U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 March 2018

CASE NO.: 2016-STA-00021

IN THE MATTER OF

CARL HALL
Complainant
v.

ROADRUNNER INTERMODAL SERVICES, LLC
Respondent

APPEARANCES:

SAVANNAH ROBINSON, ESQ.
Counsel for Complainant

DREW T. PETERS, ESQ.
Counsel for Respondent

BEFORE: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER

This case arises from a complaint filed by Carl Hall (Complainant) on December 21, 2015 against Respondent Roadrunner Intermodal Service, LLC pursuant to the provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended and recodified, 49 U.S.C. § 31105 and implemented by the regulations at 29 C.F.R. § 1978.100 *et. seq.* (2001).

Complainant alleges that Respondent retaliated against him by terminating his employment on December 20, 2015, for reporting defective brakes on Truck #1515 on numerous occasions from November 23, 2015 to December 20, 2015. As a result of Employer's refusal to properly repair the brakes, Complainant was involved in an accident on December 19, 2015.

Following Complainant's timely-filed objections to OSHA's initial finding of no violation, the instant case, pursuant to 29 C.F.R. §1978.106, was referred to the undersigned Administrative Law Judge for hearing. Pursuant to 29 C.F.R § 1978, the undersigned conducted

a hearing on the issues raised by Complaint's termination in Dallas, Texas on August 1-2, 2017 and September 13, 2017.

At the hearing, the parties were afforded the opportunity to call witnesses and introduce evidence. Complainant testified live and called driving expert Thomas Williams. Complainant also introduced 57 exhibits (CX-1 -57) which were admitted into evidence.[1] Respondent called Jason Hammett and introduced 9 exhibits (RX-A to RX-I) which were also admitted into evidence.

This decision is based upon a full consideration of the entire record.[2] Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. ISSUES PRESENTED

1. Whether Complainant engaged in protected activity under the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105(a)(1)(A)(i), by complaining on repeated occasions about poorly functioning brakes on his assigned truck.

2. Whether Complaint's alleged protected activity was a contributing factor, in whole or in part, in any adverse action taken against him by Respondent, including his termination on December 20, 2015.

3. Whether Respondents established by clear and convincing evidence that it would have made the same decision even if Complainant did not engage in the alleged protected activity.

II. STATEMENT OF THE CASE

A. Carl Hall, Complainant

Carl Hall is a 40 year old male commercial truck driver with a CDL license and hazmat and tanker endorsements. (RX-D). Complainant is a high school graduate with less than three years of college who has driven commercially for the past ten years. (Tr. 98-100).

Complainant applied for employment with Respondent through an ad online. (Tr. 99). Complainant was then hired by Respondent on November 5, 2015 as an independent contractor for its Seagoville or Dallas terminal under the management of John B. Hammett. Seagoville is an

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[1]Although Complainant admitted 57 exhibits, it is evident that many of Complainant's logs from CX-11 to CX-40 are inaccurate in that Complainant recreated them on December 20, 2015 in order to get paid as directed by Hammett. (Tr. 239-245). To the extent that there is a dispute about what deliveries were made on a particular date, I have relied on the daily shipping manifests. (RX-I).

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___.

intermodal facility shipping containers by truck. (CX-1; RX-A; Tr. 101-102). Hall worked for Respondent until his termination on December 22, 2015. (RX-D, p. 107.)

Complainant completed pre-employment training and had his truck inspected. He also signed a contract with Respondent regarding Truck 4151. After getting his vehicle weighed, Complainant carried one or two loads on Truck 4151 when he noticed diesel leaking from the engine intakes. (Tr. 103-106).

Complainant's supervisor, John Hammett, dispatched Complainant to retrieve Truck 2203 from Joplin, Missouri. Truck 2203 had been sitting unused in Joplin for about 9 months. Complainant replaced the batteries and drove the truck to Seagoville. While on his way to Seagoville, Complainant stated he smelt oil burning. Complainant returned to Seagoville and then made a trip to Lubbock. Upon his return to Seagoville, Hammett removed Truck 2203 from service to have a mechanic inspect it. (Tr. 107-110; CX-6).[3]

On November 23, 2015, Hammett assigned Complainant to Truck 1515 to transport a load to Lubbock. Before taking the truck, Complainant performed a pre-trip inspection with Hammett which revealed a hole in the red air line. Hammett told Complainant to take the truck to Texas Cowboy, a truck and trailer repair facility, to have the air lines repaired. In addition besides replacing the air lines, Hammett also paid for Texas Cowboy to repair a valve under the hood. Complainant also noted the brakes needed checking and the adapter replaced. Hall was off duty from November 25-29, 2015. (Tr. 111-125; CX-8; CX-10).

On November 30, December 1-6, 2015, Complainant reported a need to repair his truck brakes. Hammett told Hall to take the truck to Texas Cowboy for repairs. On December 10, 2015, Hall reported a brake failure as he was leaving a Chrysler plant while in a school zone. Hall testified he applied the brakes as came to a stop light. Instead of stopping, Hall went through the light into the school zone. After coming to a stop, Hall called Hammett and told him what happened and offered to pay for a brake repair if Respondent would reimburse him. In response, Hammett told him to take the truck to Texas Cowboy for repairs. Texas Cowboy replaced the brakes shoes and air chamber. (Tr. 128-141; CX-28).

This repair apparently did not solve the brake problems for Complainant had to seek further repairs and replace the drums. Unfortunately, this repair did not solve the brake problem for Hall had to return to Texas Cowboy on December 17, 2015 to have a parking valve and an elbow nipp fitting replaced. Hall picked up his truck on December 18, 2015 and made a number of local runs to Mesquite and Carrollton and then parked the truck in front of his house.[4] (Tr. 142-151; CX-39).

On December 19, 2015 between 9:00-10:00, Complainant drove Truck 1515 to a local Valero gas station to purchase a pack of cigarettes. As he approached the gas station, he testified the truck's brakes failed again and hit an overhead crossbar located in an adjacent pawn shop

[3] CX-6 is a voucher showing Hammett paying Hall for retrieval of Truck 2203 from Joplin.

[4] Hammett authorized brake repairs on three occasions- November 23, December 11, and December 18, 2015.

parking lot. The impact was strong enough to tear off part of the roof of his truck and totaled his truck. Complainant knew he had to inform Respondent of the incident but lost the paper with the phone numbers during the accident. (Tr. 152-158; RX-F; RX-G; CX-42).

Since crime was high in the area, Complainant took his vehicle to the truck stop and paid for secure parking. Complainant then tried to contact Marcus, a co-worker, in order to reach Hammett. Complainant did not ask the truck stop for a telephone or search for a pay phone. Eventually, within 24 hours of the accident, Complainant was able to report the accident and the location of his vehicle to Respondent. (Tr. 158-159).

When he spoke to Hammett, Complainant told him the brakes were not properly repaired. In turn, Hammett terminated Complainant for not immediately reporting the accident. Complainant was later able to secure new employment in February 2016, although it was a lesser quality job with lower pay. Complainant's current job pays similar to his position at Respondent. (Tr. 160-166).

On cross examination, Complainant testified he did not think he was in any way responsible for the truck hitting the overhead object despite there being several ways to get into the parking lot without having to navigate around the overhead object. (Tr. 179-182, 195).

Complainant stated he did not contact the police or take any photos of the vehicle after his December 20, 2015 incident although company rules directed he do so. Complainant testified he reported the accident the following day at 3:00 pm after he was able to call his sister to pick him up from the gas station. (Tr. 210-213, 220).

When asked about his daily logs, Complainant alleged Hammett "got rid" of his logs which forced him to recreate them in order to get paid. Specifically, Complainant stated he recreated logs on November 22, 24, 30, December 1-7, 9-19, 2015. He recreated his logs after his termination on December 20, 2015 so he could receive his last paycheck before the Christmas holiday. (Tr. 235-242). Later, Complainant stated he recreated his logs three times, because his log books continued to go missing. Complainant elaborated by alleging Hammett took his book from him due to reporting the brakes. (Tr. 244-246).

Upon examination by Respondent, Complainant stated his vehicle would roll two to five with the brakes set but still decided to try to pull the hood of the vehicle underneath the bar. (Tr. 400-401).

B. Thomas Williams, Jr.

Complainant called Williams as an expert witness in professional truck driving. For the past 18 years, Williams has driven straight trucks, combination trucks with a flat bed, liquid tanker trailer, and pneumatic trailers. (Tr. 34-35). Williams testified that a truck driver is responsible for pre-trip inspection of a truck which includes checking the vehicle's brake lines. The brake inspection involves a visual inspection of the brakes, checking the brake lines pressure from the truck to the trailer, the rotors, and brake drums. The driver is also responsible for testing the brakes and making sure they respond and engage. (Tr. 36-38).

Williams stated that if a driver experiences a brake problem while driving the truck, he must try to get the truck to a safe place, report the problem, and wait for a repair service. A driver must refuse to drive the truck unless he is satisfied that driving it will not endangering the public. (Tr. 37-39).

Concerning Complainant, Williams testified Complainant did take precautions as far as reporting the brakes as no safe and went above his responsibilities as a truck driver. (Tr. 40). In examining Complainant's vehicle inspection reports, Williams stated Complainant should have not driven his vehicle if he noted defects during his pre-trip inspection. (Tr. 59-61). Williams also admitted Complainant noted defects that affected safety but continued to operate the vehicle anyway based on the records. (Tr. 66-67). On redirect examination, Williams stated the brakes defects noted in the driver's daily logs were located on the truck since no trailer was listed. (Tr. 69-75).

C. John Hammett[5]

Hammett serves as the general manager of the Seagoville and Dallas truck facilities for Respondent. Hammett stated Respondent employed 15 drivers of which 3 had Hazmat endorsements. As part of the drivers' responsibilities, they were required to turn in daily driving logs and daily manifests used to develop payrolls, railroad passes, and fuel receipts.[6] Complainant submitted all of his paper work except for the logs which he recreated on several occasions. (Tr. 410-414).

Between November 23 and December 18, 2015, Hammett was aware that Complainant's truck was experiencing brakes problems and sent the vehicle to the repair shop several times to "get the brakes work done." Hammett testified he never pulled the truck from service. He also stated that he followed what Texas Cowboy recommended since Hammett had no experience as a truck mechanic. (Tr. 415-417).

Upon examination by Respondent, Hammett never denied that Truck 1515 needed its brakes repairs and followed the advice of the vendor. (CX-44; Tr. 419).

Regarding Complainant's trip from Joplin, Missouri back to Texas, Hammett stated he remembered discussing Complainant's reports of oil burning with him and was upset Complainant did not perform a pre-trip inspection before leaving. Upon Complainant's return to Texas, Hammett sent Truck 2203 to a mechanic to remedy the oil smell. The mechanic found no problem with the vehicle after running diagnostics. (Tr. 440-441).

Hammett then recalled how Complainant was assigned Truck 1515. Hammett needed a driver with a Hazmat certification and chose Complainant to carry the load and furnished Truck 1515 to him. There was a verbal agreement for Complainant to rent the vehicle for $75.00 a day. (Tr. 441-444).

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[5] Hammett has worked as terminal manager for about 20 years. (Tr. 426).

[6] Besides Hammett and the drivers, Respondent employed a dispatcher, Barbara Browning, and an office clerk, Niki Coral. (Tr. 427).

In response to Complainant's account of going through a school zone, Hammett testified that the school zone was not on Complainant's route and that he should have observed all posted signs. Despite Hammett telling Complainant to bring the vehicle in from an inspection, Complainant never complied. At Texas Cowboy, Hammett was told only the brake shoes kits needed repairs, not the brake drums. (Tr. 455-457).

Moreover, Hammett denied destroying Hall's logs or directing others to do so. He also denied ever disciplining him for reporting repairs to be made. (Tr. 463-465).

Concerning the accident of December 19, 2015, Hammett learned of it on the following day December 20, 2015 at about 3:15 pm when Hall called and told him what happened. (Tr. 468-470). In turn, Hammett called Bob Cheatham, safety director, who told him to terminate Hall on December 22, 2015 for not following company accident procedures by immediately reporting the accident. (Tr. 480-484).

Upon questioning by Complainant's Counsel, Hammett testified Respondent has a progressive disciplinary system but that Complainant did not receive any discipline before his termination. (Tr. 500-502).

On December 23, 2015, Hammett had the brakes inspected which showed the brakes were not adjusted properly and that truck could be operated without a problem at slow speeds. (Tr. 518-519; CX-44).

D. Complainant's Exhibits

CX-8 shows Complainant noted the brakes of Truck 1515 needed to be checked on his first day in service as a driver of the vehicle. (CX-8, p. 1). Complainant also indicated via text message that the vehicle could not be driven to Lubbock, Texas due to the brakes. (CX-13, p. 1).

Driver's daily logs at CX-11-12, 16-22, 24-27, 29, 31-32, 35-38, and 40 show Complainant noted brake deficiencies or defects on November 24 and 30, December 1-13, 15-19, 2015.[7]

CX-23, a settlement report, shows Complainant being reimbursed for driving expenses on November 27, 30, December 1-6, 2015 in the amount of $2,720.47. This is supported by daily manifests for the same period. A subsequent settlement report for December 7-10, 12, 2015, shows Hall being paid for trips to Mesquite and Carrolton, Texas. (CX-23, pp. 1-13). This is also supported by daily manifests and a settlement report. (CX-26, pp. 1-9).

Complainant's December 11, 2015 text message wherein he requests to have the truck's brakes inspected and repaired is found at CX-28. (CX-28, p. 1). CX-30 indicates Texas Cowboy Repair inspected the vehicle and replaced its four brake shoe kits and a brake chamber on December 11, 2015. (CX-30, p. 1). CX-39 indicates Truck 1515 returned to Texas Cowboy Repair on December 18, 2015 for a parking valve replacement and elbow nipp fitting. (CX-39, p. 1).

[7] As noted above, Complainant admitted he recreated these logs on December 20, 2015. (Tr. 236-242, 305-307).

CX-44 contains a brake inspection report of Truck 1515 dated December 23, 2015 performed by Southern Diesel Repair. The only discrepancy noted in the inspection was that the brakes were not adjusted properly and were "too loose." The report also noted "going slow, no problem. Driving fast won't stop." (CX-44, pp. 1-2).

E. Respondent's Exhibits

Respondent has an incident reporting policy that mandates that all accidents are to be reported immediately regardless of severity or fault. (RX-B, p. 4; RX-C, p. 1). The safety policy also states that discipline, as it relates to accidents, will be dealt with on a case-by-case basis. (RX-B, p. 4).

The policy further states that:

> (a)ccidents, in which gross negligence is found to be the cause, can be considered grounds for termination. Failure to report an accident will be dealt with suspension or termination as well.

(RX-B p. 4).

Respondent's reporting policy further states all accident must be reported immediately regardless of severity or fault 24 hours a day/7 days a week/365 a year to Great West Casualty Company, insurance contact; Bob Cheatham, safety director; or after hours to Corporate Safety. The accident procedures also call for the driver to contact police or document the attempt in the event police will not respond. The driver is also instructed to take photos of all vehicles or property involved and to complete the accident report supplied by MGAS/RRIS. The incident must also be phoned-in to insurance and to Corporate Safety the day it occurs. (RX-C, p. 1).

RX-E contains the maintenance, inspection, and repair records for Truck 1515. On November 23, 2015, Texas Cowboy Repair replaced two blue and red air lines to address the air leaks. (RX-E, p. 8).

IV. THE PARTIES' POSITIONS

A. Complainant

In his brief, Complainant argues his reporting of the brake failure of Truck 1515 was a factor in his termination. Specifically, Complainant asserts he identified the brake issues multiple times and brought it to Hammett's attention. Further, Truck 1515 was unrepaired on December 19, 2015, with the needed part to complete the repair due on the following day.

Although Respondent repaired the truck three times, none of the repairs completely resolved the brake deficiencies. On December 19, 2015, Complainant stopped at a gas station to buy cigarettes, and the truck's brakes failed as it was coming into a parking position. As a result, the truck struck an overhead beam and ripped the top of the truck's cab. Complainant then

parked the truck in a secured location and called a co-worker for the telephone number to report the incident to Respondent which he did within 24 hours of the accident.

Upon inspection of the vehicle after the incident, the repairmen found the brakes were not properly adjusted. As such, Complainant asserts he was terminated immediately after the wreck for reporting faulty brakes and that the wreck was the result of the brakes failing. Moreover, Complainant contends there was a negative attitude from Hammett towards making the brake repairs. Finally, Complainant argues Respondent's allegation that he was fired for not reporting the accident is merely pretext.

B. Respondent

On the other hand, Respondent contends Complainant was never disciplined, reprimanded, or terminated for raising Truck 1515's brakes. Respondent also asserts Complainant's driver's logs were unreliable since he recreated all logs submitted into evidence after his termination. Rather, Respondent alleges every time Complainant reported brake issues with Truck 1515, Hammett instructed the truck be taken in for repairs.

On December 11, 2015, Complainant asked Hammett if he could take Truck 1515 to the repair shop. Hammett instructed Complainant to bring the truck to Texas Cowboy Repair where numerous brake parts were replaced that day. Further repairs were performed on December 18, 2015.

Regarding the December 19, 2015 accident, Respondent contends the post-incident inspection showed the brakes worked properly at slow speeds and that the driver of the truck should have noticed the improper adjustment of the brakes.

Regarding Complainant's termination, Respondent argues Complainant did not follow accident procedures by not informing Respondent, contacting police, or taking any photographs. Despite Respondent's policy that accidents should be reported immediately, Complainant did not report the incident until the following day. Finally, Respondent contends the decision to terminate Complainant came from safety director Bob Cheatham who was unware of Complainant's prior brake complaints.

V. DISCUSSION

A. 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, 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 his demeanor while testifying and considering what he had to say versus the demeanor and testimony of Respondent's witness, I find no reason to credit Complainant's testimony.

Initially, I note Complainant admitted to recreating his driver's logs at the formal hearing. Specifically, Complainant stated the logs submitted into evidence were created on December 20, 2015, the day after the incident in question. (Tr. 236-242). More important, Complainant also admitted his logs were likely inaccurate. (Tr. 239-240, 253-254). As such, I detract weight from his testimony wherein he stated he repeatedly noted defects in the vehicle's brakes in his logs since these logs are inaccurate and were recreated after his termination.

Next, while Complainant alleged Hammett stole or destroyed his driver's logs, he also admitted he never saw Hammett remove his personal items from the truck or heard of Hammett doing these actions. (Tr. 245-246, 255-256). Rather, Complainant offered a baseless allegation against Hammett without any evidence to support his claim. Accordingly, I accord no probative value to Complainant's testimony regarding Hammett stealing or destroying his driver's logs or other personal items.

Regarding the incident at issue, Complainant was aware of the area and of the overhead bar. Complainant also admitted there were numerous entrances to the gas station that do not involve having to navigate around the overhead restrictive bar. (Tr. 176-183). Complainant even acknowledged there was another service station near the gas station where the accident occurred. (Tr. 176-179). In addition, Complainant also admitted he knew his truck would not fit under the

overhead restrictive bar. (Tr. 181, 185). Further, despite admitting Truck 1515 would roll two to five feet when parked, Complainant refused to admit he could have parked the truck anywhere else. Rather, Complainant testified he parked underneath the overhead restrictive bar since the gas station was in a "high crime area." (Tr. 188-190, 371, 400-401). Moreover, while Complainant testified he was driving at a slow speed at the time of the accident, photos of the truck taken after the accident reveal the roof of the truck to be severely damaged and torn off. (Tr. 398-400; RX-G, pp. 1-12). Accordingly, I also detract weight from Complainant's testimony regarding the December 19, 2015 accident.

Finally, although he received a copy of Respondent's incident reporting policy and knew he had to report the accident immediately, Complainant did not call the police or take any photographs after his December 19, 2015 accident. (Tr. 157, 207-210, 373). Although Respondent's incident reporting policy states an accident should be reported immediately, Complainant did not report the accident until the next day and contends the policy allows a driver 24 hours to report an incident. (Tr. 22, 210-212, 468). While Complainant alleges he could not report the incident from the scene due to an inoperable cell phone, he also admitted he did not call the police, ask someone at the gas station to borrow a phone, call an operator, use the company's Nextel device to send a message, look for a pay phone, use the Internet to search for Respondent's number, or retrieve his permit book from the truck. (Tr. 157, 219-222, 225, 228-231, 372-374). As such, I was not impressed with Complainant's testimony concerning his account of the alleged accident and accord no probative value to his testimony.

Indeed, based on the inconsistencies in Complainant's testimony, I accord little to no probative value to his testimony. The evidentiary inconsistencies discussed above detract from the weight to be accorded to Complainant's testimony and his claim in general.

On the other hand, I find the testimony of John Hammett to be credible and consistent with Respondent's safety and reporting policies. Specifically, Hammett responded to Complainant's reports of defective brakes by sending the truck to Texas Cowboy Repair on three occasions and followed the mechanic's recommendations on all three occasions. (Tr. 417-419, 456-459). In addition, Hammett testified that at no point in Complainant's short term employment did he discipline, reprimand, or take adverse action against him due to his complaints of repeated brake problems. No action was taken against Complainant by Respondent until he failed to immediately and properly report his accident on December 19, 2015. Instead, Complainant waited until 3:00 pm. on December 20, 2015 to notify Respondent of the incident. Accordingly, I credit Hammett's testimony and find it to be straight forward, generally consistent, and credible, as opposed to Complainant's testimony which is not consistent with the objective evidence of record.

B. The Statutory Provision

The employee protection provisions of the STAA provide, in pertinent part:

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

> (A)
>
> (i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

49 U.S.C. § 31105(a). Thus, under the employee protection provisions of the STAA, it is unlawful for an employer to impose an adverse action on an employee because the employee has complained or raised concerns about possible violations of DOT regulations. 49 U.S.C. § 31105(a)(1)(A). *See e.g., Reemsnyder v. Mayflower Transit, Inc.*, Case No. 1993-STA-4 @ 6-7 (Sec'y Dec. and Ord. On Recon. May 19, 1994).

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of enforcement through formal proceedings." (Emphasis added). *Davis v. H.R. Hill, Inc.*, Case No. 1986-STA-18 at 2 (Sec'y Mar. 19, 1987).

C. Burden of Proof

In 2007, Congress amended the STAA's burden of proof standard as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). Under the amendment, STAA whistleblower complaints are governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b)(AIR 21). Under the AIR 21 standard, a complainant must show by a "preponderance of evidence" that a protected activity is a "contributing factor" to the adverse action described in the complaint. 49 U.S.C. § 42121(b)(2)(B)(i); see also 75 Fed. Reg. 53545, 53550. The employer can overcome that showing only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545, 53550; 49 U.S.C. § 42121(b)(2)(B)(i). *White v. Action Expediting, Inc.,* ARB No. 13-015, ALJ No.2011-STA-11 (ARB June 6, 2014); *Clarke v. Navajo Express, Inc.*, Case No. 2009-STA-18 at 4 (ARB June 29, 2011) (citing *Williams v. Domino's Pizza*, Case No. 2008-STA-52 at 6 (ARB Jan. 31, 2011)).

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams, supra* at 6. The complainant can succeed by "providing either direct or indirect proof of contribution." *Id*. "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." *Id*. If direct evidence is not produced, the complainant must "proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating" the complainant's employment. *Id*. "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Id*. (*citing Riess v. Nucor Corporation-Vulcraft-Texas, Inc.*, Case No. 2008-STA-11 at 3 (ARB Nov. 30, 2011)). If the complainant proves pretext, an ALJ may infer that the protected activity contributed to the termination, but he is not compelled to do so. *Williams, supra* at 6.

If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Williams, supra* at 6 (citing 49 U.S.C. § 4212(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Id*. (citing *Brune v. Horizon Air Indus., Inc.*, Case No. 2002-AIR-8 at 14 (ARB Jan. 31, 2006).

D. The Protected Activity

An employee engages in STAA-protected activity where 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*, *supra* at 6. 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 he reasonably believed he 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).

49 C.F.R. § 392.7 states in part that "[n]o commercial motor vehicle shall be driven unless the driver is satisfied that the following parts are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed: service brakes, including trailer brake connections, parking (hand) brake…."

After a review of the record in this matter, I find Complainant engaged in protected activity when he complained of the faulty brakes on Truck 1515. On November 24, 2015, Complainant reported Truck 1515 could not be driven to Lubbock due to the defective brakes. (CX-8, p. 1; CX-13, p. 1). Thereafter, on December 11, 2015, Complainant again reported Truck 1515's brakes were defective and requested an inspection and repair of the brakes. (CX-28, p. 1). The record indicates Texas Cowboy Repair inspected the vehicle and replaced its four brake shoe kits and a brake chamber that same day. (CX-30, p. 1). On December 18, 2015, Complainant again reported an issue with the brakes, and the record evidence indicates Truck 1515 returned to Texas Cowboy Repair that same day for a parking valve replacement and elbow nipp fitting. (Tr. 142-151; CX-39, p. 1).

Moreover, Respondent does not dispute Complainant reported brake issues associated with Truck 1515 on November 24, December 11, and December 18, 2015. In fact, Hammett testified he was aware that Truck 1515 was experiencing problems with its brakes and sent the vehicle to the repair shop several times to "get the brakes work done." In addition, he testified he followed the recommendations of Texas Cowboy Repair. (Tr. 415-419; CX-44). Thus, the record supports the finding that Complainant engaged in protected activity under the STAA on November 24, December 11, and December 18, 2015, when he reported problems with Truck 1515's brakes to Hammett.

While Complainant attempts to rely on his driver's logs to show he reported defects with Truck 1515's brakes over a twenty day period, I find his reliance on those logs are self-serving and not supported by the objective evidence. As discussed above, Complainant admitted he recreated his logs on December 20, 2015, after his termination of employment by Respondent. Given the inaccuracies and the fact that the logs do not reflect the actual work Complainant performed, I find these driver's logs are insufficient to show Complainant had reported problems with Truck 1515's brakes on November 30 and December 1-7, 9-19, 2015. (Tr. 235-242). Consequently, I find Complainant's assertion that he noted the truck's faulty brakes in his driver's logs is not a reasonable complaint based on the circumstances of this case. As such, it does not constitute protected activity.

In sum, since the record contains sufficient information to show Complainant concerns regarding Truck 1515's brakes on November 24, December 11, and December 18, 2015 were reasonably and objectively related to safety, Complainant has established he engaged in protected activity.

E. Respondent's Adverse Action

The STAA states that an employer may not "discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because of his/her protected activity." 49 U.S.C. § 31105(a)(1). In *Long v. Roadway Express, Inc.,* Case No. 1988-STA-31 (Sec'y Sep. 15, 1989), the Secretary held any employment action by an employer which is unfavorable to the employee's compensation, terms, conditions, or privileges of employment constitutes an adverse action. Thus, regardless of the employer's motivation, proof that such a step or action was taken is sufficient to meet the employee's burden of

establishing that the employer took adverse action against the employee. *Id*. In a case tried fully on the merits, the relevant inquiry is whether the complainant "established, by a preponderance of the evidence" that the employer subjected him to adverse action in retaliation for protected activity. *Walters v. Exel North American Road Transport*, Case No. 2002-STA-3 at 2 (ARB Dec. 10, 2004).

In August 2010 the Secretary of Labor issued new implementing regulations under the STAA that define the scope of discipline or discrimination actionable under the STAA's whistleblower protections. 29 C.F.R. § 1978.102. Those regulations make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]" 29 C.F.R. §§ 1978.102(b), (c). The Administrative Review Board (ARB) has recognized that the regulations broaden prior interpretations of what constitutes an adverse action under the STAA. *Strohl v. YRC, Inc*., ARB No. 10-116, ALJ No. 2010-STA-35 (ARB Aug. 12, 2011).

In this case, there is no question that Respondent's termination of Complainant constitutes adverse action.

F. Contributing Factor

A complainant can prove that his protected activity was a contributing factor either through direct or indirect evidence of a discriminatory motive. *Williams v Domino Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan 31, 2011). "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." *Id*. In the absence of direct evidence, complainant can raise an inference of a discriminatory motive by "proving by a preponderance of the evidence that retaliation" was a contributory reason for terminating his employment. *Id*. For example, complainant may "discredit the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Id; Riess,* ARB 08-137, slip op. at 6. If the complainant proves pretext, the court "may infer that the protected activity contributed to the termination," although it is not compelled to do so. *Williams,* ARB 09-092, slip op. at 5.

An inference of causation may be raised if the adverse action is close in time to the protected activity. While not dispositive, the closer the temporal proximity is, the stronger the inference of a causal connection. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-30 (ARB Feb. 29, 2012); *see e.g., Bergeron v. Aulenback Transportation, Inc.*, 91-STA-38, slip op. at 3 (Sec'y June 4, 1992) (concluding that an inference was raised when the discharge immediately followed the protected activity); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991) (finding a causal connection where the employee was fired immediately after bringing the lawsuit). For example, temporal proximity alone "will not support an inference in the face of compelling evidence that [Respondent] encouraged safety complaints". *Moon v. Transp. Drivers, Inc*., 836 F.2d 226, 229-30 (6th Cir. 1987) (finding no causal link between protected activity and the adverse employment action where the record showed that Respondent periodically held sessions, during which complainant and other drivers were invited to air their safety concerns, and complainant testified that he felt free to call his superior to complain about vehicle problems); *see also Robinson v. Northwest Airlines, Inc*., ARB No. 04-041, ALJ No.

2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005); *Riess v. Nucor Corp. Vulcraft-Texas, Inc.*, ARB No. 08-137, 2008-STA-11 (ARB Nov. 30, 2010). Further, an inference of causation may be negated by intervening events. *Johnson v. Rocket City Drywall*, ARB No. 05-131; ALJ No. 2005-STA-24 (ARB Jan. 31, 2007).

After examining the evidence submitted by the parties, I find Complainant failed to demonstrate by a preponderance of the evidence that his safety complaints were a factor in his discharge. Rather, I find Respondent's decision to terminate Complainant had nothing to do with his protected activity. The evidence indicates Bob Cheatham, Respondent's Director of Corporate Safety, terminated Complainant for failing to immediately and properly advise Respondent of the December 19, 2015 accident in violation of its accident and incident reporting policy. (RX-B, p. 3; RX-C, p. 1; RX-D, p. 28).

While Complainant is correct in that he reported the accident within 24 hours, it is nonetheless clear that Respondent's accident/incident reporting policy requires drivers to report accidents immediately, and not 18 hours later. The failure to follow progressively discipline does not imply a pretext for there is no evidence that Respondent treated other drivers with lesser penalties, such as suspension, when it terminated Hall. Rather, Complainant was fired for a legitimate, non-discriminatory reason- his refusal to timely report an accident.

In particular, I note Complainant did not present any evidence to conclusively link his termination to his reports of faulty brakes. While Complainant attempts to use his own self-serving testimony in an attempt to show his reports were a factor in his termination, he also fails to mention the events that occurred immediately after the accident and his failure to follow Respondent's accident/incident reporting policy. Indeed, Complainant failed to call the police, ask to borrow a phone, contact an operator, search for a pay phone, use the Internet to find Respondent's phone number, or attempt to recover his permit book and other materials from his truck. (Tr. 222-225, 228-231, 373-374). Complainant also admitted he did not take any photos of the vehicle after the accident. (Tr. 210-213).

Respondent's incident reporting policy mandates that all accidents are to be reported immediately regardless of severity or fault. (RX-B, p. 4; RX-C, p. 1). The safety policy also states that discipline, as it relates to accidents, will be dealt with on a case-by-case basis. (RX-B, p. 4). The reporting procedures also call for the driver to contact police and take photos of all vehicles or property involved. (RX-C, p. 1). After locating Truck 1515 and investigating the accident, Hammett reported the incident to safety director Bob Cheatham, who made the decision to terminate Complainant for his failure to timely and properly report the accident. (Tr. 480-483).

Moreover, Hammett testified that Complainant was not terminated because he complained about his truck's brakes. Rather, the record reflects that Complainant was not terminated, disciplined, or reprimanded in any manner for reporting the truck's faulty brakes or for refusing to drive the truck. (Tr. 280-281). Indeed, each time Complainant noted the truck was experiencing brake problems, Hammett sent the vehicle to the repair shop and followed the recommendations of Texas Cowboy Repair. (Tr. 415-419; CX-44). Therefore, I find the record is devoid of any evidence linking Complainant's termination to his safety complaints.

Next, Complainant also relies on indirect evidence in an attempt to demonstrate Respondent's proffered reasons for his termination are merely pretext. However, I find that Complainant failed to show by a preponderance of the evidence that Respondent's reasons for termination is unworthy of credence. As discussed above, Complainant was fired for a legitimate, non-discriminatory reason- his refusal to timely report an accident.

While Complainant attempts to show Hammett refused to allow a full repair of the brakes, I find this contention lacks merit. Contrary to Complainant's assertion, the record evidence reflects Respondent addressed Complainant's complaints and instructed the vehicle be taken in for repairs. In addition, Complainant also raises a similar argument that there was hostility towards him over the need for repairing the brakes by Hammett and Respondent. Again, I reject this assertion due to the lack of objective evidence in support of this argument. As discussed above, I do not credit Complainant's testimony wherein he alleged Hammett stole or destroyed his driver's logs and other personal items. (Tr. 245-246, 255-256). Despite Complainant's contention, I find Hammett addressed Complainant's concerns and relied on the recommendations of the repairmen. (Tr. 419, 456-459).

Complainant also contends Respondent's proffered reasons for his termination are merely pretext since the defective brakes on Truck 1515 caused the December 19, 2015 accident. In support of this position, Complainant relies on the December 25, 2015 inspection by Southern Diesel Repair which found the brakes were not adjusted properly. (RX-E, pp. 26-27). However, Complainant fails to consider that the inspection report also indicated that the truck's brakes worked properly at slow speeds, which Complainant claims he was doing at the time of the accident. (*Id.*; Tr. 398-400). However, in examining the photographs of the vehicle after the incident, it is evident the damage to the vehicle could not have occurred at a slow speed. (RX-G, pp. 1-12). Further, Complainant admitted his vehicle would roll two to five feet with the brakes set but still decided to park the vehicle under the overhead restrictive bar. (Tr. 400-401).

Finally, Complainant claims Respondent's incident reporting policy is unreasonable and was impossible for Complainant to follow under the circumstances. Initially, I note, similar to my discussion above, that it was not impossible for Complainant to adhere to Respondent's reporting policy after the accident. Complainant failed to provide evidence as to why he could not contact the police or take any photographs of the damaged vehicle and property. In like manner, Complainant failed to offer any evidence to show he attempted to contact Respondent until the afternoon of December 20, 2015. As such, I also reject Complainant's contention that Respondent's reporting policy allowed him 24 hours after the accident to report it to Respondent.

Similarly, I reject Complainant's argument that Respondent failed to follow its own procedures for discipline and termination. While Complainant is correct that Respondent has a progressive disciplinary system and the reporting procedures handout does not specify any penalties for failing to report an accident, Complainant does not mention that Respondent's safety policy contained in its Driver Safety Guidebook states "failure to report an accident will be dealt with suspension or termination as well." (Tr. 500-502; RX-C, p.1; RX-B, p. 4).

In addition, Complainant does not consider that Respondent's policy also states that "accidents, in which gross negligence is found to be the cause, can be considered grounds for termination." (RX-B, p. 4). As mentioned above, Complainant knew of the overhead restrictive bar when parking his truck and was aware of other possible locations to park the vehicle, but he still proceeded to attempt to park the truck under the bar. (Tr. 188-190, 371). After the accident, Complainant failed to call the police, ask to borrow a phone, contact an operator, search for a pay phone, use the Internet to find Respondent's phone number, or attempt to recover his permit book and other materials from his truck. (Tr. 222-225, 228-231, 373-374). As such, I find Respondent terminated Complainant's employment for a legitimate, non-discriminatory reason-his refusal to timely report an accident.

Therefore, I conclude Complainant is unable to prove, through direct or circumstantial evidence, that any safety complaints were a factor, either alone or in combination with other factors, in Respondent's decision to terminate his employment on December 20, 2015.

V. CONCLUSION

The undersigned has considered all of the evidence submitted by the parties, but remains of the opinion that Respondent terminated Complainant for his failure to timely and properly report his accident of December 19, 2015. Indeed, Complainant failed to produce any evidence that his protected activity played any role in his termination Therefore, I find he has not met his burden under the STAA and dismiss the instant charges as lacking merit.

VI. ORDER

In view of the foregoing, **IT IS HEREBY ORDERED** that the claim in the above-captioned matter file by Complainant Carl Hall against Respondent Roadrunner Intermodal Service, LLC is **DISMISSED** with prejudice.

SO ORDERED this 27th day of March, 2018, at Covington, Louisiana.

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of

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

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

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

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

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

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

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

petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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