



**Issue Date: 11 April 2017**

Case No.: **2015-STA-00025**

In the Matter of:

**SHANE DAVIS,**  
Complainant,  
v.

**AIRGAS USA, LLC**  
Respondent.

Appearances:

Robert S. Gallagher, Esq., Gallagher, Millage & Gallagher, LLC  
For Complainant,

Thomas B. Huggett, Esq., Littler Mendelson, P.C.  
For Respondent,

Before: William S. Colwell  
Administrative Law Judge

**DECISION AND ORDER DISMISSING COMPLAINT**

This case involves a claim under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“STAA” or “Act”), with implementing regulations at 29 C.F.R Part 1978.<sup>1</sup> The STAA prohibits an employer from retaliating against an employee because the employee engaged in protected activity. In addition, the Act protects employees who refuse to operate a commercial motor vehicle when such operation would violate a Federal safety regulation or because the employee has a reasonable apprehension of serious

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<sup>1</sup> The STAA was amended on August 3, 2007 by Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007) and the implementing regulations were amended on August 31, 2010, 75 Fed. Reg. 53544 (Aug. 31, 2010). References in this decision are to the current version of the statute and regulations.

injury to himself or the public due to the vehicle's unsafe condition.<sup>2</sup> Mr. Shane Davis ("Complainant") alleges that Airgas USA, LLC ("Respondent") terminated him in violation of the STAA.

### **STATEMENT OF THE CASE**

On July 7, 2014, Complainant filed a timely complaint, a Notice of Alleged Safety or Health Hazards, with the Secretary of Labor, Occupational Safety and Health Administration ("OSHA"). (ALJ-7).<sup>3</sup> He alleged that Respondent terminated his employment with them in retaliation for reporting the unsafe conditions and violations regarding the handling of hazardous materials. On August 8, 2014, an investigation was conducted by OSHA. On August 12, 2014, Complainant filed an amended notice of Alleged Safety or Health Hazards correcting a scrivener's error regarding the dates of such safety and health hazards. (RX-7). On December 4, 2014, OSHA dismissed the complaint. (ALJ-7). On January 2, 2015, Complainant filed a timely objection and requested a hearing before an administrative law judge. (ALJ-7).

A hearing was held before the undersigned on November 1-2, 2016 in Cedar Rapids, Iowa. At the hearing, Complainant's Exhibits 1 through 17 (CX-1 through CX-17), Respondent's Exhibits 1 through 9, excluding Exhibit 6 (RX-1 through RX-9, excluding RX-6), and ALJ Exhibits 1 through 7 (ALJ-1 through ALJ-7) were admitted. The parties were allowed sixty (60) days to submit post-hearing briefs, which was subject to extension by stipulation. (TR-275). Complainant submitted a post-hearing brief on January 16, 2017. Respondent submitted a post-hearing brief on January 17, 2017.

### **ISSUES**

Did Complainant engaged in protected activity on March 17, 2014? If so, has Complainant proven by a preponderance of the evidence that his protected activity contributed, in part, to Respondent's decision to take adverse action against him, i.e. was it a factor which, alone or in connection with other factors, tended to affect in any way the outcome of the decision? If so, has Respondent shown by clear and convincing evidence that it would have taken the adverse action even in the absence of the protected activity? If not, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate?

### **CONTENTIONS OF THE PARTIES**

#### **Complainant**

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<sup>2</sup> As amended on August 3, 2007, the STAA was amended to include three other categories of protected activity: (1) accurately reporting hours on duty; (2) cooperating with a safety or security investigation by certain federal entities; and (3) furnishing information to federal entities relating to an accident or incident resulting in injury, death, or property damage. Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007).

<sup>3</sup> Complainant's and Respondents' exhibits will be referred to as "CX" and "RX," respectively, followed by the exhibit number. "Tr." followed by a page number refers to the transcript of the hearing in this case.

Complainant argues that on March 17, 2014, he was engaged in protected activity by reporting unsafe conditions and refusing to deliver an unsafe load. Complainant argues that the temporal proximity and direct causal connection between the protected activity and the unfavorable personnel action establishes that Respondent knew of Complainant's protected activity and retaliated against Complainant in violation of the employee protection provisions of STAA. Complainant contends that he is entitled to lost wages from his employment for Respondent, lost wages during his resulting unemployment, and lost wages from the reduced salary at his following employment.

Respondent

Respondent contends that on March 17, 2014, Complainant entered Branch Manager Jason Lingle's office and complained that he was not going to do the Northwest Respiratory Protection route that he had been assigned, because it would spread him out over a large geographic area. Respondent argues that Complainant did not make any complaint about unsafe loads to Mr. Lingle on March 17, 2014. Respondent argues that Complainant never completed a Notice of Unsafe Customer Delivery Site related to Northwest Refinery.

Respondent argues that there was no protected conduct by Complainant and that Complainant's termination was not related to protected conduct. Respondent argues that Complainant was terminated for his personal behavior.

**SUMMARY OF THE EVIDENCE**

Mr. Shane Davis ("Complainant") Testimony (TR 11-109)

Complainant testified that he was an employee at Respondent's Davenport, Iowa branch. (TR at 12). Complainant testified that his job consisted of delivering hazardous materials to customers, such as flammable gases contained in cylinders. (TR at 16). Complainant affirmed that the hazardous gases contained in the cylinders that he transported were Class II gases. (TR at 26). Complainant testified that the transportation of the cylinders containing Class II gases required training and was regulated by the Department of Transportation. (TR at 16). Complainant testified that the regulations contained specific regulations and requirements for securing the cylinders during transportation. (TR at 15-29). Complainant affirmed that according to the Department of Transportation regulations, the Respondent Training Manual, the Respondent Code of Safe Conduct, and the Respondent Driving Training Manual, it was illegal for him to transport the cylinders when they were not properly secured. (TR at 17); (CX-1); (CX-7); (CX-8); (CX-9). Complainant testified that Respondent properly trained him to be able to identify unsecured cylinders that did not satisfy the Department of Transportation's requirements. (TR at 18, 26).

Complainant testified that as a truck driver he could refuse to transport cylinders that did not meet the Department of Transportation's requirements:

the rule was: our license, our say. If it wasn't safe, we were not supposed to do it. We were supposed to fill out a document of unsafe delivery site in which they would investigate the site, and

before a delivery could be made to that site that you complained about, they'd have to go check it out and deem it safe. (TR at 18).

Complainant testified that according to the Respondent Code of Safe Conduct, if he failed to "comply with the code and applicable laws and regulations" he would be "subject to disciplinary measures up to and including discharge from the company." (TR at 27); (CX-8).

Complainant testified that on March 17, 2014, he refused to transport improperly secured cylinders that violated the federal regulations to a company called Northwest Respiratory. (TR at 29-30). Complainant testified that he complained to Jason Lingle, the branch manager that the cylinders were not properly secured and he refused to transport them. (TR at 17-20). Complainant testified that this led to his termination. (TR at 17, 32).

Complainant testified that he did not see the carts on March 17, 2014. (TR at 105). Complainant examined three photos, labelled CX-4A, CX-4B, CX-4C, and affirmed that the three photos accurately depicted the carts that were regularly used during deliveries to Northwest Respiratory. (TR at 36); (TR at 105); (CX-4A); (CX-4B); (CX-4C). Complainant testified that CX-4A, CX-4B, and CX-4C showed carts that were:

not the proper carts, number one. All the tanks are all not segregated individually. They're all leaning against each other. If you hit a bump, there's no way you could stop them from rattling.

The ones in the big tall green cart, they had to [have] all different size bottles. If you was to make a hard turn or anything, they'd go slide out the center. Some of the carts have broken welds on them, the sides are flopping on them. It wouldn't fit on the skids of the truck. It barely fit on the life gate. I mean, just too many things that could go wrong with something like that. (TR at 37); (CX-4A); (CX-4B); (CX-4C).

Complainant affirmed that the carts in CX-4A, CX-4B, and CX-4C were inconsistent with the Code of Safe Conduct, the C.F.R. regulations, the website of PHMSA, and the Respondent training manuals. (TR at 38); (CX-1); (CX-2); (CX-7); (CX-8); (CX-9).

Complainant examined CX-4A, which displayed the carts stacked in a horizontal position secured by one strap. (TR at 92-93); (CX-4A). Complainant testified that the carts in the CX-4A were not secure because the "smaller tanks stacking on top the big ones. So if the cart shifts, they'll fall." (TR at 93); (CX-4A). Complainant testified that the strap securing the carts would not hold them in place, "Not all the way, no. They'll rattle loose. That will not work." (TR at 93). Complainant testified that the carts would rattle loose because "the strap's too low." (TR at 94). Complainant testified that there were additional straps available for the drivers and securing the carts with additional straps as needed is the driver's responsibility. (TR at 94).

Complainant examined CX-4B, which displayed a cart loaded with cylinders standing upright secured by a strap down the middle of the cylinders. (TR at 94); (CX-4B). Complainant testified that the carts in CX-4B were not secure because "just the tanks itself, there's no way that they're going to stay there. They're going to fall over." (TR at 94). Complainant testified

that the photo didn't show "that the cart is longer than that pallet." (TR at 94). Complainant testified that:

It's not all the way on the pallet, no. And the cylinders ain't in their own little spot. They're all in the cart. And this side is one of the ones that had duct tape on the side of it, where the back was flopping out. So that black – some of these cylinders are – well, the cylinders, alone are not the right cylinders – right cylinders, but the wrong cart, because they got to be secured individually. They can't be butted up together like that. (TR at 95).

Complainant testified that the cylinders in CX-4B are supposed to be "[s]eparated, and not touching." (TR at 95); (CX-4B). Complainant testified that the cylinders are supposed to be secured in their own individual compartments. (TR at 98). Complainant testified that "with these not being in their separate spot, that's not legal to have a strap around all them inside that cart, no." (TR at 98). Complainant testified that the cylinders don't have to be individually segregated in certain carts and can be secured by a strap, but the cart displayed in CX-4B "is not the cart that you use." (TR at 98); (CX-4B).

Complainant examined CX-4C. (TR at 99); (CX-4C). Complainant affirmed that the cylinders in the cart in CX-4C were secured with a strap in the vertical position. (TR at 102); (CX-4C). Complainant testified that "they won't stay there. You cannot get them all tight. As you see on the end of that, that one tank's already leaning. When you strap it together, they all start leaning, cluttering together, and they're loose in the center." (TR at 102). Complainant testified that to try to properly secure the cart in CX-4C "[t]hat strap can be tightened, but it's still not going to be legal, because you're going to run loose." (TR at 102). Complainant testified that the drivers "can put another strap on there, yeah. But it's not going to work. It's just not the right cart. And I requested, I requested carts all the time, and they wouldn't get the new carts. They kept using these old ones that wouldn't work. And it's a DOT violation." (TR at 102). Complainant affirmed that the cylinders would need to be better secured in the carts to satisfy the DOT regulations. (TR at 72). Complainant testified that it was the driver's obligation to secure the carts inside the truck and using two straps to secure the carts inside the truck was Respondent's policy. (TR at 77-80).

Complainant testified that on March 17, 2014, he found out that he was delivering to Northwest Respiratory through a list that detailed the truck driver's routes for the day. (TR at 87). Complainant testified that when he saw the list detailing his route to Northwest Respiratory, he immediately went to Jason Lingle, the branch manager. (TR at 34, 87). Complainant testified that:

I told Jason that I wasn't going to run this route, or this particular stop. I'll run this route, but I ain't running the Respiratory, because I told him that I already put in an Unsafe Delivery Site, and the policy of Airgas is they must investigate the site before another delivery could be made. All right. John Welsh, when he – I approached John Welsh with the paperwork, asking, you know, why they didn't investigate it. He said he was too busy. I was just

following company policy. If I would have took that load and got hurt, then I would have been terminated anyway. (TR at 89).

Complainant testified that Mr. Lingle told him to “either run the route or go home.” (TR at 34). Complainant testified that he then “went back upstairs, filled out the paperwork, come back down, told him I didn’t want to run the route. He blew up, got out of his chair, started screaming at me, and followed me up the steps, and said just get out of here.” (TR at 34). Complainant testified that Mr. Lingle “was the one following me up the steps, fingering at me and screaming at me on the way out. I don’t recall saying anything back to him, no.” (TR at 35).

Complainant testified that he “was actually called and informed by Lori Klocke on that same day, a couple hours after I had gotten home, and she said that my services were no longer needed and I was not employed by Airgas anymore.” (TR at 46).

Complainant testified that March 17, 2014 was not the first time he had been asked by Respondent to deliver improperly secured cylinders to Northwest Respiratory. (TR at 33). Complainant testified that in addition to March 17, 2014, “[a]pproximately a few months, four months, five months” prior to that date, he had been asked to deliver improperly secured cylinders to Northwest Respiratory Protection that did not meet the federal requirements. (TR at 33). Complainant testified that he had refused to deliver the improperly secured cylinders to Northwest Respiratory Protection, complained to Mr. Welch, the branch manager at the time, and filled out a copy of the Complaint of Unsafe Customer Delivery Site. (TR at 32). Complainant testified that he did not keep a copy of the Complaint of the Unsafe Customer Delivery Site. (TR at 32).

In addition, Complainant testified that he complained to Mr. Lingle and Mr. Welsh about the Northwest Respiratory Protection deliveries multiple times at safety meetings. (TR at 39-41). Complainant testified that Respondent would hold safety meetings once a month “with all the drivers, and the manager gets together, talks about unsafe conditions, any violations from other drivers, maybe tickets from the DOT, and stuff like that.” (TR at 39). Complainant testified that the branch manager always attended along with “approximately seven” other drivers. (TR at 40). Complainant testified that he complained about the unsafe deliveries to Northwest Respiratory Protection at “[p]ractically every safety meeting after that first delivery I did I brought that up. And other drivers also.” (TR at 39). Complainant testified that he brought up this safety issue “probably for six months, a year.” (TR at 39). Complainant testified that Jason Lingle, current branch manager, and Mr. Welch were both present when he discussed the unsafe and illegal carts. (TR at 41).

Complainant testified that he made a complaint of discrimination following his termination. (TR at 81). Complainant testified that the complaint he filed was a Notice of Alleged Safety or Health Hazard, which he submitted it to the Occupational Safety & Health Administration. (TR at 81). Complainant testified that in his complaint he wrote “I was asked to pick up and deliver hazardous materials that were not properly secured in safe carts at Northwest Medical. I informed both of our branch managers, John Welsh and Jason Little [sic] of unsafe carts at this customer location in August or September of 2003.” (TR at 82). Complainant testified that he did not have a copy of this form, but the date he referenced, “August or September of 2003,” was an inaccurate date because he was not employed at Respondent in 2003. (TR at 82); (RX-6). Complainant testified that the date in the original complaint should be

2013. (TR at 83). Complainant testified that after filing the original complaint he filed an amended complaint to fix the mistake. (TR at 84). Complainant testified that in the amended complaint he wrote that the date that he informed Mr. Welsh and Mr. Lingle of the unsafe carts was “November or December of 2013.” (TR at 84); (RX-7).

#### Mr. James Franks Testimony (TR 109-133)

Mr. James Franks testified that he worked at the Davenport, Iowa branch for Respondent for 28 years. (TR at 110). Mr. Franks testified that he “was the warehouse manager for probably eight years, and then I went to inside sales. And then for the last, let’s see, probably the last two years, I’ve been back as the warehouse manager. But I’ve always been a backup driver.” (TR at 110).

Mr. Franks testified that he attends the safety meetings that are held every month. (TR at 112). Mr. Franks affirmed that during the safety meetings there would be discussions about certain routes or things that could become unsafe. (TR at 112). Mr. Franks testified that he did not “recall” Complainant ever bringing up Northwest Respiratory as an unsafe delivery site at a safety meeting. (TR at 113). Mr. Franks testified that the Northwest Respiratory route was discussed during the safety meetings, “There is times when we’ve talked about it, but to my knowledge, it’s not an unsafe delivery site. Or we wouldn’t be doing it.” (TR at 112). Mr. Franks testified that when the Northwest Respiratory Route was brought up “we were discussing the carts. They wanted us to maybe have better carts that what we have here. These carts, we’ve used these carts in the 18 years I’ve worked there.” (TR at 130). Mr. Franks testified that “if there was a safety issue, we took care of it before we made the next delivery. I don’t recall it ever being an unsafe delivery site.” (TR at 114). Mr. Franks testified that the carts on the Northwest Respiratory route did not violate the DOT regulations and if he did believe the carts violated the DOT regulations he “wouldn’t have left the parking lot.” (TR at 131).

Mr. Franks testified the time the Northwest Respiratory Protection route takes:

varies. It all depends on how many cylinders you’re delivering, you know, per load, or per delivery. There’s sometimes that you may have, say 100 cylinders. And then there’s times when there are – you may have six or eight of these carts on there. So it would come up, you know, it could be 3- or 400 cylinders. I would say on an average, a good hour. (TR at 128-129).

Mr. Franks examined three photos, labelled CX-4A, CX-4B, CX-4C. (TR at 115); (CX-4A); (CX-4B); (CX-4C). Mr. Franks testified that he did not take the pictures labelled CX-4A, CX-4B, CX-4C. (TR at 115); (CX-4A); (CX-4B); (CX-4C). Mr. Franks testified that he “would have no reason to take pictures” of the carts for Northwest Respiratory “because I’ve made this stop so many times, I don’t have a problem with it.” (TR at 115). Mr. Franks testified that in “the 28 years I’ve worked for Airgas, I’ve never taken any pictures.” (TR at 120),

Mr. Franks examined CX-4A. (TR at 116); (CX-4A). Mr. Franks testified that in the photo CX-4A “the only thing I see about, that’s not safe about this is the way it’s strapped into the truck.” (TR at 116); (CX-4A). Mr. Franks testified that:

What I’m saying is that that picture right here, I would not have left the Airgas parking lot driving this way, because for one thing, we always have at least two straps on the pallet when we leave. Before we leave the Airgas location on 4919 Tremont, it needs two straps wrapped around. If you look at this picture, there’s only one on the bottom of the wheels. So I would say what happened here is the fill plant may have put this on the pallet and strapped it to there, and then we have to – it’s our right, or, you know, before we even pull out of the Airgas location, we have to put straps on it to be okay with the DOT regulations. (TR at 116).

Mr. Franks testified that the cylinders are strapped into the carts by the drivers, “We put two straps on the outside of the cart to secure it to the actual pallet if it’s – you know, to make sure that the cart cannot move.” (TR at 122).

Mr. Franks examined CX-4B. (TR at 116); (CX-4B). Mr. Franks testified that in the photo CX-4B there were two blue straps securing the cart. (TR at 123); (CX-4B). Mr. Franks testified that before taking the load in CX-4B the driver “would have to put two more straps on the – to secure that cart to the pallet.” (TR at 123); (CX-4B). Mr. Franks testified that “[i]f you look, that’s why the smaller straps are hooked, are around the cylinder, so they are tight and they will not move, and it’s up to the driver’s responsibility to make sure they don’t move because if they do move, it’s a DOT regulation.” (TR at 121); (CX-4B). Mr. Franks testified that if a driver gets “fined, it’s our fine. Airgas will not pay for our fines.” (TR at 121).

Mr. Franks examined CX-4C. (TR at 123); (CX-4C). Mr. Franks testified that in CX-4C the cart was sufficiently secured because only one strap was needed to secure this type of cart. (TR at 123); (CX-4C). Mr. Franks testified that “you’re looking at a totally lot smaller cart. And that’s why there’s only one strap on the smaller cart.” (TR at 124).

Mr. Franks testified that recently new carts had been purchased for the Northwest Respiratory route. (TR at 130). Mr. Franks testified that the carts were upgraded “to haul more cylinders per load.” (TR at 133).

#### Mr. Jesus Rosales Testimony (TR 133-136)

Mr. Jesus Rosales testified that he worked for Respondent as a driver for 8 years. (TR at 134). Mr. Rosales testified that he attended the monthly safety meetings. (TR at 134). Mr. Rosales testified that he couldn’t remember if Complainant talked about the Northwest Respiratory route being unsafe because it had “been so long ago.” (TR at 135).

#### Mr. Clifford Terrell Testimony (TR 136-153)

Mr. Clifford Terrell testified that he has been a driver at Respondent for 9.5 years. (TR at 138, 141). Mr. Terrell testified that he attended the monthly safety meetings. (TR at 138). Mr. Terrell testified that he remembers at a safety meeting “something brought up about carts”



concerning the Northwest Respiratory route. Mr. Terrell testified that he “can’t recall” who brought up the Northwest Respiratory carts at the safety meeting. (TR at 139). Mr. Terrell testified that he was not sure how many times the Northwest Respiratory carts were brought up at the safety meeting, but it “could have been less than ten, less than five.” (TR at 139). Mr. Terrell testified that the Northwest Respiratory route carts “[t]o my common knowledge they were not unsafe.” (TR at 140). Mr. Terrell testified that [i]t’s my responsibility as a driver that when I leave that load is secured. If it is not secured, I will not take that load as a driver.” (TR at 142). Mr. Terrell testified that he does not “feel that they’re unsafe carts. I haul them. I make sure everything’s secure in that cart before I pull them out or put them on trucks.” (TR at 152).

Mr. Terrell testified that on March 17, 2014 he “was out on route already. I have no knowledge of what happened there.” (TR at 144). Mr. Terrell testified that if he had been asked on March 17, 2014 to drive the Northwest Respiratory route he “would have took the run.” (TR at 146). Mr. Terrell testified that he did not believe that the Northwest Respiratory Protection route was an unsafe route. (TR at 146). Mr. Terrell testified that the carts used for the Northwest Respiratory Protection route had adequate straps to properly secure the carts. (TR at 147).

Mr. Terrell examined CX-4A. (TR at 141); (CX-4A). Mr. Terrell testified that he “would put two straps” on the carts in CX-4A, but said that with the two straps the cylinders were properly secured in the cart. (TR at 142); (CX-4A).

Mr. Terrell examined CX-4C. (TR at 143); (CX-4C). Mr. Terrell testified that the cart in CX-4C met the federal law requirements. (TR at 144).

Mr. Terrell testified the carts depicted in CX-4A, CX-4B, and CX-4C looked like the carts used on the Northwest Respiratory route. (TR at 149).

Mr. Terrell testified that he has no knowledge of the carts being changed or upgraded to address a safety issue. (TR at 151).

#### Mr. John Welsh Testimony (TR 158-198)

Mr. John Welsh testified that he has worked at Respondent for 11.5 years. (TR at 159). Mr. Welsh testified that he “started as an inside sales backup driver. Since then I’ve went through, and I was branch manager for a while. And then that was an awful lot for me to take in with the family I had so I went back to inside sales.” (TR at 159). Mr. Welsh affirmed that he has completed the Respondent training on driver safety and driver compliance. (TR at 160).

Mr. Welsh testified that he was branch manager from September of 2011 to February of 2014. (TR at 179). Mr. Welsh testified that his job description as branch manager was to:

see the daily ins and outs of the branch itself, oversee – at that time I think we had somewhere between 10 and 12 employees, [sic] Help route the routes as needed, help direct employees on what they needed to do. And in your management role there are times that you have to, you know, praise your employees, or also discipline them with, you know, write-ups or anything else that needed to be done with them. (TR at 160).

Mr. Welsh testified that routes are given to different drivers in order to “try to equal them out so that everybody gets about the same amount. A lot of times it’s divvied up into areas, but not always is that just an area that you go to.” (TR at 160). Mr. Welsh testified that Northwest Respiratory Protection has been a customer of Respondent since January of 2013. Mr. Welsh testified that Respondent delivers to Northwest Respiratory Protection “at least twice a week.” (TR at 162). Mr. Welsh testified that the Northwest Respiratory Protection route is not assigned to a single driver, but rotates between the drivers. (TR at 162). Mr. Welsh testified that the driver that usually is assigned the Northwest Respiratory Protection route is the driver “that is light” on deliveries that day. (TR at 163). Mr. Welsh testified that the Northwest Respiratory Protection route is not unsafe and he has made that delivery himself. (TR at 163).

Mr. Welsh testified that he started running the safety meetings when he became branch manager and continued to run the safety meetings after he was no longer branch manager. (TR at 177). Mr. Welsh testified that the monthly safety meetings were:

a procedure that each month we go through and talk about any incidents from the month prior, any issues that may have come up over the last 30 days that need to be shared, that’s companywide. It could cover anything DOT-related, safety-related, FDA-related. That also helps keep refreshers in with all of the employees of things that Airgas needs to make sure that they get reminded of each year to keep up on standards that we have. At any given point of the safety meeting, we really focus in on safety items if there’s anything that needs to be covered. The employees are invited to then also give back feedback if there’s any issues at the time, if they have seen anything.

I usually close every meeting with asking each person – and then, you know, like the manager at the time, if I wasn’t the manager, then I would ask – like right now I ask Jason. Then I ask the sales guys, and I just keep working through the line of – if anybody’s got anything to add, before I close the meeting. (TR at 170-171).

Mr. Welsh testified that at the July 17, 2013 safety meeting he did a presentation on “proper cylinder cart tag out procedures” and “proper liquid cylinder handling PowerPoint.” (TR at 172). Mr. Welsh testified that at the August 4, 2013 safety meeting he did a presentation on “cylinder securement training.” (TR at 173). Mr. Welsh testified that at the September of 2013 safety meeting he did a presentation on “inspection of ratchet straps for route trucks and tombstone pallets.” (TR at 174). Mr. Welsh testified that at the December 18, 2013 safety meeting he did a presentation on “moving safely with Airgas high pressure cylinder movement.” (TR at 175). Mr. Welsh testified that Complainant was present at all of the previously mentioned safety meetings. (TR at 174). Mr. Welsh testified that he never received a complaint from Complainant regarding the safety of the Northwest Respiratory Protection route. (TR at 169).

Mr. Welsh testified that:

I believe the whole time I was a manager, the only time I’ve seen – actually, no, it was before management. The whole time I’ve ever

been at Airgas, I only recall one incident where there was a cart issue, and that was dealing with – [Complainant] had brought up about the liquid carts, and they are, I mean they move the big liquid cans that we move, they range from 600 pounds or more, that the care we normally used, you have to lift the cart up into it, and you have to tilt it back quite a ways. And I – and he had gone and asked for what I call a zero gravity. It’s really low to the ground, you barely have to move the cylinder to put it into the cart, and then you can move the cylinder without actually has to physically, like, get your movement into it. (TR at 177).

Mr. Welsh testified that to remedy Complainant’s liquid cart complaint “Airgas bought that specific cart, and brought it in for him.” (TR at 177).

Mr. Welsh testified that as branch manager he had to discipline employees who did not obey Respondent’s policies by orally warning them “a couple times, and then if no action was taken, then we’d have to write him up.” (TR at 184). Mr. Welsh testified that he issued Complainant a couple different” write-ups for “not following procedure.” (TR at 184). Mr. Welsh affirmed that he issued a write-up to Complainant on January 16, 2013, because Complainant “initiated a confrontation with R.J. that included swearing and a comment about taking the matter out in the parking lot.” (TR at 185). Mr. Welsh testified that there was:

an incident between [Complainant] and another inside sales associate, R.J. There were some comments made between each other, then there was – as stated here, it says there was some swearing and some yelling back and forth from each other . . . . And then [Complainant] was wrote up for that. I did state below that, that Shane was verbally warned prior to that. (TR at 185).

Mr. Welsh testified that Complainant refused to sign the write-up, so Mr. Welsh “sent it on to HR, and also then put it in his employee file.” (TR at 187).

Mr. Welsh testified that on March 17, 2014 he was sitting at his desk outside Mr. Lingle’s office when the incident took place. (TR at 188). Mr. Welsh testified that:

I can recall [Complainant] had entered from the driver’s break room upstairs, downstairs. I had noticed that – I could – you could just tell on his face that he wasn’t happy about something.

He went down the hallway and was talking to Jason about – I could hear it down the hallway, it’s just right around the corner. He had mentioned that he wasn’t going to do a stop at Northwest. He had mentioned – I could hear him say that he wasn’t going to do the stop because of his back issues.

And then I could hear Jason ask him if he needed to go to the doctor. And at that point, then [Complainant] had raised his voice and started cursing at Jason and yelling at him. And conversation

moved down the hallway back into my area. And Jason had followed at that point – it looked like [Complainant] was going back up the stairs into the driver’s area. And Jason had came out right by me and asked him if he needed to go to the doctor a second time. And that’s when [Complainant] stopped and turned around and took a couple steps back towards Jason and basically started cursing again, and said that he was going to sue Jason, and he was going to sue me, he was to sue Airgas, and F- this place. And then upstairs he took off. As he was heading out, I remember Jason asking him to calm down, or that he was going to go home.

So, and then they were gone for a couple minutes. After that I remember Jason coming back down with the clipboard with the routes that [Complainant] was assigned for the day. The clipboard ended up on my desk. I believe I was then tasked with trying to find out who else could go do those stops at that point, because Jason had said that he had to send [Complainant] home for the day. So I needed to find people to then go run those routes.

At that point then I saw [Complainant] heading for the parking lot. I looked at the clipboard and realized I didn’t have the keys for the Airgas truck. So I went to the front door and met him. I said, hey, do you have Airgas keys. I was just asking for the truck keys. And he responded with he just got F-ing fired, and I responded with all I heard was that he got sent home for the day. (TR at 188-190).

Mr. Welsh testified that during the interaction between Mr. Lingle and Complainant he did not hear every word that Mr. Lingle said, but he could “definitely hear [Complainant’s] voice.” (TR at 191).

Mr. Welsh examined CX-4A. (TR at 165); (CX-4A). Mr. Welsh testified that the cart in CX-4A had:

one blue strap around the bottom. The fill plant always has a second strap around the top to help secure that. There’s the one blue strap on the bottom’s holding the wheels so the cart can’t move. I don’t see the second strap there; that there’s usually always a second strap about midway to secure it. (TR at 166).

Mr. Welsh testified that the second strap that was needed on the cart in CX-4A “[i]f the fill plant did not do it, it is myself, as a driver, or the driver’s responsibility to make sure that’s on there.” (TR at 166).

Mr. Welsh examined CX-4B. (TR at 167); (CX-4B). Mr. Welsh testified that the cart in this picture is secure, “Yep, there, that one is. That one’s got like two straps on it.” (TR at 167). Mr. Welsh testified that the cylinders inside the cart were secure, “Yeah, there’s another inch-and-a-half, or inch strap right there that’s binding all the cylinders together to make them nice

and tight as a group.” (TR at 167). Mr. Welsh testified that there was not a DOT issue associated with the pallet size or the cart size. (TR at 168).

Mr. Welsh examined CX-4C. (TR at 168); (CX-4C). Mr. Welsh testified that CX-4C displayed “a smaller cart that holds less cylinders. Probably about half as many as the larger cart does. Same thing, it’s secured to the pallet with the strap, and it’s got the inch, inch-and-a-half strap around it to hold them all together.” (TR at 168); (CX-4C). Mr. Welsh affirmed that the cylinders were held securely in the cart in CX-4C. (TR at 168); (CX-4C). Mr. Welsh testified that if a driver felt the cylinders were not securely in place in the cart in CX-4C, the driver could “add a second” strap. (TR at 168); (CX-4C).

#### Mr. Jason Lingle Testimony (TR 198-215)

Mr. Jason Lingle testified that he has been branch manager for the last two and a half years at Respondent’s Davenport, Iowa branch. (TR at 200). Mr. Lingle testified that he started as branch manager on February 24, 2014. (TR at 201). Mr. Lingle testified that his job as branch manager was to oversee “operations, making sure customers were getting deliveries on time, making sure all Airgas SOPs were followed, you know, leaning on the safety team to make sure that we were operating safely. You know, I had financial responsibility for the inventory. You know, basically overseeing the entire operation.” (TR at 202).

Mr. Lingle testified that he had occasional interactions with Complainant:

Unfortunately, yeah, my first week he came to me. And I can’t remember the delivery that he was upset about, but it was another delivery, it wasn’t Northwest.

And he got upset out in the showroom, where the retail area is. Started screaming that he wasn’t going to take a delivery. And I managed to pull him back in to the corner office to talk to him. And he got up in my face, told me, you know, he was going to kick my ass. He was going to take me to the parking lot, all this stuff. It caught me by surprise. I just basically tried to calm him down.

As soon as I got off the call, I contacted HR to let them know what had happened. And they explained to me that I couldn’t let this ride, because if I let him do this to me, it was going to happen over and over again. That the next time this behavior popped up, I needed to send him home. And that was kind of where that was left at that point. (TR at 203).

Mr. Lingle testified that he did not initiate any disciplinary actions at that time, but he discussed the incident with Lori Klocke, a human resources officer, and Tracy McDowell, the regional vice president. (TR at 203).

Mr. Lingle testified that on March, 17, 2014 Complainant:

came into my office. He showed up at the door. He was visibly upset, kind of the same look he had on his face two weeks prior.

And I asked him what was wrong, and he started complaining that he was spread out all over the place, and that I needed to give the delivery to someone else. He even recommended that I give it to Tim Munger. And I think at that time my – I know at that time my reaction was that he had the lightest load and that's why he had the delivery, and he just needed to take it. And he complained a little more, told me it was bullshit, and disappeared. You know, he went back upstairs, I assumed everything was going to be okay.

He came back down about 15 or 20 minutes later and started with the same thing, I'm spread out all over the place. I reiterated what I had said before, you know, you are the lightest driver, that's why you have the delivery. So he changed his tone and said, you know I've got a bad back. And that route is hard on my back. And that is when I offered – I said do you need to see a doctor.

For what reason, that's what set him off, because then the F- you's started coming out fast and furious. He left my door, and I followed him out to make sure that he wasn't going out into the showroom where there were customers to raise a ruckus and cause a scene. As he was going by John, he actually said something to John to the effect of thanks a lot John, fuck you.

And I followed him up the stairs. And as we got to the bottom of the stairs where you go up to the break room, I told him, I said you just need to go home for the day. And I followed him up to get his paperwork. When we got to the top of the stairs, he squared around, got in my face, started yelling at me again. That's when he said he was going to kick my ass, challenged me to go to the parking lot, again, and the fuck you's starting coming, and he was going to sue me, he was going to sue John Welsh, and he was going to sue Airgas.

At that point, when he was nose to nose with me, I turned away, and he took his safety glasses and he threw them across the break room. I said just please give me your clipboard. He handed me his clipboard. As I was walking down the stairs, he said I'm going to sue you, I'm going to sue Airgas, I'm going to sue John Welsh. I said, do whatever you got to do. And I said, just please go home. And that's when he left. (TR at 205-206).

Mr. Lingle testified that after Complainant left he "contacted HR to let them know what had happened" and contacted Tracy McDowell. (TR at 211). Mr. Lingle testified that after contacting human resources and Tracy McDowell, he prepared a statement for Lori Klocke. (TR at 207-208). Mr. Lingle testified that he was not involved in the decision to terminate Complainant's employment. (TR at 208).

Mr. Lingle testified that he had no knowledge of Complainant ever making a safety complaint. (TR at 205).

Mr. Aaron Smith Testimony (TR 222-256)

Mr. Aaron Smith has worked at Respondent as a DOT compliance specialist and HAZMAT division specialist for the North Central region since 2008. (TR at 222). Mr. Smith testified that the North Central region includes the Davenport, Iowa branch. (TR at 223). Mr. Smith testified that he oversees:

all the DOT compliance for our seven state regional company. So I oversee and answer specific questions to the area safety managers, to branch managers, and to drivers, as well as conduct on-site audits on an annual basis, and inspect the field to ensure that we are in compliance with all DOT regulations. (TR at 223).

Mr. Smith testified that if a driver feels a load is unsafe the proper procedure to follow:

is really dependent on the situation. If a driver refuses to perform his job duties after a load has been vetted and verified, at that point, I – we would try to retrain the driver, we'd try to have the discussion to make sure that the driver understood the applicable regs. But at that point, he would be still required to move the load once it was vetted that it was in compliance. (TR at 237).

Mr. Smith testified that:

We do have drivers, quite often, that will question cargo securement, will question the regulations, and that's my job, to talk them through the . . . regulations, as well as I reach out to PHMSA officers specifically here in the state of Iowa, to discuss regulations interpretation of said law to ensure that we're hauling within compliance. (TR at 252).

Mr. Smith testified that after explaining to a driver that the load is not unsafe he would then ask the driver to transport the load. (TR at 252). Mr. Smith testified that if the driver continues to refuse to transport the load, he would contact the field manager and the human resources department. (TR at 253).

Mr. Smith examined CX-4A. (TR at 226); (CX-4A). Mr. Smith testified, in reference to CX-4A, that the:

only thing questionable that I see is that there's a single strap strapped extremely low on this specific cart. But, you know, prior to transportation, dependent on which this picture was taken, you know, the – it's really the driver's responsibility to re-strap the load in accordance with 393 to ensure that the cargo is secured prior to transportation. (TR at 227); (CX-4A).

Mr. Smith affirmed that with additional straps there would be securement within the cart. (TR at 227).

Mr. Smith examined CX-4B. (TR at 228); (CX-4B). Mr. Smith testified, in reference to CX-4B, that the cart and cylinders were:

secured, again, the same as Exhibit 4-A. The cart itself, or the over pack cart itself appears to have two 10,000-pound tensile strength straps, or two 3,333-pound working load straps securing the cart itself. And then it appears to have at least one individual load-rated strap securing the cylinders, probably either to the cart itself, and/or to the tombstone pallets that are affixed to the motor vehicle. (TR at 229); (CX-4B).

Mr. Smith examined CX-4C. (TR at 229); (CX-4C). Mr. Smith testified, in reference to CX-4C, that:

This is a safety cart, specifically. And, again, this cart looks to be – they light loaded it, so there’s – you could obviously fit more cylinders in this cart. This cart, again, is retained by one single 10,000-pound tensile strength strap and one 3,333-pound working load strap. And, again, it looks like it has another weight-rated strap retaining the cylinders either to the cart or to the tombstone skid that it’s attached to. Again, as the pictures are slightly out of focus, and not being there, there’s nothing that looks to me that is blatantly out of compliance. You know, ultimately it’s the driver’s responsibility that the cylinders don’t have any lateral movement, and that they are secured in compliance. (TR at 229-230); (CX-4C).

Mr. Smith testified that Code 49 C.F.R. 177.840 of the Federal Regulations is not applicable to the securement of the cylinders in CX-4A, CX-4B, or CX-4C because:

177.840, it’s giving the definition of a portable tank, and the portable tank is given a definition under 171.8, which is the definition and abbreviation section within 49 C.F.R. A portable tank under 171.8 is defined as a bulk package. A bulk package is then defined furthermore within 171.8 as a package that must exceed 119 gallons or 450 liters. Therefore, I don’t wish the Court to believe that, because the cylinders in which are being reference to Exhibits 4-A, 4-B and 4-C, while maybe the general public may refer to them as a portable container, they’re not considered to be a portable contained under 49 C.F.R. because their water volume does not exceed 119 gallons or 450 liters. 49 C.F.R. § 177.840; (TR at 243); (CX-4A); (CX-4B); (CX-4C).

Ms. Tracy McDowell Testimony (TR 256-261)



Ms. McDowell testified that she has worked as the regional vice president for Respondent for the last 7 years. (TR at 257). Ms. McDowell testified that the region she covers includes the Davenport, Iowa branch. (TR at 257).

Ms. McDowell testified that as part of her job she goes to the branches and:

I try to make a round, walk through the warehouse. Not always, but I try to because I like to know, I like to know the people that work for us. And so from time to time I will have conversation with warehouse people, route drivers, inside sales, how's it going, be safe, things like that. (TR at 257-258).

Ms. McDowell also testified, that Complainant made a safety complaint to her:

It was shortly after I came – so I was in the medical division before I came back to the industrial market. And I was walking through the warehouse, and he had made a comment about liquid carts, liquid cans are very large and difficult to maneuver, and he had complained about our carts not being – just hard, it's hard to do. So I brought in – we had our safety director at the time, his name was Tim Peterson (ph.), brought him in, and he did some research and he recommended an alternate cart that might be a little easier for the drivers to use, and the plant people as well. (TR at 258).

Ms. McDowell testified that in response to Complainant's complaint Respondent bought the cart Complainant requested and brought it to the Davenport, Iowa branch. (TR at 258). Ms. McDowell testified that she was not aware of any other safety complaints made by Complainant. (TR at 258). Ms. McDowell testified that she would have recalled if Complainant had made another safety complaint, because "I take those types of situations very seriously." (TR at 258-259).

Ms. McDowell testified that she recalled Mr. Lingle having an issue with Complainant shortly after Mr. Lingle became branch manager in February of 2014. (TR at 260). Ms. McDowell testified that Mr. Lingle called for advice on how to handle the situation. Ms. McDowell testified that:

[Complainant] had gotten in his face – I don't know what the words would be, but had confronted him about something he didn't want to do, a delivery he didn't want to make. Mr. Lingle wanted to know how to handle that should it come up again. He thought he could handle it. He thought he had it handled, but wanted some advice basically on how to manage a situation like that, whether it be from [Complainant] or any other associate. He was a new manager. It's very common. It's part of my job. (TR at 260).

Ms. McDowell testified that she told Mr. Lingle if the situation happened again "we needed to get the HR department involved, which is very typical. It's what we do with any type of situation involving employee relations." (TR at 261).

Ms. McDowell testified that she was not involved in the termination of Complainant. (TR at 261).

#### Ms. Lori Klocke Testimony (TR 262-269)

Ms. Lori Klocke testified that she has been employed by Respondent as a human resources manager for the North Central Region, which includes the Davenport, Iowa branch, for 12 years. (TR at 262-263). Ms. Klocke testified that her job duties are to “make sure that policies and procedures are followed by the company and by the employees.” (TR at 263).

Ms. Klocke testified that she had dealt with disciplinary issues regarding Complainant. (TR at 263). Ms. Klocke testified that the first disciplinary issue regarding Complainant had been brought to her by Mr. Welsh. (TR at 263). Ms. Klocke testified that she did an investigation into an incident where Complainant had threatened Mr. Romine, an inside sales associate. Ms. Klocke testified that she gave Complainant “a written warning because of his confrontation and threatening comments.” (TR at 264). Ms. Klocke affirmed that she decided to give a written warning, because Complainant had been previously warned about that particular type of conduct. (TR at 264).

Ms. Klocke testified that a second incident regarding a similar type of behavior by Complainant took place at the end of February 2014. (TR at 265). Ms. Klocke testified that. “Mr. Lingle had just become branch manager, and he and Tracy McDowell contact me asking if – not asking – telling me what had occurred with [Complainant] and Mr. Lingle, and asking for, you know, direction on how to handle it if it was repeated.” (TR at 265).

Ms. Klocke testified that Mr. Lingle called her on March 17, 2014, and told her in great detail the way Complainant had behaved that day. Ms. Klocke testified that she:

asked Mr. Lingle what he thought he would like to do as manager of that facility, and he told me that he did not feel comfortable with Shane returning to work. And so then we went to – followed our procedures in our own process of discussing it with area vice president, our president, and our HR director. (TR at 265-266).

Ms. Klocke testified that after discussing the situation with the area vice president, the president, and the HR director, the decision was made to terminate Complainant. (TR at 266).

Ms. Klocke testified that she was not aware of any complaint being made by Complainant against Mr. Welsh. (TR at 268).

### **DISCUSSION AND ANALYSIS**

The employee protection provisions of the STAA prohibit covered employers from discharging or otherwise retaliating against employees because of their participation in protected activity. 49 U.S.C. § 31105; 29 C.F.R. § 1978.102. STAA prohibits retaliation against

employees who have filed a complaint or participated in a proceeding related to the violation of commercial motor vehicle safety or security regulations, and STAA also protects employees who are believed to be engaged in such activity. 49 U.S.C. § 31105(a)(1)(A); 29 C.F.R. § 1978.102(b), (e). Similarly, the Act protects employees who refuse to operate a vehicle either because operation of the vehicle would violate motor vehicle safety regulations or because they have a reasonable apprehension of serious injury to themselves or others due to the vehicle's hazardous condition. 49 U.S.C. § 31105(a)(1)(B); 29 C.F.R. § 1978.102(c)(1).

STAA provides that whistleblower complaints shall be 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"). 49 U.S.C. § 42121(b) (2011); 49 U.S.C. § 31105(b)(1). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must initially make a *prima facie* showing by a "preponderance of the evidence" that a protected activity was a "contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(i), *see also*, 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) ("It is the Secretary's position that the complainant [in a STAA case] must prove by a 'preponderance of the evidence' that his or her protected activity . . . contributed to the adverse action at issue."); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, ALJ Nos. 2008-STA-012, 2008-STA-041, slip op. at 8 (ARB Sept. 15, 2011). Thereafter, a respondent can only rebut a complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant suffered an unfavorable personnel action,<sup>4</sup> and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

Consequently, in order to meet his burden of proving a claim under STAA, Complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity by reporting to Respondent. a safety concern that created a reasonable apprehension of serious injury to himself or others, (2) Respondent knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action.<sup>5</sup> *See Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32

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<sup>4</sup> An adverse employment action must actually affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l Railroad Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009). *See also Simpson United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

<sup>5</sup> Although I list the knowledge requirement as a separate element, I note the ARB has reiterated that there are only three essential elements of an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker's "knowledge" and "animus" are

(ALJ Dec. 11, 2007). A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).<sup>6</sup> If Complainant satisfies his *prima facie* case by a “preponderance of the evidence,” the burden shifts to Respondent to demonstrate by “clear and convincing evidence” that it would have terminated Complainant even absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii); *see also* 75 Fed. Reg. at 53,550; *Salata*, ARB Nos. 08-101, 09-104, slip op. at 9. For the reasons discussed below, I find that Complainant has not established that he engaged in protected activity on March 17, 2014, or that his refusal to drive a truck carrying unsecured cylinders containing Class II gases was a contributing factor to his being terminated by Respondent. Accordingly, I find Respondent has not violated the STAA.

### *Prima Facie Case*

#### *I. Complainant Filed a Complaint*

The Act protects employees who have filed a complaint or participated in a proceeding related to the violation of commercial motor vehicle safety or security regulations, and those who refuse to operate a commercial motor vehicle when he reasonably believes to do so could cause serious injury to the employee or the public. 49 U.S.C. § 31105(a)(1)(A); 49 U.S.C. § 31105(a)(1)(B)(ii) Under the Act, a complaint need not explicitly mention a commercial vehicle safety standard to be protected. The statute requires only that the complaint relate to a violation of a commercial motor vehicle safety standard. *Nix v. Nehi-RC Bottling Co., Inc.*, 84-STA-1 (Sec’y July 13, 1984). Furthermore, internal complaints to management are protected activity under the whistleblower provision; the complainant, however, must prove by a preponderance of the evidence that he actually made such an internal complaint. *Williams v. CMS Transportation Services, Inc.*, 94-STA-5 (Sec’y Oct. 25, 1995).

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only factors to consider in the causation analysis. *See Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013).

<sup>6</sup> In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3rd Cir. 2013), the court held that the employee “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination, not the sole or even predominant cause.” In addition, an employee “need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed.Cir.1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit); *see also Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (“A *prima facie* case does not require that the employee conclusively demonstrate the employer’s retaliatory motive.”); *Menendez v Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011), at 31-32; *Kuduk v. BNSF Railway Company*, 768 F. 3d 786 (8th Cir. Oct. 7, 2014)(“[a] *prima facie* case does not require that the employee conclusively demonstrate the employer’s retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity”).

Complainant testified that he complained about the unsafe deliveries to Northwest Respiratory Protection at “[p]ractically every safety meeting after that first delivery.” (TR at 39). Complainant testified that he complained about this issue “probably for six months, a year” to Mr. Welch, who ran the safety meetings, and Mr. Lingle, the branch manager, in front of the other drivers who attended the safety meetings. (TR at 39).

Mr. Welch testified that he never received a safety complaint from Complainant concerning the Northwest Respiratory Protection route. (TR at 169). Mr. Lingle testified that he had no knowledge of Complainant ever making a safety complaint. (TR at 205). Mr. Franks, a driver, testified that he attends the safety meetings that are held every month. (TR at 112). Mr. Franks testified that he did not “recall” Complainant ever bringing up Northwest Respiratory Protection as an unsafe delivery site at a safety meeting. (TR at 113). Mr. Rosales, a driver, testified that he couldn’t remember if Complainant talked about the Northwest Respiratory Protection route being unsafe at the safety meetings because it had “been so long ago.” (TR at 135). Mr. Terrell, a driver, testified that he attended the monthly safety meetings. (TR at 138). Mr. Terrell testified that he remembers at a safety meeting “something brought up about carts” concerning the Northwest Respiratory route. Mr. Terrell testified that he “can’t recall” who brought up the Northwest Respiratory carts at the safety meeting. (TR at 139). I find that Complainant did not establish by a preponderance of the evidence that he complained to Mr. Welch or Mr. Lingle about unsafe deliveries to Northwest Respiratory Protection at the monthly safety meetings.

Complainant testified that “a few months” before March 17, 2014, he refused to deliver improperly secured cylinders to Northwest Respiratory Protection. (TR at 33). Complainant testified that he complained to Mr. Welch about the improperly secured cylinders and filled out a form titled Complaint of Unsafe Customer Delivery Site. (TR at 32). Mr. Welch testified that he never received a safety complaint from Complainant concerning the Northwest Respiratory Protection Route. (TR at 169). I find that Complainant did not establish by a preponderance of the evidence that he complained to Mr. Welch about improperly secured cylinders he refused to deliver to Northwest Respiratory Protection “a few months” before March 17, 2014.

Complainant did not provide evidence that he filed a Complaint of Unsafe Customer Delivery Site Form. (TR at 32). Claimant testified that he lost his copy of the Complaint of Unsafe Customer Delivery Site Form that he filed. (TR at 32). I find that Complainant did not establish by a preponderance of the evidence that he filed a Complaint of Unsafe Customer Delivery Site Form because of the improperly secured cylinders he refused to deliver to Northwest Respiratory Protection “a few months” before March 17, 2014.

Complainant testified that on March 17, 2014, the day his employment was terminated, he complained to Mr. Lingle that the cylinders were not properly secured and he refused to transport them. (TR at 17). Mr. Lingle testified that he had no knowledge of Complainant ever making a safety complaint. (TR at 205). I find that Complainant did not establish by a preponderance of the evidence that he complained to Mr. Lingle about improperly secured cylinders on March 17, 2014.

Complainant filed an Amended Notice of Alleged Safety or Health Hazards with the U.S. Department of Labor Occupational Safety and Health Administration on August 12, 2014. (RX-

7). Complainant did not establish that he filed an original Notice of Alleged Safety or Health Hazards before the Amended form. The original complaint was not offered into evidence. Respondent offered into evidence a copy of the filed Amended Notice of Alleged Safety or Health Hazards Form. (RX-7).

The form detailed that on March 17, 2014 Complainant explained to his supervisor that he would not pick up the load because it was unsafe pursuant to “49 CFR 177.834-177.851 related to blocking and bracing class 2 gases.” In addition, the form detailed an incident that took place in “November or December of 2013” where Complainant refused to transport unsafe carts that did not satisfy 49 C.F.R.. § 177.840.

Transporting Class II gases can result in harm to the employee or the public, because Class II gases are hazardous materials strictly regulated by the Department of Labor. 49 C.F.R. § 177.840. It is reasonable to believe that unsecured Class II gases being transported by truck could create a situation of serious injury to Complainant or the public. Therefore, the Amended Notice of Alleged Safety or Health Hazards Form filed with the U.S. Department of Labor Occupational Safety and Health Administration on August 12, 2014 satisfies the required element that Complainant made a complaint relating to a violation of a commercial motor vehicle safety standard that could create a situation of serious injury to the employee or the public. 49 U.S.C. § 31105(a)(1)(B).

## *II. Complainant Suffered an Unfavorable Personnel Action*

In order to meet his burden, Complainant must prove by a preponderance of the evidence that he suffered an unfavorable personnel action.

Complainant testified that his employment was terminated by Respondent on March 17, 2014. Ms. Lori Klocke, a human resources manager for the Davenport, Iowa branch, testified that after discussing the situation with the area vice president, the president, and the HR director, the decision was made to terminate Complainant on March 17, 2014. (TR at 266). In addition, Complainant was mailed a letter from Respondent acknowledging his termination on March 17, 2014 that was offered into evidence. (RX-4).

I find that Complainant has established by a preponderance of the evidence that he suffered an unfavorable personnel action.

## *III. Complainant Did Not Establish that Respondent Knew of the Complaint*

In order to meet his burden, Complainant must prove by a preponderance of the evidence that Respondent knew of the protected activity.

Complainant testified that he complained about the unsafe deliveries to Northwest Respiratory Protection to Mr. Welsh, Mr. Lingle, filed a Complaint of Unsafe Customer Delivery Site, and complained at multiple safety meetings in front of other drivers. However, as discussed above, Complainant did not establish the existence of these complaints by a preponderance of the evidence. In addition, Ms. McDowell, regional vice president, testified that she would have recalled if Complainant had made another safety complaint because “I take those types of

situations very seriously.” (TR at 258-259). Ms. McDowell testified that she was not aware of any safety complaints made by Complainant concerning unsafe deliveries to Northwest Respiratory Protection. (TR at 258). The only complaint that could be established by a preponderance of the evidence by Complainant was filed with OSHA on August 12, 2014. (RX-7). Complainant was terminated on March 17, 2014, nearly five months before Complainant filed his complaint with OSHA.

I find that Complainant did not establish by a preponderance of the evidence that Respondent was aware of Complainant’s complaint until well after the date he was terminated.

#### *IV. Complainant Did Not Establish that the Protected Activity Contributed to his Termination*

In order to meet his burden, Complainant must prove by a preponderance of the evidence that the protected activity he engaged in was a contributing factor in the unfavorable personnel action. If Complainant satisfies his *prima facie* case by a “preponderance of the evidence,” the burden shifts to Respondent to demonstrate by “clear and convincing evidence” that it would have terminated Complainant even absent the protected activity.

As discussed above, Complainant could not establish that Airgas, Inc. was aware of the protected activity, filing a complaint about the unsafe deliveries to Northwest Respiratory Protection, at the time of his termination. Therefore, Complainant did not present evidence that demonstrated that engaging in a protected activity was contributing factor in his termination.

Furthermore, Respondent offered substantial evidence that supported their contention that Complainant was fired because of his personal behavior that did not conform to Respondent’s policies. Mr. Welch testified that he had given Complainant multiple oral warnings concerning his aggressive and unacceptable behavior on the job. (TR at 185). Respondent offered into evidence a written warning that was issued to Complainant on January 16, 2013, that detailed an interaction with another employee, RJ Romine, where Complainant “initiated a confrontation” that “included swearing and a comment about taking the matter to the parking lot.” (RX-2). Mr. Lingle, the branch manager, testified about an interaction in February of 2014, where he was cursed at and challenged to a fight by Complainant. (TR 203). Mr. Lingle testified that on March 17, 2014, the day that Complainant was terminated, Complainant cursed at Mr. Lingle and threatened to “kick his ass.” (TR at 205-206). Ms. Lori Klocke, confirmed that she was aware of and had filed reports concerning Complainant’s actions towards Mr. Lingle and Mr. Romine. (TR at 264). Ms. McDowell testified that she was aware of the incidents that took place between Complainant and Mr. Lingle. (TR at 261). Respondent established a clear pattern of behavior by Complainant that was grounds for termination that did not concern Complainant’s protected activity.

I find that Complainant did not establish by a preponderance of the evidence that the protected activity contributed to the unfavorable personnel action. I find that Respondent established by clear and convincing evidence that they would have taken the adverse action in the absence of protected activity.

#### Conclusion

For the reasons discussed above, I find that Complainant has failed to establish his *prima facie* case. The evidence does establish that Complainant was subject to an adverse employment action when Respondent discharged him on March 17, 2014. However, the evidence does not establish that Complainant engaged in protected activity that contributed to the employer's adverse employment action. Complainant has not proven by a preponderance of the evidence that protected activity was a contributing factor in Respondent's decision to terminate his employment.

**ORDER**

The complaint for whistleblower protection under the Surface Transportation Assistance Act filed by Shane Davis with the Occupational Safety and Health Administration on July 7, 2014, is hereby DISMISSED.

WILLIAM S. COLWELL  
ASSOCIATE CHIEF JUDGE

WSC/bcw  
Washington, DC



**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in

opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.