U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 May 2017

Case No.: **2015-STA-00071**

In the Matter of:

MARGARET WATKINS,
Complainant,

v.

PBR LOGISTICS, LLC,
Respondent

Appearances:

Paul O. Taylor, Esq., Truckers Justice Center, Burnsville, MN
For Complainant.

Alan Shachter, Esq., Manassas, VA
For Respondent.

Before: William S. Colwell
Associate Chief Administrative Law Judge

DECISION AND ORDER DENYING 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.[1] 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

[1] 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.

operation would violate a Federal safety regulation or because the employee has a reasonable apprehension of serious injury to himself or the public due to the vehicle's unsafe condition.[2] Margaret Watkins, ("Complainant"), alleges that PBR Logistics, LLC ("Respondent") terminated her in violation of the STAA.

STATEMENT OF THE CASE

On September 4, 2014, Complainant filed a timely complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") office in Philadelphia, Pennsylvania. She alleged that Respondent had discharged her in retaliation for refusing to complete the last assignment of the day due to becoming ill with profuse sweat, a headache and fatigue that developed because of a lack of air conditioning in her truck. OSHA investigated the complaint and, on August 14, 2015, concluded that there was no reasonable cause to believe that Respondent violated the STAA and dismissed the complaint. On August 19, 2015, Complainant filed a timely objection and requested a hearing before an administrative law judge.

A hearing was held before the undersigned on June 1-2, 2016 in Washington, D.C. At the hearing, the undersigned admitted ALJ Exhibits 1 through 8. (Tr. 6).[3] Complainant offered Exhibits 1 through 9 (CX 1-9), withdrawing Exhibits 3 and 8. (Tr. 7). Respondent objected to CX 1, 2, 5, and 9 on the grounds of relevance (and hearsay for CX-2). (Tr. 11). Complainant withdrew pages 7 and 8 of Exhibit 1. (Tr. 12). The undersigned admitted CX-1, 2, 5, and 9, but stated that he would determine how much weight to give to the Exhibits based on all the evidence admitted. (Tr. 12, 17-18). Overall, Complainant's Exhibits CX-1, 2, 4, 5, 6, 7, and 9 were admitted. Joint Exhibits 1 through 4 (JX 1 - JX 4) were admitted. (Tr. 8). Respondent offered Exhibits 1 through 6 (RX 1 - RX 6). Complainant objected to RX-2 on the grounds of relevance. The undersigned admitted RX-2, but stated that he would determine how much weight to give RX-2 based on all the evidence admitted. (Tr. 23). The parties were allowed until August 8, 2016 (postmark date) to submit post-hearing briefs, which was subject to extension by stipulation. (Tr. 362). Complainant's and

[2] 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).

[3] Complainant's and Respondent's exhibits will be referred to as "CX" and "RX," respectively, followed by the exhibit number. Joint exhibits will be referred to as "JX." "Tr." followed by a page number refers to the transcript of the hearing in this case.

Employer's post-hearing briefs were both postmarked August 8, 2016 and received on August 12, 2016 and August 10, 2016, respectively. This case is now ready for a decision. The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The parties have stipulated to, and this Administrative Law Judge finds the following, as fact:

1. Complainant Margaret Watkins resides at 7283 Wellington Rd., Manassas, VA 20109. At all times material hereto Ms. Watkins was an employee within the meaning of 49 U.S.C. § 31101 and 29 C.F.R. § 1978.101(h).

2. Respondent PBR Logistics, LLC is a limited liability corporation with its principal place of business located at 8807 Sudley Road, Suite 210, Manassas, VA 20110.

3. Respondent is engaged in trucking operations and operates commercial motor vehicles having a gross vehicle weight rating of 10,001 pounds or more transporting property in commerce. Respondent is a person within the meaning of 49 U.S.C. § 31105. It is also a commercial motor carrier and employer within the meaning of 49 U.S.C. § 31101. Respondent is engaged in transporting dirt, asphalt, demolition construction debris and aggregate such as stone, sand, and landscaping mulch.

4. Respondent employed Complainant from August 14, 2013 to August 27, 2014. In the course of her employment with Respondent, Complainant operated commercial motor vehicles having a gross vehicle weight rating of 10,001 pounds transporting property in commerce. As such, Complainant directly affected commercial motor vehicle safety.

5. Paul B. Robertson is the owner and general manager of Respondent.

6. On the afternoon of August 27, 2014, Complainant refused a dispatch. But for this refusal, she would not have been fired.

7. On August 27, 2014, the air conditioning unit on Complainant's assigned commercial vehicle did not work.

8. On August 27, 2014, Respondent fired Complainant.

9. On September 4, 2014, Complainant timely filed a complaint with the Secretary of Labor alleging that Respondent had discharged her and retaliated against her in violation of the employee protection provisions of the STAA.

10. On August 14, 2015, the Secretary of Labor, by the Action Regional Administrator, for OSHA Region 3, issued preliminary findings and dismissed Complainants' complaint pursuant to 49 U.S.C. § 31105.

11. On August 19, 2015, Complainant[4] filed timely objections to the Secretary's Findings and Order and requested a hearing *de novo* before an administrative law judge of the Department of Labor.

12. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of this proceeding.

13. Complainant's average weekly wage at the time of her separation from Respondent was $665.35.

ISSUES

Did Complainant engage in protected activity on August 27, 2014? If so, has Complainant proven by a preponderance of the evidence that her protected activity contributed, in part, to Respondent's decision to take adverse action against her, 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

Complainant contends that she engaged in protected activities by filing internal complaints related to violations of commercial vehicle safety regulations and by refusing to continue operating commercial vehicles due to fatigue. On August 27, 2014, Complainant refused to operate her assigned dump-truck while extremely fatigued. Complainant was discharged

[4] Complainant and Respondent's Joint Stipulation of Facts stated that "[r]espondent filed timely objections to the Secretary's Findings and Order . . ." However, it was Complainant who filed timely objections to the Secretary's Findings and Order.

immediately following this refusal. Complainant argues that her refusal and filing of internal complaints, and then subsequent termination, concludes that Complainant was discharged in retaliation for engaging in protected activity in violation of the employee protection provisions of the STAA. Complainant contends that she is entitled to lost wages (with interest), compensatory damages, punitive damages, attorney's fees, abatement of the violation, and reinstatement.

Respondent

Respondent contends that Complainant did not engage in protected activity and did not allege that her vehicle's condition was unsafe, and therefore in violation of any safety regulation. Respondent further states that Complainant did not file a complaint or began a proceeding regarding violations of commercial motor vehicle safety or security regulations, standards or orders. Respondent further states that Complainant attempts to equate the mandatory filing of the daily vehicle inspection reports with the filing of complaints regarding safety violations. However, Respondent asserts that Complainant never informed Employer that any of the defects or deficiencies she noted in the reports concerned the safety of her truck or the violation of regulation. Respondent states that Complainant did not refuse to drive her truck because of safety issues related to the noted defects or deficiencies. Respondent states that neither the Complainant, nor any other employee at PBR were disciplined, criticized, discriminated against or suffered any adverse employment action because of submitting the daily vehicle inspection reports. Respondent states that PBR mandated these reports and required the immediate reporting of maintenance problems. The Respondent states that the evidence provided shows that PBR promptly addressed all maintenance issues.

Finally, Respondent states that Complainant never communicated a "reasonable belief" that the company was engaging in violations of motor vehicle safety regulations. Respondent argues that Complainant has not established any "nexus" between her daily vehicle inspection reports and her termination for refusing to work.

SUMMARY OF THE EVIDENCE[5]

Margaret Watkins

[5] The summary of the evidence is not intended to be an exhaustive analysis of each exhibit or a verbatim transcript of the hearing but merely to highlight certain relevant portions.

Complainant Margaret Watkins (Peggy) was employed by PBR Logistics as a dump truck driver. (Tr. 34). When Complainant began her workday at PBR she inspected her assigned truck for "safety issues" and prepared an inspection report on the truck which included her name, the truck number and odometer mileage. (CX-2). Complainant testified during her workday she recorded vehicle defects that arose. (Tr. 53, 169). She further testified that at the end of her workday she signed the inspection report and submitted it to PBR. (Tr. 53-54, 151-154). Complainant explained that it was common for PBR to defer repairs of defects noted on the inspection report. (Tr. 58, 263). Complainant drove PBR-03, a Sterling dump truck with two rear axles plus three lift axles. (Tr. 36-37; CX-1, p.1). Complainant testified that shortly after she began at PBR, Franklin Winslow, PBR Logistics Coordinator, told her to stop recording continuing defects on inspection reports. (Tr. 58-59).

On May 22, 2014, Complainant alleged that her air conditioning was not working, and she notified PBR that she was too hot and could only do more one more load. (JX-2). On August 5, 2014, Complainant sent a text message to Mr. Winslow stating, "A/C not working all day." (CX 2, p. 7). She also called and told him that she "was too exhausted from the heat to continue driving safely and that [she] was done for the day." (JX-2, p. 1; Tr. 69). Complainant refused to continue working on August 5, 2014 due to fatigue caused by the heat. (Tr. 69-70). On August 5, 2014, Complainant recorded on her vehicle inspection report that PBR-03 had a bent exhaust stack and a defective head lamp. (CX-2 p. 9). She also indicated that the air conditioning system was emitting "warm air." (Tr. 52-53; CX-2, p. 9). On Complainant's vehicle inspection reports for August 6 and August 7, 2014, she noted that PBR-03 had a defective headlamp and that the air conditioning system was not working. (CX-2, pp. 10-11; Tr. 56-57). On August 7, 2014, PBR had freon added to the air conditioning system for PBR-03. (CX-2, p. 11; Tr. 162-163).

Complainant testified that on some days when she operated PBR-03 without a working air conditioner, it was not to hot to drive. (Tr. 226). Complainant recorded on her vehicle inspection report for August 20, 2014 that PBR-03 had a broken seat control, a broken marker light, the air conditioning did not work, and that a head lamp was defective. (CX-2, p. 19; Tr. 61). Complainant testified that on her vehicle inspection report for August 22, 2014, she recorded that the air conditioning system on PBR-03 was not working. (Tr. 61-63; CX-2, p. 20). On her vehicle inspection reports for August 25 and 26, 2014, Complainant recorded that PBR-03 had a broken marker light and that the air conditioning was not working. (Tr. 63, 172-173; CX-2, pp. 21-22).

On August 27, 2014, PBR-03 stalled and lost power and Complainant parked it on the shoulder of the highway. (Tr. 73-74, 199, 283-284). After the truck was parked, Complainant called the owner of the company, Mr. Paul Robertson and told him that PBR-03 was stalled out and that she was stuck on I-17. (Tr. 77, 319-320). Mr. Robertson asked if she had tried to start it back up, to which Complainant replied that she had tried but that it would not start. Mr. Robertson told her that he would send "Jack" from Jack's Repair Service to repair the truck. (Tr. 77, 319-320). Complainant testified that she waited for three hours in the hot sunlight while she waited for the mechanic. (Tr. 77-79, 200-201; R-6). Complainant testified that she was stopped on the side of the road from 7:49 am until 10:49 am. (Tr. 200). On August 27, 2014, the temperature varied from 63F degrees at 7:27am to 81F degrees while Complainant waited. (Tr. 201; CX 4 at 11). While Complainant waited for the repairman, she had to relieve herself, but could not walk approximately ½ mile to the restroom facility at McDonalds. (Tr. 347-348, 352, 353).

Complainant testified that when the mechanic, Jack Belcher, Jr., arrived and repaired PBR-03, Complainant felt like "toast." (Tr. 81, Tr. 286, 315-316, 319-320). Complainant testified that she told Jack that she was hot and uncomfortable; but did not have a headache at that time, and did not ask him to take her to a cool location. (Tr. 202). Complainant testified that she told Jack that the air conditioning was not working, but did not ask him about the freon. (Tr. 189). She further testified that she did not tell Jack that she believed PBR-03 was unsafe. (Tr. 177). Complainant also testified that she understood she had the right not to drive an unsafe vehicle under the STAA, but she couldn't remember if she refused to drive a PBR vehicle in the past (Tr. 177). After PBR-03 was repaired, Complainant resumed working and hauled two more loads from the Sanders Quarry for delivery to Fresta Christian School. (Tr. 83). After delivering the load to Fresta Christian School, Ms. Watkins testified that she felt "drained of all my energy," "had a pounding headache," and her "heart was pumping outside [her] chest." (Tr. 83-84). The outside temperature was at least 88 degrees at 2:55pm on August 27, 2014 for Mannassas, VA according to the National Climatic Data Center. (CX-4, p.11). Complainant then determined that it was unsafe for her to haul another load and that it would be unsafe for her to haul loads of stone on "those little country roads." (Tr. 88, 89).

Complainant testified she first called Bonnie Connelly at Sanders Quarry, where Complainant had one more load of stone to deliver from and told Ms. Connelly that she was "too hot," "soaking wet with sweat right now from heat inside this cab," "pounding headache," that she could not "continue to safely work anymore," and she was "heading back to the yard." (Tr. 89-90, 134, 136, 203). Ms. Connelly told her to call Paul Robertson.

(Tr. 89-90, 134, 136, 203). Complainant called PBR and spoke to Mr. Robertson, the owner of the company, telling him she had just delivered a load to Fresta Christian School and that she was "sweating like a pig" due to the heat in the cab. (Tr. 90). She stated that she had a "pounding headache" and that was "overwhelming" her and she would not continue working unsafely, that she was "too hot" and that she was "heading back to the yard." (Id.). She also testified that she told Mr. Robertson that, "I was too hot to continue working. . . I couldn't take the load." (Tr. 204). Mr. Robertson replied, "if that's the way you feel, then pack your stuff up." (Tr. 90, 203-204, 210, 238-240, 321, 324, 328-339; CX-6, p.1; JX-2, p.2). Ms. Watkins did not feel as if she was in her "safest mode" and believed she should not have been driving. (Tr. 210, 222).

After her phone call to Mr. Robertson, Complainant drove her truck to the Y-Not store where she spent about 40 minutes organizing all of her property and cleaning out her truck. (Tr. 206, 222). She further testified that she did "cool down a little bit at the Y-Not Stop before I actually drove down 29, so I had about 30, 40-minutes break." (Tr. 222). Complainant testified she felt safe when she stopped to make a call to Ms. Connolly and Mr. Robertson, and on the drive to the convenience store. (Tr. 209). She testified that after starting the day with two bottles of water, 16.9 ounces each, she still had half a bottle of water left in an insulated lunch bag and had no need to buy additional cool drinks at the convenience store. (Tr. 205, 206, 222, 349). However, Complainant testified that she did not have any water left in her cooler. (Tr. 348). Complainant testified that when she was at the Y-Not she was at her "breaking point," and she would not leave her truck because "that's abandonment of a vehicle and DOT has a recordable offense when you abandon vehicles on the side of the road." (Tr. 230).

She testified she drove her truck for approximately 45 minutes to PBR's yard where she parked it. (Tr. 209). She testified that she took Route 29 to Wellington to Godwin back to PBR driving 45 minutes and she was driving over-cautiously with the state she was in (Tr. 209, 210). She testified that she was not using 100 percent of her driving skills and that she was aware that she shouldn't have been driving at all, but still chose to drive herself back to the yard. (Tr. 210). Complainant testified that when she arrived at the yard at 3:45 pm, it was 88 degrees outside and 48 humidity. (Tr. 211-212, CX 4). When Complainant arrived at the yard, she testified she submitted a vehicle inspection report noting the defective air conditioning (Tr. 96, 175, 206-207; CX-2, p. 23). Complainant drove her own personal vehicle home on August 27, 2014 and was "really upset." (Tr. 97).

Complainant testified that she never requested assistance that PBR send a driver to pick her up, she did not call for a cab, or request medical treatment for her headache. (Tr. 207). She further stated that she took no medicine while she was on the road or after she arrived home. (Tr. 207). She also testified that she had worked before with a headache. (Tr. 213). Complainant testified that she does not have a history of migraines and has not been treated for migraines. (Tr. 160). However, she testified that she has a trigger and that it could possibly be a migraine, but she is unsure because she has never gone to a doctor about them. (Tr. 160-161). Complainant testified that her medical records, with her name on them, which state she "suffers from mood problems, depression, and panic attacks" are incorrect. (RX-4, pg. 1; Tr. 178). She testified that "it does talk about panic attacks, and down at the bottom it tells you what my current medications are. They're aspirin and metoprolol." (Tr. 178). She further testified that she doesn't suffer from depression or mood problems, stated "that's a good question," in response to why her records talk about panic attacks if she claims she does not suffer from them. (Tr. 178, 181).

Furthermore, in this case, Complainant testified she filed a claim for unemployment benefits against PBR and was denied the claim because she was found to have committed misconduct. (Tr. 149; RX 2).

Bonnie Connelly

Ms. Bonnie Connelly testified she has been with Vulcan Materials, a rock quarry called Sanders Quarry in Warrenton, Virginia for twenty years. (Tr. 123). She has been with Quarry as a Scale Clerk, weighing the trucks in and out since 2003. (Tr. 123-124). Ms. Connelly testified she knows the owner of PBR, Mr. Robertson, because his trucks haul for Sanders Quarry, and she also knows Complainant, "Peggy." (Tr. 124, 132). She testified that the last conversation she had with Complainant was that "Peggy" said she was hot and she was going home. (Tr. 132). Ms. Connelly testified that Complainant did not tell her that she had a headache or was exhausted, and she has a vivid recollection of that conversation. (Tr. 133, 203). Ms. Connelly also testified that she does not recall Complainant ever having any difficulties maneuvering in the quarry, but she did have trouble manipulating on the mountain with some loads. (Tr. 134-135). Ms. Connelly also testified that she had not dealt with a situation where a driver was fatigued and it was unsafe for that driver driving on the quarry. (Tr. 135). She told Complainant that because there was another load she was supposed to get, Complainant needed to call the owner of PBR, Benny, to let him know she was going home for the day. (Tr. 134).

Michelle Lee Robertson

Michelle Lee Robertson worked as a dispatcher for Respondent for three years, taking calls through the day – allotting different loads to drivers throughout the day. (Tr. 139). Ms. Robertson testified that Complainant called her on August 27, 2014 and told her that she could not take the load and that she was too hot. (Tr. 141). Ms. Robertson then proceeded to transfer the call to Mr. Robertson, her father. (*Id.*). Ms. Robertson told Mr. Robertson that Ms. Watkins had said that it was too hot and that she could not haul another load. Ms. Robertson also testified that Complainant never made a safety complaint. (Tr. 143).

Patrick "Benny" Robertson

Mr. Robertson testified that he has owned PBR since 2008. (Tr. 233). He stated that the company's policy (as stated in the handbook) with respect to daily vehicle inspection reports was to fill out daily inspection reports and to immediately notify the company of any issues with their trucks. (Tr. 308-309, RX 3). He stated it was important to bring any issues with the trucks to the company's attention as soon as possible so they could have a mechanic fix it or get parts needed, because the inspection reports are checked the following morning. (Tr. 308-309). He again stated that drivers need to report any issues with the truck, because the company does not want drivers on the road with issues with their trucks. (Tr. 309). Mr. Robertson testified that he does not consider the daily inspection reports to be equivalent to safety complaints and that the intent of the daily inspection reports is to deal with potential problems. (Tr. 336-337). Mr. Robertson testified that the company handbook applies to all 10 drivers, and all 10 drivers reported "that their vehicle might have had a problem with the air conditioning, or might have had a light out. . . and that it wasn't unusual to get vehicle inspection reports showing maintenance-type problems that needed to be done." (Tr. 337-338). He further testified that he did not discipline any of the ten drivers for filling out daily inspection reports, but that he would discipline them if they did not fill out the inspection reports. (Tr. 339).

Mr. Robertson testified that Complainant did more damage to her truck than a typical driver, citing that she would have difficulty driving up a hill and would override the brakes and make them smoke. (Tr. 312-313). In that realm, Mr. Robertson testified the company had a policy of holding drivers responsible for damage to their trucks, but "it was seldom that we made anybody pay for damage." (Tr. 309). Mr. Robertson listed Complainant's following incidents with the company, where the company did not discipline her for them:

> with the railroad trestle where she did the exhaust pipe and muffler . . . pulling in on fresh pavement . . . damage to asphalt . . . backing into

> the sweeper tractor . . . and damage to the rims by hitting the apron [and] turning in the construction entrance in the parking lots. (Tr. 313-314).

He testified that he fired Complainant solely for refusing to complete another haul on August 27, 2014. (Tr. 233). He further testified that he has not fired anyone else in the last several years other than Complainant. (Tr. 315). He also stated that Complainant never filed a complaint saying that she was operating an unsafe vehicle. (Tr. 315). Mr. Robertson further stated in his testimony that he understood the A/C was not working in Complainant's truck on the day she was fired. (Tr. 235). Mr. Robertson stated that the truck the Complainant drove, similar to other trucks that his employees drove, had problems with the air conditioning because of the age of the truck (the truck is out of production and parts are difficult to obtain). (Tr. 315-317). Mr. Robertson stated that "a lot times" they have to charge the air conditioning system "if the hose doesn't have a leak and it's a temporary patch until the parts" are available. (Tr. 317). He further testified that the company's trucks are inspected once a year by the Department of Transportation (DOT) or Virginia State inspection, and that the company has chosen DOT inspections. (Tr. 318). He also stated that Complainant let them know that through a report that her truck's Virginia inspection was set to expire, and that the company got the truck inspected by the DOT in the meantime. (Tr. 318). Mr. Robertson stated that there was no reason to respond to Complainant's reports that the Virginia inspection was about to expire. (Tr. 318).

Mr. Robertson testified that Complainant had called the company the morning of August 27, 2014 to let them know that the truck had stopped. Mr. Robertson testified that as a result he sent Jack Belcher, the company's mechanic, to fix Complainant's truck. (Tr. 319). Mr. Robertson stated that Jack let him know that "he had replaced a few relays and got the water out of it." (Tr. 320). Mr. Robertson testified that Complainant did not mention anything about the air conditioning when she called the company about the truck stopping or at any time prior. (Tr. 320).

Mr. Robertson testified that Complainant refused her last load before 3:30pm on August 27, 2014. (Tr. 331). Mr. Robertson further testified that when Complainant called again the afternoon of August 27, 2014 to say that,

> [s]he was hot and evidently sweating. Never said anything else about having a headache, or being sick, or anything, because if she would have been sick and couldn't drive, we could have picked her up and drove her back. (Tr. 321).

Mr. Robertson further testified that,

> [e]verybody gets hot and they sweat. So she said she wasn't going to make the other load, and we were loaded to out because the other truck that was hauling to the same job, he was on his way to take a run. . . I just felt that she could have cooled off if she was hot, waited a few minutes, then went and got the load. (Tr. 321-322).

Mr. Robertson testified that Complainant's last load would have taken 30 minutes to 45 minutes, and that she could have taken a break and time to cool down. (Tr. 322). He further testified that Complainant did not tell him that "she was so ill, so fatigued, [and] had such a pounding headache." (Tr. 323). Mr. Robertson testified that he did not conclude that when Complainant told him that she was hot and sweaty that "she was too sick to drive." (Tr. 324). He further told her that "if she couldn't make the other load, just bring the truck to the yard and clean her stuff out." (Tr. 324). Mr. Robertson also stated that Complainant did not try to contact anyone at PBR or try to give any detail about her condition. (Tr. 324). He also stated that he sees himself as an easy disciplinarian, but that this was the second or third time that Complainant refused loads, which has caused the company to lose money. (Tr. 324-325). He stated that each time Complainant refused loads it caused the company to lose about $150.00. (Tr. 324). He stated that firing Complainant had nothing to do with safety complaints or safety issues. (Tr. 325).

Mr. Robertson testified that in the past if an employee gets sick while on the job, and can not operate the vehicle, the company will send someone to bring the vehicle back or take them to the hospital. (Tr. 325). He stated that he would have done the same for Complainant if she had said she was sick. (Tr. 326). He also stated that as far as he knew, there was no rule that prohibits a driver from leaving their vehicle and going to a restroom or a store and getting a cold drink to cool down, or seeking medical attention. (Tr. 326).

He also testified that he agreed that there are some days in which it becomes too hot, such that a driver could become over heated and not be able to drive. (Tr. 237). Mr. Robertson stated that his call with Complainant on August 27, 2014 was about three to four minutes and that Complainant told him she was too hot, but does not remember her saying she was sweating. (Tr. 237, 239-240, CX 6).

Marshall Edward Martin

Mr. Martin testified that he is employed by PBR, drives dump trucks and has done so for thirty years. (Tr. 242-243). Mr. Martin drove PBR-3

during his course of his employment with PBR; he did not recall exactly when he drove or any unusual mechanical problems with the truck. (Tr. 243). Mr. Martin testified that there were occasional issues with the air conditioning, caused by going in and out of quarries, but they were always appropriately fixed. (Tr. 244). He testified that when there are mechanical issues with his truck, such as a marker light out, PBR will have it replaced by the afternoon. (Tr. 253). He further testified that when the air conditioning goes out that he still drives the truck and he rolls the window down. (Id.). He further testified that on August 27, 2014, he recalls the weather as an average summer day and that the air conditioning in his car worked. (Tr. 244, 251). But he testified that he does not always run the air conditioning as he rides with the windows down. (Tr. 252). He testified that PBR fixes mechanical issues with trucks in a timely manner, and he has not been reluctant to report mechanical issues. (Tr. 245). He also testified that he did not experience any more heat coming into PBR-03 in the summertime, than the truck he usually drives, PBR 2. (Tr. 246).

Mr. Martin testified that he has not refused a load because it was too hot or the road was too narrow to drive on. (Tr. 255). Mr. Martin further testified that he was present at the quarry when Complainant refused work. (Id.) He also testified that you do not have to be any less cautious on a highway than one does in a quarry. (Tr. 247). He further testified that you have to allow for stopping distance for being loaded, and still having awareness of what is around you and that the quarry is not any more dangerous than driving on Route 29 or Route 17. (Id.). He further testified that there are no large loaders on Route 29 and you do not drive backwards on Route 29. (Tr. 249). He also testified that there are no cars or trucks driving 55 miles an hour in the quarry or motorcycles driving around the quarry. (Tr. 254). He also stated that if you are paying attention while you are in a quarry that there shouldn't be any potential for danger, other than hitting a stone pile. (Tr. 254, 255).

Franklin Miller Winslow Jr.

Mr. Winslow testified that he is a logistics coordinator for PBR Logistics in Manassas, Virginia and has been in the trucking business for thirty years as a driver, owner/operator. (Tr. 256-257). He dispatches trucks for PBR, takes job orders, surveys jobs, does mechanical work, and repairs lights. (Tr. 257). He testified that the truck Complainant drove, PBR-03, is out of production but that there is nothing mechanically different with the Sterlings from typical dump trucks. (Tr. 258). Mr. Winslow testified that after two years, all of the trucks encounter mechanical issues because "it is the nature of the beast." (Id.). He testified that as far as he was aware, under federal regulations air conditioning is not required in dump

trucks. (Tr. 259). He stated that dump trucks require either a federal inspection or state inspection, and that PBR trucks are federally inspected. (Id.). He further testified that he has not refused work because it was too hot. (Id.). He testified that Complainant's truck, PBR-03 has been in operation continuously since Complainant left the company. (Tr. 259-260). He testified that he drove PBR-03. (Tr. 260). He further testified that based on Complainant's performance as a driver, PBR had been "more than fair" to her in terms of damage to her trucks. (Tr. 260). He testified,

> [there] was constantly something wrong. . . [there] would be telephone calls, this road's too narrow, they're passing me, trucks are passing me, everything's – you know, just different times its more complaints – but they're going [that] way and I'm going this way, and they're passing me. (Id.).

He went on to state,

> [at] a driver's meeting. . . all drivers [were told] do not go Piper Lane, the truck stacks will not clear them. Following the meeting, Ms. Watkins drove the truck straight down Piper Lane and bent the stack, bent the muffler on the stack, everything was laid back, and bent the top down on it. No disciplinary action was filed against her for that. (Tr. 261).

For the smoke stack incident, Mr. Winslow testified that Complainant was not disciplined. (Tr. 267). He further testified that when Complainant forgot to "dump a load" she was also not disciplined. (Tr. 268). He further testified that if a driver had a pounding headache, was overcome by heat, and was sweating profusely that she believed she couldn't safely drive, you would not want that driver on the highway. (Tr. 269). But that if he received a call from an employee and all they said was they are hot, that he would not conclude that that was an excuse for refusing a load. (Tr. 274).

In terms of filling out daily inspection reports, Mr. Winslow stated that he told employees to,

> Report to us if something's happened to a truck during the day. If they've got an issue with the truck, a light out or something, if we need to get parts, because if they come in, write it up that night, I might not have time to get the part at a part store, so we have advanced notice of it. And if it's a part that's been ordered for an air conditioned line, or anything that's non-essential or the safe operation of the truck, they can write it up. It's been ordered. And we just keep on and on, and on, and on but that's only for something that's non-safety-oriented. (Tr. 263).

He further testified that drivers need to be alert at all times, whether on the highway or in a quarry. (Tr. 263). He also testified that he never noticed any unusual heat coming from PBR 03. (Tr. 264).

Mr. Winslow testified that in his 32 of years of driving that it has gotten hot inside a cab of a truck. (Tr. 267). He further testified that the temperature outside makes the cab hot and that the engine heat does not make the cab hot. (Id.). Mr. Winslow further testified that he does not agree that a vehicle should not be operated with a DOT-required marker light out. (Tr. 271). Mr. Winslow testified that he is aware of some of the DOT safety regulations, but was not familiar with regulation 393.9 that "[a]ll lamps required by the subpart shall be capable of being operated at all times." (Tr. 271-272). Mr. Winslow further testified that he agrees that if a headlight is out it should be replaced right away. (Tr. 273).

Mr. Jackie Belcher

Mr. Jackie Belcher testified that he has been employed by Jack's Heavy Truck Repair as a mechanic for trucks for eleven years. (Tr. 275-276). Mr. Belcher testified that he is familiar with inspections of dump trucks and that his father is a state inspector. (Tr. 276). Mr. Belcher testified that he has worked on PBR's dump trucks, that his company does an annual federal inspection on PBR's trucks, denoted by a sticker on the truck, and once a vehicle has passed the federal inspection it no longer needs the state inspection. (Id.). Mr. Belcher testified that when PBR had a mechanical problem, he was notified immediately and that he was never told not to fix a problem. (Tr. 278). He further testified that he has road calls every day for trucks that need to be fixed. (Tr. 280). Mr. Belcher testified that on May 28, 2014, he replaced PBR 03's A/C's compressor dryer. (Tr. 280; RX-5). He testified about the extensive work on the air conditioning system:

> [w]e had five hours involved in it. Most likely all this work was done, probably the both of us were involved, to be done in five hours. That was probably five hours' worth of A/C work and it looks like somebody else must have did the service. (Tr. 281).

He further testified about his repairs to PBR-03 on August 4, 2014 and August 7, 2014, recalling that,

> [I] ended up – there was a road call, I don't know if it was the 17, 66 but I physically – she said that it shutdown as she was driving it, and I coordinated with Frankie and Benny, and told them that Western Branch is a Mercedes-Benz authorized dealer, and we took it there. I remember picking up the driver and taking her back to the yard. (Tr. 282-284).

Mr. Belcher testified that on July 29, 2014, he "replaced the alternator, went to purchase alternator, jumpstart to restart. (Tr. 282; RX-5). Mr. Belcher further testified that on August 27, 2014, that he had a road call to 17 and 66 for 1.5 hours,

> [w]hen I showed up on the side of the road, the truck would start back and it was running. I cleaned the fuse box out then checked some different connections, and everything seemed normal to me at the time. (Tr. 283-284; RX-5).

Mr. Belcher testified that his work on August 27, 2014 ultimately took care of the shutoff problem and that Mr. Robertson never told him not to fix the air conditioning system. (Tr. 286, 289). Mr. Belcher testified that he had no reason to believe Complainant was lying about the electrical system on August 27, 2014. (Tr. 302).

Mr. Belcher testified that Complainant had a cooler to relieve herself. (Tr. 287). He further testified that the Y-Not and a McDonald's were within walking distance of where the truck was parked on the side of the road. (Id.). He further testified that Complainant did not mention that she was sweating and hot or that the air conditioning needed to be worked on. (Tr. 287-288). He testified that the air conditioning was not discussed. (Tr. 288). Mr. Belcher further testified that had Complainant told him about the problem with the air conditioning, he had all the proper equipment with him to test the air conditioning and that he would have gone forth and tried to fix the problem. (Id.) He testified that,

> [I] could have recharged it, checked the systems, make sure there [were] no leaks. . . I mean, I had a thermostat that I keep with me that I can put in the vents and actually can tell me how warm or how cold it is blowing out. (Tr. 288).

Mr. Belcher further testified that when he had repaired the air conditioning on PBR-03 in the past that he had trouble getting the parts, as they had to special order them because of the age of the truck. (Tr. 289).

Mr. Belcher testified in this case that Complainant did not ask him for a ride back to the yard. (Tr. 301). He testified that if Complainant felt ill he would have given her a ride, but she did not let him know how she was feeling on August 27, 2014 between the times of 10:59 am and 2:30 pm. (Tr. 301). Mr. Belcher testified that the truck was drivable at 2:30 pm, but was not present with Complainant at 2:30pm and did not know her condition at 2:30 pm. (Tr. 301).

Mr. Belcher further testified that if Complainant was ill and couldn't drive, he would have offered to drive her somewhere as he has done so in the past. (Tr. 289-290). He also testified that he has offered drivers to get into his vehicle with air conditioning, and that Complainant did not ask for him to drive her or to sit in his car with the air conditioning on. (Tr. 290). He further testified that he did not need the Complainant present when he was making the repairs

Mr. Belcher further testified that there is no reason that PBR-03's cab should be hot as opposed to any other dump truck and that this Sterling is a "non-emission truck, so it stays cooler than what the newer models would with the particulate filter." (Tr. 292). He further testified that Complainant did not tell him that the engine or inside the cab was hot or receive any report from PBR that the engine was creating heat. (Tr. 292-293). Mr. Belcher did testify though that engines can give off heat, but that "if its not operating at a normal temperature the truck will shut off because it won't allow the truck to overheat." (Tr. 294, 296).

DISCUSSION AND ANALYSIS

Credibility

In deciding the issues presented, I have considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. *See Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). As the court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe ... Credible testimony is that which meets the test of plausibility.
>
> 442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner, and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

After observing her demeanor while testifying and considering what she had to say versus the demeanor and testimony of Respondents' witnesses, I find no reason to credit Complainant's testimony. Rather, I find Complainant to be an incredible witness, whose testimony was inconsistent, contradictory and misrepresentative. Specifically, Complainant failed to definitely answer questions about whether she paid attention to safety or not when she was driving back to PBR in the afternoon of August 27, 2014. Complainant's statement given to the Department of Labor about why she could not continue working was the following, "I know my limitations and will not forsake safety." (JX 2, p. 5). During the hearing, Complainant was asked whether she gave up safety when she drove back to PBR or not on August 27, 2014. Complainant's answer is as follows,

> [w]ell, I would say that this statement on Page 5 of 6 was talking about continuing to work in an unsafe manner, and I wouldn't want to forsake safety working, so I decided not to continue working, and that was my choice I made. I made the choice to stop working and return to the yard . . . I would say, at this point, it would be, yes, it's not safe to drive, but I had to be very cautious about returning to the yard in that state. (Tr. 221-222).

And when asked again about being cautious, she was asked if she was safe or unsafe when she was driving back to the yard, "[w]ell I would say that I was not at 100 percent safe to drive back." (Tr. 222). She further testified that she was not using 100 percent of her driving skills when she was driving back to PBR and that she was aware that she shouldn't have been driving at all, but still chose to drive herself back to the yard. (Tr. 210).

Moreover, Complainant's testimony is contradictory. Complainant testified that she told Mr. Robertson on her call to him when she refused the load, that she was "sweating like a pig" due to the heat in the cab, had a "pounding headache" and that was "overwhelming" her and she would not continue working unsafely, that she was "too hot" and that she was "heading back to the yard." Yet she later testified that she told Mr. Robertson that, "I was too hot to continue working. . . I couldn't take the load." (Tr. 204).

Another example of Complainant's contradictory testimony is as follows. Complainant testified that she had worked before with a headache. (Tr. 213). She further stated that just prior arriving at the Y-Not, while she was at Fresta Christian school, she testified that she felt like she was inside "an oven," a "hot dog being broiled," she felt, "drained of all [her] energy," "had a pounding headache," and felt as if her "heart was pumping outside [her] chest." (Tr. 83-84). She further stated at that point she could not return to work and did not return to work because,

> [i]t would have meant being at the quarry for a longer extended period of time. It would have meant driving in the hot cab for extended long periods of time. It would have taken approximately two more hours that I have would have subjected myself to the intense heat in the cab. (Tr. 223).

Yet she the testified that she did "cool down a little bit at the Y-Not Stop before I actually drove down 29, so I had about 30, 40-minutes break." (Tr. 222). Then, Complainant testified that when she was in the parking lot at the Y-Not she was at her "breaking point." However, Complainant testified that she spent about 40 minutes during that time organizing all of her property and cleaning out her truck while outside at the Y-Not. (Tr. 204, 206, 222). She also testified that she drove herself back to PBR and drove herself home after she dropped off her truck at PBR. (Tr. 96-97). These statements are contradictory and misrepresentative of Complainant's then current state.

Complainant would have me believe that Respondents left her no choice but to drive an unsafe truck with no air conditioning while she is too ill or too fatigued, despite a lack of evidence to support this assertion. However, Complainant testified that she never requested assistance that the PBR send a driver to pick her up, she did not call for a cab or request medical treatment for her headache. (Tr. 207). When Mr. Belcher was physically present with Complainant repairing her truck, Complainant did not tell Mr. Belcher that she felt unsafe, but she testified that she told Mr. Belcher that she was hot and uncomfortable. (Tr. 177, 202). Mr.

Belcher testified that Complainant did not mention that she was sweating and hot. (Tr. 287-288).

She further stated that she took no medicine while she was on the road or after she arrived home. (Tr. 207). She also testified that she had worked before with a headache. (Tr. 213). Moreover, in another contradictory statement, Complainant testified that she does not have a history of migraines and has not been treated for migraines. (Tr. 160). However, she testified that she has a trigger and that it could possibly be a migraine, but she is unsure because she has never gone to a doctor about them. (Tr. 160-161).

Lastly, Complainant testified that her medical records are incorrect, that include her name on them, which state she "suffers from mood problems, depression, and panic attacks." (RX-4, pg. 1; Tr. 178). She testified that the medical records "talk about panic attacks, and down at the bottom it tells you what my current medications are. They're aspirin and metoprolol." (Tr. 178). She further testified "that's a good question," whether she suffers from depression or mood problems in response to why her records talk about panic attacks if she claims she does not suffer from them. (Tr. 178, 181). This is another example of misrepresentative and contradictory statements based on the evidence provided.

On the other hand, I find the testimony of Mr. Robertson, Ms. Robertson, Ms. Connelly, Mr. Belcher, Mr. Winslow, and Mr. Martin to be straightforward, generally consistent, and credible as opposed to Complainant's testimony which was not supported or consistent with the objective evidence of the record. Specifically, I find that PBR would not have required Complainant to drive in the condition that she stated she was in based on the corroborated testimony. However, she did not communicate to Mr. Robertson or any of the witnesses that she felt unsafe or ill in the condition she was in, and therefore I find that PBR based its decision to discharge Complainant because of her refusal to perform work, not based on internal complaints or because she was fatigued.

STAA

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. Specifically, 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,[6] 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 her burden of proving a claim under STAA, Ms. Watkins must prove by a preponderance of the evidence that:

[6] 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).

(1) she engaged in protected activity by reporting to PBR a safety concern impacting her ability to safely operate a motor vehicle, (2) PBR knew of the protected activity, (3) she suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action.[7] *See Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (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).[8] If Complainant satisfies her *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 she engaged in protected activity on August 27, 2014. Accordingly, I find Respondent has not violated the STAA.

Protected Activity

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." 49 U.S.C. § 31105(a)(1)(A)(i). Internal complaints to management are protected activity under the whistleblower provision of the STAA. *Williams v. Domino's Pizza*, Case No.

[7] 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 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).

[8] 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").

2008-STA-52 at 6 (ARB Jan 31, 2011). A complaint need not expressly cite the specific motor vehicle standard allegedly violated, but the complaint must "relate" to a violation of a commercial motor vehicle safety standard. *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-41 at 4 (ARB Mar. 27, 2012). An internal complaint must be communicated to management, but it may be oral, informal or unofficial. Id. A complainant must show that she reasonably believed she was complaining about the existence of a safety violation. *Id.* This standard requires the complainant to prove that a person with his expertise and knowledge would have a "reasonable belief" that there was a violation of a commercial vehicle safety regulation. *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-31 at 11 (ARB Sept. 14, 2007). Moreover, a complainant is protected even if the alleged violation complained about is proved ultimately to be meritless. *Allen v. Revco D.S., Inc.*, 1991- STA-00009 slip op. at 6, n. 3 (Sec'y Sept. 24, 1991). However, once an employer adequately addresses a safety concern, an employee's continued complaints may be unreasonable and, therefore, unprotected under the STAA. *Patey v. Sinclaire Oil Corp.*, ARB No. 96-174, ALJ No. 1996-STA-00020 (ALJ Aug. 2, 1996). Complainant also must prove by a preponderance of the evidence that Respondent took adverse action against her.

In her original complaint to OSHA in this matter, Complainant asserted that she engaged in protected activity on August 27, 2014, when she refused to operate her assigned dump-truck while extremely fatigued and when she filed multiple complaints with PBR that PBR-03, the truck she drove, the air conditioning did not work. On May 22, 2014, Complainant contends that she was unable to safely operate a commercial motor vehicle because she was "sweaty and hot." (Tr. 65; JX-2, p. 1). On August 5, 2014, Complainant sent a text message to Mr. Winslow, stating "A/C not working all day," and that she "was too exhausted from the heat to continue driving safely and [she] was done for the day." (JX-2, p.1; Tr. 69). On August 27, 2014, Complainant felt "drained of all [her] energy" and had "a pounding headache." (Tr. 83). In support of her contention that she reasonably perceived violations of commercial safety regulations, Complainant points to 49 C.F.R. § 392.3, which states in part that,

> [n]o driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

However, based on the following facts, Complainant could not have reasonably believed that she was complaining about the existence of a safety violation based on the following facts in her testimony at the hearing. Complainant testified that while she refused to take the last load, she never requested assistance that PBR send a driver to pick her up, she did not call for a cab or request medical treatment for her headache. (Tr. 207). She further testified that she did not tell Mr. Belcher, the mechanic, that she believed PBR-03 was unsafe. (Tr. 177). After her phone call to Mr. Robertson, Complainant drove PBR-03 to the Y-Not store where she spent about 40 minutes organizing all of her property and cleaning out her truck. (Tr. 206, 222). She testified that she did "cool down a little bit at the Y-Not Stop before I actually drove down 29, so I had about 30, 40-minutes break." (Tr. 222). She testified she drove PBR-03 for approximately 45 minutes to PBR's yard where she parked it. (Tr. 209). Complainant testified she drove her own personal vehicle home on August 27, 2014. (Tr. 97). She further stated that she took no medicine while she was on the road or after she arrived home. (Tr. 207). She also testified that she had worked before with a headache. (Tr. 213). Moreover, the mechanic, Jack Belcher, testified that the air conditioning was not discussed with Complainant when he fixed PBR-03 on August 27, 2014. (Tr. 288). Mr. Belcher further testified that had Complainant told him about the problem with the air conditioning, he had all the proper equipment with him to test the air conditioning and that he would have gone forth and tried to fix the problem. (Id.).

Furthermore, based on the evidence, at least two PBR drivers, Mr. Martin and Mr. Winslow have confirmed that they would not refuse a load because they were hot, drove the same truck as Complainant in the past, did not experience the same issues with the truck, were not reluctant to report any issues for repair with the truck to PBR, and did not face retaliation for reporting repair issues with the trucks.

Mr. Martin, a driver at PBR, testified that he drove PBR-3 during his course of his employment with PBR, he did not recall any unusual mechanical problems, and if there were problems with the air conditioning they were always properly fixed (Tr. 243-244; 255). He also testified that he did not experience any further heat coming into PBR-03 in the summertime, than the truck he usually drives, PBR-02, which is also a Sterling truck. (Tr. 246). He testified that PBR fixes mechanical issues with trucks in a timely manner and he has not been reluctant to report mechanical issues. (Tr. 245). Mr. Martin testified that he has not refused a load because it was too hot or the road was too narrow to drive on. (Tr. 255).

Mr. Winslow, a logistics coordinator for PBR Logistics, testified that he did not refuse work because it was hot outside. (Tr. 256-257, 259). Mr. Winslow stated that he tells employees to report issues with trucks immediately so PBR has advanced notice of the problem and can fix it. (Tr. 263).

Furthermore, Respondent has a history of maintaining and repairing its trucks in a timely manner without retaliating against its employees for reporting repair issues for any of the Respondent's trucks. Moreover, Respondent stated that if an employee has stated they are ill, the company would pick that employee up and take them to a safe location.

Mr. Robertson, the owner of the company, stated that Complainant never filed a complaint saying that she was operating an unsafe vehicle. (Tr. 315). Mr. Robertson further stated in his testimony that he understood the A/C was not working in Complainant's truck on the day she was fired. (Tr. 235). Mr. Robertson testified that Complainant did not mention anything about the air conditioning when she called the company on August 27, 2014 about the truck stopping or at any time prior. (Tr. 320). Mr. Robertson testified that Complainant refused her last load on the afternoon of August 27, 2014 because,

> [s]he was hot and evidently sweating. Never said anything else about having a headache, or being sick, or anything, because if she would have been sick and couldn't drive, we could have picked her up and drove her back. (Tr. 321).

He stated that the company's policy (as stated in the handbook) with respect to daily vehicle inspection reports was to fill out a daily inspection reports and to immediately notify the company of any issues with their trucks. (Tr. 308-309, RX 3). He stated it was important to bring any issues with the trucks to the company's attention as soon as possible so they could have a mechanic fix it or get parts needed because the inspection reports are checked the following morning. (Tr. 308-309).

Consequently, under the facts of this case, I find that Complainant has not shown by a preponderance of evidence that she engaged in protected activity as alleged in her complaint.

Conclusion

For the reasons discussed above, I find that Complainant has failed to establish her prima facie case. The evidence does not establish that Complainant engaged in STAA-protected activity under 49 U.S.C. §

31105(a)(1)(A)(i). In other words, Complainant has not proven by a preponderance of the evidence that she engaged in protected activity.

ORDER

The complaint for whistleblower protection under the Surface Transportation Assistance Act filed by Margaret Watkins, with the Occupational Safety and Health Administration on September 4, 2014, is hereby DENIED.

Digitally signed by WILLIAM COLWELL
DN: CN=WILLIAM COLWELL, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.
W.S.C.: LDG

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.