced. Finally, Mr. Catic offered to take the truck to the dealership to get checked out.

The logbook sheets corroborate Mr. Catic's statement that Mr. Tocci took too many days off - they show that he worked only 29 of the 46 days he was employed by Miky. They also corroborate Mr. Catic's testimony about repeated inaccuracies and failures to complete the forms. Although Mr. Tocci stated at the hearing that the only incorrect logbook sheet was the one for February 17, 2013, where he wrote the wrong date, in fact the logbook sheets show that he provided the incorrect date three times, on February 17, February 18, and February 19, 2013. Mr. Rizvik testified that as soon as Mr. Tocci started, his logs were incomplete, and he called Mr. Tocci a few times about this. Mr. Tocci acknowledged to the OSHA investigator that he had been informed on at least two occasions that he was missing days in his log book, and made errors in documenting his log book (CX 7).⁹

Mr. Tocci argues that he worked hard for Miky, and that Mr. Catic's claim that he wanted too many days off is disingenuous. He notes that he earned an average of \$635.50 a week working for Miky, which results in earnings of \$32,500 annually, consistent with the earnings of Miky's top earners. Nevertheless, the record establishes that after he was hired in late December 2012, and after a two week delay, he worked 29 days out of the next 46 days. Mr. Catic, whose operation is small, stated that he cannot afford to let a truck sit idle for such lengths of time.

Mr. Tocci was fired immediately after complaining about his headlights on his last run, and the temporal proximity of Mr. Tocci's complaint to his termination raises the possibility of an inference that his termination was the result of his protected activity. As discussed *supra*, I find that Mr. Catic had credible and legitimate reasons for firing Mr. Tocci, unrelated to any of his complaints about safety.

Nor is Mr. Tocci correct when he claims that Mr. Catic did not fire him until shortly after his protected activity. The record amply demonstrates that Mr. Tocci made numerous complaints about the operation of his truck to Mr. Gotten and Mr. Rizvik; in particular, he made complaints about his headlights before he left on his last trip, which Mr. Rizvik passed on to Mr. Catic.¹⁰

I credit Mr. Catic's testimony, and find that Mr. Tocci's complaints, about his headlights or any other issues related to the operation of his truck, were not the reason that Mr. Catic fired Mr. Tocci. I disagree with Mr. Tocci, who argues that the logical conclusion is that Mr. Catic

⁹ The Respondent claims that Mr. Tocci provided incorrect information on his fuel stops on January 14, 15, 16, 17, 23, and 26, and February 5, 14, and 22, 2013. It is not clear to the Court just how these entries are deficient, and there is no testimony to clarify this issue.

¹⁰ Mr. Tocci argues that even if he took excessive time off, Mr. Catic's continuing to retain a difficult employee until he engaged in protected activity is evidence of pretext. Complainant's Brief at 21. Not only does this make no sense, as discussed above, Mr. Tocci engaged in protected activity well before he was fired.

fired him because he was fed up, and could not handle his protected complaints. Mr. Catic fired Mr. Tocci not because he complained about his headlights, but because he wanted too much time off, and because he did not keep complete and accurate records. Indeed, he tried to fire him earlier, when Mr. Tocci wanted time off, but Mr. Tocci decided to come back to work. When Mr. Tocci did the same thing a few weeks later, Mr. Catic fired him. I find that Mr. Tocci's complaints about his headlights, or other safety issues, were not a causal factor in his termination.

It was Mr. Tocci's request for time off that was the catalyst for Mr. Catic's firing of Mr. Tocci. Although Mr. Tocci's complaints about his headlights may have angered Mr. Catic, and put him in a frame of mind where Mr. Tocci's request for more time off was not well received, nevertheless Mr. Catic fired Mr. Tocci, not because of any safety complaints, but because he was not working sufficient hours, and did not complete his paperwork correctly. I find that Mr. Tocci's complaint about his headlights was not a factor that, alone or in combination with other factors, tended to affect in some way Mr. Catic's decision to fire him.

*Whether the Respondent has shown by clear and convincing evidence
That it would have fired Mr. Tocci absent one or more of
His protected activities*

Again, relying on Mr. Catic's statements in his letter to Mr. Tocci's counsel, Mr. Tocci argues that the sole reason Mr. Catic gave for firing him was Mr. Tocci's concerns for his safety, and thus it was not "highly probable or reasonably certain" that Miky would have fired Mr. Tocci absent his protected activity. But as indicated above, this letter must be considered in the context of all of the evidence.

Mr. Tocci acknowledged that when he went to work for Miky, he was looking for a temporary job to fill the gap until the next season started, and he was able to get hired on back in North Dakota. Mr. Tocci was employed by Miky for 46 days, during which he worked only 29 days. Indeed, Mr. Tocci was warned about taking too many days off before he made his February 25, 2013 complaint about his headlights. The evidence reflects that Mr. Tocci was warned about missing days or incomplete logbook entries shortly after he began working for Miky; Mr. Rizvic repeatedly warned him about his incomplete logbook sheets.

The Respondent points out that at the hearing, Mr. Tocci acknowledged that if he had continued "working properly," with everything up to date, he would still be working for Miky. Mr. Catic testified that he could not employ a driver who let his truck sit in the yard for a week, because it is too expensive for the company. From January 26, 2013 to February 1, 2013, and again from February 8, 2013 to February 14, 2014, Mr. Tocci did not come to work. When Mr. Tocci told Mr. Catic on February 27, 2013 that he was going to take more time off, that was the last straw for Mr. Catic. He could not afford to employ Mr. Tocci on his schedule, and still pay all of the costs for the truck. Indeed, Mr. Catic had tried to fire Mr. Tocci two weeks earlier because he was taking too much time off.

Mr. Tocci was aware that Miky was not happy with the amount of time he was taking off, and the low amount of hours he was driving. Mr. Tocci had also been warned about his failure

to complete his logbooks correctly. During his final conversation with Mr. Catic, Mr. Tocci told him that he would need to take more time off. I find that it was in this context that Mr. Catic decided that he had had enough, that he needed a driver who could be relied on to work longer and more consistent hours, and not leave his truck sitting idle in the lot, and he fired Mr. Tocci.

I find that, even if Mr. Tocci's complaints about the headlights on his truck were a "contributing factor" in Mr. Catic's decision to fire him, the Respondent has established by clear and convincing evidence that it would have fired Mr. Tocci regardless of his protected activity.

CONCLUSION

Based on the foregoing, I find that the Complainant has established that he engaged in protected activity under the STAA, when he made his complaints to Mr. Gotten, Mr. Rizvik, and Mr. Catic about the operation of the headlights on his truck. I also find that Mr. Tocci suffered an "adverse action" when he was fired.

As the Secretary of Labor has previously noted, although whistleblowers are protected from retaliation for blowing the whistle, the fact that any employee may have done so does not afford him protection from being disciplined for reasons other than his whistleblowing activities, nor does it give such an employee *carte blanche* to ignore the usual obligations involved in an employer-employee relationship. *Dunham v. Brock*, 794 F.2d 1037 (5th Cir. 1986).

I find that Mr. Tocci has not established that any adverse action taken by Respondent was motivated by Mr. Tocci having engaged in alleged protected activity – Mr. Tocci has not established that Mr. Catic fired him because he complained about the headlights on his truck, or that his termination was motivated by any prohibited reasons, as opposed to Mr. Catic's concerns about Mr. Tocci's work hours and his incomplete and inaccurate logbooks. In sum, Mr. Tocci has not demonstrated by a preponderance of the evidence that his protected activities contributed to any adverse action taken against him.

But even if Mr. Tocci had established that his complaints about the headlights on his truck were a "contributing factor" in Mr. Catic's decision to fire him, I find that the Respondent has established by clear and convincing evidence that it would have terminated Mr. Tocci absent his protected activity.

Accordingly, I find that Mr. Tocci is not entitled to relief under the Act.

RECOMMENDED ORDER

Based on the foregoing, IT IS RECOMMENDED that the complaint of Joseph Tocci for relief under the Act be DENIED.

SO ORDERED.

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARBCorrespondence@dol.gov.

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

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix

(one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). 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(a) and (b).