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Issue Date: 28 July 2015

CASE NO.: 2014-STA-00080

In the Matter of:

NATHAN LEAKS,
Complainant,

v.

ARCTIC GLACIER,
Respondent.

DECISION AND ORDER DENYING WHISTLEBLOWER COMPLAINT

This action involves a complaint under the employee protection provision of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105, and its implementing regulations found at 29 C.F.R. § 18.1978.

On February 4, 2015, I conducted a hearing in Las Vegas, Nevada. Nathan Leaks ("Complainant") appeared in pro se. Arctic Glacier ("Respondent") was represented by Ashley Brightwell, Attorney at Law. At the hearing, Complainant's exhibits ("CX") A through L and Respondent's exhibits ("RX") 1 through 3 were entered into evidence. Hearing Transcript ("TR") at 8, 72. Respondent was given leave to object in writing to CX M-1 through M-14, but did not do so. TR at 29-31. Complainant's exhibits CX M-1 through M-14 are relevant on the issue of damages and are admitted into evidence. Respondent's closing brief was filed on March 30, 2015, and Complainant's closing brief was filed on April 1, 2015, thereby closing the record.[1]

I. ISSUES IN DISPUTE

This matter presents the following disputed issues:

1. Did Complainant engage in protected activity under STAA by reporting an unsafe truck on August 30, 2013?
2. Was Respondent aware of the protected activity?
3. If so, did Respondent terminate Complainant on August 30, 2013, because of the protected activity or did he resign/voluntarily quit on that date?

[1] Complainant's closing brief was filed without page numbers. I numbered the pages 1-10, sequentially, for ease of reference.

4. Was Complainant's protected activity a contributing factor in Respondent's adverse action, if any?
5. If so, can Respondent show by clear and convincing evidence that it would have taken the same adverse action regardless of the protected activity?

II. FINDINGS OF FACT

1. Complainant obtained his commercial driver's license in 2005 through a class at Swift Company where he worked intermittently as a delivery driver in 2005 and 2006 doing long haul driving. TR at 12-13, 53. Complainant worked for a company called DBI driving a side-load truck, which was different from a tractor-trailer and more like a bobtail truck, in 2006 and 2007. TR at 54. Complainant also drove a tractor-trailer and a bobtail truck locally for a company called New Haven in 2011, which he left after less than a year. TR at 53. Complainant said he had approximately two years of experience driving a tractor-trailer, of which more than a year involved making local deliveries. TR at 54. He thought that local driving was more work than long haul driving since the driver had to stop at lights and shift gears more often. TR at 55.

2. Respondent hired Complainant in mid-July of 2013 as a local delivery driver in Las Vegas and Henderson, Nevada, delivering ice to gas stations and supermarkets with a tractor and 45 foot trailer. TR at 10-11. Complainant worked from a warehouse located in Henderson. TR at 17. Respondent did not own the tractors it used for ice deliveries, but rented them from Penske Corporation. TR at 119. Complainant was initially supervised by two trainers who were based in Phoenix, Arizona, but would travel on alternate weeks to Henderson. TR at 34. He underwent two weeks of training, including a two day video safety course and driving training, before starting his delivery routes. TR at 55.

3. Christian Sanchez was a plant manager for Respondent overseeing operations in Arizona and Nevada and has worked for Respondent for 11 years. TR at 117. Mr. Sanchez was based in Phoenix. TR at 22, 60. He obtained his commercial driver's license in 2004. TR at 117. Mr. Sanchez interviewed and hired Complainant as a seasonal commercial driver for local deliveries, and expected Complainant's contract to end in September 2013. TR at 118, 136. Respondent regularly hired approximately 20 extra drivers during its busy season in the summer. TR at 117. Complainant disputed that he was hired as a seasonal worker. TR at 139-40.

4. Avelino Orosco began working for Respondent in Phoenix, Arizona in April 2013 before transferring to Henderson as the lead driver during the first week of August 2013. TR at 34, 60, 74. While Complainant regarded Mr. Orosco as his supervisor, Mr. Sanchez was actually Complainant's direct supervisor. TR at 22, 60. Mr. Orosco has held a commercial driver's license since 2006 and consistently worked driving jobs since then. TR at 87. Mr. Orosco did not drive with Complainant or have an opportunity to form an impression of Complainant's experience as a driver. TR at 87-88. He said that Complainant was often tired at work due to early mornings and fourteen hour days, and that Complainant would sometimes sleep in the warehouse. TR at 91. Mr. Orosco did not handle paperwork at the Henderson warehouse. TR at 78.

5. On several occasions during Complainant's employment with Respondent, Complainant told Mr. Sanchez that he was having trouble waking up in the mornings. TR at 108-9. At one point Mr. Sanchez was sent a picture, taken by another employee, which showed Complainant sleeping in the warehouse office. TR at 131. Mr. Sanchez did not discipline Complainant over the incident because he was a new employee and he was trying to support Complainant. TR at 133. Mr. Sanchez had never received any complaints about Complainant from customers, and did not recall Complainant ever not showing up to work, failing to complete his route, or receiving any disciplinary action. TR at 126.

6. On August 26, 2013, Complainant had begun his delivery route, which he typically started between 4:00 and 5:00 a.m., when he received a phone call from Mr. Orosco, saying that Complainant's tractor, an International model, and the attached trailer needed to be taken to Phoenix for repairs. TR at 14, 84. Complainant met Mr. Orosco at a delivery stop around 6:00 a.m., and they transferred the cargo of Complainant's trailer into another trailer attached to a Freightliner model tractor, which Complainant then took to finish his delivery route for the day. TR at 14-15. Complainant had driven the same Freightliner tractor during his training period. TR at 56.

7. When Complainant began driving the Freightliner, he thought that it did not drive the same as the International tractor he had been driving, and that the gears did not shift smoothly. TR at 15. According to Complainant, during his training, his trainer had told him that the tractor had shifting problems. TR at 25-26. Complainant said that none of the other tractors he had ever used drove like the Freightliner, and despite being comfortable driving tractors, he was scared to drive the Freightliner. TR at 15, 25. However, Complainant was able to complete his delivery route on August 26. TR at 15.

8. When Complainant tried to start the Freightliner on August 27, 2013, he found that the ignition would cut off within ten seconds. TR at 16. Complainant contacted Mr. Orosco and Mr. Sanchez to let them know about the problem, and Mr. Sanchez had a mechanic from Penske look at the tractor. TR at 16-17, 22, 104. Mr. Sanchez also told Complainant to check the fluids on the Freightliner, but Complainant did not think that the fluids were low. TR at 65. Since Mr. Sanchez said that it would be several hours until a mechanic arrived, Complainant stayed in the warehouse and waited. TR at 16. The mechanic arrived by 8:00 a.m., and found that the fluids in the tractor were low and that there was a leak coming from the radiator. TR at 17-18. The mechanic said that Complainant could drive his route that day with the Freightliner but, according to Complainant, said that it would need to be repaired immediately. TR at 18. However, the work order submitted to Penske indicated that no problems were found and no repairs were made. RX 1 at 4. Mr. Sanchez explained that when a mechanic is dispatched to repair a tractor, the mechanic is responsible for resolving the problem or following up with him, and Mr. Sanchez did not remember the mechanic calling him about the truck. TR at 107. Mr. Sanchez told Complainant to keep a jug of water in his tractor in case the engine overheated. TR at 19. Complainant said at the hearing that he was afraid that he might get into an accident due to the gear shift problem or that the tractor might overheat, and he was worried about driving because of a recent accident involving another driver for Respondent, and an experience where Complainant saw a burning tractor by the side of the road. TR at 18-19. Complainant was able to complete his deliveries on August 27, 2013, and did not work for the next two days. TR at 19.

9. Complainant did not bring up his shifting difficulties with the Freightliner or complain about any problems with the tractor to Mr. Orosco or Mr. Sanchez after driving the Freightliner on the August 26 or 27 because he expected to return to driving the International. TR at 20-21, 57. Complainant described himself as a person who would "really try to avoid confrontation at all points." TR at 21.

10. Mr. Orosco typically drove the International when Complainant was not working. TR at 33. When Complainant arrived at the warehouse on August 30, 2013, he saw the Freightliner parked at the side of the building and the International parked in the loading dock. TR at 21. Complainant asked if Mr. Orosco would be driving the International, and Mr. Orosco said he would. TR at 21, 80. Complainant was very upset by this and told Mr. Orosco that he did not feel safe with the Freightliner. TR at 21-22. Complainant felt that Mr. Orosco was getting special treatment, and was angry that Mr. Orosco was driving a tractor that Complainant felt was "his." TR at 33, 49. According to Complainant, Mr. Orosco laughed and said that Complainant would be okay. TR at 21-22. Complainant did not explain why he felt unsafe, or ask to drive the other tractor, and just walked into the warehouse and did not speak to Mr. Orosco after that. TR at 25, 59-60, 80, 102-03. Mr. Orosco called Mr. Sanchez about twenty minutes later and told him that Complainant was upset because he had to use the other tractor and had left the building. TR at 80, 90, 102-03.

11. At approximately 5:00 a.m., Complainant sent a text message to Mr. Sanchez to let him know that he felt unsafe driving the Freightliner, but since it was so early, he did not expect Mr. Sanchez to respond immediately. TR at 22; CX D at 4. Complainant then examined the tractor and found that the ignition was functioning properly. TR at 23. Since he did not feel safe driving, Complainant waited at the warehouse until 6:00 a.m., then left to get coffee and afterwards went to a friend's house "to vent." TR at 23, 60-61. At 6:50 a.m., Mr. Sanchez sent Complainant a text message instructing him to call Mr. Sanchez. CX D at 4. At 6:53 a.m., Mr. Sanchez called Complainant and left a voicemail. TR at 103; CX E. Complainant called Mr. Sanchez back to ask who had decided which tractor Complainant would drive. TR at 23.

12. Complainant described his conversation with Mr. Sanchez as very quick, and said he told Mr. Sanchez that there were issues with the tractor's gears grinding. TR at 23, 108, 112. Mr. Sanchez responded that Complainant was responsible for reporting any mechanical issues and that if he had a problem operating the tractor, Complainant could be given more training. TR at 108, 112. Mr. Sanchez thought that Complainant was more upset that Mr. Orosco was using the International tractor than about the gears grinding. TR at 108, 113-14. Complainant also told Mr. Sanchez that he was having a difficult time waking up in the morning and getting to work. TR at 108. Complainant said that he told Mr. Sanchez that he felt unsafe driving the Freightliner, but that Mr. Sanchez "basically, just asked [Complainant] in sort of an ultimatum type of way, he said 'Are you going to drive the tractor - - yes or no, are you going to drive the tractor?'" TR at 24. TR at 108. Complainant told Mr. Sanchez that he would not drive the Freightliner. TR at 24. Mr. Sanchez said he asked Complainant whether he wanted to continue working for Respondent, and Complainant said no. TR at 108. Mr. Sanchez told Complainant to turn in his keys and gas card, and that was Complainant's last communication with Mr. Sanchez other than getting his final paycheck. TR at 24, 108.

13. Mr. Sanchez said that he would have allowed Complainant to take the rest of the day off and return to work the next day. TR at 115. He said that it was a busy time and he wanted to get Complainant back on his route, had no desire for Complainant to stop working for Respondent, and that he did not terminate Complainant. TR at 125. Mr. Sanchez typically does not require a letter of resignation from employees, but accepts them when employees give two week or other notice. TR at 134. Mr. Sanchez said that when gears are grinding on a tractor, the problem is often that the RPMs are not set right, even if the clutch is in. TR at 122.

14. Mr. Orosco said that Complainant never made a complaint that his tractor was unsafe on August 30, and only complained about difficulties he experienced when shifting gears. TR at 80. Mr. Orosco had driven the Freightliner for several weeks before August 30, had no issues when driving it, and had never noticed the gears grinding or the engine failing to stay on. TR at 81, 83-84, 88, 89. He suggested that shifting between 1300 and 1700 RPMs would be smoother, and said that usually shifting would be part of the training to obtain a commercial driver's license. TR at 81-82. Mr. Orosco said that there was no difference between the Freightliner Complainant was driving and the International, except that they were different models. TR at 62. Mr. Orosco said that he used the International tractor on August 30 because it was already connected to his partly loaded trailer; he would usually load his trailer with ice the night before driving a route if he had a busy route to drive the next day and would sometimes add more ice in the morning. TR at 85-86, 91-92. He said that tractors were not assigned to a particular driver, but some drivers would drive a certain tractor more than others. TR at 97-98.

15. On September 6, 2013, the Freightliner tractor was returned to Penske because the season was winding down and Respondent no longer needed it. TR at 123; RX 2 at 5; CX A at 2. The return form indicated that the tractor had been rented without damage and was returned without damage. RX 2 at 5.

16. On December 10, 2013, Mr. Sanchez wrote a narrative of his phone interaction with Complainant on August 30, 2013, in which he noted that his end of the conversation took place in his office on speakerphone and was overheard by Lupe Castro, another employee with Respondent. TR at 111, 150; CX A at 1.

17. After his employment with Respondent ended, Complainant worked a commission based job with nightclubs and took an EMT class. TR at 27. Complainant had been working the nightclub job before being hired by Respondent, and was able to return to work within a week or two after leaving Respondent. TR at 27, 31. Complainant began working at Brookstone in September 2014 making $10.50/hr plus commissions, and was employed there at the time of the hearing. TR at 32. While employed by Respondent in 2013, Complainant was paid $14/hr, and earned a total of $5,957; from August 18 to August 31, his last pay period, he earned $1,421. TR at 67-68; CX M9. In 2014, Complainant earned $1,607.23 from MB BC Management, LLC, $4,995.41 from Club Jungle Management, LLC, $725.50 from YSB Nightclub, LLC, and $5,006.56 from Brookstone Stores, Inc. CX M3-M6. Complainant said he had earned up to $1,500 per week working at nightclubs in 2013, but did not have wage records or a precise recollection of his 2013 earnings from nightclubs. TR at 68.

18. After leaving his work at Respondent, Complainant said he struggled to pay rent, feed himself, and had to take the bus after his car was repossessed. TR at 46, 48. He applied for driving jobs between August and November of 2013, when his car was repossessed, and was interviewed by Goodwill, but did not get that job. TR at 63-64. Complainant said he was not interested in returning to work for Respondent. TR at 46-47, 61.

III. ANALYSIS AND CONCLUSIONS OF LAW

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

A. Legal Standard

The STAA provides protection to employees who are discharged or discriminated against regarding pay, terms, or privileges of employment because they have "filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order." 49 U.S.C. § 41105(a)(1)(A(i). As amended in 2007, the STAA employs the two-step analytical framework in whistleblower protection cases imposed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). 49 U.S.C. § 31105(b)(1); *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20, 21, slip op. at 7 (ARB May 13, 2014). The AIR 21 standard requires the complainant to show by a preponderance of the evidence "that protected activity was a 'contributing factor' in the alleged adverse personnel action." *Beatty*, ARB No. 13-039, slip op. at 8.

To prevail under the first step of the STAA, therefore, a complainant must prove by a preponderance of the evidence that he (1) engaged in protected activity, (2) that the employer was aware of the activity, (3) that there was an adverse employment action taken against the complainant, and (4) that there was a causal connection between the protected activity and the adverse employment action. *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-18, slip op. at 4 (ARB June 29, 2011). If the complainant meets his prima facie burden, the respondent may avoid liability if it can demonstrate by clear and convincing evidence that it would have taken the same adverse action in any event. 49 U.S.C. § 42121(b)(2)(B)(iv); *Clarke*, ARB No. 09-114, slip op. at 4. "Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain." *Clarke*, ARB No. 09-114, slip op. at 4 (internal quotation marks deleted)(citations omitted).

B. Credibility

Initially, I note that Complainant was not a credible witness. Complainant offered little evidence beyond his own self-serving testimony to support his claims. Complainant's testimony was influenced by his emotions, his anger at Respondent, his relative inexperience as a local driver, and his desire to recast events to portray him in a positive light. He appeared unhappy working with Mr. Orosco, and it appeared he resented that Mr. Orosco was the lead at the Henderson warehouse despite starting at that location after Complainant. Complainant felt that

Mr. Orosco was getting special treatment, and was angry that Mr. Orosco was driving a tractor Complainant felt was "his." F.F. ¶ 10; TR at 33, 49. His recollection of events minimized his role in any of the events leading to his separation from Respondent, and was not supported by any persuasive or other credible evidence in the record.[2] I was not impressed or persuaded by the character, quality and substance of this testimony, as well as his demeanor while testifying.

I found Mr. Orosco to be a forthright and credible witness, and he did not appear to hold any enmity against Complainant. His recollection of the events appeared consistent with the other evidence in the case and was generally consistent with and corroborated by Mr. Sanchez. Mr. Sanchez was also a credible witness, and his testimony was generally consistent with the incident report he made in December 2013, lending further credibility to his testimony. F.F. ¶ 16. Mr. Sanchez also had a good recollection of the events, and the information he provided was corroborated by Mr. Orosco and by the other evidence in the record. I found Mr. Orosco and Mr. Sanchez to be the more credible and believable witnesses and find their testimony to be entitled to more weight than Complainant.

C. Complainant's Protected Activity

The STAA creates two situations where an employee's refusal to drive constitutes protected activity. 29 C.F.R. § 1978.102(c)(1). First, the employee engages in protected activity when he refuses to drive because the operation of a vehicle would violate "a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security." 49 U.S.C. § 31105(a)(1)(B)(i); 29 C.F.R. § 1978.102(c)(1)(i). Second, a refusal to drive constitutes a protected activity when "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." 49 U.S.C. § 31105(a)(1)(B)(ii); 29 C.F.R. § 1978.102(c)(1)(ii). Complaints made internally, to a company hotline or a supervisor, constitute protected activity under the STAA. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op at 7 (ARB Jan. 31, 2011).

Complainant contends that he engaged in protected activity when he refused to drive the Freightliner tractor because it was unsafe due to the grinding noise when he shifted gears, and he also contends he reported his refusal to drive to his superiors. Complainant's Post-Hr'g Br. at 9. Respondent contends that Complainant did not engage in protected activity because he did not claim that the grinding violated a commercial motor vehicle safety or security regulation, and could not have reasonably believed that the grinding violated any such regulation. Respondent's Post-Hr'g Br. at 7. After an examination of the record, I find that Complainant has not established that he engaged in protective activity under either prong of the STAA.

1. Refusal to Violate a Commercial Motor Vehicle Regulation

[2] Complainant argued in his closing brief that he would be willing to undergo a polygraph test, and demanded that Mr. Sanchez and Mr. Orosco both be required to submit to polygraphs. Complainant's Post-Hr'g Br. at 8. Polygraph tests are generally not admissible as evidence in state or federal courts, and "courts continue to express doubt about whether such evidence is reliable." *United States v. Scheffer*, 523 U.S. 303, 311 (1998). Complainant's demands are denied. His willingness to take a polygraph does not improve his credibility and is not considered here.

Complainant asserts that his refusal to drive the Freightliner was a protected activity under 49 C.F.R. § 396.7(a), which provides that "[a] motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle."[3] An employee engages in protected activity when he refuses to drive because the operation of a vehicle would violate "a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security." 49 U.S.C. § 31105(a)(1)(B)(i); 29 C.F.R. § 1978.102(c)(1)(i). In addition to situations where operating a motor vehicle would violate a safety law, STAA protects employees who refuse to drive "where the operation of a vehicle would actually violate safety laws *under the employee's reasonable belief* of the facts at the time he refuses to operate a vehicle" so long as the refusal is both subjectively and objectively reasonable. *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 9 (ARB Sept. 30, 2011)(emphasis added). The refusal is subjectively reasonable so long as the employee "actually believed that the conduct he complained of constituted a violation of relevant law." *Id.* The objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the employee. *Id.* Here, Complainant did not show that the Freightliner was in such a condition that operating it would likely cause an accident or breakdown.

The evidence showed that Complainant was able to operate the tractor and complete his route on August 26 and 27 even though he alleged the gears grinded. F.F. ¶¶ 7, 8. Complainant never reported an unsafe vehicle to anyone, and also never said anything about the gears grinding until he learned that he would have to drive a tractor other this the one he preferred. F.F. ¶¶ 9, 10. Mr. Orosco operated the tractor for a few weeks before Complainant with no incidents or grinding. F.F. ¶ 14. The tractor was examined on August 27 by a mechanic, who found no problems. F.F. ¶ 8. Complainant alleges that the mechanic said the vehicle needed to be repaired, but the invoice of repair shows there were no issues with the truck. *Id.* When the vehicle was returned to Penske a few weeks later, someone was able to safely drive the Freightliner from Henderson to Phoenix, where it was returned to the rental agency with no damage. F.F. ¶ 15.

I am more persuaded by the testimony and evidence from Respondent that Complainant was not shifting gears at the correct RPMs, and that he was angry at Respondent, particularly Mr. Orosco for driving the truck he preferred. *See* F.F. ¶ 13, 14. Moreover, the evidence shows that Complainant left work out of frustration and anger that Mr. Orosco would be driving what he perceived to be his vehicle. F.F. ¶¶ 10, 12. There is no persuasive or believable information that

[3] While not raised by Complainant, in other cases arising under STAA, complainants have invoked 49 C.F.R. § 396.13, which states that, before driving a motor vehicle, the driver must "[b]e satisfied that the motor vehicle is in safe operating condition." This argument, however, has been limited by courts which have required that the complainant demonstrate not only a good faith subjective belief that the vehicle is unsafe but also that the driver's assessment of the condition is correct. *Brame v. Consolidated Freightways*, 90-STA-20 (Sec'y June 17, 1992) (finding that a driver's refusal to drive was not protected activity because he offered only his opinion that the brakes were faulty, and other evidence showed that the braked complied with federal brake performance standards). There was no evidence that Complainant had a good faith belief that the vehicle was unsafe, but there was persuasive evidence that his assessment was incorrect. A mechanic examined the truck on August 27, but did not note any issues of concern. F.F. ¶ 8. The truck was later returned to Phoenix at the end of the season, shortly after Complainant quit his job, and there were no issues noted when the truck was returned. F.F. ¶ 15. Moreover, Mr. Orosco drove the truck prior to Complainant and reported no issues, and Mr. Orosco was a more credible witness than Complainant. F.F. ¶ 14.

the truck was in such a condition that if Complainant had driven the tractor on August 30 a breakdown was likely to occur, and therefore Complainant has failed to show that operating the tractor would actually violate a motor vehicle safety law.

Additionally, even construing his allegations generously, and assuming for the sake of argument that Complainant believed the gear shift system in the Freightliner was not adequate to safely operate the tractor, there is no indication that he refused to drive because of a reasonable belief that operating the tractor would violate a motor vehicle safety law. To constitute protected activity, Complainant belief must have been both subjectively and objectively reasonable. The evidence shows that Complainant's refusal to drive was not objectively reasonable. The testimony of Mr. Sanchez and Mr. Orosco, both experienced commercial drivers, established that a reasonably experienced commercial driver would be aware that gear grinding could result when shifting gears, and even someone with Complainant's level of experience should have been aware of gear shifting procedures and the potential problems. F.F. ¶¶ 13, 14. Given the otherwise serviceable condition of the tractor, and Complainant's previous experiences successfully driving the Freightliner, I am not persuaded that a reasonable person with the same driving knowledge, training, and experience as Complainant would consider the Freightliner's gear shifting system to be in a state that posed a likely risk of accident or breakdown.

Since Complainant has failed to show that his refusal to drive was both a subjectively and objectively reasonable, his claim of having engaged in protected activity fails under the first prong of the STAA.

2. Apprehension of Serious Injury

Under the second prong of the STAA, Complainant's contention that he engaged in protected activity rests on whether or not he had a reasonable apprehension that the condition of the Freightliner was likely to cause a serious injury to Complainant or the public. The apprehension of serious injury is reasonable "only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury or serious impairment to health" and the employee must have sought but been unable to obtain from the employer correction of the hazardous condition. 49 U.S.C. § 31105(a)(2). The refusal must be based on an objectively reasonable belief that operation of the motor vehicle would present to the employee or the public a risk of serious injury. *Krahn v. United Parcel Serv.*, ARB No. 04-097, ALJ No. 2003-STA-24, slip op. at 12 (ARB May 9, 2006).

Complainant's apprehension must have been objectively reasonable, which means that Complainant did not have to show that there was an actual problem with the condition of the tractor, but he must provide evidence that a reasonable person would conclude that there was a defect likely to cause a serious injury. There is no evidence that the Freightliner actually had a hazardous safety condition. The tractor was returned without incident and with no damage to Penske on September 6, 2013, one week after Complainant refused to drive it. F.F. ¶ 15. The truck had been used regularly by other drivers, including Mr. Orosco and Complainant, and neither reported any issues until Complainant became angry at work over being forced to drive a different truck. F.F. ¶¶ 6, 9, 14. There are no repair or incident reports which show any damage

to the gear shifting mechanism of the tractor, and Complainant agreed that he never reported the issue or filled out a safety report. F.F. ¶¶ 8, 9, 15. Mr. Orosco and Mr. Sanchez persuasively established that the grinding was more likely than not due to Complainant's shifting gears incorrectly, and that a driver with training similar to Complainant's would have recognized this. F.F. ¶¶ 13, 14. The tractor had recently been examined by a mechanic, who had noted no problems. F.F. ¶ 8. For the foregoing reasons, I find that Complainant failed to show that a reasonable person would conclude that there was a defect in the truck likely to cause a serious injury.

Moreover, there is no indication that Complainant made a good faith effort to seek correction of the problem before he walked out of the warehouse on August 30. F.F. ¶ 10. He did not attempt to drive the Freightliner on that day, and assumed that, based on his previous experience in the tractor, the gears would again grind. *Id*. He alleged that he told Mr. Orosco and Mr. Sanchez for the first time on August 30 that he felt unsafe driving the truck, but he did not ask to use a different truck and he did not accept his supervisor's offer of additional training. F.F. ¶¶ 9, 10, 12. I do not believe Complainant's testimony that he left work on August 30 due to any safety concerns with the Freightliner truck.

Based on the foregoing, I find that Complainant has failed to establish protected activity under the second prong of the STAA, and that he did not engage in protected activity when he refused to drive the Freightliner on August 30, 2013. He did not allege any other protected activity, and therefore Complainant has failed to meet his burden of showing that he engaged in protected activity.

D. Adverse Action

Even if Complainant had established that he engaged in protected activity, he would also need to show that he was the subject of an adverse action by Respondent. The STAA prohibits discharge because an employee engaged in protected activity, 49 U.S.C. § 31105(a)(1), and it is Complainant's burden to establish by a preponderance of the evidence that he was discharged. 29 C.F.R. § 1978.109(a); *Clarke*, ARB No. 09-114, slip op. at 4. Complainant argues that, because he refused to drive the Freightliner, he was terminated by Respondent. Complainant's Post-Hr'g Br. at 9. Respondent asserts that he voluntarily quit his job and was not subject to any adverse action. The question here turns on whether Complainant quit or was fired by Mr. Sanchez on August 30, and I find that Complainant was not terminated but instead voluntarily resigned his position.

Complainant and Respondent give two different accounts of what transpired on August 20, 2014, Complainant's last day of work. As previously discussed, I found Respondent's witnesses to be entitled to more weight, and I believed them over Complainant. I am more persuaded by Respondent's evidence related to Complainant's last day of work than Complainant's. Complainant said that he was fired after reporting concerns about the Freightliner. His case rested in large part on his credibility, as there was no evidence supporting his contentions in the record. Mr. Sanchez and Mr. Orosco gave similar versions of what occurred on August 30, but, importantly, the record corroborates their accounts.

Based upon the evidence and testimony, I find that Complainant was upset that he did not get to drive his tractor of choice. He sent a text message to Mr. Sanchez, his supervisor located in Phoenix, and then physically left the building and worksite. F.F. ¶ 11. Complainant told Mr. Sanchez that he had a hard time waking up and working the early hours required by the job, in addition to expressing his displeasure that Mr. Orosco had what he considered to be his tractor. F.F. ¶ 12. Mr. Sanchez offered additional training to help Complainant work with the gear shifting issues in an effort to get Complainant back to the worksite and make his deliveries. *Id.* Mr. Sanchez persuasively established that Complainant was a temporary worker hired because the summer months were so busy that he needed the extra help. F.F. ¶ 3. I believed his testimony that he did not want to lose Complainant as a worker, given the difficult position it would leave him and the other drivers during the busy season. Mr. Sanchez credibly testified that Respondent was in the midst of its busy season, that he did not want Complainant to stop working for Respondent, and that he would have allowed Complainant to come back to work even after Complainant walked off the job. F.F. ¶ 13. Complainant's version differs only slightly from Mr. Sanchez's version of the events. Complainant said that Mr. Sanchez asked him if he would drive the tractor, to which Complainant said no. F.F. ¶ 12. Mr. Sanchez said that he asked Complainant whether he wanted to continue working for Respondent, and Complainant said no. *Id.* In both versions of the events, Mr. Sanchez then instructed Complainant to turn in his keys and fuel card. *Id.* The difference between the versions is simply refusal to drive versus resignation. Complainant does not dispute that he was angry and left the worksite, and never returned on August 30.

As explained above, I find Mr. Sanchez to be generally more credible than Complainant. Furthermore, Mr. Sanchez's version of the event is supported by and consistent with the written report he prepared in December 2013. F.F. ¶ 16. Mr. Sanchez provided logical reasons why he did not want to lose Complainant as an employee, and would not have fired him. While Complainant had been found sleeping in the warehouse, and had complained about the early hours, there had been no complaints against Complainant and he had not been subject to any discipline. F.F. ¶ 5. For these reasons, I find Mr. Sanchez's version of events more convincing than Complainant's, and that Complainant quit his job with Respondent and was not fired.

Complainant argues that since Respondent did not call Ms. Castro, who overheard the conversation in which he resigned, to testify should be taken as proof that he did not resign. Complainant's Post-Hr'g Br. at 2-3; *see* F.F. ¶ 16. There are many reasons why a witness may not be called at trial. There has been an insufficient showing, however, that I should take an adverse inference against Respondent because it did not call Ms. Castro as a hearing witness, and I decline to do so. Complainant could have subpoenaed Ms. Castro to testify or taken her deposition, the same as Respondent. There is simply no evidence that failure to call Ms. Castro as a trial witness entitles either party to an adverse inference about her testimony. *See Adelson v. Hananel*, 652 F.3d 75, 87 (1st Cir. 2011) (denying a missing witness inference to a party who took no action to depose or subpoena to testify the witness).

Complainant similarly argues that the non-existence in the record of letter of resignation from him to Respondent proves that he did not resign. Complainant's Post-Hr'g Br. at 4. Mr. Sanchez explained that he normally does not request a letter of resignation, and generally does not expect one unless the employee is giving a two-week' notice. F.F. ¶ 13. This is a reasonable practice, and a convincing explanation for the lack of a letter of resignation. Further,

Complainant did not resign, which implies a thoughtful end to employment, but instead angrily quit by walking off the job. Given that I credit Mr. Sanchez' testimony over Complainant's, I do not find the lack of a letter of resignation from Complainant probative since I find that he voluntarily quit his position when he got mad that he did not get his way in the workplace. Complainant quit; he was not fired.

Because Complainant has not shown that he engaged in any protected activity, and, assuming he had, he did not demonstrate that he was the subject of an adverse action, the inquiry goes no further. Complainant has not established any violation of the STAA. His request for relief is denied.

SO ORDERED.

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

RICHARD M. CLARK
Administrative Law Judge

San Francisco, California

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

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

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

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

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

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

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

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

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