

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 February 2017

Case No.: 2016-STA-00024

In the Matter of:

ALEX HERRITZ,
Complainant,

v.

INDEPENDENT OPERATOR, INC.
AND JERRY KISSINGER,
Respondents.

Appearances: Peter L. La Voie and Paul O. Taylor
Truckers Justice Center
Burnsville, Minnesota
For the Complainant

Richard A. Westley
Westley Law Offices, S.C.
Madison, Wisconsin
For the Respondents

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This proceeding arises from a claim of whistleblower protection under Section 405 of the Surface Transportation Assistance Act (“STAA”), as amended.¹ The STAA and implementing regulations² protect employees from discharge, discipline and other forms of discrimination for engaging in protected activity, such as reporting violations of commercial motor vehicle and safety rules or refusing to operate a vehicle because of its unsafe condition. In this case, the

¹ 49 U.S.C. § 31105 (2015).

² 29 C.F.R. Part 1978 (2015).

Complainant requested a hearing before the Office of Administrative Law Judges because he objects to a finding by the Occupational Safety and Health Administration (“OSHA”) that Respondents did not commit a violation of the STAA. The Complainant seeks reinstatement, back wages, compensatory damages, punitive damages, interest, attorney fees and costs and abatement of the violation.

STATEMENT OF THE CASE

On September 3, 2014, Alex Herritz (“Complainant” or “Herritz”) filed a complaint against Independent Operator, Inc. (“IO”) and Jerry Kissinger (collectively “Respondents”) with OSHA, alleging retaliation against him in violation of the STAA. The Complaint states the complainant was discharged for complaining about violations of commercial vehicle safety regulations and because he refused to operate a commercial motor vehicle in violation of such regulations.

On March 3, 2016, OSHA issued its findings on the Complaint. It determined that the Complaint was timely filed and that Complainant and Respondents are covered by the STAA. However, it found no reasonable cause to believe that Complainant’s protected activity contributed to his termination. It therefore dismissed the complaint. Complainant objected to the determination and requested a hearing on March 8, 2016.

A hearing in this matter was held on August 31, 2016 in Milwaukee, Wisconsin. The parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. Part 18A. At the hearing, the date for submission of closing argument briefs was set as October 31, 2016. Because of a delay in receiving hearing transcripts, the date was extended to November 30, 2016. Both parties timely filed briefs. In reaching my decision, I have reviewed and considered the entire record, including the exhibits admitted into evidence, the testimony at the hearing, and the post-hearing briefs of the parties.

ISSUES

The issues in this case are whether Complainant engaged in protected activity within the meaning of the STAA; whether Respondent violated the STAA by discharging the Complainant; and, if so, whether Respondent has established by clear and convincing evidence that it would have terminated Complainant even absent protected activity. The Complaint alleges violations under 49 U.S.C. § 31105(a)(1)(A)(i), § 31105(a)(1)(B)(i), and § 31105(a)(1)(B)(ii).

APPLICABLE STANDARDS

The Employee Protection section of the STAA provides in part:

§ 31105. Employee protections

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

(A)(i) the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because-

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition;

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

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

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

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

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

enforcement agencies, they need express protection against retaliation for reporting these violations.”³

STAA whistleblower complaints are governed by the legal burdens set forth in whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“Air 21”).⁴ In order to prevail on his case, Mr. Herritz must show, by a preponderance of the evidence, that he engaged in a protected activity, that Respondent took an adverse employment action against him, and that the protected activity was a contributing factor to the adverse action. If Complainant does not prove one of these elements, his claim fails.⁵ If Complainant proves that Respondents discriminated against him because of his protected activity, then Respondents may avoid liability by showing by clear and convincing evidence that they would have taken the same unfavorable employment action in the absence of the protected activity.⁶

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CONTENTIONS OF THE PARTIES

Complainant’s Contentions:

Complainant alleges that he was discharged because he filed complaints with Respondents related to violations of commercial vehicle safety regulations and refused to operate a commercial vehicle because such operation would result in violations of commercial vehicle safety regulations. Specifically, he contends that on March 26, 2014 he complained to Respondents that he could not properly secure a barrel of lactic acid he was supposed to transport, and that this was a safety issue. He contends he was told by Respondent Jerry Kissinger that he had to load the barrel. He contends that the decision to terminate him was made immediately after his complaints about securing the barrel. Complainant alleges that his refusal to haul the unsecured load constitutes protected activity under 49 U.S.C. § 31105(1)(a)(A)(i), 49 U.S.C. § 31105(a)(1)(B)(i) and 49 U.S.C. § 31105(a)(1)(B)(ii). He alleges that his complaints regarding the securement of the load were related to violations of 49 C.F.R. § 392.9. Complainant contends that his refusal to haul the unsecured barrel of lactic acid constitutes protected activity even if actual violations of commercial vehicle safety regulations would not have occurred. Complainant also contends that his protected activity contributed to his discharge. He further contends that Respondents have not shown by clear and convincing evidence that they would have discharged him absent the protected activity. Complainant seeks reinstatement to his position as a truck driver, back wages, compensatory and punitive damages, interest, attorney fees and costs and abatement of the violation. *See Complaint, Complainant’s*

³ *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

⁴ 49 U.S.C. § 42121(b) (2015). *See* 49 U.S.C. § 31105(b)(1).

⁵ *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035 (Sept. 30, 2016); *Dick v. Tango Transport*, ARB No. 14-054 (Aug. 30, 2016); *Pattenaude v. Tri-Am Transport*, ARB No. 15-007 (Jan. 12, 2017).

⁶ 49 U.S.C. § 42121(b)(2)(B); *see Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035 (Sept. 30, 2016); *Pattenaude v. Tri-Am Transport*, ARB No. 15-007 (Jan. 12, 2017); *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039 (May 13, 2014), PDF at 7-10; *Dick v. Tango Transport*, ARB No. 14-054 (Aug. 30, 2016).

Prehearing Statement, Complainant's Proposed Findings of Fact and Legal Argument and testimony.

Respondents' Contentions:

Respondents deny that Complainant engaged in protected activity. They deny that Complainant refused to operate his truck because of an alleged violation of a safety regulation or because of a reasonable apprehension of serious injury to himself or the public. Respondents state that even if Complainant did refuse to operate the vehicle, he cannot show protected activity because section 31105(a)(2) requires that in order to qualify for protection under 31105(a)(1)(B)(ii), Complainant must show that he sought and was unable to obtain correction of the safety condition from Respondents. Respondents deny that Complainant made any safety-related refusals on March 26, 2014, and deny that Complainant was terminated because of a complaint regarding securement of the barrel of lactic acid. Respondents allege that the decision to discharge Complainant was made before the "complaint" was made, and resulted from Complainant's false claim for waiting time ("detention") in connection with his delivery of cargo to Carthage, Missouri before he picked up the barrel of lactic acid. Respondents also state that Complainant's "foul language and abusive behavior" and falsification of driver logs were further grounds for his termination. *See Respondent's Prehearing Statement and Post-Hearing Brief.*

B. SUMMARY OF THE EVIDENCE

STIPULATIONS

Prior to the hearing, Complainant and Respondents filed a Joint Stipulation of Agreed Facts. (Joint Exhibit 5). The parties stipulated to the following:

1. Complainant Alex A. Herritz resides at 1523 Hawthorne Ave., Janesville, WI 53545. At all times material hereto Mr. Herritz was an employee within the meaning of 49 U.S.C. § 31101 and 29 C.F.R. § 1978.101 (h).
2. Respondent Independent Operator, Inc. is a corporation with its principal place of business located at 2863 County Hwy. N., Cottage Grove, WI 53527.
3. At all times material hereto Respondent Independent Operator, Inc. was engaged in trucking operations and operated commercial motor vehicles having a gross vehicle weight rating of 10,001 pounds or more transporting property in commerce. Independent Operator, Inc. was an employer within the meaning of 49 U.S.C. § 31101 (3) and 29 C.F.R. § 1978.101 (i), and a person subject to 49 U.S.C. § 31105.
4. During Complainant's employment with Independent Operator, Inc., Independent Operator, Inc. was primarily engaged in the transportation of cheese for its principal customer, Schreiber Cheese.⁷

⁷ Schreiber's shipping documents identify the company as Schreiber Foods, Inc. *See* Joint Exhibit 1, page 3.

5. During Complainant's employment with Independent Operator, Inc., Independent Operator, Inc. served Schreiber facilities in Green Bay, WI, Carthage, MO., and occasionally in Joplin, MO.
6. Respondent Jerry Kissinger was the owner and general manager of Independent Operator, Inc. Mr. Kissinger is also a person as defined at 29 C.F.R. § 1978.101 (k) and a person subject to 49 U.S.C. § 31105.
7. Jerry Kissinger is the person who made the decision to discharge Complainant.
8. Respondent Independent Operator, Inc. employed Complainant from about April 2012 to March 31, 2014. In the course of his employment with Independent Operator, Inc., Complainant operated commercial motor vehicles having a gross vehicle weight rating of 10,001 pounds transporting property on the highways in commerce. As such, Complainant directly affected commercial motor vehicle safety.
9. On March 26, 2014, Complainant was dispatched to pick up a shipment of approximately 40,484 pounds of cheese in Carthage MO; pick up a 1,147 pound barrel of 88% concentration lactic acid in Joplin, MO; and deliver the entire load to Green Bay, WI.
10. Copies of the shipping documents relating to the March 26, 2014 shipments are marked as Joint Exhibit 1.
11. Upon his arrival in Joplin MO, Complainant placed a telephone call to Jerry Kissinger and discussed the issue of proper securement of the barrel of lactic acid.
12. Complainant was disciplined in 2012 for alleged abusive behavior. Joint Exhibit 2.
13. Complainant was disciplined in 2013 for alleged abusive behavior. Joint Exhibit 3.
14. On March 31, 2014, Respondents fired Complainant.
15. Respondents issued a letter to complainant dated March 31, 2014 explaining the reasons they claim for the discharge. Joint Exhibit 4.
16. On September 3, 2014, Complainant timely filed a complaint with the Secretary of Labor alleging that Respondent had discharged him and retaliated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105.
17. On March 3, 2016, the Secretary of Labor, by the Regional Administrator for OSHA Region 5, issued preliminary findings and dismissed Complainant's complaint pursuant to 49 U.S.C. § 31105.

18. On March 8, 2016, Complainant 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.
19. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of this proceeding.
20. Complainant's average weekly gross wage at the time of his separation from Respondent was \$883.08.

Additionally, Complainant and Respondent stipulated at the hearing that Complainant was neither a member of a labor union nor was he subject to the terms of a collective bargaining agreement.

Except with regard to stipulations No. 7 and No. 9, I find these stipulations to be accurate and I adopt them as findings of fact. With respect to stipulation No. 7, I find that the evidence supports a finding that both Jerry Kissinger and Kay Kissinger made the decision to discharge Complainant. Stipulation No. 9 states that the barrel of lactic acid weighed 1,147 pounds. Complainant testified that the barrel was under 1,000 pounds, and the document he identified as the shipping document for the barrel gives its weight as 562.17 pounds. CX 7, p. 2 (also JX 1, p. 5); Tr. at 37, 48-50, 110. The weight of 1,147 pounds appears to be taken from JX 1, pp. 1 and 2. I must assume that this weight includes something other than the barrel of lactic acid.⁸

EXHIBITS

At the hearing, the following exhibits were offered and admitted into evidence: Joint Exhibits ("JX") 1 through 5; Complainant's Exhibits ("CX") 6, 7, 8, 10, 11, 12, 13, 15, 16 and 17;⁹ Respondents' Exhibits ("RX") 1 through 10, 13 and 14.¹⁰

SUMMARY OF THE TESTIMONY

Alex Herritz¹¹

Direct examination

⁸ Mr. Herritz originally testified that he was told by an officer with the Missouri State Patrol that if the barrel of lactic acid was over 1,000 pounds it would have to be placarded as hazardous material. However, he later testified that the officer told him in a subsequent conversation that the material did not have to be placarded even if over 1,000 pounds. Therefore, the specific weight of the barrel does not appear to be critical to deciding this claim.

⁹ Complainant's Exhibits 1 through 5, 9 and 14 were withdrawn by Complainant. Transcript of hearing ("Tr.") at 61-62, 68. Page 246 of the transcript incorrectly states that CX 9 was admitted.

¹⁰ RX 14 is page 6 of the document identified by Complainant as CX 3. Complainant did not offer CX 3 in evidence; Respondents offered in evidence, as RX 14, page 6 of the document identified as CX 3. Thus, RX 14 consists of one page, *i.e.*, page 6 of the document marked as CX 3. Tr. at 101, 248. I sustained Complainant's objection to RX 11 and it was not received in evidence. Tr. at 189-191. Respondents' Exhibit 12 was not offered into evidence. I note that page 2 of CX 7 and page 4 of JX 1 are the same document, and CX 6 is the same document as RX 10.

¹¹ Mr. Herritz's testimony is at Tr. 25-129 of the hearing transcript.

Mr. Herritz testified that he has been an over-the-road truck driver for 25 years and has driven two to three million miles. He has a hazmat endorsement and a tanker endorsement in addition to a commercial driver's license. He has driven several different types of vehicles. He has had only one accident in a commercial vehicle, in 1985. He was hired by IO to drive their truck and trailer, which is a refrigeration unit operation.¹² He mainly hauled cheese from Schreiber Foods ("Schreiber"), IO's main account. Tr. at 25-28.

Mr. Herritz was dispatched to pick up a shipment of about 40,000 pounds of cheese in Carthage, Missouri on March 26th, after delivering cargo to that facility late on March 25th.¹³ He was then to pick up a 1,100 pound barrel of lactic acid in Joplin, Missouri. This was the first time he had hauled a barrel of lactic acid for Schreiber. He testified that Carthage is a facility where drivers are not permitted to go on or behind the loading dock. The driver checks in at the office and is assigned a door to back up to. Personnel at the facility do the unloading and loading. The cargo is loaded and the doors to the trailer are sealed without the driver being able to inspect the cargo. Tr. at 28-30. Mr. Herritz picked up the load in Carthage and proceeded to Joplin to pick up the barrel. Tr. at 31. At the Joplin facility Complainant was allowed to go onto the dock. The seal securing the back of the trailer was cut so that it could be opened. Mr. Herritz opened up the trailer and saw the load that was put on in Carthage. He saw the pallets of cheese in the trailer and saw one "load lock"¹⁴ affixed in the trailer horizontally against one skid. The other load lock was on the floor. He said there was about six feet of space between the rear of the trailer and the pallets of cheese. He was given a piece of paper indicating what he was picking up in Joplin. He was told it was a barrel of lactic acid. He testified that he had never heard of lactic acid before, but knew that "acid is nasty to the environment, to humans, to animals, and it can cause problems, period." Tr. at 31-34. He wondered whether it was "hazmat" or not. Tr. at 34. The forklift driver was unable to tell him if it was. The barrel, a 55 gallon plastic drum, was sitting on a four-by-four wooden pallet, with nothing securing it to the pallet. He asked the forklift driver if there was a strap machine to use to secure the barrel to the pallet, and was told there was not. Tr. at 34-35. Mr. Herritz identified CX 7 as Schreiber's bill of lading. He wrote on it "one barrel on skid not secured." Tr. at 37 (p. 2 of CX 7¹⁵). He identified page 1 of CX 7 as the bill of lading for the load of cheese picked up in Carthage. Tr. at 37.

Mr. Herritz testified that because of his concern about the barrel, he called Jerry Kissinger from the Joplin facility. He told Mr. Kissinger that there was a problem with the barrel because it was not secured to the skid and would not be secure if it was loaded on the trailer as it was. He said that Mr. Kissinger told him "Well, it's going to go on" and he responded "Not if I have anything to say about it." When Mr. Kissinger asked him what he meant, he said "load securement act, because if it ain't safe to haul, I'm not going to put it on." Complainant told Mr. Kissinger that he did not know what lactic acid is and asked if it was "hazmat." Mr. Kissinger told him that it is a food grade acid used in the processing of cheese and that it was not "hazmat." *Id.* Complainant stated that it was a safety issue and that if he could not put it on the trailer

¹² The parties stipulated that Mr. Herritz worked for IO from April 2012 to March 31, 2014. Joint Stipulation No. 8.

¹³ The cargo was yogurt. *See* Tr. at 83-84.

¹⁴ Mr. Herritz testified that load locks are metal tubular bars used to secure a load. Tr. at 54.

¹⁵ CX 1 page 2 is also page 3 of JX 1.

safely he would not take it. According to Mr. Herritz, Mr. Kissinger said “[expletive] you ain’t. You’re going to put that [expletive] barrel on it. You’re going to put the damn thing on, period.” Complainant testified that he then told Mr. Kissinger “No” and told Mr. Kissinger that he was swearing at him and he was going to hang up, which he did. Tr. at 40-42. He went back to the dock, rearranged two of the skids of cheese on the trailer and loaded the barrel using a partially inflated airbag and strong cardboard to secure it. He testified that although he had two load locks, one of them did not work. Complainant drew a diagram of how he secured the barrel on the trailer (CX 17). Tr. at 42-47, 51-55. He testified that he was familiar with commercial motor vehicle safety regulations concerning transport of freight, and that a load needs to be secure. He said he did not have enough equipment in the trailer to properly secure the barrel. Tr. at 121.

Mr. Herritz testified that he also called the Missouri State Patrol about the barrel of lactic acid and spoke with Officer Simms. Complainant asked Officer Simms if the material had to be placarded as a hazmat material. He said he was told that it is a dangerous material because it is acid and it would have to be placarded if it was over a certain weight. Tr. at 47-48. He then called Mr. Kissinger again, after the barrel was loaded, and told him that Officer Simms said the material had to be placarded but that there was a weight issue and the barrel was under the amount of weight that would require placarding.¹⁶ Complainant said that he believed they were only taking one barrel because two barrels would be above the weight limit. Mr. Kissinger said that the material did not have to be placarded. Complainant told Mr. Kissinger the “if [the barrel] rides good, I’ll take it.” Tr. at 49-51. He told Mr. Kissinger that the barrel was loaded and he was leaving. He said they apologized to one another for the last conversation. Complainant then left to deliver the cheese and the barrel of lactic acid in De Pere, Wisconsin. Tr. at 51, 55-56.

Mr. Herritz testified that the next time he spoke to Mr. Kissinger was when he called him for the Monday morning check-in call. Mr. Kissinger told him he was terminated and to “come get your shit.” Tr. at 56. This call was on Monday morning, March 31st. Mr. Herritz identified his termination letter, dated March 31, 2014 (JX 4). Mr. Herritz testified that he did not understand “about the swearing part and all that” and that “I’m being fired for a bunch of things that I have no idea about to a certain degree here.” Tr. at 57-59. He testified that because of his discharge he could not pay his bills and lost a vehicle and his duplex. He was out of work for three months. His termination negatively affected his health and his relationships.

Cross examination

Mr. Herritz identified a letter dated May 23, 2012 he received from Mr. Kissinger (JX 2). The letter references a telephone call Complainant made to an IO employee, Heather, and states that Mr. Herritz yelled and swore at her. Tr. at 74. Mr. Herritz denied doing so. He stated that sometimes he will raise his voice because he has ringing in his ears. Tr. at 79, 85, 105, 122, 125-127. The Complainant also identified a letter he received dated September 26, 2013 from Mr. Kissinger, which refers to the Complainant’s attitude and language during a telephone conversation of the same date (JX 3). Mr. Herritz testified that he recalled a conversation with

¹⁶ Mr. Herritz later testified that he made his second call to Mr. Kissinger after he left the Joplin facility with the barrel loaded and drove to a driveway a short distance away. Tr. at 56, 118-120.

Mr. Kissinger but that he did not know if it had to do with a clutch adjustment. He stated that he did not recall what he said that resulted in the September 26th letter and that he doesn't know anything about a clutch problem. Tr. at 80-82. Mr. Herritz was asked about delivering a load of yogurt to Schreiber in Carthage just prior to March 26th. He stated it was probably delivered probably around 11:00 the night before the 26th. He said there was some spillage of the product from damage to some cases of yogurt. Tr. at 83-84. In response to a question about a conversation with either Jerry or Kay Kissinger about "chicken lights," Mr. Herritz said he had a conversation with them about getting some spare lights for the truck. He wanted to stop by the office on his way to Missouri and pick up some lights. Jerry Kissinger told him he could, but Kay Kissinger told him that he could not. He denied raising his voice or speaking in an angry voice concerning this. Tr. at 84-85.

Mr. Herritz was asked, in connection with the pickup of the load of cheese in Carthage, whether he told Mrs. Kissinger that he had been delayed on the pickup and thought he was entitled to detention time. He testified that he told her that they held him up in getting the load off, and that he had to clean up a bunch of yogurt in the trailer before they would load the cheese. He agreed that he asked Mrs. Kissinger for detention pay because of the length of time it took to load. He stated that he did not recall what time he arrived but agreed that the time he gave "should be" before the scheduled loading time. When asked if it was true that he didn't arrive to load the cheese until 2:00 in the morning, he said that he didn't know. He denied misrepresenting his arrival time to load the cheese in Carthage. He said that if he was sitting there and things were scheduled, he would expect to be paid. He said that Respondent was paying \$15 an hour for detention time, and that he had received detention pay previously. When Mrs. Kissinger called him back and told him she had submitted the claim for detention to Schreiber and they had denied the claim because he didn't arrive when he was supposed to, Mr. Herritz said they were wrong in saying that he did not arrive for the pickup of cheese until 2:00 a.m. Complainant did not remember any prior instances when he had claimed detention time for arriving on time and the claim was denied because he was actually late. Tr. at 85-94.

Mr. Herritz did not recall when he arrived in Joplin but though it was maybe between 11:00 a.m. and noon. He identified RX 14 (page 6 of CX 3) as his Driver's Daily Log for March 26, 2014. He stated that he prepared the document and that the handwriting on the log was his. He testified that the log indicated that he was in Carthage from 8:00 a.m. until 4:30 p.m., and drove to Joplin from 4:30 to 4:45 p.m. The log indicates that he left Joplin at 5:15 p.m. Mr. Herritz agreed that the events he described as occurring in Joplin took place between 4:45 and 5:15 p.m. Tr. at 94-100. With regard to the barrel of lactic acid, he said there were no markings on the barrel. The paperwork he was given did not identify the product (JX 1, p. 5). He was told it was a barrel of lactic acid. The barrel was already on a standard pallet. He objected to putting the pallet and barrel on the trailer the way it was, and he had the trailer reloaded as he had described, before putting in the pallet with the barrel on it. He testified that the barrel was still on the loading dock when he called Mr. Kissinger. Complainant denied being angry during the call. He said he may have raised his voice a bit because of his hearing. Mr. Kissinger said he (Mr. Herritz) had four load locks, but he only had two, and one of them was "junk." He said Mr. Kissinger told him that he should have four load locks, but he only had two. Tr. at 102-107. His telephone call to Officer Simms was also before the barrel was loaded. Complainant agreed that this call was probably around 5:00 p.m. Officer Simms told him that lactic acid was a hazardous

material if it was over a certain weight limit, 1,000 pounds. Mr. Herritz told him the barrel was under that weight. He therefore understood that the product did not require placarding. Mr. Herritz had another conversation with officer Simms one or two months later, when Mr. Herritz called him about the load. Officer Simms said he was wrong and the product did not require placarding even if it was over 1,000 pounds. Tr. at 107-114. Mr. Herritz testified that after he rearranged the load as he described, he felt safe enough to transport it. Tr. at 116. He stated that he did not get the shipment document for the barrel until after the trailer was loaded (referencing page 5 of JX 1). He wrote the notation "one barrel on skid not secure" when he received the document after the barrel was loaded. He agreed that he wrote the language about "proof of protest" after the barrel was delivered to Schreiber in De Pere, Wisconsin. He said that the barrel "rode good." Tr. at 116-118.

Mr. Herritz testified that his second conversation with Mr. Kissinger was after he left Joplin and had driven about a couple of blocks to a mile. He told Mr. Kissinger that he put the barrel on and that he felt safe enough, that he was okay with it, "I'm happy." He said Mr. Kissinger was apologetic about the earlier conversation. He agreed that Mr. Kissinger asked him to bring the truck back to IO after the delivery to De Pere. Tr. at 118-120.

Redirect and Recross examinations

Mr. Herritz testified that people have told him he has a loud voice and that it sounds extra loud over the phone. He said he has some hearing loss as a result of a rifle being fired close to his right ear at age 16 and a rocket attack in Iraq. He has constant ringing in both ears. Tr. at 121-122. Referring to the May 23, 2012 letter from Jerry Kissinger (JX 2), he stated that when he called the office he did not raise his voice. He stated that if he had placed the barrel of lactic acid "as you were directed to behind the shipment of cheese," it would not have been secure. He stated that he could not have secured it with one load lock. Referring to page 5 of JX 1, he testified that the notation about "barrel on skid not secured" meant that it was just sitting on the skid with nothing holding it.

Mr. Herritz agreed that as a holder of a commercial driver's license must undergo a physical examination every two years, and that it includes a hearing test. He agreed that one of the questions on the health history form the driver completes relates to ear disorders, loss of hearing, or balance. He stated that he usually answers that question "yes." He was shown the "Medical Examination Report" form in the Code of Federal Relations at 49 C.F.R. § 391.43. When it was pointed out that when the driver checks "yes" to the question about ear disorders an explanation must be provided, Mr. Herritz then stated that he answers "no" to the question about hearing problems but tells whoever he is working for that he has a "little problem hearing" and that sometimes his voice may be raised. Tr. at 124-127. He stated that no doctor has ever told him that his hearing made him unfit to operate a commercial vehicle. Mr. Herritz testified that once a doctor gave him a document about tinnitus and indicated that he had a light case of it. Tr. at 127-128.

Rebuttal

Mr. Herritz denied that he lied to get detention pay on March 25th at the Carthage facility. He said he had delivered a load at the facility the same day and was already onsite, and it would not have made sense for him to leave. Mr. Herritz also denied the allegation of Douglas Herrick that he was late for a delivery to SuperValu.¹⁷ He denied that he cursed at any employees at SuperValu, and said that if he had, he would have been told to leave or they would have called the authorities. He stated that he did not lie to get detention pay on March 25th. He said it would not have made sense for him to leave between his drop-off and his pickup. Tr. at 243-246.

Gerald Kissinger¹⁸

Direct examination

Mr. Kissinger was one of the owners of IO since about 2006. The company ceased operations in July 2014 because “we decided life was too short and the numbers weren’t going the right way with the company, and we just wanted to redirect our lives.” Tr. at 148. During the period of Complainant’s employment with Respondents, Mr. Kissinger was on the road part of the time, did maintenance, customer relations, and worked in the office. He said he was the president of the company.¹⁹ He shared ownership of IO with his wife. He was also in charge of sales. The company was started in 1981, and had as many as about 60 trucks at one time. Eighty percent of IO’s business was from Schreiber Foods. At the time IO closed, it was Schreiber’s oldest carrier. IO transported product from 12 or 13 points in Wisconsin to Missouri, Utah and Arizona. The Carthage, Joplin and Monett area was a major distribution center where a lot of product came in from different facilities. He stated that Carthage shipped over three million pounds of cheese a day averaging from 100 to 150 trucks a day. Schreiber’s headquarters was in Green Bay, Wisconsin and IO would take product up to the Green Bay distribution center. Tr. at 147-150.

Mr. Kissinger testified that Joplin was a dry (non-refrigerated) warehouse. A typical shipment would involve picking up cheese in Carthage on pallets, shrink wrapped. Most of the time the load would take up most of a semi-trailer. There would often be a small quantity of dry product that would move with a shipment of refrigerated product. He stated that different products were picked up in barrels, and could be cleaning material or different ingredients for the cheeses. Sometimes they would ship lactic acid in a barrel. Mr. Kissinger stated he had no reason to believe that there was anything about lactic acid that required special hazardous materials precautions. He said that Schreiber is one of the largest cheese producers in the world, and that if Schreiber has a carrier do something illegal such as put a hazardous material on the trailer, it is liable as well as the carrier. Tr. at 150-156.

¹⁷ Mr. Herrick’s testimony is at Tr. 236-242.

¹⁸ Mr. Kissinger’s testimony is at pages 18-24, 147-207 of the hearing transcript.

¹⁹ In later testimony, while identifying JX 4, a letter that identifies him as vice-president, Mr. Kissinger stated that he was actually the vice-president and that his wife was the president. See Tr. at 175 and 209. Joint Stipulation No. 6 states that Mr. Kissinger was the owner and general manager of IO.

Mr. Kissinger identified JX 1 as “a Lean Logistics.” These documents are what he receives from Schreiber when IO is putting loads together. IO had page 2 of JX 1 in its possession prior to the shipment being picked up. He conveyed this information to Mr. Herritz. He stated that his (Mr. Kissinger’s) handwriting is at the top left-hand corner. He made the appointments and gave Mr. Herritz the load number and his load time at the Fairview distribution center (Carthage). When Mr. Herritz was done at Fairview, he was to be at the Joplin warehouse at 8:00 a.m. the next morning. Tr. at 156-157. He gave this information to Complainant by telephone. Referring to page 2 of JX 1, he testified that Mr. Herritz’s scheduled arrival time for the Carthage pick up was 23:00 hours (on March 25) (handwritten entry in the column for Fairview Distribution Center).²⁰ Below that, the arrival time of 22:45 is the time Mr. Herritz reported to IO that he arrived and checked in at the facility. The entry below that, with the date of 3/26 and the time of 11:52, is the time Mr. Herritz reported he was finished loading and signed his bills. Mr. Kissinger stated that Mr. Herritz made a claim for detention time because of the delay in getting loaded at Carthage. He explained that when a driver calls in and gives him their times, they enter it in the LeanLogistics system, and it is automatically fed into Schreiber’s computer. He testified that it cross-checks with Schreiber’s system as to when the driver actually checked in because the system records the driver’s arrival time. The times that IO put in based on what Mr. Herritz reported were “kicked back out” and the detention time was rejected. According to Schreiber, Mr. Herritz checked in at Carthage at 02:10 hours on March 25. That time is shown on page 3 of JX 1 in the lower right-hand corner. When asked if there was any reason for Schreiber to falsify that entry, Mr. Kissinger stated that Schreiber has never given him a hard time on legitimate detention claims. His agreement with Schreiber was that IO gave them two hours to do the loading or unloading and after that the clock starts, with a maximum of \$550 per day. Tr. at 157-160. Mr. Kissinger said his wife received the rejection and informed him of it, and he told her “I think this is going to be it for Alex.” He stated that of all the drivers, Mr. Herritz had the most detentions rejected. He stated that besides the truck being late, giving false information to the office and the office trying to collect based on it is a bad mark for the company. Tr. at 131-161.

Mr. Kissinger indicated that page 2 of JX 1, in the column with the number 2 circled, relates to the pickup of the barrel at Joplin. The document indicates that Mr. Herritz’s appointment time was 08:00 hours. Mr. Herritz reported that he arrived there at 12:30 and left Joplin at 13:00 hours. Mr. Kissinger stated that Complainant’s log indicated that he got there at 4:45 p.m. instead of 12:30. Tr. at 162-163.

Mr. Kissinger identified the bill of lading for the barrel of lactic acid (JX 1, p. 4). Mr. Herritz called him after he arrived in Joplin to load the barrel. He had not spoken to Mr. Herritz prior to that about his progress that day. He said that Complainant told him that “they want to put an [expletive] barrel on me on a pallet and it ain’t goddamned secured.” Mr. Kissinger testified that he asked Mr. Herritz how many load locks he had and was told he had four. Mr. Kissinger told him that he could not secure one barrel to a pallet safely and told him how to secure the barrel with the load locks. He said he had no reason to doubt that Complainant had four load locks because he never saw him with less than four. He said it was a requirement by Schreiber that everyone have at least two load locks. Mr. Kissinger described Mr. Herritz’s tone

²⁰ Mr. Kissinger noted that the Fairview Distribution Center is what was referred to as “Carthage” in the testimony; he noted that there are two other facilities at the distribution center, including the Carthage plant.

during the telephone call as very angry, hostile and loud, and that he used foul language repeatedly. He said the phone went dead during the conversation and he inferred that Mr. Herritz hung up on him because he had done so in the past. Tr. at 163-168.

Mr. Kissinger testified that he received a second call from Mr. Herritz about a half an hour later, about the same thing. Mr. Kissinger said he again told him how to secure the barrel with the four load locks, and told him to “haul the [expletive] load. He testified that Mr. Herritz never told him, and never implied, that he was refusing to haul the load. He testified that Mr. Herritz did not express any concern about the product being a hazardous material, and did not say anything about having a conversation with anyone with the Missouri State Patrol. He stated that if the material had been hazardous, IO could not have hauled it because it was not a hazardous material handler. Tr. at 168-169.

Mr. Kissinger stated that the next time he spoke to Mr. Herritz was when Complainant called in mid-morning on Monday. He said everything had been delivered and he had no problems with the barrel. Mr. Kissinger told him to make out a list of what the truck needed and to bring the truck and trailer down because he would be home for a long weekend. He stated that he did not fire him at that time because Mr. Herritz still had a \$100,000 truck, a \$50,000 trailer and a load worth \$100,000, and he was an “irate driver.” Tr. at 170-171.

Mr. Kissinger identified a letter dated May 23, 2012 that he wrote to Complainant (JX 2). The letter concerned a telephone conversation Mr. Herritz had with a former employee, Heather, who was the dispatcher and office manager. Mr. Kissinger said that Mr. Herritz screamed and hollered at Heather. The letter states that Mr. Herritz had previously been verbally warned about his temper and bad language. Tr. at 171-173. Mr. Kissinger identified a letter from him to Mr. Herritz dated September 26, 2013 (JX 3). The letter relates to a telephone call with Mr. Herritz about servicing his truck. Mr. Herritz spoke first to Mr. Kissinger’s wife and then to him. Mr. Kissinger testified that Mr. Herritz complained about his clutch adjustment. The letter states that Mr. Herritz’s “language and attitude” during the phone conversation was unacceptable. The letter states that he is being given one more chance because of a management change since his last warning. Mr. Kissinger explained this referred to the fact that Heather left the company and Mr. Kissinger was now in the office full-time. The letter states that this is the last time Mr. Herritz will be warned about this. Tr. at 173-175.

Mr. Kissinger identified Complainant’s letter of dismissal, dated March 31, 2014 (JX 4). He testified that he and his wife composed the letter, and that the letter contains all of the reasons for the discharge of the Complainant. Mr. Kissinger stated that he wanted to make sure the load was delivered and that the truck and trailer were in his possession. When Mr. Herritz called in that morning, Mr. Kissinger told him his services were no longer required and that his belongings were there for him to pick up. He stated that to his knowledge Mr. Herritz did not dispute what was written in the letter. Tr. at 175-176.

Mr. Kissinger was asked about RX 5, which documents violations resulting from a United States Department of Transportation (“DOT”) audit. He testified that the review took place in January 2014. He testified that Mr. Herritz and other drivers were noted as having violations. The report notes 15 violations of “395.8I,” described as false reports of duty status

(pages 1 and 2 of RX 5).²¹ The report notes violations by Mr. Herritz and other drivers in July and August 2013. The company was assessed a civil penalty of \$5,900 for the violations (RX 6). Mr. Kissinger explained that the trucks are fueled with a credit card and that when the card is swiped the time goes into a database and the DOT uses it in their audit. Mr. Kissinger testified that he addressed the violations by telling the drivers that they have “to do it exactly as when you fuel it. You got to log it the way you run it.” Mr. Kissinger testified that Mr. Cousineau and Mr. Neuman (other IO drivers) responded to his direction that the problem be corrected but Mr. Herritz did not. Tr. at 177-183; 188. Mr. Kissinger identified RX 8 as a report from the State of Oklahoma regarding a falsification of log violation prior to the DOT audit. He identified RX 9 as his attempt to analyze drivers to determine if they were continuing to falsify their logs. RX 9 is the report for February and March 2014. He stated that the report shows a number of violations after the audit.²² Mr. Kissinger also identified a letter he sent to drivers dated March 14, 2014 concerning proper completion of the driver logs (RX 10). Tr. at 184-187.

Mr. Kissinger identified RX 13 as the Material Safety Data sheet for the barrel of lactic acid picked up by Complainant. He requested this from Schreiber. He noted that page 4 of the document indicates that the material is not regulated as dangerous goods. Tr. at 190-191.

Cross examination

Mr. Kissinger stated that he obtained the Material Safety Data sheet (RX 13) within 60 days prior to the hearing and did not have it at the time Mr. Herritz picked up the barrel. He agreed that drivers sometimes are late delivering a load because they run out of hours and may have to take a ten-hour break to comply with DOT regulations. Tr. at 192. He denied that IO’s operating authority was revoked by the DOT in August 2014, but admitted that it had been dropped to “conditional.” Mr. Kissinger was shown a copy of a document from the Federal Motor Carrier Safety Administration website (CX 10). Mr. Kissinger stated that this was when they closed the company and had their attorney cancel their authority. Tr. at 193-194.

Mr. Kissinger confirmed that IO provided its drivers with load locks and makes it a practice that every truck had two. He stated that if a shipper told them a load needed four load locks, the driver would go to the truck stop and buy them, which he said happened frequently. Tr. at 195-196. With regard to Mr. Herritz’s letter of termination (JX 4), Mr. Kissinger testified that he made the determination to fire Mr. Herritz on March 26, the day he had the disagreement with Complainant. When asked if it is true that truckers do not always use delicate language, he stated that that is probably true among themselves, but that it is unacceptable around customers or office personnel. He also testified that both Mr. Cousineau and Mr. Patee were still working for the company when it closed and were not fired. Tr. at 197-199.

²¹ 49 C.F.R. § 395.8(e) states: “No driver shall make a false report in connection with a duty status.”

²² All of the violations listed on this report are by Mr. Herritz. Although it is not entirely clear from the record, I assume that this report addresses only Mr. Herritz. The record is not clear as to whether any other drivers had such violations during this same period.

Redirect examination

Mr. Kissinger testified that Mr. Herritz's use of foul language and his attitude as expressed in his conversations were not typical of his company's drivers. He said it differed in that Mr. Herritz was always complaining about something and when there was a problem he called and yelled and swore and accused. Mr. Kissinger stated that there have been times when Mr. Herritz needed two good load locks and one was damaged, and he bought one and was reimbursed for it. Tr. at 199-200.

Recross examination

When asked if Mr. Herritz's complaining occurred when he first started working at IO in 2012, Mr. Kissinger said he would hear of it through the rumor mill. He said Mr. Herritz was very vocal and very loud when things did not go his way and that it turned into a pattern. Tr. at 200-201.

Redirect

Mr. Kissinger testified that Mr. Herritz reported to him and his wife. Heather was a supervisor because she was a dispatcher and in a managerial position. She did not have authority to do hiring and firing. Only he and his wife had the authority to discipline a driver. Tr. at 206-207.

*Additional testimony*²³

Mr. Kissinger testified that IO was a Wisconsin corporation that was dissolved on August 18, 2014. July 31, 2014 was the last day of operation. The only officers were Mr. Kissinger as vice-president and Kay Kissinger as president. There were no other managers other than Heather, who was an office manager and dispatcher until she left. Mr. Herritz reported to Mr. Kissinger and Kay Kissinger. Tr. at 201-202. Mr. Kissinger was unaware whether there is a regulation that applies specifically to securing a barrel, but stated that everything had to be secured properly. He testified that the decision to close the company was made in mid-July 2014. He stated that IO was not a hazmat carrier. He stated that he found out that what Mr. Herritz said about detention time with Schreiber was not true on Friday and terminated Mr. Herritz on Monday after he got the equipment back. He testified that they made the decision to terminate him when they learned his detention claim was not true, but added that Mr. Herritz's calling him and swearing about the [expletive] barrel "put me over the edge." Tr. at 201-206.

*Kay Kissinger*²⁴

Mrs. Kissinger testified that she became the president of IO around 2003, and that her husband was the vice-president. Her day-to-day duties were doing the payroll, invoicing, and data entry for "Lean," the dispatch program IO had with Schreiber to keep track of loads. She said that when Heather left, her husband had to come back in the office as a dispatcher, and she

²³ Testimony responding to questions by the administrative law judge.

²⁴ Mrs. Kissinger's testimony is at pages 208-235 of the hearing transcript.

did a little more data entry than before. She said Mr. Herritz was employed from April 2012 to March 2014. Tr. at 208-210.

Mrs. Kissinger identified as RX 1 a handwritten note dated May 23, 2012 that she asked Heather to write concerning an incident with Mr. Herritz that was the subject of the letter to Mr. Herritz dated May 23, 2012 (JX 2). She said that Heather told her what happened and she asked her to write it down. Mrs. Kissinger said she helped compose JX 2, using Heather's statement and what she told her. Mrs. Kissinger said that Mr. Herritz did not tell her he disagreed with JX 2 or respond in writing to it. Tr. at 210-213. She testified that she also helped compose the letter of September 26, 2013 to the Complainant. (JX 3). She stated that Mr. Herritz called that morning and spoke to her and was "yelling and screaming that that was the worst [expletive] clutch job that anyone had ever done and who the hell did it." Tr. at 213. She said that Mr. Kissinger spoke to him after she did.

Mrs. Kissinger identified RX 2 as a write-up she did, dated October 21, 2013, concerning a delivery and a claim for detention time. She also identified RX 3, describing incidents on January 6 and January 15, 2014. She testified that she overheard the conversation of January 6th and was the recipient of the telephone call documented as occurring on January 15th. Mrs. Kissinger identified RX 4 as two notes she made dealing with two separate incidents on March 21, 2015 and March 26, 2014. She stated that the notes were based on her conversations. She said the March 21st incident was at the beginning of the trip to Missouri involving the loading of the barrel of lactic acid. Tr. at 214-220. Mrs. Kissinger also testified about the note on RX 4 concerning the incident on March 26 about sweeping out the trailer. Tr. at 224-225.

Mrs. Kissinger discussed the incident involving Mr. Herritz's claim for detention time in Carthage. She testified that she put in a claim for detention with Schreiber for \$400 based on the times Mr. Herritz gave her when he called in. She received a response from a Schreiber employee stating that the claim would not be authorized because Mr. Herritz had arrived "considerably later than what his appointment was." Tr. at 221. Mrs. Kissinger stated that after the delivery receipt was turned in, she checked the times and they matched what she was told by the Schreiber employee. Mrs. Kissinger referred to JX 1 and stated that it shows that Mr. Herritz's appointment time to load in Carthage on March 25 was 23:00 (11:00 p.m.). She said that the Complainant called and told her he arrived at 22:45, fifteen minutes before the appointment time, and got out at 11:52 a.m. the next day (*see* p. 2 of JX 1). Referring to the delivery receipt that was turned in to her after the delivery, Mrs. Kissinger stated that it shows Mr. Herritz arrived at 2:10 a.m., three hours after his loading appointment (referring to page 3 of JX 1, lower right-hand corner.) She stated that Mr. Herritz did not dispute the times indicated by Schreiber. Tr. at 221-224.

Mrs. Kissinger testified that she was present when her husband spoke with Complainant on the telephone about the barrel of lactic acid and heard Mr. Kissinger's side of the conversation. She said that she heard him ask Mr. Herritz how many load locks he had and his instructions to Mr. Herritz about how to secure the load with four load locks. She stated that she wrote the handwritten note at the bottom of RX 4 about waiting until Mr. Herritz returned to Wisconsin before discharging him. Tr. at 225-227.

Cross examination

Mrs. Kissinger stated that they did not fire Mr. Herritz after the incident with Heather (JX 2) because they wanted to give him a chance. She said they did not fire him after the incident that is the subject of JX 3 because of new management. When questioned about the reasons for discharging Mr. Herritz, she testified that when he lied about the detention time “that was one of the big things,” noting that he had done so previously. She agreed that there were a series of incidents that had built up and March 26th was “the straw that broke the camel’s back.” Tr. at 233-234. She stated that the decision to terminate him was made on March 26th but they did not want to do so until they had their equipment back. She stated that Mr. Herritz was paid weekly, by the mile. Tr. at 234-235.

Gerald Patee²⁵

Direct and cross examination

Mr. Patee has been a truck driver for 34 or 35 years, mainly over-the-road trucking. He worked for IO as an independent truck driver from June 1995 until the company closed. He was familiar with Mr. Herritz because he ran into him once in 2012 in Logan, Utah when he worked for IO. Mr. Herritz worked for IO when this occurred. Mr. Patee testified that Mr. Herritz was waiting to be reloaded and was there ahead of his appointment time. They would not reload him early and he got mad at the girl who said he could not get loaded early and started yelling and swearing at her because he was in a hurry to leave. He testified that when he worked for IO he was never asked to do anything illegal. He said he had hauled barrels for Schreiber and said that if a driver was concerned about securing the load properly all you had to do was ask them. Mr. Patee testified that he never drove as a team with Mr. Herritz and never dispatched him or interacted with him on a daily basis. They operated independently of each other. Tr. at 132-139.

John Cousineau²⁶

Direct and cross examination

Mr. Cousineau testified that he is currently a truck driver and has been one for 35 years. He previously worked for IO as an owner-operator and then as a company driver. He worked for IO during two different periods, with the last period ending when the company went out of business in July 2014. He became familiar with Mr. Herritz during his time with IO and would encounter him at different loading and unloading sites “just once in a while.” Tr. at 142. Mr. Cousineau testified that Mr. Herritz seemed to be mad all the time. He used swear words and complained about the loads he had to haul, where he had to go and about the truck. Mr. Cousineau said that Mr. Herritz’s assignments were not different from those of the other drivers.

Mr. Cousineau said he was aware that IO was the subject of an audit by the Department of Transportation and that various drivers were determined to have falsified their driver logs. He said that part of the audit was comparing fuel times to driver logs. When the audit was

²⁵ Mr. Patee’s testimony is at pages 132-139 of the hearing transcript.

²⁶ Mr. Cousineau’s testimony is at pages 139-147 of the hearing transcript.

completed, Mr. Kissinger told the drivers to make their times match the fuel receipts. Mr. Cousineau therefore made them match, which he testified was not hard to do. He stated that neither IO nor Schreiber ever asked him to do anything illegal. He testified that during his time with IO he did not transport a single barrel that he was aware of, and he was not aware of any problems with securement of barrels. He testified that when you pulled up at Schreiber, they secured the load. With respect to the Department of Transportation audit, he said that Mr. Kissinger told them that to be in compliance the drivers had to make the log and fuel receipts match with respect to the time the driver got the fuel. The driver would therefore have to make sure that the fuel receipts and what was shown on the driver's log lined up. When asked if Mr. Kissinger's solution to not falsifying was to make it look like the logs matched, he responded "well, you made them match, yes." Tr. at 139-147.

Douglas Herrick²⁷

Mr. Herrick testified that he has been an owner-operator over-the-road driver for almost 19 years. He worked for IO from April 2008 until they closed. He was acquainted with Mr. Herritz while at IO. He described an incident at SuperValu in De Pere, Wisconsin in the fall of 2013 where he and Mr. Herritz were supposed to be at SuperValu at the same time. They were to meet there so they could save money by writing one check for unloading fees. He stated that he was there on time but Mr. Herritz was not. Mr. Herrick said that if a driver is late to a receiver it can result in a fine or they may delay unloading you. Mr. Herrick quoted Mr. Herritz as using curse words and saying "I'll get here when I want." Mr. Herrick said SuperValu employees could hear Mr. Herritz. Tr. at 236-240.

Mr. Herrick also testified that IO never asked him to do something illegal. He also stated that he could not specifically recall ever being involved in the pickup of a barrel in Joplin, Missouri.

C. DISCUSSION

Facts not in dispute

Complainant worked as a company truck driver for Respondents from 2012 until he was discharged on March 31, 2014. He is a resident of the state of Wisconsin. Respondent IO has its principal place of business in the state of Wisconsin. Respondent Jerry Kissinger was a co-owner of IO with his wife, Kay Kissinger, and was the vice-president and general manager of IO. Kay Kissinger held the office of president. Complainant Alex Herritz was an "employee" within the meaning of 49 U.S.C. § 31101(2) and 29 C.F.R. § 1978.101(h) at all times relevant hereto. Respondent IO was an "employer" within the meaning of 49 U.S.C. § 31101(3) and 29 C.F.R. § 1978.101(i) at all times material hereto. Respondent Jerry Kissinger was a "person" as defined at 29 C.F.R. § 1978.101(k). Respondent IO owned, and Complainant operated, "commercial motor vehicles" as defined in 49 U.S.C. § 31101(1)(A) and 29 C.F.R. § 1978.101(e). Complainant was not a member of a labor union and was not subject to the terms of a collective bargaining agreement. On September 3, 2014, Complainant timely filed a complaint with the Secretary of Labor alleging that Respondents discharged him and retaliated

²⁷ Mr. Herrick's testimony is at pages 236-242 of the hearing transcript.

against him in violation of the STAA. On March 3, 2016, OSHA issued its Findings and dismissed the complaint. On March 8, 2016, Complainant timely filed objections to the Secretary's Findings and Order and requested a hearing before an administrative law judge. I have jurisdiction over the parties and subject matter of this proceeding.

During the period relevant to this case, IO was primarily engaged in the transportation of cheese for its principal customer, Schreiber Foods. Complainant was dispatched by Mr. Kissinger to pick up a cargo of cheese in Carthage, Missouri and a barrel of lactic acid in Joplin, Missouri. His scheduled arrival time to pick up the load of cheese in Carthage was 23:00 on March 25, 2014 (*i.e.*, 11:00 p.m.). Mr. Herritz reported that he arrived at 22:45 (*i.e.*, 10:45 p.m.) (JX 1, p. 2). He reported that he finished loading at 11:52 a.m. on March 26th. *Id.* According to Schreiber, Mr. Herritz checked in at Carthage at 2:10 a.m. on March 26, not at 22:45 on March 25th (*see* JX 1, p. 3, lower right-hand corner). After picking up the load of cheese at Carthage, Mr. Herritz went to Joplin, Missouri to pick up the barrel of lactic acid. Mr. Herritz did not know what he was to pick up in Joplin until he arrived. After he found out what the load was, he called and spoke to Mr. Kissinger. He called Mr. Kissinger again approximately one-half hour later. After the barrel of lactic acid was loaded, Mr. Herritz delivered both the cheese and the barrel of lactic acid to the Green Bay, Wisconsin area. Complainant returned the truck and trailer to IO on Monday, March 31, 2014. Mr. Herritz spoke to Mr. Kissinger by telephone on the morning of March 31st, after he had delivered the load. IO terminated Complainant on March 31, 2014. (JX 4).

Did Complainant engage in protected activity?

The parties have different accounts of the telephone conversations between Mr. Herritz and Mr. Kissinger regarding the loading of the barrel and surrounding events. Both conversations appear to have occurred during the approximately one-half hour that Complainant was in Joplin to load the barrel of lactic acid, or immediately thereafter. Mr. Herritz contends that during the first conversation he told Mr. Kissinger that the barrel was not secured to the skid and would not be secure if it was loaded on the trailer as it was. He testified that Mr. Kissinger said "well, it's going to go on," and Complainant responded "not if I have anything to say about it." Complainant testified that Mr. Kissinger asked him what he meant and he told him "load securement act, because if it ain't safe to haul, I'm not going to put it on." Mr. Herritz said he told Mr. Kissinger that he did not know what lactic acid is and asked if it was "hazmat." Mr. Kissinger replied that lactic acid is a food grade acid used in the processing of cheese and was not "hazmat." Complainant testified that he said it was a safety issue and if he could not put it on the trailer safely he would not take it. He testified that Mr. Kissinger then said "[expletive] you ain't. You're going to put that [expletive] barrel on. That's it. You're going to put the damn thing on, period." Complainant testified that he then told Mr. Kissinger "no," and that Mr. Kissinger was swearing at him and that he was going to hang up. He testified that Mr. Kissinger said "I don't give a damn. You're putting that barrel on." Complainant states that he replied "Jerry, I don't need to hear it. I'm going to hang up, okay?" and he then hung up. Tr. at 40-42.

Mr. Herritz testified that after this telephone call he and the forklift driver pulled off two of the skids of cheese already on the trailer to create a slot where the pallet with the barrel on it could be put and loaded the barrel, using a partially inflated airbag and strong cardboard to

secure it.²⁸ The two skids of cheese were then put back in the trailer.²⁹ He said that although he had two load locks, one of them did not function. He testified that he was familiar with commercial motor vehicle safety regulations and that a load needs to be secure. He stated that his did not have enough equipment in the trailer to properly secure the load. Tr. at 42-47, 51-55. He testified that after he had the load rearranged as he described and the barrel loaded, he felt the load was secure and safe enough to transport it. Tr. at 116.

Mr. Herritz also testified that at some point while he was in Joplin, apparently before his second telephone call to Mr. Kissinger, he called the Missouri State Patrol, was referred to an Officer Simms, and asked him if lactic acid had to be placarded or was dangerous. He said that Officer Simms told him that it was dangerous because it is an acid and is dangerous to skin contact and could be dangerous to “soil and stuff like that.” He said that if it was over a certain weight (1,000 pounds) it had to be placarded.³⁰ Mr. Herritz testified that he felt “uncomfortable” about transporting the barrel after his conversation with Office Simms. He testified that after this conversation he called Mr. Kissinger back. He testified that this was after the barrel had been loaded. He testified that he asked Mr. Kissinger if the product was acid, and was told it was. He told him that Officer Simms said it was supposed to be placarded, and Mr. Kissinger said that was not correct. Complainant then told him that the barrel was under the weight that Officer Simms said would require placarding, and Mr. Herritz wondered if he were only taking one barrel because two barrels would be over the weight limit and would then have to be placarded. He said Mr. Kissinger asked him if he had called the state patrol. Mr. Herritz said that Mr. Kissinger was not happy to hear that he had. Regarding the load, he said he told Mr. Kissinger “I believe we’ll try. If it rides good, I’ll take it. That’s the best I can do, okay?” He said that he and Mr. Kissinger then apologized to each other. Mr. Herritz said he was then on his way to De Pere, Wisconsin. Tr. at 47-51, 112-113. Mr. Kissinger’s testimony about the second telephone call suggests that Mr. Herritz told him that the barrel was not yet loaded, as Mr. Kissinger testified that he again told Mr. Herritz how to secure the barrel with four load locks. Tr. at 168-169.

Mr. Herritz testified again about his second conversation with Mr. Kissinger, stating that after the load was secured he signed his paperwork and left the facility. He said that he drove a couple blocks to a mile, parked the truck, and called Mr. Kissinger. He testified that he told Mr. Kissinger “Okay, Jerry, I got it on. I’ve done the best I can.” He said he would leave and proceed to De Pere.³¹ Tr. at 55-56. On cross-examination, Mr. Herritz confirmed that his first telephone conversation with Mr. Kissinger was when the barrel was on the loading dock, before it was loaded onto the trailer. Tr. at 104-105. He was again asked about his second conversation with Mr. Kissinger. He testified that he told Mr. Kissinger “I put the load – I got the barrel on, Jerry. It looks good enough to – and I feel safe enough that might – it should ride up there. It’s on and I’m checking in to tell you it’s on.” He testified that Mr. Kissinger said he was apologetic about their conversation. Mr. Herritz replied “Hey, I – I’m okay with it, Jerry. No

²⁸ Mr. Herritz testified that inflated air bags are used in loading to take up room and hold the product in. Tr. at 42.

²⁹ Mr. Herritz drew a diagram demonstrating how he loaded the barrel. CX 17.

³⁰ The weight of the barrel was 562 pounds according to JX 1, pages 4 and 5 and Tr. at 110, 113.

³¹ Although it was not clear whether Mr. Herritz was testifying to a third telephone call with Mr. Kissinger on the same day, he testified that he only had two such calls, one before the barrel was loaded and one after it was loaded. Tr. at 56.

problem. I'm happy if you're – if it's like this, great. I'm happy. I'm ready to go now." Tr. at 118-119. He stated that his conversations with Mr. Kissinger probably took place between 4:45 and 5:15 p.m. Tr. at 98.

Complainant testified that he had a second conversation with Officer Simms a month or two later, in which Officer Simms told Mr. Herritz that he had been wrong, that the material did not have to be placarded as hazardous. Tr. at 112.

Jerry Kissinger also testified about his telephone conversations with Complainant regarding the loading of the barrel of lactic acid. He said Mr. Herritz called him from Joplin and told him that "they want to put an [expletive] barrel on me on a pallet and it ain't goddamned secured." Mr. Kissinger told him he could not secure one barrel to a pallet safely, that he had to take the barrel off the pallet and put the barrel against the wall of the trailer. He asked Complainant how many load locks he had and Mr. Herritz said he had four. Mr. Kissinger told him how to secure the barrel with four load locks. He told him to have Schreiber take the barrel off the pallet, put it against the right wall and put two load locks on the left side and two load locks across. He said the barrel would ride fine. He said the phone went dead in the middle of that and he didn't know how much of it Complainant heard. He believed Mr. Herritz hung up on him, stating that he had done that in the past. Mr. Kissinger said he had no reason to doubt that Mr. Herritz had four load locks because he would come into the yard with five or six load locks. Mr. Kissinger said he (Kissinger) always had about 30 load locks tied to the wall in the shop where Mr. Herritz would come in and leave the bad ones. He testified that he never saw Mr. Herritz with less than four load locks on a truck.³² He said that the company policy was that everyone had at least two load locks. Mr. Kissinger testified that during this phone call Mr. Herritz was very angry, very hostile, very loud, sarcastic and aggressive. He testified that he used foul language. Tr. at 164-168, 20-24. Mr. Kissinger testified that the method he recommended would have complied with federal regulations regarding cargo securement. Tr. at 24.

Mr. Kissinger testified that Mr. Herritz called him again about one-half hour later and told him he couldn't secure the barrel. Mr. Kissinger testified that he again told him how to secure it with the four load locks. He said he should put two load locks up and two across and "haul the [expletive] load." Mr. Kissinger testified that during the two phone conversations Mr. Herritz never refused to haul the load or implied that he was refusing. He said that Mr. Herritz did not mention speaking with someone from the Missouri State Patrol and that if he had Mr. Kissinger would have called that person to get clarification. He said there was no allegation from Mr. Herritz that the lactic acid was hazardous material under Department of Transportation regulations. He stated that if he had been told it was hazardous he would have contacted the load planner and told him that IO could not haul the material because it is not a hazardous material handler. Tr. at 168-170.

³² Mr. Kissinger inconsistently testified that there had been times when Mr. Herritz was on the road and needed two good load locks and didn't have all four load locks. Mr. Herritz bought a load lock, for which he was reimbursed. Tr. at 199.

Protected activity under 49 U.S.C. § 31105(a)(1)(A)(i)

Section 31105(a)(1)(A)(i) provides that a person may not discharge, discipline or discriminate against an employee because the employee “has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding.”

Complainant alleges he filed a complaint within the meaning of this section when he complained to Mr. Kissinger that he could not safely transport the barrel as it was at that time, *i.e.*, sitting on a pallet and not secured to the pallet. Complaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial. *Jackson v. CPC Logistics*, ARB No. 07-006 (Oct. 31, 2008, *citing Calhoun v. United Parcel Service*, ARB No. 04-008 (Sept. 14, 2007)). The complaint must be communicated to management. *Harrison v. Roadway Express, Inc.*, ARB Case No. 00-048 (Dec. 31, 2002). For a finding of protected activity under the “complaint clause” of the STAA, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation. *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016 (March 27, 2012). Complainant alleges that his complaints about load securement were related to violations of 49 C.F.R. § 392.9. That regulation requires, *inter alia*, that:

(a) *General.* A driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless-

(1) The commercial motor vehicle’s cargo is properly distributed and adequately secured as specified in §§393.100 through 393.136 of this subchapter.

Section 392.9(b) states in part:

(b) Drivers of truck and truck tractors. Except as provided in paragraph (b)(4) of this section, the driver of a truck or truck tractor must-

(1) Assure himself/herself that the provisions of paragraph (a) of this section have been complied with before he/she drives that commercial motor vehicle;

Complainant’s Proposed Findings of Fact and Legal Argument at pp. 13-16.

Complainant’s post-hearing filing did not specify any provision in sections 393.100 through 393.136 that specifically addresses the transport of barrels or 55-gallon drums, and my review of those sections does not indicate any such section.³³ Complainant’s complaint cites to

³³ Mr. Herritz identified the barrel as a 55-gallon drum. Section 393.106, which states the general requirements for securing articles of cargo, provides:

(c) *General.* Cargo must be firmly immobilized or secured on or within a vehicle by structures of adequate strength, dunnage or dunnage bags, shoring bars, tiedowns or a combination of these.

sections 392.9, 393.100, 393.104 and 393.105, which do not relate specifically to the securement of barrels but do relate to all cargo. However, under either party's version of the two telephone calls, it is apparent that the discussion concerned how to safely secure the barrel. In *Maddin v. TransAm Trucking, Inc.*, ARB No.13-031 (Nov. 24, 2014), *petition for review denied in TransAm Trucking, Inc. v. Administrative Review Board*, 833 F.3d (10th Cir. 2016), the Board stated that a complaint is protected if it "relate[s] to a violation of a commercial motor vehicle safety or security regulation, standard or order", citing 29 C.F.R. § 1978.102(b)(1). *Maddin*, PDF at 6. The Board further stated that "as long as the complaint raises safety concerns, the layman who usually will be filing it cannot be expected to cite standards or rules like a trained lawyer. The statute requires only that the complaint 'relate' to a violation of a commercial motor vehicle safety standard." *Id.* Here, Complainant's expression of concern to Respondents meets that test. I therefore find that Complainant engaged in protected activity under section 31105(a)(1)(A)(i).

Respondents argue that even if Mr. Herritz's concern about securement of the barrel is construed as a "complaint," the basis for the complaint was resolved before he left Joplin with the barrel loaded on the truck. *Respondents' Post-Hearing Brief* at pp. 11-12. Although whether the complaint was resolved is an issue under section 31105(a)(1)(B)(ii), it does not preclude a finding of protected activity under section 31105(a)(1)(A)(i). Respondents also argue that Mr. Herritz's conduct was not sufficient to put Respondents on notice that he was engaging in protected activity. I disagree. As noted above, according to either party's version of the telephone conversations, one or both conversations clearly concerned Complainant's complaint that the barrel was not properly secured for transport and discussion of how to appropriately secure it. For a finding of protected activity, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation. *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016 (March 27, 2012); *Calhoun v. United Parcel Service*, ARB No. 04-108 (Sept. 14, 2007), *aff'd*, *Calhoun v. United States DOL*, 576 F.3d 201 (4th Cir. 2009). Here, Complainant has made that showing, and I find that he filed a complaint with Respondents for purposes of 49 U.S.C. § 31105(a)(1)(A)(i). I note that with respect to Complainant's professed concern regarding the danger presented by lactic acid, Complainant knew by the time of his second conversation with Mr. Kissinger that the material was not classified as hazardous material and did not have to be placarded. Respondents also argue that Complainant forfeited any protected activity status by engaging in belligerent and confrontational behavior, citing *Formella v. United States Dep't of Labor*, 628 F.3d 381 (7th Cir. 2010). I find that Complainant's behavior, while constituting grounds for discipline, was not so egregious as to remove him from protected status.³⁴

Protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) and 31105(a)(1)(B)(ii)

Complainant also alleges that he engaged in protected activity under these sections. *Complainant's Proposed Findings of Fact and Legal Argument* at pp. 16-18. Regardless of whether section 31105(a)(1)(B)(i) requires a complainant to show that his driving the vehicle would have resulted in an actual violation of a relevant law,³⁵ I find that that transporting the

³⁴ *Formella* is further discussed later in the context of whether Respondents have shown by clear and convincing evidence that they would have discharged Complainant in the absence of protected activity.

³⁵ In *Bailey v. Koch Foods, LLC*, ARB No. 10-001 (Sept. 30, 2011), the Board held that this provision does not require an actual violation of a relevant regulation, but only that the complainant reasonably believed that a violation

single barrel unsecured on a pallet would violate 49 C.F.R. § 392.9, requiring that cargo be adequately secured as specified in sections 393.100 through 393.136, and would result in an actual violation. Mr. Kissinger testified that Mr. Herritz could not secure one barrel to a pallet safely. *See* Tr. at 168. For purposes of § 31105(a)(1)(B)(ii), a complainant must show that his apprehension of serious injury was objectively reasonable, *i.e.*, that a reasonable person in the same circumstances would have been justified in the refusal. *See Pollock v. Continental Express*, ARB No. 07-073 (April 7, 2010), PDF at p. 3; *Stauffer v. Walmart*, ARB No. 00-062 (July 31, 2001); 29 C.F.R. § 1978.102(f). A complainant must also show that he sought, and was unable to obtain, correction of the condition complained of. *Calhoun v. United Parcel Service*, ARB No. 04-108 (Sept. 14, 2007), *aff'd*, 576 F.3d 201 (4th Cir. 2009).

Respondents argue that Complainant cannot be protected under section 31103(a)(1)(B)(i) or (B)(ii) because he did not refuse to operate a vehicle. Mr. Herritz testified that he told Mr. Kissinger he would not drive the truck unless the product could be put on safely. Tr. at 41. As noted, Mr. Kissinger stated that a single barrel on a pallet could not be secured safely. Tr. at 168. Mr. Kissinger testified that he told Mr. Herritz how to properly secure the barrel in the trailer and that he should secure it in that manner and haul the load. Although Complainant did not load the barrel in the manner suggested by Mr. Kissinger, he did load it to his satisfaction, stating that after the barrel was loaded, he felt safe enough to transport it and that “I’m okay with it, Jerry. No problem. I’m happy if you’re – if it’s like this, great. I’m happy. I’m ready to go now.” Tr. at 119. However, Complainant argues that his refusal to drive if the barrel were loaded in an unsecure fashion, *i.e.*, with the barrel sitting on a pallet, unsecured to the pallet, constitutes a refusal to drive within the meaning of section 31105(a)(1)(B). For support, Complainant cites to *Maddin v. TransAm Trucking, Inc.*, ARB No. 13-031 (Nov. 24, 2014), *petition for review denied* in *TransAm Trucking, Inc. v. Administrative Review Board*, 833 F.3d 1206 (10th Cir. 2016), and *Palmer v. Western Truck Manpower*, 1985-STA-6 (Sec’y January 16, 1987).

In *Maddin*, the Board upheld the administrative law judge’s finding that the complainant had engaged in protected activity when he “refused to operate the truck under the conditions set by [his supervisor].” PDF at 7. The complainant in *Maddin* had been directed by his supervisor to drive his truck with a trailer that had frozen brakes. The complainant refused to do so and instead unhooked the trailer and drove the truck. The Board stated that the “refusal to operate” clause should not be read narrowly, citing a case where protected activity was found where an employee who refused to drive an overweight truck did not lose protection under the “refusal to drive” provision by correcting the illegality by off-loading and then driving the truck (*citing Beveridge v. Waste Stream Envtl.*, ARB No. 97-137 (Dec. 23, 1997)).³⁶ On appeal in *Maddin*, the Tenth Circuit Court of Appeals stated that the Board interpreted the term “operate” “to encompass not only driving, but other uses of a vehicle when it is within the control of the employee,” and that under this interpretation the refusal-to-operate provision “could cover a situation in which an employee refuses to use his vehicle in the manner directed by his employer even if that refusal results in the employee driving the vehicle.” 833 F.3d 1203, 1211-1212. The

would occur if he or she operated the vehicle. On appeal of the Board’s decision, the Eleventh Circuit disagreed and held that the employee must show that operation of the vehicle would have resulted in an actual violation. The Court remanded the case to the Board. *See Koch Foods v. Sec’y, United States DOL*, 712 F.3d 476. *See also Klosterman v. E.J. Davies, Inc.* ARB No.12-035 (Dec. 18, 2012).

³⁶ The Board additionally *cited McGavock v. Elber, Inc.*, No. 1986-STA-005 (Sec’y July 9, 1986) and *Krahn v. United Parcel Serv., Inc.*, ARB No. 04-097 (May 9, 2006).

Court upheld the finding that unhooking the trailer was a refusal to operate for purposes of section 31105(a)(1)(B)(ii).³⁷

In *Palmer*, the complainant was assigned to drive a load that he determined was not safely loaded. His request to have the load repacked was refused, but some of the excess dunnage was removed. After being told by the plant superintendent that he had fifteen minutes to begin his delivery of the load, complainant drove the truck because he feared he would be fired if he did not. The administrative law judge found that complainant's belief that the load was unsafe was reasonable and that he sought correction of the unsafe condition but his requests for reloading were denied. The Secretary agreed that complainant engaged in protected activity, rejecting the employer's argument that he did not refuse to drive the truck since he actually drove it. The Secretary determined that ultimately driving the truck because of a fear of being discharged did not make the initial refusal less of an activity protected under [then § 2305(b)] of the STAA.

In *Calhoun v. United Parcel*, ARB No. 04-108 (Sept. 14, 2007), *aff'd*, 576 F.3d 201 (4th Cir. 2009), the administrative law judge found that the complainant's refusal to drive until he completed his pre-trip inspections constituted a "refusal to drive," reasoning that "Calhoun's refusal to drive was conditioned on completing his inspections of his vehicle, and I find that a conditional refusal to drive satisfies the refusal to drive" element" of complainant's prima facie case." PDF at 12. The Board held that this was error as a matter of law. *Id.*

In both *Maddin* and *Palmer*, the employees were directed to perform acts they refused to perform. Here, Mr. Herritz's version of the first conversation with Mr. Kissinger, which occurred when the barrel was sitting on the dock before it was loaded on the trailer, suggests that he was ordered to load the barrel as it was, *i.e.*, with the barrel unsecured on the pallet. Mr. Kissinger's version of that conversation is different. He testified that he told Mr. Herritz that he could not secure one barrel to a pallet safely, and instructed him how to load the barrel using load locks. On cross examination, Mr. Herritz admitted that during the first telephone call Mr. Kissinger talked to him about securing the load with load locks, and that Mr. Kissinger asked him how many load locks he had. Tr. at 105-106. This strongly supports that this conversation involved a discussion of how to properly secure the barrel on the trailer and that Mr. Kissinger did not order Complainant to load and drive the truck with the barrel unsecured on a pallet. Because of this testimony and other issues regarding Mr. Herritz's credibility, addressed below, I accept Mr. Kissinger's version of the telephone calls and find that Mr. Herritz was not ordered to haul the barrel unsecured on the pallet. I also find that Complainant never stated that he refused to drive the truck. Therefore, there was no "refusal to drive," and Mr. Herritz cannot prevail on his claim under § 31105(a)(1)(B)(i).³⁸

Because there was no refusal to drive, Mr. Herritz also cannot prevail on his claim under § 31105(a)(1)(B)(ii). Further, § 31105(a)(2) provides that to prove a violation under (1)(B)(ii)

³⁷ Although the specific clause at issue in *Maddin* was § 31105(a)(1)(B)(ii), its reasoning applies equally to § 31105(a)(1)(B)(i).

³⁸ Mr. Herritz put a notation on one of the shipment documents after the load was delivered to Schreiber stating "My proof of protest and cover my ass as well as Jerry's!" JX 1, page 5. See Tr. at 116-117. The Board has held that "driving under protest" is not a "refusal to drive" under § 31105(a)(1)(B)(i) or (ii). See *Calhoun v. United Parcel Service*, ARB No. 04-108 (Sept. 14, 2007) at 12-13, *aff'd*, *Calhoun v. U.S. DOL*, 576 F.3d 201 (4th Cir. 2009).

the complainant must show both that his apprehension of serious injury was reasonable and that he sought from the employer, and was unable to obtain, correction of the hazardous safety or security condition. Here, Complainant has shown that his apprehension of serious injury was reasonable. However, he cannot show that that he was unable to obtain correction of the hazardous condition. Mr. Herritz did seek correction, and was given a recommended method of securing the barrel by Mr. Kissinger. Mr. Kissinger testified that the method he recommended would have complied with federal regulations regarding securement of cargo (Tr. at 24), and Complainant has not contended that it would not have complied.³⁹ Although Complainant used a different method to secure the barrel than the one recommended by Mr. Kissinger, he secured the barrel to his satisfaction, stating that the barrel “looks good enough”, he felt “safe enough,” was “happy” and “ready to go.” Tr. at 119.

I find that Complainant has not proven protected activity under either subsection 31105(a)(1)(B)(i) or (B)(ii). However, he has proven protected activity under subsection 31105(a)(1)(A)(i).

Was Complainant’s protected activity a contributing factor to Respondents’ adverse action?

In *Palmer v. Canadian National Railway/Illinois Railroad Co.*, ARB No. 16-035 (Sep. 30, 2016), the Board held that in determining whether a complainant’s protected activity contributed to the Employer’s adverse action, the factfinder may consider all relevant, admissible evidence, including the employer’s evidence of non-retaliatory reasons for the adverse action. *Id.*, PDF at 15, 29. The Board further stated:

We have said it many a time before, but we cannot say it enough: “A contributing factor is ‘any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision’ We want to reemphasize how low the standard is for the employee to meet, how “broad and forgiving” it is. “Any factor really means any factor. It need not be “significant, motivating, substantial or predominant” – it just needs to be a factor. The protected activity need only play some role, and even an “[in]significant or [in]substantial” role suffices.

Id., PDF at 53 (citations omitted).

Respondents contend there is no causal link between the alleged protected activity and the adverse action of discharging Mr. Herritz. They note that the letter terminating Mr. Herritz (JX 4) does not state the discharge was due to the alleged complaint, but instead notes instances of abusive behavior, prior written warnings and other reasons for the discharge. *Respondents’ Post-Hearing Brief* at p. 22. They further state that there is no statement by either Jerry Kissinger or Kay Kissinger that suggests that the discharge took place because of the complaint. *Id.*

I find that the evidence supports that Complainant’s protected activity contributed to his discharge on March 31, 2014. With regard to the telephone call from Mr. Herritz, Mr. Kissinger

³⁹ Mr. Kissinger’s method required four load locks, and Mr. Herritz testified that he had only two, one of which did not work. However, Mr. Kissinger testified that he believed the Complainant had four, and that load locks could be purchased at a truck stop. In evaluating the witnesses’ relative credibility, I find Mr. Kissinger to be the more credible witness, for reasons discussed below.

testified “that was the last straw, his verbal abuse and language and the way he handled it.” Tr. at 23. He also testified that he and his wife made the decision to terminate Mr. Herritz when they learned his detention claim was not true, but added that Mr. Herritz’s calling him and swearing about the barrel “just put me over the edge.” Tr. at 206. He testified as follows:

Q. Now, you indicated that you had pretty much decided after the false claim for detention time that you were not going to continue using his services?

A. That put me on the edge.

Q. Okay. Did these hostile calls about the barrel seal the deal for you?

A. Yes.

Tr. at 170.

Although I believe that what put Mr. Kissinger “over the edge” was Mr. Herritz’s tone and language, I cannot exclude entirely Complainant’s complaint about the securing of the barrel as a factor, even if not a significant one, in the decision to terminate him.

Have Respondents proven by clear and convincing evidence that they would have discharged Complainant in the absence of STAA-protected activity?

Because Complainant has proven that the protected activity was a contributing factor in Respondents’ decision to terminate him, I must now determine whether the Respondents have proven, by clear and convincing evidence, that they would have taken the same adverse action in the absence of Complainant’s protected activity. *See Palmer v. Canadian National Railway/Illinois Railroad Co.*, ARB No. 16-035 (Sep. 30, 2016), PDF at 56; *Pattenaude v. Tri-Am transport, LLC*, ARB No. 15-007 (Jan. 12, 2017), PDF at 9; 29 C.F.R. § 1978.104(e)(4). In *Palmer*, the Board stated that:

The standard of proof that the ALJ must use, “clear and convincing” is usually thought of as the intermediate standard between “a preponderance” and “beyond reasonable doubt,” and requires that the ALJ believe that it is “highly probable” that the employer would have taken the same adverse action in the absence of the protected activity.

Palmer, PDF at 56-57.

In *Pattenaude*, the Board noted that it is not enough to show that the employee’s conduct violated company policy or otherwise constituted a legitimate independent reason justifying the adverse action, or that the employer could have taken the adverse action in the absence of the protected activity. It stated that in determining whether a respondent has met its burden of proof, consideration should be given to the independent significance of the non-protected activity relied on by the respondent to justify the adverse personnel action, the facts that would change in the absence of the complainant’s protected activity, and evidence relevant to whether the employer would have taken the same adverse action without the protected activity. *Pattenaude*, PDF at

11.⁴⁰ It further stated that the respondent must show “through factors extrinsic to [complainant’s] protected activity” that the discipline complainant was given was “applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same of similar violations.” *Pattenaude*, PDF at 11, citing *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057 (Sept. 30, 2015).

Respondents contend that Complainant was discharged because he made a false claim for detention time at Schreiber Foods by lying about the time he arrived to pick up the load of cheese at Schreiber’s distribution facility in Carthage, Missouri. Respondents contend they made the decision to terminate Complainant after this incident and before the telephone call regarding securing the barrel of lactic acid. Complainant denies that he lied about the time he arrived to pick up the load of cheese. Respondents contend that a contributing factor in his termination was his pattern of behavior and language, including yelling and swearing. According to Respondents, an additional contributing factor was Complainant’s fabrication of driver logs. Respondents provided testimony and documentary evidence of other incidents that they contend were part of a pattern of behavior that resulted in the discharge. Respondents also state that Complainant forfeited any protected activity status by engaging in “belligerent and confrontational behavior,” citing *Formella v. United States Dep’t of Labor*, 628 F.3d 381 (7th Cir. 2010). See *Respondents’ Post-Hearing Brief* at pp. 23-28.

Complainant contends that Respondents have not shown by clear and convincing evidence that they would have discharged Complainant in the absence of protected activity. He states that Respondents did not terminate Mr. Herritz in close proximity to any of the alleged incidents they rely on and that Mr. Kissinger did not mention such incidents in his two conversations with Complainant regarding securement of the barrel of lactic acid. He also states that continuing to retain a difficult employee until he engages in protected activity is evidence of pretext.⁴¹ Complainant also cites *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 13-091 (Feb. 28, 2014), which states that “when an ostensibly legitimate basis for termination is inextricably intertwined with protected activity, Respondent must bear the risk that the ‘mixed motives’ are inseparable.” PDF at 7. See *Complainant’s Proposed Findings of Fact and Legal Argument* at pp. 22-24.

Mr. Kissinger characterized Mr. Herritz’s language during the first telephone call as angry, hostile and loud, and stated that he used foul language. See Tr. at 164-168. He identified his letter to Complainant dated May 23, 2012 about an incident with the former office manager and dispatcher (Heather) (JX 2). The letter states that Complainant yelled and swore at Heather. The letter indicates that Complainant had been spoken to before regarding his “temper and bad language” and been told it was not acceptable. Tr. at 171-173. Kay Kissinger also discussed this incident. She testified that Heather called her from home about the incident, was crying and told her what happened. She told Heather to write it down and identified RX 2 as Heather’s account of the incident, which Mrs. Kissinger used to type the May 23rd letter. She testified that Mr.

⁴⁰ The Board cited *Carr v. Soc. Security Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Whitmore v. Dep’t of Labor*, 680 F.3d 1353, 1370-1375 (Fed. Cir. 2012); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, slip op. at 12 (Apr. 25, 2014).

⁴¹ In support of this proposition, Complainant cites *Pollock v. Continental Express, Inc.*, ARB No. 07-073 (Apr. 7, 2010).

Herritz received JX 2 and never told her that he disagreed with anything in it and did not respond to it. Tr. at 210-212. Mr. and Mrs. Kissinger also testified about JX 3, the letter dated September 26, 2013 to Complainant concerning a telephone call by Mr. Herritz about a clutch adjustment Mr. Kissinger made to Mr. Herritz's truck. Mr. Kissinger stated that although the May 23, 2012 letter (JX 2) said that it would be Complainant's only written warning, they gave him another chance because of the management change, *i.e.*, Heather leaving the company and the fact that Mr. Kissinger was now in the office full-time. His wife received the call about the clutch adjustment first and then Mr. Kissinger spoke with Complainant. He testified that he thought maybe Heather and his wife were making the situation with Mr. Herritz sound worse than it was, but he was finding out that they weren't. Tr. at 173-175. He testified that Mr. Herritz was complaining about a clutch adjustment Mr. Kissinger had made to his truck. Mrs. Kissinger also testified about the September 26th letter (JX 3). She stated that she received the call from Mr. Herritz and helped compose JX 3. She testified that Complainant called in yelling and screaming that that was the "worst [expletive] clutch job anybody had ever done and wanted to know who did it." She then let her husband speak to him. Tr. at 212-214.

Mrs. Kissinger identified RX 2 as a write-up she did regarding a prior incident where Complainant put in for detention time. He claimed he had gotten to the delivery appointment on time, but when Mrs. Kissinger checked the computer she found out he was late. Tr. at 214-215. She also testified about RX 3, notes about two separate incidents. With regard to the January 6, 2014 entry, she stated that she overheard a long conversation between Complainant and her husband regarding Complainant's logbook. After they completed the call, Complainant called back with another logbook question when Mr. Kissinger was out in the shop. Mr. Herritz said he wasn't going to "turn a tire" until Mr. Kissinger answered his question. Mrs. Kissinger testified that she asked if that would make him late for the delivery and he said "I give a [expletive] if I'm late." Mrs. Kissinger stated that she responded in kind and hung up. She said she only spoke that way to drivers if they spoke to her that way. She testified that no one else spoke to her like that. She also testified about an incident on January 15, 2014. Tr. at 215-218.

Mrs. Kissinger identified RX 4 as notes she made concerning incidents on March 21 and March 26, 2014. The March 21st note concerns the telephone call to her from Complainant regarding extra lights for the truck, during which, Mrs. Kissinger testified, Complainant was screaming. Tr. at 218-220. RX 4 also contains a note concerning an incident on March 26 at Schreiber about Mr. Herritz sweeping out his trailer. Mrs. Kissinger testified that she received a call from an employee, "Toni," in Schreiber's office in Carthage. Mr. Herritz was asked to sweep out his trailer after he delivered the load of yogurt so that they could reload the trailer. He was told he had to move the trailer from the dock to a specified location to sweep it out, but he did not move it and instead swept it out where it was. Mrs. Kissinger testified that Toni told her what happened and was very upset. She told Mrs. Kissinger that if Complainant was going to behave that way he would not be allowed at the facility anymore. Tr. at 224-225. Respondents' testimony concerning these events was supported by written, contemporaneous accounts of the incidents. *See* Tr. at 214-215, 218.

Mr. Kissinger testified about an audit performed by the DOT concerning driver logbooks. *See* Tr. at 177-183, 188 and RXs 5-10. The audit revealed violations by Complainant and other drivers, including violations for false reports of records of driver duty status (driver logs). Mr.

Kissinger sent a letter to drivers informing them of the changes that had to be made in view of the audit. RX 10. He testified that after the audit he attempted to analyze drivers to see if they were continuing to falsify their logs. RX 9 shows violations by Complainant after the audit in February and March 2014. He identified RX 10 as his letter of March 14, 2014 to the drivers concerning proper completion of the driver logs. Tr. at 177-187. I note that it appears that the violations set forth in RX 9 were before Mr. Kissinger's letter to the drivers on March 14 (RX 10).

Mr. Kissinger identified the material data sheet for the product in the barrel Mr. Herritz picked-up on March 26th. RX 13. He stated that page 4 of the document indicates that the material is not regulated as dangerous goods. Tr. at 190-191. He testified that he did not have this document at the time Mr. Herritz picked up the barrel.

Mr. and Mrs. Kissinger testified about the detention claim Mr. Herritz made in connection with the pick-up of the cheese in Carthage. Mr. Kissinger identified JX 1 as documents received from Schreiber in connection with the pick-up of the cheese and barrel of lactic acid on March 26th. Mr. Kissinger had page 2 of JX 1 in his possession before the shipment was picked up and the information was given to Mr. Herritz. He testified that Complainant's designated arrival time in Carthage to pick up the cheese was 23:00 hours (on March 25th). Mr. Herritz reported that he arrived for the pick-up at 22:45.a.m. on March 25. However, these times, which IO used to put in the claim for detention with Schreiber, were rejected by Schreiber. Schreiber told IO that Complainant arrived at 02:10 hours on March 26th (see lower right-hand corner of page 3 of JX 1). Mr. Kissinger testified that when his wife received Schreiber's rejection of the claim and informed him of it, he told her "I think this is going to be it for Alex." He stated that Complainant had the most claims for detentions rejected of all the drivers, and that IO trying to collect on false information was a "bad mark" for the company. Tr. at 155-163. Mrs. Kissinger testified that she put in a claim for detention for \$400 based on the times Complainant gave her when he called in. She received a response from Schreiber that the claim could not be authorized because Complainant arrived "considerably later" than his appointment time. Mrs. Kissinger stated that the delivery receipt that was turned in after the delivery showed that he arrived three hours late for the delivery. She said that Complainant did not dispute the times indicated by Schreiber. Tr. at 221-224.

Mrs. Kissinger stated that Complainant's lying about the detention times was "one of the big things" that resulted in the discharge, noting that he had made false detention claims in the past. She agreed that there were a series of incidents that built up and March 26th was "the straw that broke the camel's back." She said that she "put in for detention so many times on Alex and it kept getting kicked out all the time because of lying to me." She said "he lied to me again about when he got there." She said the decision to terminate him was made on March 26th but they did not want to do so until they had their equipment back. Tr. at 233-234.

Three former drivers for IO, Gerald Patee, John Cousineau and Douglas Herrick testified for Respondents. Mr. Patee testified regarding an incident in Utah when he said Complainant yelled and swore at an employee because she would not let him load his truck early. Mr. Cousineau testified that during his time with IO he would encounter Mr. Herritz "just once in a while" and that Complainant seemed to be mad all the time and would swear and complain about

his driving assignments. Douglas Herrick testified about an incident when he and Complainant were supposed to meet at a delivery site at the same time but Mr. Herritz was late. When Mr. Herrick said something about Complainant being late, Complainant used curse words and said "I'll get here when I want." All three former drivers testified that neither IO nor Schreiber asked them to do anything illegal. Tr. at 132-139, 139-147, 236-240.

Complainant denied the allegations of swearing and yelling. He testified that he has a hearing problem and therefore raises his voice at times. Complainant denied the allegations contained in JX 2 and JX3 and the allegations by Mr. Patee, Mr. Cousineau and Mr. Herrick.

I find that Jerry and Kay Kissinger were more credible witnesses than Mr. Herritz. Mr. Herritz did not successfully refute the testimony and the clear documentary evidence that he lied about his claim for detention at Schreiber Foods. Respondents also produced documentary evidence regarding a prior incidence of a false claim for detention by Complainant (RX 2). I credit Mr. Kissinger's version of the telephone calls with Mr. Herritz on March 26, including his testimony about the nature of the language Complainant used and the substantive content of the calls. I have discussed above why I find that Mr. Herritz and Mr. Kissinger did discuss how to properly secure the barrel of lactic acid and I find that Mr. Kissinger did not order Complainant to drive with a barrel of lactic acid that was not properly secured. Mr. Kissinger's contentions about Complainant's language and demeanor were supported by Mrs. Kissinger, the testimony of three disinterested witnesses, Mr. Patee, Mr. Cousineau and Mr. Herrick, the incident report written by Heather Behnke (RX 1), the letter regarding that incident (JX 2) and the other incident reports (JX 3 and RX 4).

Complainant denied the allegations about his demeanor and use of language, but produced no witnesses to support him. He contended that his voice is sometimes loud because of difficulty hearing and/or tinnitus, but he produced no medical evidence to support that he has a significant hearing problem. Further, he first stated that he disclosed a hearing problem on the form he filled out for his periodic physical examination for his commercial driver's license but, when he was informed that an affirmative answer to the question on the form about ear disorders requires a further explanation, he changed his testimony and said that he did not disclose it, but rather told his employers that he has "a little hearing problem." He said he was told by a doctor once that he had a "light" case of tinnitus. I find that any hearing difficulty Complainant had was not significant and does not account for his yelling, and of course does not account for his swearing. I find credible the testimony of Mr. and Mrs. Kissinger and the other witnesses about Complainant's yelling and swearing. Mr. Kissinger testified that the type of language used by Complainant was not typical of truck drivers and that while drivers may use indelicate language among themselves, it is unacceptable around customers or office personnel. I recognize that the language used by Mr. and Mrs. Kissinger at times was inappropriate, but Mrs. Kissinger's use of such language was in response to Complainant's use of inappropriate language, and Mr. Kissinger's use of inappropriate language with Mr. Herritz was in the context of a conversation where Mr. Herritz was using such language. Further, Mr. Herritz used offending language with both his management and with customers.

I find that Mr. Herritz's complaint regarding securement of the barrel of lactic acid, apart from the manner in which he conveyed the complaint, was a minor contributor to his discharge.

I find that Respondents have shown, by clear and convincing evidence, that Respondents would have taken the same adverse action, *i.e.*, the discharge on March 31st, in the absence of the protected activity. I note that the first telephone call between Mr. Herritz and Mr. Kissinger involved both the complaint about securement of the barrel and Mr. Herritz's use of offending language. Thus, a legitimate basis for discipline, the unacceptable language, was "intertwined" with protected activity, an issue that Complainant addresses in his post-hearing brief, citing *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 13-091 (February 28, 2014). In *Tablas*, the Board stated that it was not convinced "that Tablas's failure to wait for repairs was legally separable from his protected refusal to drive. But for the faulty air lines, there would have been no need to wait for repairs." PDF at 7. Here, I find that Complainant's use of unacceptable language is not "inextricably intertwined" with his complaint regarding securement of the barrel, as his complaint could easily have been conveyed without the use of inappropriate language. Under the circumstances here, the fact that Complainant chose to use inappropriate language during the conversation in which he engaged in protected activity does not "inextricably intertwine" a legitimate basis for discipline with the protected activity.

As Complainant notes, the discharge on March 31st was in close proximity to the protected activity on March 26th. However, this was only one of the several incidents of inappropriate language by Complainant, and I have found credible those accounts of his use of such language. I find that Respondents adequately explained why they did not discharge Complainant for his inappropriate demeanor and language in connection with similar prior incidents (*see* RX 1, JX 2 and JX 3). I also accept as true Respondents' version of the detention claim by Complainant related to the delivery at Schreiber. I find that the allegation regarding falsified driver logs was not a significant factor in the termination. It is not clear that Complainant was the only driver who had continued issues with driver logs.⁴²

Complainant's false claim for detention and inappropriate language were legitimate reasons for the discharge and I find that Respondents would have discharged Complainant for those reasons in the absence of the protected activity. I find that the false claim for detention time was the primary reason for the discharge, but that Complainant's pattern of behavior, specifically his pattern of raising his voice and using inappropriate language, was a significant contributor to the discharge. I find that the protected activity, the complaint about securing the barrel of lactic acid, was not a significant factor, and that it is highly probable that Respondents would have taken the same adverse action in the absence of the protected activity. Mr. Kissinger testified that they made the decision to discharge Complainant when they learned of the false detention charge on March 26th, but added that the telephone call from Mr. Herritz on the same day "put me over the edge." As noted above, I believe the "over the edge" statement refers to Complainant's language and demeanor, not to the discussion concerning securement of the barrel.

⁴² Mr. Kissinger testified that Mr. Cousineau and Mr. Neuman did not have further violations but he did not address whether there were other drivers in addition to Complainant who did. I also note that Mr. Cousineau's response when asked if Mr. Kissinger's solution to not falsifying was to make it look like the logs matched, that "well, you made them match" raises questions about whether the primary concern was avoiding further fines for falsification rather than the accuracy of the driver logs.

Applying the factors set forth in *Pattenaude*, I have considered the independent significance of the non-protected activity relied on by Respondents to justify the discharge. As noted above, I give significant weight to Respondents' reliance on the false claim for detention and Complainant's pattern of behavior. I give little weight to the issue involving the driver logs. I have considered the facts that would change in the absence of the protected activity. I find it highly probable that Respondents would have taken the same adverse action in the absence of the complaint about the securing of the barrel.⁴³ The false claim for detention time on March 26, and the prior incidents of inappropriate behavior and language, would remain as legitimate reasons for discharging Complainant. Both Mr. Kissinger and Mrs. Kissinger testified that they made the decision to terminate Complainant after they learned of the false detention claim, and Mr. Kissinger testified that Complainant's "cussing and swearing" about the barrel put him over the edge. Tr. at 205-206, 233-234. Respondents' reason for not discharging Complainant immediately after learning of the false detention claim, because they wanted to get their equipment back safely, was a reasonable and legitimate reason to delay the discharge. The evidence supports that Respondents were aware of the false claim for detention on March 26 before the telephone calls between Complainant and Mr. Kissinger on that date about the barrel of lactic acid.

Pattenaude also states that Respondents must show that the discipline given was "applied consistently, within clearly-established company policy and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations." *Pattenaude*, PDF at 11. Respondents failed to produce such evidence.⁴⁴ Mr. Kissinger did testify that Mr. Herritz's use of foul language and his attitude were not typical of his company's drivers (Tr. at 198-200), and Mrs. Kissinger also testified that no other drivers spoke to her as Mr. Herritz did. Tr. at 217. This testimony suggests that there had been no previous similar incidents. There was no testimony about prior incidents, if any, of false claims for detention by other drivers. In *Formella v. Schnidt Cartage*, ARB No. 08-050 (March 19, 2009), *aff'd*, *Formella v. United States Dep't of Labor*, 628 F.3d 381 (7th Cir. 2010), the administrative law judge (ALJ) found that the complainant was discharged because of his "provocative, intemperate, volatile and antagonistic conduct" toward his superiors and not because of his protected activity. PDF at 5. The complainant appealed and argued that his behavior did not exceed the leeway to which a whistleblower is entitled when voicing a safety complaint, and therefore he should not lose protection under the STAA. The Board noted that a whistleblower must be given some leeway in presenting safety concerns, but that substantial evidence supported the ALJ's finding that Formella was "provocative, intemperate, volatile, and antagonistic, and thus crossed the line of permissible behavior." PDF at 6.⁴⁵ The Board held that substantial

⁴³ Of course, without the telephone call concerning the barrel, there may have been no conversation on March 26th in which Complainant spoke to Mr. or Mrs. Kissinger in an unacceptable manner. Even if that were the case, I find that the evidence supports a finding that it is highly probable that Complainant would still have been discharged on March 31st, because I find that the primary reason for the discharge was the March 26th false claim for detention. Further, as discussed above, the complaint here was not "inextricably intertwined" with the offensive language, and the offensive language may be relied upon as a basis for discipline.

⁴⁴ Complainant identified as CX 2 a "Driver's Handbook and Safety Manual" but neither party offered this document in evidence, and it is therefore not part of the record.

⁴⁵ The ALJ cited in support of his finding *Kenneway v. Matlack, Inc.*, 1988-STA-020, slip op. at 6 (Sec'y June 15, 1998) ("[The] right to engage in statutorily-protected behavior permits some leeway for impulsive behavior, which is balanced against employer's right to maintain order and respect in its business by correcting insubordinate acts;

evidence supported the ALJ's finding that complainant was terminated for his conduct and not for his protected activity. *Id.* at 6-7. On appeal to the 7th Circuit, the Court affirmed. The Court noted that an "employee's entitlement to some indulgence for the manner in which he engages in protected activity 'must be balanced against the employer's right to maintain order and discipline.'" (quoting *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965)). The Court stated that "[w]hereas modest improprieties will be overlooked, 'flagrant,' 'indefensible,' 'abusive,' or 'egregious' misconduct will not be" (citing cases). 628 F.3d at 931. The Court stated that conduct that is disruptive or that amounts to blatant insubordination typically will fall into the category of unprotected behavior. *Id.*

Here, I do not find that Complainant's conduct removed his safety complaint from constituting protected activity. However, in the absence of evidence from either party relevant to whether the discharge of Complainant was consistent with past discipline, if any, for inappropriate language and behavior and submission of false claims for detention, I find that such conduct was significant enough to constitute legitimate grounds for discharge.

D. CONCLUSION

For the reasons set forth above, I find that Complainant has not proven his claim under the STAA.

ORDER

Complainant's claim is hereby **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

LARRY A. TEMIN
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

[the] key inquiry is whether [the] employee has upset the balance that must be maintained between protected activity and shop discipline....").

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).