**U.S. Department of Labor**

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

**Issue Date: 30 January 2017**

Case No.: **2014-STA-00046**

*In the Matter of*:

CHARLES E. PATTERSON,
Complainant,

v.

PROTERRA, INC.,
Respondents.

Appearances:

Charles E. Patterson
*Pro Se Claimant*

Jonathan Varcelli,
Co-Owner of Employer
*Pro Se* for the Employer

Before: Joseph E. Kane
Administrative Law Judge

## DECISION AND ORDER DISMISSING CLAIM

This matter arises from a claim under the employee protection provisions of § 405 of the Surface Transportation Assistance Act ("STAA" or "Act"), 49 U.S.C. § 31105, as amended and re-codified, and the implementing regulations at 29 C.F.R. part 1978. The STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee regarding pay, terms, or privileges of employment because the employee has undertaken protected activity, including: (1) participating in proceedings relating to the violation of a commercial motor vehicle safety regulation; or (2) refusing to operate a motor vehicle when doing so would violate the regulations. In this case, the Complainant, Charles Patterson, alleges that Respondent, Proterra, Inc., terminated him from his position as a truck driver because he complained about safety related issues regarding the mechanical condition of Respondent's trucks.

## I. PROCEDURAL HISTORY

Respondent terminated Claimant's employment on April 12, 2014. (EX 2).[1] Thereafter, Complainant filed a Complaint with the Secretary of Labor on April 14, 2014, alleging Respondent terminated him in violation of the STAA. Thereafter, the Occupational Safety and Health Administration ("OSHA") of the Department of Labor ("DOL" or "Department") initiated an investigation. In a letter dated April 22, 2014, OSHA's Regional Supervisory Investigator dismissed the Complainant's complaint, after concluding: (1) while the Complainant complained about safety issues in the past, Respondent did not take adverse action towards Complainant when he raised these concerns; (2) Complainant's actions on April 12, 2012 did not constitute protected activity; and, (3) Respondent terminated Complainant for refusing to follow the dispatcher's directions on April 12, 2012, by returning to Respondent's location; and not for protected activity. (ALJ 1 at 2).

In a letter received May 27, 2014, Complainant filed objections to OSHA's findings and requested a hearing before the Office of Administrative Law Judges. (ALJ 2). This case was assigned to Administrative Law Judge Joseph E. Kane on June 25, 2014, Pursuant to a Notice of Assignment. Thereafter, pursuant to a Notice of Hearing and Prehearing Order issued on March 17, 2016, I held a hearing on this claim on June 28, 2016, in Cleveland, Ohio. I afforded both parties a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges.[2] Both parties proceeded without counsel. At the hearing, I admitted into the record ALJ 1-4,[3] CX 1-7,[4] EX 2-5.[5] (TR at 7-8, 19). The parties did not file closing briefs, the record is now closed, and the case is ready for decision.

In reaching a decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the hearing testimony, and parties' arguments. Where applicable, I have determined the credibility of the witnesses. While I have considered all of the evidence of record, I have summarized only the evidence that is relevant to resolving the issues in this case.

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[1] In this Decision and Order, "ALJ" refers to the Administrative Law Judge's exhibits, "CX" refers to the Complainant's exhibits, "EX" refers to Respondent's exhibits, and "TR" refers to the transcript of the hearing held on June 28, 2016.

[2] 29 C.F.R. Part 18, Supbart A.

[3] The record contains the following Administrative Law Judge Exhibits: (1) Complainant's complaint and OSHA's investigative report; (2) Complainant's Objections to Secretary's Findings and request for a hearing; (3) the Notice of Hearing, dated March 17,2014; and (4) the Notice of Hearing Location. (TR at 7).

[4] The record contains the following Complainant's Exhibits: (1) a letter written by Complainant on April 11, 2016, regarding the allegations in his complaint; (2) the Notice of Determination on Reconsideration from the Ohio Civil Rights Commission and Complainant's request for a hearing to the Office of Administrative Law Judges (3) the Notice of Determination from the Ohio Civil Rights Commission; (4) letter from Ohio Civil Rights Commission re commencement of investigation; (5) charge from Cuyahoga County for driving overweight; (6) Proterra Operating General rules; (7) Log Truck Driver's Inspection Condition Reports. (TR at 8).

[5] The record contains the following Respondent's Exhibits: (2) February 25, 2014 incident report, (3) April 12, 2014 termination report; (4) write-up for speeding; and, (5) policy paperwork with Complainant's acknowledgment indicating violations can result in termination.

## II. ISSUES

The parties contest the following:

1. Whether Complainant engaged in activity protected under 49 U.S.C. § 31105(a)(1)(A)(i);

2. Whether Complainant engaged in activity protected under 49 U.S.C. § 31105(a)(1)(B)(i);

3. Whether Complainant has shown that his allegedly protected activity contributed to the Respondents' decision to terminate him;

4. Whether Respondents have shown by clear and convincing evidence that they would have taken the same adverse action against the Complainant absent his alleged protected activity;

5. Whether Complainant took reasonable steps to mitigate his damages;

6. Whether Complainant is entitled to relief under the STAA.

## III. APPLICABLE STANDARDS

The Employee Protection section of the STAA provides:

§ 31105. Employee protections

(a) PROHIBITIONS.—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

> (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;
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> (B) the employee refuses to operate a vehicle because—
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> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
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> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

49 U.S.C. § 31105(a). This provision was enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations."[6]

STAA whistleblower complaints are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[7] In order to prevail on his case Complainant must show that he engaged in a protected activity, he suffered an adverse action, and the protected activity was a contributing factor in the adverse action. If these elements are satisfied, the burden shifts to Respondent to show by clear and convincing evidence that the adverse action would have been taken regardless of the protected activity.[8]

[6] *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).
[7] 49 U.S.C. § 42121(b) (2014). *See* 49 U.S.C. § 31105(b)(1).
[8] 49 U.S.C. § 42121(b)(2)(B); *Beatty v. Inman Trucking Management, Inc.*, Case No. 13-039 (ARB May 13, 2014) (STA), PDF at 7–10.

## IV. EVIDENCE PRESENTED BY THE PARTIES

### A. Complainant's Evidence and Testimony

Complainant started working for Respondent, Proterra, in 2012. (Tr. 31). He worked as a dump truck driver. (Tr. 31). He is a Class A CDL driver. (Tr. 31). Prior to Proterra, Complainant worked for WRK Express in Cleveland, Ohio as a cross-country driver. (Tr. 30-31). Complainant received his Class B CDL twelve years ago, and his Class A CDL in November 2010. (Tr. 32). The Class A license allows him to drive a dump truck like he operated while working for Respondent. (Tr. 32).

Complainant testified that the owners of Proterra, Jonathon Varcelli and Michael Zychowski, served as his supervisors throughout his employment. (Tr. 33). Complainant disagreed with Varcelli and Zychowski that the dispatcher Paul Valvoda supervised him. (Tr. 77). Although he stated he had no knowledge of Valvoda's hiring or firing authority, Complainant agreed that Valvoda fired him and that Bob, who Valvoda took over for, hired him. (Tr. 77).

On April 12, 2014, Complainant worked hauling dirt away from an excavation site. (Tr. 34). Respondent had a contract to haul dirt away from the site in Detroit where another company was building a Bob Evans restaurant. (Tr. 34-35). On the day in question, Respondent's truck drivers worked at the excavation site for about forty-five minutes, when the company operating the site informed the drivers that they were no longer needed that day. Complainant testified that he called Valvoda to see what to do and Valvoda told him to stay parked at the jobsite anyway. (Tr. 37). Complainant stated that the foreman at the jobsite informed him that if he stayed parked at the jobsite, the foreman would call the police. (Tr. 37). It is unclear from the testimony whether the police actually came to the scene or whether the company only threatened to call the police. Complainant testified that seven drivers were at the excavation site at the time, two drivers went back to Proterra immediately, and the others pulled to a nearby street and waited. Complainant and another driver, Buddy Gee, went back to Proterra. (Tr. 39). Complainant agreed that Valvoda instructed him to remain at the jobsite and not to leave. On his way back to Proterra, Valvoda called and asked Complainant for his location and he informed Valvoda that he left the jobsite. (Tr. 38-39). Valvoda terminated Complainant when he arrived back at Proterra. (Tr. 32, 39). Complainant testified that Valvoda stated he was terminated for disobeying a direct order. (Tr. 39). Valvoda was mad because he told Complainant to stay put and he ignored him. (Tr. 57).

Complainant agreed that Valvoda did not give him permission to leave the jobsite. (Tr. 67). He disagrees with Respondent on whether Buddy received permission to drive back to Proterra. (Tr. 68). He did not, however, present testimony from Buddy. Complainant did not wait because he did not want to go to jail and he did not park on Main Street, instead, because he stated there wasn't parking. (Tr. 69).

Complainant related his termination to safety, stating he complained about truck #410 often. (Tr. 41; 45). Complainant entered into evidence Log Truck Driver's Inspection Condition Reports for October 2013 and April 2014. (CX 7). The reports note issues with Truck #410 and #406 ranging from a knocking sound around the tires, missing mud flaps, power steering and brake issues, defrost issues, to fuel leaks and fumes coming into the cab. (CX 7; Tr. 48). He felt Valvoda was frustrated with all of the complaining. (Tr. 43). Complainant stated that someone would always say they would look into the issues with the Truck, but they never did. (Tr. 46-47). Complainant complained about other trucks as well. (Tr. 49). He had no knowledge of whether other drivers also submitted paperwork on truck issues, but agreed the drivers are supposed to fill out inspection reports daily. (Tr. 50). Once the forms are filled out they are supposed to give them to dispatch. (Tr. 50). Complainant "couldn't say" whether his termination occurred because of the reported issues, but believed Valvoda thought of him as a "trouble maker." (Tr. 51). Complainant's last complaint occurred on April 10, 2014, and he last worked on April 12. (Tr. 54; CX 7).

Complainant testified that he also "had words" with Valvoda over driving overweight. (Tr. 41). Complainant received a fine for driving overweight. (Tr. 41). He agreed that he had trouble getting along with Valvoda. (Tr. 41). Complainant further related the fact that Valvoda did not terminate Buddy, who he claims also came back instead of waiting at the job site, as another reason he believes his safety complaints resulted in his termination. (Tr. 39). Buddy is currently still employed by Respondent. (Tr. 39).

Complainant testified that after he left Respondent he could not find employment until September 7, 2014. (Tr. 58-59). Complainant is currently employed by Morabito Trucking as a dump truck driver. (Tr. 30). He hauls locally for the company. (Tr. 30). He states that he makes $100 less per week at his new employer. (Tr. 61). On cross examination, however, Complainant admitted that just after leaving Proterra Ohio Bulk hired him on April 21, 2014. (Tr. 63). He only worked for Ohio Bulk for around 90 days and was terminated. (Tr. 63).

I find Complainant's testimony credible. Some of Complainant's testimony was based on speculation and hearsay and those issues if relevant to the underlying facts are addressed in the analysis below.

B. Respondent's Evidence and Testimony

Michael Zychowski, co-owner of Respondent, testified on behalf of Respondent. (Tr. 82). Zychowski owns fifty percent of the Company and Varcelli owns the other fifty percent. (Tr. 85). Varcelli performs the administrative, clerical, and billing tasks for the Company. (Tr. 86). Zychowski handles the day to day activities with the drivers and customers. (Tr. 86). He relayed the daily routes and activities to Valvoda, who then diverted the drivers appropriately. (Tr. 86). The drivers answered to the dispatcher, Valvoda. (Tr. 83). Zychowski also handles the mechanic work during the day.

On April 12, 2014, the Respondent's drivers were performing work for Severino, a contractor who contracted with Respondent to do work hauling for Cuyahoga Valley Trucking at the site of a future Bob Evans restaurant. (Tr. 84). Severino informed Respondent that the Company would receive payment for four hours of work on April 12. (Tr. 84). Zychowski told Valvoda to instruct the drivers to stay at the job site for four hours that day. (Tr. 84). When the Company told Respondent's drivers to leave, the drivers should have either waited at the jobsite or pulled around the corner. (Tr. 84). Some of the drivers were told to come back, but the drivers at the jobsite were told to wait so they could get their tickets signed. (Tr. 86-87). Zychowski agreed that he did not want them to sit at the jobsite if the foreman was going to call the police, but the drivers needed to at least pull over somewhere else and wait. (Tr. 122). Complainant did not have permission to leave. (Tr. 87). Drivers must listen to dispatch for their individual orders and follow them. (Tr. 87). He was unsure who Valvoda informed to stay or return. (Tr. 96). Cuyahoga Valley told Proterra to have the drivers stay at the jobsite. (Tr. 122). Zychowski agreed that Buddy still works for the Company, but he could not say whether Valvoda gave Buddy permission to return to Proterra. (Tr. 99). He couldn't remember whether he talked to the other drivers after Complainant's termination. (Tr. 109).

Zychowski testified that when Complainant came back to Proterra, it was the final straw for Valvoda, Varcelli, and himself. (Tr. 84). He knew Complainant was not a good fit for the Company. (Tr. 84). Zychowski was originally going to discuss the incident with Complainant, but after talking the situation over with Valvoda and Jon, he decided it was best to terminate Complainant. (Tr. 113). Valvoda supervised Complainant so Zychowski yielded to his judgment. (Tr. 114).

Zychowski also stated that customers did not want Complainant on jobs, so in his opinion it was best to part ways with Complainant. (Tr. 110). The complaint involved an altercation between Complainant and someone at Independence about clean aprons. (Tr. 112). Zychowski stated that he did not terminate Complainant after the customer complaint because they get complaints all the time about drivers and it is not always the driver's fault. (Tr. 113). Independence was the Company which complained about Complainant; however, Complainant testified that he currently delivers at Independence and had no knowledge of an issue. (Tr. 111-112).

Zychowski stated that he also witnessed Complainant speeding in March 2014, and he discussed the situation with Valvoda. (Tr. 101). Valvoda then wrote up Complainant for speeding. (Tr. 104). Complainant, however, stated that while Valvoda told him to slow down, no one informed him of the write-up. (Tr. 108). Respondent submitted a copy of the unsigned and undated write-up into evidence. (EX 3). The write-up stated, "was speeding [through] parking lot (GPS 10mph) told him to slow down – wanted to argue that he wasn't, Jon and Mike both witnessed." (EX 3).

Zychowski testified that Respondent has never fired anyone for reporting or refusing to drive due to a safety concern. (Tr. 89-90). All drivers are expected to write-up issues with their trucks daily. (Tr. 89). The Company needs to know when there are mechanical and safety issues with the trucks so that they can be repaired. (Tr. 89). The Company currently has thirty employees. Other drivers reported the same issues as Complainant and they are still employed. (Tr. 90). All drivers have an inspection sheet each day to fill out before starting their day. (Tr. 91). The mechanic then prioritizes what to fix and when. (Tr. 91). It is up to the driver not to drive a truck if an issue is not fixed. (Tr. 93, 95). He would give the driver the ok not to drive the truck. (Tr. 93). He helped perform mechanical issues during the day and they also have a third shift mechanic. (Tr. 94).

I find Zychowski's testimony credible. Some of Zychowski's testimony was based on speculation and hearsay and those issues if relevant to the underlying facts are addressed in the analysis below.

## V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The STAA prohibits discharge, discipline, or discrimination against an employee in retaliation for reporting safety concerns and for refusing to operate a commercial motor vehicle that is in violation of the Federal weight Rules or Regulations or because of apprehension of serious injury due to unsafe conditions or health matter.[9] On August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 1536, § 31105, 121 Stat. 266, 464-67 (2007), Congress amended paragraph (b)(1) of 49 U.S.C. § 31105 to make applicable in the adjudication of STAA whistleblower claims the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b) ("AIR 21").

In order to prevail on his claim under the STAA, the Complainant must demonstrate by a preponderance of the evidence that he engaged in protected activity under the STAA, that the Respondents took an adverse employment action against him, and that the protected activity was a "contributing factor" to the adverse personnel action.[10] A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[11] To prove by a preponderance of the evidence means that the Complainant must show that his protected activity "more likely than not" contributed to his termination.[12] The fact finder may consider all the relevant, admissible evidence to determine whether Complainant has met that burden.[13] If the Complainant establishes that the protected activity was a contributing factor in the Respondents' decision to take adverse action, the Respondents may avoid liability if

[9] 49 U.S.C. § 31105; 29 C.F.R. § 1978.100(a).
[10] 49 U.S.C. 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a); *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011); *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035 at 16-17(ARB Sept. 30, 2016).
[11] *Williams*, ARB No. 09-092, slip op. at 6.
[12] *Palmer*, ARB No. 16-035 at 17.
[13] *Id.*

they demonstrate "by clear and convincing evidence" that they "would have taken the same adverse action in the absence of any protected activity or the perception thereof."[14] "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'"[15]

**1) Protected Activity**

The Complainant alleges that he engaged in protected activities when he (1) reported safety concerns related to the condition of Respondent's Trucks; and (2) refused to drive over weight trucks.

a. Safety Complaints

The Complainant first alleges that he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(A)(i)[16] when he complained to the Respondent about mechanical issues related to Truck #410. An employee engages in STAA-protected activity when he files a complaint or begins a proceeding "related to a violation of a motor vehicle safety regulation, standard, or order."[17] To qualify for protection, a complaint must be based on a "reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation."[18] Internal complaints to management are protected activity under the whistleblower provision of the STAA.[19] A complaint need not expressly cite the specific motor vehicle standard allegedly violated, but it must "relate" to a violation of a commercial motor vehicle safety standard.[20] An internal complaint must be communicated to management, but it may be oral, informal, or unofficial.[21]

Essentially, Complainant alleges the Respondents violated various provisions in 49 C.F.R. §§ 392, 393, and 396. The regulation at 49 C.F.R. §§ 392.1 provides, "Every motor carrier, its officers, agents, representatives, and employees responsible for the management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers, shall be instructed in and comply with the rules in this part." Moreover, 49 C.F.R. § 392.2 provides, "Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated."

[14] 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(b).
[15] *Williams*, ARB No. 09-092, slip op. at 6, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 14 (ARB Jan. 31, 2006).
[16] 49 U.S.C. §§ 31105(a)(1)(A)(i) provides that "A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding."
[17] 49 U.S.C. § 31105(a)(1)(A)(i).
[18] *Calhoun v. United States DOL*, 576 F.3d 201, 212 (4th Cir. 2009), citing *Dutkiewicz*, No. 97-090, 1997 DOL Ad. Rev. Bd. LEXIS 98, at 6 (Aug. 8, 1997), *aff'd sub nom. Clean Harbors*, 146 F.3d 12.
[19] *Williams*, ARB No. 09-092, slip op. at 6.
[20] *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-41 at 4 (ARB Mar. 27, 2012).
[21] *Id.*

The Complainant testified that on various occasions, he reported to Respondent that the trucks Respondent wanted him to drive had various mechanical issues. (Tr. 41-45). He testified that he often complained about truck #410. (Tr. 41; 45). The record includes thirty-four Log Truck Driver's Inspection Condition Reports between October 9, 2013 and April 10, 2014. (CX 7). The reports include the following complaints:

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|---|---|
| October 9, 2013 | Truck #410 power steering leaks, brakes need serviced, washer fluid does not work, and front tires needed. |
| October 10, 2013 | Truck #410 brakes are still bad and mud flap needed. |
| October 17, 2013 | Truck #410 defrost isn't working, tire has a slow leak, brakes are bad, and power steering leaking. |
| October 18, 2013 | Truck #410 has no heat, defrost isn't working, power steering fluid leaking, air leak in cab, brakes still need work, and bad tire axle. |
| October 21, 2013 | Truck #410 power steering leaking, oil pressure light on, tire pressure issues, air leak in cab, no heat, brakes need serviced, backup alarm isn't working, and mud flap needed. |
| October 22, 2013 | Truck #410 backup alarm isn't working, oil pressure off, wiper fluid out, and wheels wobbling. |
| October 25, 2013 | Truck #410 has another problem with brakes and ABS brake light on. |
| October 25, 2013 | Truck #410 motor keeps smoking, continued issues with brakes, and, power steering fluid leak, and small air leak. |
| October 28, 2013 | Truck #410 needs new brake pads and drums. |
| October 29, 2013 | Truck #410 needs brake shoes and drums and power steering is worse. |
| November 5, 2013 | Truck #410 still has a brake problem and an air leak. |
| November 9, 2013 | Truck #410 tarp does not work right. Antenna needs put on and I cannot talk to control tower. |
| November 19, 2013 | Truck #410 needs brakes serviced. Tarp has a hole in it. |
| December 23, 2013 | Truck #410 needs brakes serviced. Truck does not stop like it should. It also has an oil leak, fuel leak, and an exhaust leak. |
| December 26, 2013 | Truck #410 has no heat. It has an oil leak, coolant leak, and an exhaust leak. |
| December 31, 2014 | Truck #410 has an oil leak, coolant leak and an exhaust leak. Exhaust is coming into the cab and causing my eyes to burn. |
| January 1, 2014 | Truck #410 tarp is broken. |
| January 13, 2014 | There are no lights on #410. The brakes and dump also need serviced. |
| January 14, 2014 | Truck #410 has a bad wiper on the driver's side. Brakes need serviced. |

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|---|---|
| February 4, 2014 | Truck #410 brakes are bad. I could not do my assignment so I went home at 9:00am. |
| February 5, 3014 | Mechanic did not come in; told to stay home. |
| February 6, 2014 | Mechanic does not come in until tonight. |
| February 21, 2014 | Truck #410 needs brakes adjusted again. Also needs something done about the fumes and the coolant leak. |
| February 27, 2014 | Truck #410 has a bad tarp. There are two bad tires. |
| March 4, 2014 | Truck #410 driver side window will not go down. |
| March 7, 2014 | Truck #410 Driver's side window will not go down and needs mud flap. |
| March 10, 2014 | Truck #406 has a coolant leak. It also needs brakes adjusted. |
| March 11, 2014 | Truck #406 has no registration. |
| March 21, 2014 | Truck #410 has no brake lights and driver side door is broken. |
| March 25, 2014 | Truck #410 has no turn signal on the bottom, and red light comes on that says Engine Protected when turning. |
| March 31, 2014 | Truck #410 still has fumes coming in the cab, turn signal does not work. |
| April 2, 2014 | Truck #410 needs mud flap and turn signal fixed. |
| April 3, 2014 | Truck #410 knocking sound when making left hand turns. |
| April 10, 2014 | Truck #410 still has a fuel leak; fumes are coming inside the cab. Fumes are making me light headed. |
| July 14, 2014 | Truck #410 brakes need to be adjusted more. I have asked for months for brakes to be fixed.[22] |

In a number of the above reports, Complainant complained of failing brakes, leaking power steering fluid, exhaust fumes, and tires needing replaced. All of these issues constitute safety issues that could result in harm to the driver or others. Therefore, I find that Complainant's safety reports, while not necessarily "formal" safety complaints constitute protected activity under the Act.

Complainant also testified that he brought the issues to Valvoda's attention on a number of occasions. Respondent did not contest that it had knowledge of these issues or the filing of Complainant's reports. Zychowski also testified that he helped perform mechanical issues during the day and would have received the reports. Internal complaints to management are protected activity under the whistleblower provision of the STAA.[23] Therefore, I find that the Respondent had knowledge of these complaints.

Based on the evidence and testimony of record, I find that Complainant's Log Truck Reports constitute protected activity. The Complainant engaged in protected activity when he reported his concerns that the trucks had mechanical issues and were unsafe to drive. The evidence illustrates that Respondent knew about the reports. Therefore, I find he has met his burden to establish that he engaged in activity protected pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

[22] Complainant left his employment on April 12, 2014. Therefore, I cannot give weight to the July 14, 2014 report. Although it may have been misdated, there is no evidence or testimony in the record to explain the discrepancy.
[23] *Williams*, ARB No. 09-092, slip op. at 6

b. Refusing to Drive

Second, Complainant alleges that he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i)[24] when he refused to drive Respondent's trucks overweight. Whether a refusal to drive qualifies for protection under the Act requires evaluation of the circumstances surrounding the refusal under the requirements of each of the provisions.[25] Complainant testified that he "had words" with Valvoda over driving overweight. (Tr. 41). He also stated that he received a fine for driving overweight. (Tr. 41). This is the only evidence in the record related to driving over weight. There is nothing in the record to substantiate that the Complainant refused to drive a truck overweight or that Respondent tried to force him to drive the truck overweight. There are no facts in the record regarding the alleged date and time of these alleged events. Therefore, I find that Complainant has not proven that he participated in the protected activity of refusing to drive a truck overweight.

To the extent Complainant is alleging that his actions on April 12, 2014 constitute refusing to drive and protected activity, I find that Complainant has not met his burden of proof. The evidence establishes that on April 12, 2014, Valvoda assigned Complainant to work a jobsite, but the job foreman ordered the drivers to leave. Valvoda informed Complainant to stay at the jobsite. While other drivers also moved their trucks, they parked on a nearby street and waited further instructions from Valvoda. Complainant, however, ignored Valvoda's order and drove back to Proterra. While Complainant urges that he may have received a ticket if he remained at the jobsite, the evidence shows that Complainant had other options than to stay parked at the jobsite or go back to Proterra. Furthermore, the issues surrounding this event are not safety in nature. Therefore, I find that Complainant was not engaged in protected activity April 12, 2014 when he left the jobsite and he drove back to Proterra.

**2) Adverse Action**

Under the STAA, "any employment action by an employer which is unfavorable to the employee, the employee's compensation, terms, conditions, or privileges of employment constitutes an adverse action."[26] Accordingly, an employer's decision to terminate employment constitutes an adverse action.[27] Having reviewed the evidence of record, the undisputed testimony demonstrates that Respondent terminated Complainant from his position at Proterra on April 12, 2014. The Respondent does not dispute this finding. Accordingly, I find that the Respondents engaged in adverse action against Complainant.

[24] 49 U.S.C. § 31105(a)(1)(B)(i) provides "A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because-- the employee refuses to operate a vehicle because-- the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security."

[25] *See Eash v. Roadway Express, Inc.*, ARB No. 04-036 at 6 (ARB Sep. 30, 2005).

[26] *Long v. Roadway Express, Inc.*, ALJ No. 1988-STA-00013 (ALJ March 9, 1990).

[27] *Minne v. Star Air, Inc.*, ARB No. 05-5005, ALJ No. 2004-STA-026, slip op. at 13, 15 (citations omitted) (Oct. 31, 2007).

### 3) Contributing Factor

Complainant has proven that he participated in protected activity, by complaining about safety related issues surrounding Respondent's trucks, and that he suffered an adverse employment action, termination. To succeed he must prove by a preponderance of the evidence that his protected activity was also a contributing factor in his termination. "In other words, the [Complainant] must *persuade* the factfinder – here, the ALJ – that the protected activity played some role in the adverse activity. The factfinder must thus believe it is more likely than not that the protected activity was a factor in the adverse action."[28] A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[29] "It need not be 'significant, motivating, substantial, or predominant'- it just needs to be *a* factor. The protected activity need only play some role, even an 'insignificant or insubstantial' role suffices."[30] A complainant can succeed by "providing either direct or indirect proof of contribution."[31]

Respondent asserts that Complainant's protected activity played no part in its decision to terminate his employment. Therefore, all relevant and admissible evidence must be considered to determine whether the protected activity did in fact play some role in the adverse action.[32] This includes examining Respondent's evidence of its nonretaliatory reasons.[33]

Complainant poses the question that his protected activity "could have been" a factor in his termination but he does not persuade me that it was "more likely than not" a factor in Respondent's decision to terminate his employment. The evidence does not show that more likely than not, Respondent took his protected activity into consideration when terminating Complainant's employment.

Complainant presented 34 reports that he submitted to management regarding issues he found with Respondent's trucks. (CX 7). He presented the last report on April 10, 2014, and his termination occurred on April 12, 2014. (CX 7). He testified that he complained everyday about the condition of the trucks. (Tr. 42). While close temporal proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action, I do not believe it is the case in this matter.[34] The reports were called Log Truck Driver's Inspection Condition Reports. (CX 7). Complainant presented the reports to dispatch every morning. It was company policy that all employees were expected to

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[28] *Palmer*, ARB No. 16-035 at 18.
[29] *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, slip op. at 9 (ARB Sept. 15, 2011) (citing *Williams*, ARB 09-092, slip op. at 5).
[30] *Palmer*, ARB No. 16-035 at 53.
[31] *Salata*, ARB No. 08-101 at 9.
[32] *Palmer*, ARB No. 16-035 at 29.
[33] *Id.*
[34] *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993) (*citing Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)). "Temporal proximity is just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action." *Spelson v. United Express Systems*, ARB No. 09-063, slip op. at 3, n. 3 (ARB Feb. 23, 2011) (quoting *Clemmons v. Ameristar Airways, Inc*., ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010)). While such proximity is not dispositive, "the closer the temporal proximity is, the stronger the inference of a causal connection." *Warren v. Custom Organics*, ARB No. 10-092, slip op. at 11 (ARB Feb. 29, 2012) (citing *Reiss v. Nucor Corp.*, ARB No. 08-137 (ARB Nov. 30, 2010)).

fill out the reports and present them to dispatch each day. Complainant agreed that other drivers were supposed to submit the reports. (Tr. 50). Zychowski testified that the other drivers submitted the reports daily. (Tr. 89). Complainant worked for respondent for two years, submitted the reports daily, and he agreed that he never received discipline for the reports in the past. (Tr. 52). He "couldn't say" whether the reports were the reason for his termination. (Tr. 50). Complainant believed Valvoda thought of him as a trouble maker and that his termination was for "no reason," so he believed it had to be because of his complaints. (Tr. 75).

The Respondent asserts that Complainant was terminated for ignoring an order and bringing company property back without permission. (Tr. 79). Complainant agrees that he ignored Valvoda's order and came back to Proterra instead of keeping the truck parked at the jobsite or parking on a nearby street. Zychowski stated that, while other drivers came back, they had permission. Complainant disagreed and argues that driver Buddy Gee also came back to Proterra without permission, but Valvoda did not terminate Buddy. Complainant contends that Buddy did not talk to Valvoda. However, neither Buddy nor Valvoda testified at the hearing and it is unclear whether they actually spoke to one another. The only evidence on this issue is Complainant's speculation that they did not speak. Complainant and Buddy drove separately and did not ride together. There is also no evidence in the record that Buddy never complained about safety issues and did not file daily reports. Therefore, the fact that Respondent did not terminate Buddy is, alone, not enough to infer that Respondent terminated Complainant because of his protected activity.

Respondent also asserts that the termination decision included Complainant's prior write-up for speeding and that fact that a customer did not want to work with Complainant. These reasons, however, seem to have been established after the fact. While they may be true, they do not appear to have been taken into consideration on the day Complainant was terminated. Complainant did not even know about the write-up and customer complainant until the hearing.

This case is unique in that the decision maker did not testify at the hearing. While Zychowski testified that he agreed with the termination due to Complainant's actions on April 12, the record includes only hearsay evidence regarding Valvoda's reasoning for the termination. Both parties rely extensively on hearsay and speculation in this case, neither of which is sufficient to meet a burden of proof, and at this stage in the analysis Complainant is the one with the burden.

While Complainant testified that he believed Valvoda was frustrated with all of the complaining, he presented no evidence to connect his complaining to Valvoda's decision to terminate his employment. (Tr. 43). The evidence shows that Valvoda told Complainant to stay at the jobsite, Complainant ignored Valvoda's order, and Valvoda immediately terminated Complainant when he arrived back at Proterra. Complainant agrees that this is the course of action that day. Although the termination may seem harsh, I am not here to make that determination. The evidence simply does not show a connection between Complainant's safety complaints and his termination. Complainant has failed to present evidence making that connection. Therefore, I find that Complainant has failed to establish that his protected activity, more likely than not, contributed to his termination.

## VI. CONCLUSION

For the reasons discussed above, I find that although Complainant established that he engaged in a protected activity during his employment, he failed to establish that his protected activity was a contributing factor in his termination.

## VII. ORDER

Because Complainant has failed to establish that his protected activity was a contributing factor in his termination, his complaint filed with OSHA on April 14, 2014, is **DISMISSED.**

Digitally signed by JOSEPH KANE
DN: CN=JOSEPH KANE, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

Joseph E. Kane
Administrative Law Judge

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

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

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

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

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

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).