U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 July 2017

CASE NO.: 2016-STA-00009

In the Matter of:

SHANE HUNTER,
Complainant,

vs.

ACE TIRE & AXLE, INC.,
JAMES H. ROBERTS, III,
Respondents.

Appearances: Paul O. Taylor, Esquire
For the Complainant

William S. Hommel, Jr., Esquire
For the Respondents

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This is a case brought under the whistleblower protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "Act"). Shane Hunter ("Complainant") complains that Ace Tire & Axle, Inc., ("Ace"), his former employer, and James H. Roberts, III, Ace's President, ("James Roberts") (collectively "Respondents") violated the STAA when Ace terminated him in retaliation for making safety complaints and refusing to operate his vehicle. This claim was initiated with the Office of Administrative Law Judges ("OALJ") on December 14, 2015, when the Regional Supervisory Investigator for the Occupational Safety & Health Administration ("OSHA") filed the Secretary's Findings.

For the reasons set forth below, the Complainant's complaint for unlawful retaliation under the STAA is DISMISSED.

I. Procedural History

Complainant filed his complaint with OSHA on August 13, 2015, alleging that Respondents had unlawfully terminated him on July 23, 2015, in retaliation for complaints he

made about mechanical defects and his refusal to drive. On November 20, 2015, the Regional Supervisory Investigator for OSHA issued Secretary's Findings concluding that there was not reasonable cause to believe that Respondents violated the STAA. These findings were automatically filed with OALJ per 29 C.F.R. § 1978.105(b). On December 22, 2015, Complainant filed objections to the Secretary's Findings and requested a hearing. On January 26, 2016, this matter was assigned to me and I issued a notice of hearing, setting this case for hearing on August 17, 2016, in Charlotte, North Carolina.[1] During the telephonic pre-hearing conference on August 10, 2016, the parties agreed to the issues to be decided and indicated that a signed copy of the final version of their stipulations would be filed at or before the hearing.

Hearing was held on August 17 and 18, 2016, in Charlotte. Complainant, Respondent James H. Roberts III, Complainant's counsel, and Respondents' counsel all appeared and were given a full and fair opportunity to present evidence and argument. The signed stipulations were provided to me during the hearing. (Hearing Transcript ("HT"), p. 8.) At the hearing, I marked Complainant's Exhibits ("CX") 1-15. Respondents had no objections, so I admitted CX 1-15. (HT, p. 6.) I then marked Respondents' Exhibits ("RX") A-T. Complainant raised no objections, so I admitted RX A-T. (HT, pp. 6-7.) Finally, I marked and admitted Joint Exhibits ("JX") 1-8.[2] (HT, p. 7.) Originally, the complaint also included Brandon Roberts and Bryant Roberts (collectively "the Roberts brothers")—James Roberts' sons and managers at Ace—as respondents. At the beginning of the hearing, however, Complainant dismissed the complaint as to Brandon Roberts and Bryant Roberts on the grounds that they were not decision-makers. (HT, pp. 8-9.) The caption above has been amended to reflect these dismissals. On August 17, 2016, I heard testimony from James H. Roberts III, Brandon Roberts, Bryant Roberts, and Complainant. On August 18, 2016, I heard testimony from Stanley Schiewe, Kirby Henderson, and Melinda Carter, as well as additional testimony from each of the four witnesses who testified on the first day of the hearing. At the close of the hearing, the parties agreed that post-hearing briefs would be postmarked by October 11, 2016. (HT, p. 402.)

On September 28, 2016, Respondents filed an unopposed motion to extend the briefing deadline to November 11, 2016. This motion was granted telephonically on September 29, 2016. Respondents filed a second unopposed motion to extend the briefing deadline on November 14, 2016. On November 15, 2016, I issued an order granting this motion and setting the briefing deadline for a dispatch date of November 28, 2016. Complainant's Proposed Findings of Facts and Legal Argument ("CPB") was received on November 18, 2016. Respondents' Post-Hearing Statement ("RPB") was received on December 2, 2016. No further filings have been received.

[1] On July 8, 2016, Respondents filed a joint motion to extend the summary decision motion deadline from July 8, 2016, to July 15, 2016. It was granted telephonically the same day. No motions for summary decision were filed.

[2] Claimant's exhibits are stamped with numbering that begins anew in each exhibit. Respondents' exhibits are Bates stamped with numbering that is unique but not always sequential in the binder submitted. The joint exhibits are marked in the same manner as Complainant's exhibits. I refer to these imposed numbers, rather than any numbering internal to the documents in the exhibits. CX 1, CX 2, CX 3, CX 4, CX 5, CX 6, CX 7, RX C, RX D, RX I, and RX Q contain often redundant text messages. In most instances, I cite to only one copy of the text messages in the exhibits, rather than inserting extended string citations cross-referencing each time a text is included more than once.

II. Stipulations

At the hearing, (HT, p. 8), the parties submitted the following signed stipulations:

1. Complainant Shane Hunter is an employee as defined in 49 U.S.C. § 31101(2) and 29 C.F.R. § 1978.101(h). He resides at 355 Seabreeze Rd., Salisbury, NC 28144.
2. Respondent Ace Tire & Axel, Inc. is a motor carrier operating in interstate commerce and an employer subject to the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA"). Respondent Ace Tire & Axle, Inc. maintains its principle place of business at 16471 C R 426, Lindale, TX 75771.
3. Respondent James H. Roberts III is the president of Ace Tire & Axle, Inc., and an individual who participated in the decision to discharge Complainant and retaliate against him. He is also a person as defined at 29 C.F.R. § 1978.101(k) and subject to liability under 49 U.S.C. § 31105.
4. Respondent Brandon Roberts is a manager of Ace Tire & Axle, Inc. He is also a person as defined at 29 C.F.R. § 1978.101(k) and subject to liability under 49 U.S.C. § 31105.
5. Respondent Bryant Roberts is a driver manager of Ace Tire & Axle, Inc., and an individual who participated in the decision to discharge Complainant and retaliate against him. He is also a person as defined at 29 C.F.R. § 1978.101(k) and subject to liability under 49 U.S.C. § 31105.
6. From on or about October 1, 2013, to July 23, 2015, Respondent Ace Tire & Axle, Inc. employed Complainant to operate commercial motor vehicles having a gross vehicle weight rating of 10,001 pounds or more transporting property on the highways in interstate commerce.
7. On July 23, 2015, Respondents fired Complainant.
8. On August 13, 2015, Complainant Shane Hunter filed a timely complaint with the United States Department of Labor, Occupational Safety and Health Administration alleging that the Respondents retaliated against him and discharged him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105.
9. On November 20, 2015, OSHA issued a decision dismissing Mr. Hunter's complaint.
10. On December 14, 2015, Mr. Hunter filed a timely objection to OSHA's decision dismissing his complaint, and requested a hearing de novo before an administrative law judge of the Department of Labor.
11. The United States Department of Labor, Office of Administrative Law Judges has jurisdiction over the parties and the subject matter of this proceeding.
12. During his employment with Respondent Ace Tire & Axle, Inc. Mr. Hunter's job duties included, among other things, the purchase of used manufactured home tires and axles and the operation of a tractor-trailer set to transport those use manufactured home tires and axles on the highways in interstate commerce.
13. Mr. Hunter always operated the same truck-tractor for Ace Tire & Axle, Inc. which was identified as truck no. 88. He operated a variety of semi-trailers.

The truck-tractor and trailers that Mr. Hunter operated for Ace Tire & Axle, Inc. had a gross vehicle weight rating of 80,000 pounds.

14. On or about March 7, 2015, Complainant Shane Hunter brought his assigned truck-tractor to Big O's Auto & Truck Repair, 225 Johnson Dairy Rd., Rockwell, NC 28138. A mechanic for Big O's agreed to service Complainant's assigned truck-tractor over the weekend and instructed him that the vehicle could be picked up that following Monday, March 10, 2015.
15. Brandon Roberts informed Mr. Hunter that Ace Tire & Axle would repair the brakes at their facility in Lindale, Texas.
16. Mr. Hunter arrived at Respondents' terminal in Lindale, Texas on March 27, 2015.
17. At approximately 9:00 a.m. on April 27, 2015, Shane Hunter sent a text message to Brandon Roberts and Bryant Roberts alleging that the tread depth on the inside drive tires were less than 2/32 of an inch.
18. On June 25, 2015, Complainant Shane Hunter informed Bryant Roberts and Brandon Roberts that the oil pressure on his assigned truck-tractor was low.
19. On July 20, 2015, Complainant Shane Hunter sent a text message to Brandon Roberts alleging that the air conditioning of his assigned truck-tractor was defective, that it was 95 degrees outside, and that the driving conditions were "almost unbearable."
20. On July 20, 2015, Complainant Shane Hunter sent a text message to Brandon Roberts alleging that the tread depth on the inside drive tires were less than 2/32 of an inch.
21. On July 22, 2015, Complainant Shane Hunter sent a text message to Brandon Roberts alleging that a tire on his truck-tractor had blown out. Immediately after Complainant sent this text message, he received a telephone call from Brandon Roberts, in which Brandon instructed him to drive to the nearest repair facility to have the tire replaced.
22. Mr. Hunter's gross average weekly wage with Ace Tire & Axle, Inc. was $1,519.49.

Later in the hearing the parties stipulated that the Complainant's June 17, 2015, battery problem and June 25, 2015, oil pressure issue did not contribute to his termination.[3] (HT, pp. 337-38.)

I did not review the parties' stipulations at the hearing. Having now done so, I accept them with 4 exceptions. First, stipulation 3 describes James H. Roberts, III as a person "who participated in the decision to discharge Complainant and retaliate against him." If the parties have stipulated that James Roberts retaliated against Complainant, then there was no need for litigation on anything besides damages. Clearly there is a drafting mistake—the dispute is whether or not James Roberts and Ace retaliated against Complainant in violation of the STAA. Thus, I do not accept stipulation 3 insofar as it implies that James Roberts did, in fact, retaliate against Complainant. That will be determined below.

[3] The texts between Bryant Roberts and Complainant in CX 3 relate to these problems and, generally, show Bryant Roberts trying to assist Complainant with mechanical issues remotely. Texts in CX 6 also relate to these issues.

Second, stipulation 5 identifies Bryant Roberts as "an individual who participated in the decision to discharge Complainant and retaliate against him." This suffers from the same defect as stipulation 3. Moreover, at the beginning of the hearing, Complainant dismissed Bryant Roberts as a defendant on the grounds that he now conceded, after discovery, that Bryant Roberts was *not* involved in the decision to discharge him. (*See* HT, pp. 8-9.) The parties thus agreed to the opposite of what is reflected in stipulation 5. Therefore, I do not accept it.

Two stipulations are also obviously factually incorrect. Stipulation 13 identifies Complainant's truck-tractor as no. 88. As will be reflected below, this is true of the period most relevant to this complaint, but not true of Complainant's entire time with Ace. In addition, Stipulation 14 specifies that Complainant brought his truck to Big O's on or about March 7, 2015, and was told to pick it up the following Monday, March 10, 2015. In 2015, March 10 was a Tuesday. The evidence, again discussed below, shows that Complainant dropped the truck off for repairs on Friday, March 6, 2015, was told they would work on it first thing on Monday, March 9, 2015, and that he was able to pick it up on Tuesday, March 10, 2015. Insofar as Stipulations 13-14 are inconsistent with the evidence of record, I do not accept them.

III. Issues

During the pre-hearing conference and at the hearing, the parties agreed that the issues to be decided in this case are:

1. Did the Complainant engage in activity protected by the Surface Transportation Assistance Act?
2. Did the Complainant's alleged protected activity contribute to his termination on July 23, 2015?
3. Would Respondent[s] have terminated the Complainant even if he had not engaged in his alleged protected activity?
4. If I find in Complainant's favor, what relief and damages is the Complainant entitled to?

(HT, p. 5.)

IV. Factual Background

A. Complainant's Background

Complainant was born in 1977 and is a resident of North Carolina. He has lived in Salisbury, North Carolina for the last 20 years. He graduated from high school and completed two years of college, where he earned an Associate's degree in "welding and welding technology." (HT, pp. 130-31; JX 1, pp. 1-2.) Before getting his Associate's degree he worked in restaurants, where he had eventually moved into management. (HT, p. 131.) According to his application to Ace, from 2012 through 2013 he had been employed in management at Hendrix Bar-B-Q in Spencer, North Carolina, from 2009 to 2012 had worked as a manager at Bojangles, again in Spencer, and that at some point had worked at a driver for Goodmen Lumber in Salisbury. (*Id.* at 3.) Complainant has one child, who was 20 at the time of the hearing, and lives with his fiancé, her child, and his son. (*Id.* at 130-31.)

B. Respondents' Background

Ace Tire & Axle, Inc. is engaged in the business of buying, refurbishing, and selling axles and tires for mobile or manufactured homes. (HT, p. 24.) James Roberts is the founder and current owner of Ace. (*Id.* at 24-25.) He and another individual started the company in 1984. (*Id.* at 387-88.) Ace employs individuals who travel around geographic regions buying used tires and axles, loading them onto a truck, and then transporting them to an Ace facility.[4] (*Id.* at 24.) Ace operates about 15 trucks and employs 7-8 people in its main office. (*Id.* at 55.)

James Roberts has two sons who work for Ace, Brandon Roberts and Bryant Roberts. Brandon Roberts is a manager/buyer coordinator. He oversees a group of employees, dispatchers, who line up loads for the buyers. He also oversees the buyers, who travel around in trucks, evaluating the used tires and axles, making offers, and then loading and transporting the tires and axles back to an Ace facility. He reports directly to his father, James Roberts, who has delegated him the responsibility of dealing with the buyers on a day-to-day basis. (*Id.* at 58-59, 389.) Bryant Roberts manages production operations, sales, and fleet maintenance. He manages most of the employees in the company and takes care of most of the day to day matters. (*Id.* at 95.) He believed that in July 2015 they might have had slightly fewer than 13-15 trucks, but in that range. They had one company mechanic at that time, "Ricardo." (*Id.* at 94-95.) Ace has a shop onsite to do the repairs and stocks basic items. More expensive parts are bought as needed from shops in the town and then installed at Ace. (*Id.* at 257.)

C. Complainant's Recruitment and Hire by Ace

Complainant learned about Ace through his fiancé. She went to school with Jennifer Huron, who worked for Ace as a dispatcher out of Rockwell, North Carolina, where Ace had a yard and an office that Ms. Huron used. Ms. Huron told Complainant's fiancé about the opportunity with Ace. Complainant's father had just passed away and he was looking for a new direction/career change, so he met with her. (HT, p. 132.) They met at Ace's yard and Ms. Huron showed Complainant around, described the nature of Ace's business, and explained what the job would entail. He recalled that she told him "that the job would involve me going to different dealers throughout the week. Most dealers are only open Monday through Friday in the summer open [sic], part of the day on Saturday. She told me that I would be carrying cash and I would buy, grade and possibly sell axles out on the road, that I would have to obtain my CDL." (*Id.* at 133-34.) Complainant was interested in the job and she put him in touch with one of the Roberts. It was then arranged for Complainant to ride with an Ace driver, Jeremiah Peyton, for several days to learn more. (*Id.* at 134.) During those two days they went down to Florida and Mr. Peyton told Complainant more about the job. (*Id.* at 134-35.)

In these meetings, Complainant learned that the position paid mainly on a commission basis, depending on how many axles he bought and how well he had graded them, that is, assessed the correct price for the axle he was buying. He wasn't sure exactly how the

[4] The witnesses tend to refer as the individuals from whom Ace buys used axles and tires as "customers" on whom they makes "sales" calls, though strictly speaking these are the suppliers/seller and Ace is *their* customer/buyer The dynamic, however, appears to make the "customer" description somewhat appropriate—Ace competes with other companies to buy the used times and axles, makes cold-calls on potential suppliers, and maintains customer-like relationships with the suppliers. Below, I tend to follow the witnesses way of describing the business.

commission was calculated. It was a function of how much it cost him to fill the truck with axles, which would then routinely be taken to Texas by a different driver, who had delivered another empty trailer for Claimant to fill. (*Id.* at 135-37.) After the drive-along with Mr. Peyton, Complainant was still interested in the job, so he had a conversation with one of the Roberts brothers, probably Brandon Roberts. Ace arranged for him to ride back to Texas with the driver returning the full trailer so that Complainant could spend a week or week and a half learning the business from Ace's best driver/buyer. When he got to Texas, Complainant had lunch with Brandon Roberts and they spoke for an hour or two. Then Complainant went out with another driver, Gatlin Macadue for a little over a week, learning how to interact with customers, grade the axles, and make the buys in a way that made money for Ace and the driver. This training was focused on the buying/grading aspect of the job, not the driving aspect. (*Id.* at 137-39.) After they returned to Texas, Complainant met with Brandon Roberts again and was offered a job. He was told that he would be working out of North Carolina because Ace was expanding in the area and was going to have a second driver, in addition to Mr. Peyton, working out of that yard and being dispatched by Jennifer. (*Id.* at 140-41.)

Complainant did not have a commercial driver's license ("CDL"), so Brandon Roberts arranged for Stanley Schiewe, one of Ace's better drivers, to go to North Carolina to train him for about three weeks. After that, another driver spent a week and half training him. Complainant was taught proper maintenance, the way to keep logs, how to operate the truck, how to keep the money safe, and how to interact with and buy from customers. (*Id.* at 141-42.) On November 8, 2013, Complainant underwent a "Commercial Driver Fitness Determination" in North Carolina and was found to be qualified for a two year certificate. (JX 1, pp. 10-11.) He got his learner's permit in his second week of learning to drive, and was then able to drive. He didn't take any classes or receive written manuals. (HT, pp. 142-44.) His driver's record indicates that his learners permit was issued on November 13, 2013. (RX B, pp. 8-9.)

On November 25, 2013, Complainant officially applied to Ace for a position as a "Buyer/Driver."[5] (JX 1, p. 1.) He was officially hired the same day. He signed a confidentiality agreement and completed additional employment paperwork on November 25-26, 2013. (*Id.* at 6, 12-16; RX B, pp. 25-35; RX C, p. 71.) He also signed an Ace "Repairs Authorization Policy" on November 25, 2013, agreeing that "[i]f any repairs are made without an authorization from James H. Roberts, III, the total amount of those repairs will be deducted from your payroll check." (JX 2, p. 1.) In addition, Complainant completed an agency agreement whereby he was appointed an agent of Ace to "buy wheels, tires, and axles on a commission basis for [Ace] in the territory described as Kentucky, Virginia, West Virginia, PA, OH & New England as needed." The agreement contained a non-compete clause, lasting "six (12) [sic] months." (JX 3, pp. 1-2.) It was signed by Complainant on November 25, 2013, though the copy in evidence does not contain a signature from Ace's representative, referred to only as "President." (*Id.* at 2.) Under the contract, he was responsible for expenses and would pay for fuel and hotels, when necessary, out of his buy money, which would affect his commission. (HT, p. 146.)

Ace gave Complainant a list of rules, which he signed on November 25, 2013. Twelve rules are enumerated, after the preface that "Each employee will:"

[5] At the hearing, Complainant thought that he had completed the application in Texas after he returned from the trip with Mr. Macadue. (HT, p. 145.)

1. Perform work after having demonstrated ability to do work.
2. Not do deliberate damage to equipment of property.
3. Not have unjustified absences or tardies. (Note: For an excused absence, employee must have a doctor's slip.)
4. Give employer advance notice of at least three days for planned time off (not one or two days, but at least three days).
5. Not use obscene language in the presence of customers.
6. Not lie, steal, or use equipment without permission of employer
7. Not assault a co-worker or supervisor.
8. Not spend time socializing at work; punch out and in for lunch at employee's scheduled time.
9. Not punch in more that [sic] ten minutes early at the beginning of employee's shift or back from lunch break.
10. Not punch in or out for anyone other than himself.
11. Not interfere with or disrupt the company's relationship with any of its customers.
12. Not leave work each day without checking with his supervisor first.

(JX 4, p. 1.) Complainant agreed to random drug tests as well as a 90 day probationary period. In addition, he agreed that any violation of these rules would be good cause for termination. Authority to enforce the rules was allocated to James Roberts as President of Ace. (*Id.*)

D. Complainant's Job with Ace

Complainant was hired to make calls on businesses with used tires and axles. To do so he drove a truck, which he would load with the tires and axles after purchase. He usually took the tires and axles to Ace's facility in Rockwell, North Carolina, but sometimes drove them to the headquarters in Texas. (HT, pp. 24-25.) Ace trained Complainant for commercial truck driving, taught him how to do things like conduct a pre-trip inspection, and taught him the business of buying and grading axles. (*Id.* at 46, 350-51.) Part of his job was physically loading the used tires and axles into the trailer. (*Id.* at 77.) Complainant would carry large amounts of cash, usually around $20,000.00, to pay for the used tires and axles. Ace wanted him to keep his window rolled up in situations in which he might be robbed. (*Id.* at 78.) To get Complainant money, a check would be sent in the mail or with a trailer that was being swapped and then Complainant would cash it. (*Id.* at 91-92; *see also* RX T, p. 1067 (copies of checks).) He was paid mainly on commission, but on an hourly basis when he was delivering product back to Ace. But if he was not picking up or delivering product, he was not getting paid. (HT, pp. 25-26.)

Complainant's immediate supervisor was Brandon Roberts. (*Id.* at 59.) His schedule was usually to be out buying axles and tires Monday through Friday, but there were also occasional weekend pickups. (*Id.* at 84.) If Ace was busy, Complainant might work a lot of hours between Monday and Friday and be out of service hours for the weekend, but a 34 period off duty over the weekend would reset his driving hours of service. (*Id.* at 85.) Part of Complainant's job also involved doing the daily inspections of the truck. (*Id.* at 96.) Bryant Roberts understood that Complainant had no prior experience as a truck driver, (*id.* at 107-08), but expected him to be able to identify issues he was having and relay information so that Ace could make a decision. He was not expected to be able to diagnose problems. (*Id.* at 117.)

Complainant started driving by himself about a month and a half after he started with Ace, almost as soon as he got his CDL. (HT, pp. 144, 147.) According to his driver records, he was issued his CDL on January 3, 2014. (RX B, p. 5.) He testified that Ace would give him money, between $20,000.00 and $30,000.00 to use buying axles from Ace's "customers." The dispatcher, who in the beginning was Ms. Huron, would cold call potential sellers to see if they had any axles available. She would then send Complainant dispatches and set up appointments so he could grade and purchase axles. He would also engage in "door knocking" by stopping by dealerships or other places axles might be available and giving them a card and attempting to buy any axles they were trying to get rid of. (HT, pp. 139-40.) To begin with, he tended to go north into Virginia or Tennessee. There was a lot of relationship building involved because Ace was new to his region. (*Id.* at 147-48.) At some point, Mr. Peyton moved on, so Complainant was the only Ace buyer/driver out of Rockwell. This continued until July 2015, when Ace hired another buyer/driver, "Mike." (*Id.* at 148-49.)

Initially Ace assigned Complainant truck #77, which was an older truck. Everything seemed to work. Sometime in 2014, the clutch in #77 went out and Ace assigned Complainant to truck #85. Complainant continued to drive truck #85 through "a lot of" or "the rest of" 2014. Next, Complainant was assigned truck #88, which he drove for the remainder of his employment.[6] Truck #88 was a 2006 International tractor-trailer. (*Id.* at 149-50.) In his time at Ace, Complainant hauled a number of different trailers, usually 3 different ones on a rotating basis. The last trailer he drove was #2T. (*Id.* at 150.)

Whenever he started a new trip—that is received a new trailer—Ace asked Complainant to complete a checklist containing items to inspect on both the truck and trailer. (RX G; HT, pp. 343-45, 365.) Per the checklist, it was being required of drivers "[d]ue to recent trouble from D.O.T. Inspections." (*E.g.* RX G, p. 911.) Some of these also contain a form for a pre-trip trailer inspection that asks drivers to report on the condition of the trailer and repair logs. (*See generally* RX G.) Complainant noted problems with the tires on one of the truck trailers on March 4, 2014, but not at any point thereafter. (RX G, p. 920; HT, pp. 345-47.) On several occasions he noted loose material, gravel, on the trailer. (*See* RX G, pp. 298, 309, 312, 315, 321, 333, 341, 346, 959-60, 963, 965, 967, 969, 971, 973, 975, 977.) On a number of occasions, he did not complete the checklist. (*See, e.g.*, RX G, pp. 944-45, 948, 951.)

E. September-October 2014 Insubordination and Counseling

In October 2014, Brandon Roberts flew up to North Carolina to meet with Complainant face-to-face. At the hearing, he explained that in September Complainant had been on-the-road in Kentucky and "we asked him to do something and come to Texas and he went on, didn't answer anybody's phone calls, couldn't get a response out of him and he drove back to North Carolina." (HT, pp. 377-78.) Brandon Roberts learned that this was going on from "one of the ladies in the office." He then called and tried to reach Complainant without success. So he travelled to North Carolina and ended up meeting with Complainant at a restaurant. (*Id.* at 378.) The purpose of the meeting was to convey the message that "[t]his is not something that we're going to do going forward," (*id.* at 61), and "[t]hat type of behavior…was just unacceptable."

[6] He thought that he had driven #85 through 2014, but also that he had driven truck #88 for about a year, which would mean he started driving #88 around July 2014. (HT, pp. 149-50.)

(*Id.* at 378.) He told Complainant that "it was not something that we were going to be doing going forward and that there would be the likelihood that he would be terminated if that type of incident occurred." (*Id.* at 379.) Complainant agreed with the counseling and they agreed going forward to have face-to-face interactions, either in Texas or North Carolina, once a month. (*Id.*) This is routine practice for Ace and its drivers/buyers and they followed through on this plan with Complainant. (*Id.* at 379-80.) James Roberts told Brandon Roberts that they should be having these once a month face-to-face meetings. (*Id.* at 384.)

James Roberts recalled that Brandon flew out to North Carolina to talk to Complainant about the incident, but Complainant wasn't suspended and no discipline was put in his file. (*Id.* at 38.) As he remembered the events, Complainant "started not listening, trying—he wouldn't follow instructions. He began not to do his job correctly." (*Id.* at 388.) So he told his son Brandon that "you need to go over there. You need to talk to Shane and if he doesn't stop that, then we're not going to need him anymore." (*Id.*) Brandon Roberts agreed that the discipline involved only his flying up to North Carolina to talk with Complainant and that nothing formal was done. (*Id.* at 60-61.)

F. March 2015 Mechanical Issues and Safety Complaints

The record contains sporadic "Fleetmatics" reports for Complainant's truck-tractor from March 1, 2015, through the end of his employment. These records indicated when are where the vehicle was turned on and off and computes the total idling time, drive time, stop time, and miles for each day. (*See generally* JX 7; RX F.) The records in RX F provide more detailed tracking by GPS of the Complainant's truck's location for some days, sometimes on a minute-by-minute basis, including posted speeds. (*See* RX F.) Kirby Henderson, a bookkeeper/office manager at Ace, explained that the reports use Central Standard Time, their time in Texas, because that is the way they set up the account. (*Id.* at 276, 284.) Officially, Complainant's home terminal is Ace's Texas facility. (*Id.* at 284-85.) According to Bryant Roberts the calculations only reset once a truck is turned off/on, so totals could carry over from day to day.[7] (*Id.* at 124-25, 373-74.)

During the last 6 months of his employment, Complainant operated truck #88. (*Id.* at 70.) The truck and trailer that Complainant operated were weight rated for 80,000 pounds covering truck, trailer, fuel, and freight. (*Id.* at 113.) Complainant testified that in March 2015 he had a problem with his truck. He was slowing down, but the brake wasn't working properly and the truck wasn't stopping. With more pressure on the brake, the truck eventually stopped and Complainant pulled over. He thought he then called or texted Brandon Roberts. Complainant had no experience or expertise dealing with brakes. He was told that Ace would have a mechanic look at the problem at the end of the week. (*Id.* at 151-52.) Complainant also noticed in early March that the truck would "do a hopping in the front" or "have a very violent shaking" when he was accelerating from 0 to 15 mph, after which "it would smooth out." Complainant didn't know what the problem might be, but thought it might be the brakes or ties. (*Id.* at 152.) Complainant's DOT logs from March 5, 2015, indicate that the brakes were "not

[7] James Roberts knew that Fleetmatics tracked trucks via satellite but that otherwise he didn't understand how it worked or what time zone it used. He had only looked at them in the past to see who was moving. (HT, pp. 47-50.) Brandon Roberts was more familiar with the reports and how they tracked where the truck was at a given time, but he wasn't sure which time zone was used or how exactly the tracking worked. He only reviewed them occasionally. (*Id.* at 67-69.) Bryant Roberts wasn't exactly sure how the program worked. (*Id.* at 120-21.)

satisfactory." (CX 8, p. 5; RX p. 994.) He explained that he made that notation because "there wasn't adequate stopping available with the tractor." He thought this was the first time that the problem had occurred. (HT, p. 154.) The next day, Complainant marked that the brakes were not satisfactory on both the truck and trailer. (CX 8, p. 6; RX R, p. 995.) He explained that he thought the problem might be in the trailer. He filled out the inspection logs based solely on Ace's training. (HT, pp. 154-55.)

The record also contains different inspection reports for March 5-6, 2015, on which Complainant indicated that there were no problems with the brakes. (RX R, pp. 996-97.) He testified that the first inspection report was correct and that he completed the other report after Ms. Henderson sent him the report back and told him to re-do it so that there were no problems with the truck. He claimed this happened on several occasions. (HT, pp. 221-24.) Ms. Henderson also oversees DOT compliance at Ace. (*Id.* at 271.) She testified that she spent time with Complainant trying to explain how to complete his DOT logs properly whenever he came to Texas. Complainant had trouble with the "top part" of his logs because the hours wouldn't add up correctly, the stops and fuel wouldn't be logged correctly, or he would forget to sign the logs. (*Id.* at 272.) He usually would make the corrections when he was in Texas, but sometimes Ms. Henderson would send them to him to fix. (*Id.* at 273.) She testified that there should never be two logs for one day and that she does not ask drivers to make corrections to the inspection report portion of the logs. She denied asking Complainant to make changes to the March 5, 2015, inspection report or the March 6, 2015, inspection report. (*Id.* at 274-75.) Complainant stated that the only inspections he completed showing any mechanical problems with the truck were on March 5 and 6, 2015. (*Id.* at 316.)

In the original complaint, Complainant alleged that on the morning of March 6, 2013, he had a near miss with a civilian vehicle due to problems with his brakes. He testified that this occurred on Interstate 85, probably somewhere in South Carolina. (*Id.* at 226-27.) He didn't mention this incident in any of the texts with Ace employees. (*Id.* at 228.) Reviewing the GPS reports, (*see* RX F, pp. 243-47), Complainant agreed that he was on Interstate 95 and then a two-lane highway that morning, starting in Dillon, South Carolina and that he appeared to be consistently travelling at highway speeds. (HT, pp. 231-34.) He then stated that he wasn't exactly sure where he went that day or which highway the near miss occurred on. (*Id.* at 234.) As the day went on he agreed that he made some stops and probably went to his mother's house to pick up a check. Eventually he was on I-85 in North Carolina, but agreed that the GPS showed that he was travelling at highway speeds. (*Id.* at 235-40.) After going over his movements that day, he wasn't sure where the near miss occurred. (*Id.* at 241.) Brandon Roberts could not recall any conversations or messages about any near miss. (*Id.* at 382.) According to the phone records, on March 6, 2015, Complainant called Brandon Roberts just after 8:00 a.m. and then Brandon Roberts called Complainant just after 8:30 a.m. They also exchange calls just before 11:00 a.m. Complainant called Brandon Roberts just before 2:00 p.m. (JX 5, pp. 11-12.) The time zone isn't listed in the records. No calls were exchanged with Bryant Roberts' cell phone. (*See* JX 6, p. 44.)

Complainant testified that he made complaints about his brakes in March 2015 to Brandon Roberts, and then probably to Bryant Roberts, since he handled the mechanical issues. (*Id.* at 156.) He was told they would get the problem fixed at the end of the week. A shop was suggested to him, Big O's, by someone at Ace and he dropped the truck off at the end of the

week, on March 6, 2015.[8] (*Id.* at 157-58, 242.) Big O's told him that they wouldn't be able to get to the truck until the next Monday, and Complainant passed this information along to Brandon Roberts, who told him to pass the information along to "Marky," the dispatcher out of Texas who was working with Complainant at that time. (*Id.* at 158-59.) Complainant left the trailer in Ace's yard, drover the tractor to Big O's, they worked on it on Monday, and then Complainant picked up the tractor on the next Tuesday, March 10, 2015. (*Id.* at 161-62; *see also* CX 4, pp. 36-38 (texts with Brandon Roberts about repairs).) The bill from Big O's was prepared on March 9, 2015, and charged $772.53 for the repairs. The mechanic added "note needs brakes," and then below, "needs alignment." (CX 10, p. 1; RX H, p. 354.)

After Complainant picked up the tractor on March 10, 2015, he drove to Charlotte and Shelby, North Carolina. Complainant testified that at this point he entered notations in his log indicating brake problems because he had gone in to pick up the truck after the repairs and was told that there were "issues." Complainant recalled that the mechanic showed him "deep grooves in the metal there" and informed him that he needed new brakes.[9] Complainant passed this along to Brandon Roberts, who he claimed laughed and told him that the mechanic "was trying to get [one] over on me." Complainant interpreted this to mean he wasn't getting new brakes and he continued to drive the truck, though the problem persisted. (HT, pp. 163-65; *see also id.* at 165-71 (details on March 10, 2015, movements).) Complainant testified that he told Brandon Roberts that he felt unsafe driving the truck, but ultimately agreed to keep driving it after being reassured. These interactions were not done in text, they were over the phone. (*Id.* at 244-45.) He stated that he also would have discussed the issue with Bryant Roberts. (*Id.* at 247.) Brandon Roberts had no recollection of any verbal interactions about the issue. He thought that any of those issues would have been directed to his brother. (*Id.* at 382-83.)

On March 25, 2015, Complainant was inspected by the North Carolina Highway Patrol. It was a level II walk-around inspection. The truck passed and the officer found no problems with the brakes. (HT, pp. 314-15; RX A, p. 1; RX E, p. 239.) Bryant Roberts explained that a level II DOT inspection is a walk around type inspection that also involves review of the driver paperwork. A level I inspection is more thorough. (HT, pp. 96-97.) Complainant didn't report his complaints about the brakes to the trooper. He stated that he kept these to himself because he thought otherwise he would get in trouble with Ace. (HT, p. 369.) In text messages to Brandon Roberts, Complainant stated "I just got pulled normal inspection He still inspecting. Al should b good. I'll update asap." Brandon Roberts responded, "Okay buddy." Complainant then wrote, "Alls good Says all look good." They joked about getting a "green sticker" from the trooper. There are no other comments. (CX 4, p. 5.)

At the end of March, Complainant was on his way to the Ace facility in Texas and told Bryant Roberts that he would be able to arrive at the stop by 8 am-9 am on March 27, 2015. (CX 2, p. 1; CX 5, p. 1.) Mr. Schiewe inspected Complainant's truck, #88, on March 27, 2015, and determined that the brakes complied with the regulations. (*Id.* at 259; RX P, p. 880.) Mr. Schiewe works as a brake inspector for Ace and can do some mechanical work, but is not a qualified mechanic. His main position is as a truck driver. (HT, pp. 55, 96, 256.) When he

[8] In his complaint, Complainant listed this date as March 7, 2015, but he testified that he got his dates mixed up. (HT, p. 242.)

[9] Mr. Schiewe testified that the trucks Ace uses use drum and brake shoes for their breaking system, not rotors and pads. (HT, p. 261; *see also* RX M, pp. 853-65)

inspects brakes, he ensures that the meet the specified regulations and if they do not, he will shut down the truck until repairs are completed. (*Id.* at 258.) To do an inspection, he would conduct a visual inspection, asking someone to step on the brakes so that he could observe their function. He would also inspect the drum and measure the brake pads. (*Id.* at 259-60.) He uses a specially designed template to conduct the measurements, works with the mechanic in doing the tests, and takes the truck out on a highway without a trailer to complete the inspection. (*Id.* at 264.) He determined that the brakes were in good working order on the truck as of March 27, 2015. He didn't recall any discussions with Complainant about the brakes, but there was no reason that Complainant would have made any complaints to him. (*Id.* at 260, 263-64.) Complainant was not present during the inspection. (*Id.* at 269.)

Mr. Schiewe agreed that Complainant was not particularly knowledgeable about brakes and should not be working on or diagnosing brake problems. Instead he would need to rely on what other people told him about the problem. He also should not have been adjusting brakes. (HT, pp. 261-63.) Complainant agreed that Mr. Schiewe was more knowledgeable than him about truck brakes and inspections. (*Id.* at 315-16.) But he claimed that he was present during the inspection and that Mr. Schiewe did not inspect the brakes. He asserted that no one else was there to help Mr. Schiewe and that he watched, but did not assist in the inspection. Complainant admitted that he had no idea how to do an inspection. He remembered that Mr. Schiewe had done a visual review of the tires and then had gone inside to the computer. He contended that Mr. Schiewe was lying. (HT, pp. 325-26.) GPS records show the truck arriving at Ace's Lindale, Texas facility at 8:15 on March 27, 2015. In the rest of the day, there were 6 short start up-shut downs, all in or around that facility and totaling less than a mile. (RX F, p. 260.) Complainant was in Texas over the weekend, met with both of the Roberts brothers, and was also working on his logs to turn in. (CX 4, p. 6; CX 5, pp. 1-2.)

G. April to Mid-July 2015

During his last several months of work, Complainant was dispatched solely out of Texas because the dispatcher in North Carolina left Ace and wasn't replaced. (HT, pp. 118-19.) In April 2015, Ace hired Mindy Carter as a dispatcher out of their Texas office. She dispatched for Complainant from April 2015 through the end of his employment in July 2015. (*Id.* at 287-88; *see also* CX 4, p. 17 (Brandon Roberts instructions to Complainant to correspond with Ms. Carter and just keep him involved in "big picture stuff").) They communicated over the phone or via text multiple times a day. (*Id.* at 288.) She would set up Complainant's appointments a week in advance and try to have at least one for him per day. Generally she would contact dealers and find out what they had available to sell. She would then coordinate with Complainant to determine when Complainant could get to the dealer. Next, she called the dealers back to set up a particular appointment. She also would work out some of the prices with the dealers and then inform Complainant of what she had arranged. (*Id.* at 288-89.) She worked with Complainant; she was not one of his supervisors. (*Id.* at 300.)

Ms. Carter testified that she encountered difficulties dispatching for Complainant:

> He would not make some of the scheduled stops. I mean, it would seem like even in the morning whenever we would talk about where the stops were and what he was doing, a lot of them were the afternoon stops that he would not be able to

> make because he had stopped and rested for his one to two hours that he did on occasion and then whenever we would miss that stop, that would throw off the next stops as well and sometimes we would end up not even getting the customer because they were upset because they had waited for us to be there knowing that we were upset because they had waited for us to be there knowing that we were going to be there that afternoon and I would find out. He would call like an hour before we were supposed to be there and say, "I'm just not going to make it today"…[a]nd that would upset customers.

(*Id.* at 289-90.) When this happened, she would let Brandon Roberts know. (*Id.* at 290.)

The problem was that Complainant would be running late. Sometimes they could reschedule, but sometimes they lost the customer completely. (*Id.* at 310.) She understood that a stop could take longer than expected, that a driver might get stuck in traffic, and that a driver would need to stop to rest. But she thought it was a problem that Complainant would start in the morning, drive a few hours, and then stop and rest for a few hours, when doing so resulted in being late for appointments with customers, which she recalled happened "numerous times," though she couldn't recall particular dates. (*Id.* at 310-11.) Based on text message exchanges between Complainant and Brandon Roberts, Complainant wasn't happy that Ms. Carter was scheduling other drivers for pick-ups in what he considered his territory. Brandon Roberts apparently cleared that up with Ms. Carter, and Complainant was informed Ms. Carter was excited because she was locating a lot of product for Complainant to be able to buy. (CX 1, pp. 2-3; CX 4, pp. 23.) In her time dispatching for Complainant, Ms. Carter didn't recall him making any mechanical complaints, but she testified that those sorts of issues would have been brought to Brandon Roberts and that even if Complainant had said something to her, she would have just turned it over to Brandon Roberts to handle. (HT, pp. 290-91.)

Towards the end of April 2015, Complainant and Bryant Roberts met somewhere south of Atlanta. (CX 2, p. 3.) On April 27, 2015, they texted about a difficulty Complainant was having with his air tanks. (*Id.* at 3-6.) Repairs, totaling $516.99, were made in Salisbury, North Carolina on April 28, 2015. (RX H, p. 365; RX O, p. 879.) The parties also stipulated that Complainant sent a text to Brandon and Bryant Roberts complaining about the tread depth on his inside driver tires on April 27, 2015. In early May 2015, James Roberts was in North Carolina and met with Complainant. He had been in Indiana and was passing through, checking on Ace's facility in North Carolina, on his way back to Texas. They met briefly at his hotel on a Saturday, and he endorsed a check for Complainant so he could get buy money. (HT, pp. 389-90; *see also* RX T, p. 1066 (hotel receipt).) They talked about Complainant's son's plans and James Roberts met Complainant's girlfriend. James Roberts recalled that he asked Complainant how everything was going and was told that "everything is great." (HT, pp. 390-91; *see also* CX 4, p. 20 (texts between Brandon Roberts and Complainant referencing meeting).) Brandon Roberts also travelled to North Carolina and saw Complainant later in May. (*See* CX 4, pp. 23-24.)

On May 27, 2015, Complainant texted Brandon Roberts about having trouble with his trailer brakes. (CX 1, p. 5; CX 4, p. 24.) Complainant testified that he wasn't able to tell where the brake problem was when he was driving. (HT, p. 171.) Brandon Roberts told him to back up and apply the brakes and Complainant inquired as to how his slack adjusters were off. (CX 1, p. 5; CX 4, pp. 24-25.) Mr. Schiewe testified that some of the trailers used by Ace have automatic

slack adjusters that perform the adjustment aft the driver backs up a certain distance and then steps on the brakes. (HT, p. 268.) He also testified that an air leak in the trailer could affect the functioning of the brakes in the tractor as well, if they were connected. (*Id.* at 266.)

On June 4, 2015, Complainant sent a text to Brandon Roberts about the uprights on the trailer that he had just picked up from another driver.[10] (CX 1, p. 7; CX 4, p. 25.) He explained that the axles were leaning too much to one side of the trailer. He thought this was due to a bent upright in the trailer. Complainant took pictures of the problem, showing that the load had shifted, there was a "broken weld" and the axle was at an angle. (HT, pp. 173-76.) Brandon Roberts asked him to send more pictures after the trailer was unloaded, and he did so. (*Id.* at 176-77; CX 1, p. 7; *see also* CX 7, pp. 1-5) Complainant mentioned the possibility of getting it fixed if he could find a welder; Brandon Roberts replied, "Okay." And then, "I'm more concerned with how it happened." (CX 1, p. 7.) Complainant sent texts on June 5, 2015, mentioning shifting in the load, was instructed to tighten the load down, to which he replied that he had done so but something still wasn't correct. (*Id.* at 8; *see also id.* at 9-13 (pictures).)

Complainant also sent a text message to Bryant Roberts on June 4, 2015, stating that his inside back drive tires were too low for tread depth, but that the others were OK. He stated that someone would probably need to look at it over the next couple of weeks. Bryant Roberts replied indicating that he understood, asking for some pictures, and then telling Complainant that he would rather send tires to him than have him buy tires in North Carolina. (CX 2, p. 7; CX 5, pp. 4-5; RX I, pp. 781-82; *see also* HT, pp. 108-09.)

At some point in June, the air conditioning stopped working in Complainant's truck and was no longer blowing cold air. Since Complainant kept the windows up so he could hear on the phone and to keep the money safe, it got "super hot and swampy," which "[a]bsolutely" affected his ability to drive safely by making him "fatigued, sweaty, uncomfortable" and not pay attention to safe driving because he was worried about being comfortable in the truck. (HT, pp. 177-78.) It was especially "miserable" because he also had to do the loading of the axles in the summer heat. (*Id.* at 179.) Ace arranged to have the AC "recharged" and on July 1, 2015 Complainant sent Brandon Roberts a text indicating that it was working great. (CX 1, p. 24; HT, p. 177.)

On June 27, 2015, Brandon Roberts confirmed to Complainant that Ace would be hiring another driver to work out of North Carolina. (CX 1, p. 23.) Complainant expressed concern to Brandon Roberts on July 9, 2015, about the addition of another driver, but Brandon Roberts told him there was no plan he needed to be worried about, that he should just keep buying. (*Id.* at 26.) On July 13, 2015, Brandon Roberts told Complainant that he would be keeping his accounts. (*Id.*)

H. Complainant's Last Week of Employment

During Complainant's last week with Ace, he was being brought to Texas and was trying to buy along the way. (HT, p. 118.) Bryant Roberts recalled that Complainant was dispatched to Texas because Ace wanted to have face-to-face meetings with him on a monthly basis and it was time for one of those to take place, though he added that "Brandon handled Shane." (*Id.*)

[10] Complainant seems to have made similar complaints previously, in February 2015. (*See* RX G, pp. 291, 977.)

Brandon Roberts recalled that that during mid-July, the week before Complainant's last week with Ace, he wanted Complainant to come to Texas for one of the periodic face-to-face meetings but that Complainant said he couldn't do that, wasn't going to, and needed to be home the next weekend. Brandon Roberts told him that was fine and that he could leave the following week and do the face-to-face meeting then. (*Id.* at 381.) Ace was not bringing Complainant to Texas to terminate him. (*Id.* at 384.) Complainant stated that he was given a week or two notice that Ace wanted him to come to Texas and that he did not resist doing so. On the way he made several stops to buy axles, since he hadn't been able to fill his trailer. (*Id.* at 181-82.)

Per Ms. Carter, sometime during the week of July 13, 2015, Complainant was informed that Ace would be bringing him to Texas during the next week. She then set up pickups for him to do on his way down to Texas. (HT, p. 291.) Complainant, however, "wasn't happy that he was going to have to come to Texas" because "[h]e didn't want to have to work over the weekend." (*Id.* at 291-92.) She also arranged some later stops in Kentucky for his trip back to North Carolina so that he could buy axles and get a full-load on his way home. (*Id.* at 292.) Per the Fleetmatics GPS reports, on July 13, 2015, Complainant drove into Virginia, returning to North Carolina on July 15, 2017. (RX F, pp. 265-67; *see also* RX J, pp. 792-95 (invoices for purchases); RX L, p. 804 (same).) On July 16, 2017, he drove into South Carolina, returning to North Carolina the next day. (RX F, pp. 268-69; *see also* RX L, pp. 805-07 (invoices).)

Complainant sent a text message to Brandon Roberts on Friday, July 17, 2015, stating that his air conditioning was not working again. (CX 1, p. 27; HT, pp. 76, 179.) Complainant ended the day in Rockwell, North Carolina. (RX F, p. 269.) On July 20, 2015, the next Monday, Complainant drove through South Carolina and into Georgia, ending in Forsyth, Georgia at 5:44 p.m. and travelling a total of 389 miles. (*Id.* at 270; *see also* RX L, p. 808 (invoice).) The text records show that during the day Brandon Roberts texted Complainant to ask about his air condition and he replied that it still wasn't working. He complained that it was 95 degrees in the truck and "[a]lmost unbearable." He also indicated that he hadn't had time to make one stop in Aiken, Georgia and wasn't going to get to another in Dublin, Georgia until 4:00 p.m. (CX 1, pp. 27-28; *see also* HT, pp. 77, 180.)

At the hearing, Complainant explained that driving without air conditioning was unbearable because he was having trouble focusing, was fatigued and sweaty, and might have been dehydrated. (HT, p. 180.) It was "[j]ust absolutely miserable" without air conditioning, but he was able to roll his windows down while driving to get some relief. (*Id.* at 181-82.) Ace uses a shop in Tyler, Texas for air conditioning repairs and made an appointment with them to have the air conditioning repaired in Complainant's truck. (*Id.* at 382.) They made this appointment for Tuesday, July 21, 2015, because that is when they anticipated Complainant arriving in Texas for their meeting. (*Id.* at 385.) Complainant raised a concern with Ace about sleeping in his truck without having air conditioning and from July 20, 2015, onwards was permitted to get a hotel room instead. (HT, p. 338.) He was told by Brandon Roberts that Ace would fix the air conditioning after he arrived in the yard in Texas. (*Id.* at 359, 362.) Brandon Roberts stated that it was standard policy for hotel stays to be authorized for a driver when the air condition went out, so Ace had no problem approving it for Complainant. (*Id.* at 380-81; *see also* RX K, p. 797 (hotel receipts).) The parties also stipulated that the Complainant sent a text complaint to Brandon Roberts on July 20, 2015, regarding insufficient tread depth on his inside drive tire.

On July 21, 2015, Complainant indicated that he couldn't seem to get loaded with axles and needed to be closer to the Carolinas. He said he was on the side of the highway "roasting." Brandon Roberts told him to just keep driving towards Texas and work with the dispatcher. (CX 1, p. 28.) GPS records show him starting just after 7:00 a.m. central time in Forsyth, Georgia and then driving into Alabama and stopping in Livingston, Alabama at 5:20 p.m. central time. He had travelled a total of 375.12 miles. (RX F, p. 271; *see also* RX L, pp. 808-09.)

On July 22, 2015, Complainant texted Brandon Roberts at 8:43 a.m. to say that he was on his way and still 7 hours away. (CX 1, p. 28.) But as he was driving down the highway, he heard a loud noise, saw some debris fly up in his mirror, and immediately realized he had a blowout. He pulled over and determined that an outside rear trailer tire had blown out. He was in Mississippi at that point.[11] (HT, pp. 183-85.) At 9:18 a.m. Complainant texted Brandon Roberts "I hav [sic] a flat." 13 seconds later he texted, "I think [I] can make som where [sic]." (CX 1, pp. 28-29.) Complainant explained that he texted Brandon Roberts because that was his first contact. Complainant recalled that he and Brandon Roberts discussed the options and came to an agreement that Complainant would try to drive to a repair shop, Southern Tire Mart, 14 miles away to get the tire fixed. (HT, pp. 186-87.) He claimed that there was a verbal conversation in which he told Brandon Roberts that he thought the truck was unsafe to drive but Brandon Roberts directed him to drive to the repair shop anyway.[12] (*Id.* at 318-19.) Bryant Roberts explained that in the event of a flat tire, a driver would always be able to drive to a safe location without doing further damage. It might be possible to drive to the nearest repair facility and forgo the need to call a tow, depending on the situation. He relies on drivers to convey information about how dire the situation is in order to make a decision about whether to drive the truck to a repair facility. (*Id.* at 111-12.) The weight of the load would be a factor as well, since putting more weight on the good tires could cause further damage. (*Id.* at 113.)

After he arrived at Southern Tire Mart, Complainant inspected the truck with a technician and noticed that there was now an issue, "swelling," with the inside tire on the same axle that had the blow out. It looked like it was about to burst. Complainant recalled that the technician informed him that it looked like it had been damaged in the trip back to the repair shop and would need to be switched out. (*Id.* at 187-88.) Ace equipped trailers with one spare tire that could be used and then approved the purchase of another tire so both could be replaced. When the technician was doing the work, he noticed that the rim was warped around one of the lug nuts. When the rim was removed, the technician found damage to the hub, though Complainant didn't really understand what he was being shown. (*Id.* at 190, 192-93.) Eventually Complainant texted with and talked to Bryant Roberts on the phone, trying to determine what needed to be fixed and to get a price list/quote. (*Id.* at 194-95; *see also* CX 1, pp. 29-32 (texts with Brandon Roberts); CX 2, pp. 7-9; RX I, pp. 782-90 (texts with Bryant Roberts).)

Reviewing the messages and calls, Brandon believed that he had told Complainant to buy one new tire and then use the spare that he had to replace the tire that had a flat and the tire that

[11] Complainant admitted that in his deposition he had stated that it occurred in Texas, but explained that he had simply made a mistake in the deposition. (HT, pp. 320-22.)

[12] Brandon Roberts couldn't recall if he had spoken to Complainant during the last week of his employment, but thought that he probably had. (HT, p. 72.) According to his phone records, on July 22, 2015, Brandon Roberts received a call from Complainant at 8:28 a.m. and then called Complainant at 10:38 a.m. (JX 5, p. 166.) Brandon Roberts didn't remember exactly what they had talked about. (HT, pp. 73-74.)

was damaged. They then spoke on the phone. Brandon explained that he would have showed pictures related to the tires to his brother Bryant because Bryant handles the mechanical repair decisions. (HT, pp. 79-84.) Bryant Roberts remembered that he was informed that day that Complainant had a flat, though he wasn't sure if his brother told him or if Complainant contacted him directly. He couldn't remember if he had spoken with Complainant that day.[13] He thought that his brother had also shown him some photographs that Complainant had sent of the flat and damaged tires. (*Id.* at 100-01.) Based on the pictures, Bryant Roberts concluded that the tread had become separated and came off the casing of one tire and the other tire was worn, though he could not tell how worn it was based on the picture alone. (*Id.* at 101-02.) He probably told his brother to inform Complainant to buy a new tire but buy the cheapest brand available. He explained, "[t]he normal practice is if we have the tire fail if we do not have a spare tire on the trailer, purchase a new tire, not a used tire, but to try to be as cost effective as we can in purchasing that tire." (*Id.* at 102-03.) They don't always buy the cheapest brand, but try to match with the other tires on the trailer so that they wear at the same rate. (*Id.* at 103-04.) Some of the other photographs Complainant sent showed that the wheel nuts had come loose or had been loose and were allowing the rim to wobble on one of the trailer tires. (*Id.* at 104-05.) He and Complainant exchanged texts as well about the need for a new hub, drum, and wheels on the trailer. Bryant Roberts texted Complainant with his understanding of what was needed, but was relying on Complainant to talk to the mechanics and pass along information about what was needed to get the truck fixed. (*Id.* at 109-10; CX 2, pp. 7-9; *see also* CX 7, pp. 6-13 (pictures).)

In the texts, Bryant Roberts references the importance of checking for shiny metal, that he noticed in the pictures, on the pre-trip inspection. He also expressed frustration with getting a quote and the prices he was being told. (CX 2, pp. 8-9; CX 5, p. 5.) Bryant Roberts explained that he was referencing shiny metal because it is a sign that something could be wrong and should be checked for during a pre-trip inspection. (HT, p. 111.) Complainant testified that he did pre-trip inspections every morning, though he wouldn't touch all of the lug nuts because it would take several hours for him to do so. (*Id.* at 195.) Bryant Roberts testified that he expects drivers to at least visually inspect the lug nuts on all 18 wheels as part of this inspection. (*Id.* at 98-99.) At this point, he was frustrated with the situation and how expensive the repairs were. Complainant wasn't being clear with him about what was going on or communicated well with the mechanics to relay the information back and forth. (*Id.* at 114-15.)

While the trailer was jacked up for the repairs, Complainant noticed that the tread depth was unacceptable on some of the other tires. He said he reported this to Brandon Roberts and was told that he should keep coming to Texas and that they would switch out any tires that were too worn once he arrived. (HT, p. 196.) All three Roberts were scheduled to be out of the office on Thursday and Friday. At 12:23 p.m., Complainant texted Brandon Roberts inquiring about when he would be at Ace's facility in Texas and was told that they would be there that day but gone the next. Brandon told him that Mr. Schiewe was "set up to help" him with everything in case he arrived on Thursday. (CX 1, p. 33.) The Southern Tire Mart receipt shows that the repairs totaled $1,122.76 and that payment was made just before 1:00 p.m. (RX K, p. 798.)

[13] Bryant Roberts couldn't specifically remember talking to Complainant on the phone on July 22, 2015, but surmised that he must have because he wouldn't have handled the situation with the repairs solely through text. (HT, pp. 119-20.) Phone records show that Complainant called Bryant Roberts at 10:21 a.m. and then again at 12:47 p.m. Both calls were 2 minutes long. (JX 6, p. 167.)

Complainant estimated that his blowout occurred at 9:30 or 10:00 in the morning. The repairs were finished at 12:48. During this period, Complainant's hours of service were still ticking. (HT, pp. 197-98.) He testified that "after we got the tires fixed, I got back out on the road and got to thinking about how just [sic] had a blowout. I told Brandon Roberts that I had other tires that needed to be fixed. He refused to fix them at that time so I wanted to stop somewhere and have my tires looked at by somebody else." (*Id.* at 198.) So he stopped at a Loves Tire and Fuel Store where they have a free tire inspection with a purchase of fuel. He stopped in Flowood, Mississippi, which he thought was 6-7 hours from Ace's facility in Lindale, Texas, though he wasn't sure. Loves told him he had several tires that had too little tread depth. Complainant then continued towards Lindale, but stopped shortly thereafter because it was late in the day. (*Id.* at 198-203.) Complainant stated that he believed several of his trailer tires had bald spots, loose belts, and bulges, but he admitted that he didn't take any pictures of those tires to send to Ace. (*Id.* at 370-71.) The Loves report indicates two tractor tires with low tread depth. Two of the trailer tires were also found to have low tread depth. (CX 11, pp. 1-2.)

According to the Fleetmatics reports, as read by Ms. Henderson, Complainant drove one hour on the morning of July 22, 2015, before stopping in Meridian, Mississippi at 8:39 a.m. He left Meridian at 12:57 p.m. and drove to Flowood, Mississippi in about an hour and a half, arriving at 2:22 p.m. Complainant departed Flowood at 3:09 p.m., stopped briefly in Tallulah, Louisiana at 4:00 p.m., and then continued to Ruston, Louisiana, where he stopped for the day at 6:11 p.m. (RX F, pp. 272, 1052-57; HT, pp. 277-78.) Ms. Henderson stated that drivers have 11 hours to use in a workday and that Complainant still had 5.5 hours left when he stopped. (*Id.* at 278-79.) But she allowed that other rules, such as the 14 hour total daily limit of on-duty time, also applied. (*Id.* at 279-80.) Complainant agreed with this description of his hours and movements and that he stopped driving when he had 3 hours of duty left. (HT, pp. 357-58.) He thought it would have been 6-7 more hours to Lindale. (*Id.* at 359.) He had been driving all day without air conditioning and it was 95 degrees inside the truck. (*Id.* at 363.)

At 4:01 p.m. Brandon Roberts sent Complainant a text reminding him to do pre-trip inspections. Complainant replied that he did and though he might have overlooked it that day, he had not noticed anything loose. An hour later Complainant texted, "I hear yall have s master plan of my staying up over wk end then head to ky. I will go to ky after i have my wk end off. I cannot work wk ends." Brandon Roberts replied, "[d]rive the truck all the way here tonight and will [sic] discuss the master plan tonight." Complainant responded that it would take him until 9:00 p.m. to get there and he could not drive that long. (CX 1, pp. 33-34.) At 4:06 p.m., Complainant texted Bryant Roberts with information on what he had to pay for personally and indicating that he didn't see a reason to come into Texas late that night so would arrive the next day. Bryant Roberts responded a minute later saying that Complainant should give the receipts to Ms. Henderson when he arrived and then she would reimburse him. (CX 2, p. 9; CX 5, p. 6.)

Complainant also spoke with Ms. Carter, on July 22, 2015, who called him while he was driving. The windows were down and he had trouble hearing, but he testified that Ms. Carter told him that he would be unloading his trailer when he got to Texas and then loading it with items that needed to be delivered to Kentucky. (HT, p. 203.) He claimed that he told her about his air conditioning problems, the tires, and the brakes. She told him that he would be buying on the way back to North Carolina, going through Kentucky, and then could get the repairs in North Carolina. (*Id.* at 204.) He testified that Ms. Carter told him that no repairs were going to be

done on his truck because no one was there to complete them. (*Id.* at 362-63.) Complainant stated that he got upset because the Roberts were going to be gone by the time he arrived and that nothing was going to get fixed in Texas. He claimed that the conversation was not heated, but allowed that he hung up on Ms. Carter because he was driving and could barely hear her and was discouraged about the conversation. He decided they would just finish the conversation when he got to Texas. (*Id.* at 204-05.) He didn't receive any more calls and doesn't usually talk on his phone while he is driving. (*Id.* at 205.) Brandon Roberts agreed that it would not be advisable for Complainant to use his cell phone while he was driving. (*Id.* at 61-62.)

Complainant explained that he usually worked Monday to Friday because there wasn't much buying to do on the weekend. He used the weekend to reset his hours of service. He had told people at Ace that he couldn't work weekends for that reason. (*Id.* at 205-06.) Complainant explained that he had no interest in deadheading back home to North Carolina trying to buy axles along the way because he wouldn't make money doing so. But he did want to go into Kentucky because there were axles to buy there. (*Id.* at 206.) He did not believe it would be safe to drive until some of the tires were replaced and his brakes were fixed. (*Id.* at 369-70.)

According to Ms. Carter, she arranged stops in Kentucky for Complainant so that he could buy axles and get a full-load on his way from Texas to North Carolina. (HT, p. 292.) She stated that it would have made no sense at all for Complainant to haul items from the Texas facility to North Carolina because Ace wouldn't have anywhere to put the load in North Carolina. (*Id.* at 293.) Complainant was not happy about the planned trip buying through Kentucky: "he was already seemed to be [sic] agitated that he was coming to Texas and he didn't want to—whenever he was told about the stops in Kentucky, he wasn't happy about it. He thought he was going to be out over the weekend again which wasn't necessarily the case and the next day, he got more agitated about it." (*Id.* at 293-94.)

They spoke on Tuesday and Wednesday, the 21st and 22nd of July. On Wednesday,

> he was very upset that he was having to go to Kentucky and he wasn't happy about it. I mean, he was having—had a few words to say on the phone, cussing a little bit. He was angry about it and he hung up on me and I tried to call him back and he answered and I wasn't able to say anything else because I was trying to explain to him that he wasn't going to have to be out. He wasn't going to have to work over the weekend, but I couldn't get my full explanation out to him because he hung up on my again. Whenever I tried to call him back after that, he just didn't answer the phone.

(*Id.* at 294-95.) His main problem appeared to be having to work over the weekend, but he wasn't being required to work over the weekend. They never discussed where he was going to be over the weekend, but he said he didn't want to work so they told him he wouldn't have to work. (*Id.* at 295, 297.) In these conversations, Complainant never made problems with his truck or needed repairs an issue. (*Id.* at 295.) She would not have independently told him that he would have to return straight from Lindale to North Carolina because she doesn't make those sorts of decisions. (*Id.* at 295-96.)

Ms. Carter couldn't remember if she had arranged for any pick-ups on Friday or if they were set to start during the next week. Complainant was told about the swing through Kentucky on Tuesday, the 21st, and that is when she might have arranged a dispatch for the Friday. (*Id.* at 297-98.) They also talked about it on Wednesday, the 22nd. (*Id.* at 303.) At that point, she thought that they would have been setting up any of the appointments in Kentucky for the following week. Since Complainant had a big issue about not working on the weekend, they told him he wouldn't have to do so and she would have worked on appointments for the following week. (*Id.* at 303-04.) She added they set it up so that he wouldn't have any work over the weekend because Complainant was "throwing such a fit." The prior weekend he had been upset about not wanting to work so they had arranged his schedule so he could leave for Texas on Monday, making stops along the way to buy axles. He didn't want to work the next weekend either, so she was arranging appointments to accommodate that. (*Id.* at 305-06.) She doesn't deal with mechanical issues and did not think she was aware at that time that Complainant had experienced any mechanical issues. (*Id.* at 304-05.) But she did become aware that there was blown tire, though she didn't know where it had happened. (*Id.* at 306.)

In July of 2015, James Roberts, Brandon Roberts, Bryant Roberts, Mindy Carter, Jennifer Hudgens, and "Sharon," who is a bookkeeper, would all have been working in the front office of Ace's Texas headquarters. James Roberts estimated that Ms. Carter would have been 30-40 feet from him. He worked in the office but wasn't aware of "the day-today-stuff" that was going on. (*Id.* at 56-57.) James Roberts has a private office in the shop as well as a desk in the front office area. Most of his work time is in the front office. (*Id.* at 55-56.) Ms. Carter recalled that at some point James Roberts became aware of her difficulties with Complainant and asked her about what was going on. She normally does not speak directly to James Roberts, but he was in the room when Complainant hung up on her for the second time. He asked her about it, and she explained the situation. (*Id.* at 296.)

I. Ace's Termination of Complainant

Complainant arrived at Ace's facility in Lindale on July 23, 2015. He thought he arrived around 8:00 a.m. (HT, p. 207.) According to the GPS records, he left Ruston, Louisiana at 7:35 a.m. central time and arrived in Lindale, Texas at 10:50 a.m., driving a total of 3 hours and 15 minutes. (RX F, p. 273.) He encountered Mr. Schiewe, who asked him to come inside. Mr. Schiewe then called for Jennifer Hudgens, who was another dispatcher. The three of them talked and Ms. Hudgens informed him that James Roberts had decided to terminate him. (HT, pp. 207-08.) Complainant asked her for a reason, and she told him that it was because of his attitude. He asked for elaboration and she explained that it was related to his problem with going to Kentucky over the weekend. He tried to explain the issue to her, but she told him that the decision was out of her hands. (*Id.* at 208.) Complainant then went to a hotel nearby and eventually flew home. Ace paid for his flight home. (*Id.* at 208-09.)

Complainant texted Brandon Roberts at 8:52 a.m. on July 23, 2015, complaining that Ms. Carter was trying to send another driver to one of his customers. Accord to the text messages, less than 5 minutes later, he sent a text saying: "So yall firing me cause I cannot work wk ends. I was never hired to work wk ends." The time stamps on these text messages appear to be in error. Though consistent with Complainant's testimony about when he arrived, they are inconsistent with the GPS records. It is also highly implausible that Complainant got up before 5:00 a.m. to

complete the 3+ hour drive to Ace's terminal. The details, however, are not material—Complainant was terminated on the morning of July 23, 2015, shortly after he arrived at Ace's facility. That afternoon he texted Brandon Roberts: "Y does it have to be this way. All i needed was some kinda heads up for wk end that I need come to texas. Being n the truck so hot its very hard on top of not being told I neede be gone so long. Not sure how this right. The flight that was booked is for aug 8th How do I get home. I worked hard for u and honestly." (CX 1, p. 34.)

James Roberts claimed that he, and he alone, made the decision to terminate Complainant and that this was based on Complainant's refusal to follow instructions and "cussing on the phone." But he initially testified that the decision was made before Complaint broke down on Wednesday, July 22nd. He explained that "it was a[n] accumulation of things of him, of things that he had done." (HT, pp. 29-30.) When he made the decision, his understanding was that Complainant didn't want to do what he was being asked to do by the company, but he wasn't sure whether Complainant wanted time off or not. He believed that Complainant purposely delayed his arrival in Texas, though he understood that Complainant had a breakdown and that effected his hours of service. (HT, pp. 26-28.) At first, he didn't think he was aware of Complainant's refusal to go to Kentucky when he made the decision. He clarified,

> it kind of runs together just a little bit. Whenever I came in and Mindy was frustrated with Shane cussing at her, not taking his calls, hanging up on her, saying he didn't want to do anything…saying he didn't want to do that. He was going back to North Carolina to isolate that one thing about going to Kentucky when I came in there, he was supposed to have been in there Tuesday in the evening, he didn't make it Tuesday. He didn't make it Wednesday. He broke down on Wednesday and then everything just escalated and ran in together, but the determination to let Shane go was made before Wednesday. It wasn't the Wednesday event that made me say, "we're not going to use Shane anymore."

(HT, p. 31.) He added that the decision "was made in the chain of events that happened leading up to that on that Monday when I came in and Tuesday, the arguing back and forth, him not taking the calls, him not doing what he was asked and then whenever I asked about other problems that he had, she told me about other problems he had, not making pickups on time." (*Id.* at 31-32.) But James Roberts maintained that the decision had nothing to do with the breakdown and was made before that Wednesday. He made the decision, but it was based on what Ms. Carter told him about Complainants actions. (*Id.* at 32-33.)

In reference to the September 2014 events, James Roberts explained that they didn't cause him to terminate Complainant 10 months later, but that after the July events, "this was the second time he had done the same kind of stuff and we didn't—I wasn't going to go through it anymore." (HT, p. 38.) There was a problem with Complainant making his pick-ups as directed: "He wouldn't make his pickups. He would get 20 minutes from his stop at 1:00 in the day and he would stop and rest and it would put that dealer off till the following day which would put the people that we had set up for the following day off even later and some off the customers was [sic] getting mad." (*Id.* at 39.) This was the second set of incidents with Complainant. After the first Brandon was sent to North Carolina to talk with Complainant but after the second he decided that "[w]e're not going to have a guy out there doing that." (*Id.* at 40-41.) James Roberts wasn't clear on the exact timing and when the chain of events all occurred. But "the

decision was made on that Monday, Tuesday, Wednesday after I was listening to him on the phone or listening to [Mindy] talk to him and how frustrated she was. It wasn't that Monday, Tuesday, Wednesday. It was a chain of events that led up to that Monday, Tuesday, Wednesday." (*Id.* at 41.) He added that he thought he had made the decision by Tuesday the 21st and then the events on Wednesday the 22nd just confirmed it. (*Id.* at 42.) But Wednesday might have been the day when he informed others that "this is for sure what we're going to do." (*Id.* at 43.) But James Roberts also agreed that the refusal to drive to Kentucky was one of the acts of defiance and insubordination that led to the termination. (*Id.* at 44.)

On the second day of the hearing, James Roberts testified that he first became aware of something going on with Complainant in July 2015 when he noticed that Brandon Roberts was on the phone for 45 minutes with someone and asked him afterwards what was going on. Brandon told him it was something with Complainant, and it reminded of him of the problems that occurred the previous fall. (*Id.* at 391-92.) At that time, his understanding of the situation was that Complainant

> was missing—he would miss his appointments. He would not show up. He would get almost 20 minutes [from] his pickup. It would be in the afternoon like 1:00 or 2:00 and he would stop, not go make the pickup, then it would throw off the next day and our customers was [sic] getting mad. We was [sic] losing some product because of it and after that, I just listened to him all week the week prior and then on that Monday, Tuesday, Wednesday, I would sit over there by where they were at.

(*Id.* at 392.) "They" was Ms. Carter and Brandon Roberts. James Roberts continued: "I would listen to the conversations and then whenever she was trying to get him to take her calls and he hung up on her, I just said, I'm not going to have someone work with us like that anymore. He's got a bad attitude, cusses at the ladies in the shop." (*Id.*)

James Roberts noted that there are a small number mobile home dealers available and they get mad and use Ace's competitors if appointments aren't kept. (*Id.* at 393.) He had been informed of some difficulties with customers related to Complainant, and that was a consideration in his decision. (*Id.* at 393.) He didn't know which customers those were in particular and only relied on what he had been told. (*Id.* at 399.) He doesn't handle or deal with any of the repair issues in the business; those issues would be addressed to Bryant or Brandon Roberts. (*Id.* at 401.) Neither of his sons told him anything about any issues with the mechanical condition of Complainant's truck. (*Id.* at 394.) The first he heard that there might be an issue with the truck was when he received the OSHA complaint. (*Id.*)

Brandon Roberts testified that there was never a time when Complainant brought a mechanical issue to his attention where they didn't do something about the situation. He always referred those problems to his brother. (HT, p. 380.) He never communicated anything to his father about the mechanical condition of Complainant's truck. (*Id.* at 383.) Bryant Roberts testified that he didn't communicate the breakdown to his father. (*Id.* at 111.) In addition, he never discussed earlier repairs with his father. (*Id.* at 127.) Ms. Henderson also testified that Complainant never mentioned any mechanical complaints about his truck to her because that sort of thing would need to be presented to Brandon Roberts and/or Bryan Roberts. (*Id.* at 273.) She

never communicated any complaints from Complainant to James Roberts. (*Id.*) Complainant admitted that he never made any complaints about the condition of his truck to James Roberts. (HT, p. 225.) He talked to James Roberts once on the phone and then once when James Roberts was in North Carolina, but he made no complaints about his truck. (*Id.* at 341-42.)

Brandon Roberts stated that he had "some understanding" of the reason Complainant was terminated and agreed that it was due to insubordination and inability to listen to his supervisors. (HT, pp. 59-60.) There were two major incidents, September 30, 2014, and July 22, 2015, but in addition "[t]here were times where he was being difficult to deal with, but [we] worked through that." (*Id.* at 63.) He believed that Complainant had hung up on Ms. Carter on the 22nd and was aware that in this period Complainant had requested certain repairs, but wasn't sure when those requests were made or what they involved, beyond something with the air conditioning and an incident "with the studs." (*Id.* at 63-64.) He found out that Complainant was going to be terminated when he came back to the office from working in the shop and Ms. Carter informed him that his father had made the decision. He wasn't sure of exactly when this occurred, but it was sometime between Monday and Wednesday, the 20th-22nd. (*Id.* at 65-66., 383.) He believed the decision was linked to his father's observations of the interactions between Complainant and Ms. Carter, but he was not in the office during those calls. (*Id.* at 67.) He explained later that "I was out in the shop and I came forward [into the office] and there was, I guess, my father had seen [sic] over the phone Mindy interacting with Shane and [there] was a—Dad made a decision based on those interactions and I had talked to Shane previously about him coming to Texas the week before and I had to talk to him about coming and Dad could see I was having some trouble with him." (*Id.* at 383.)

J. Post-Termination Events

Complainant continued to send texts to Brandon Roberts after his termination, which occasionally received a response. On July 27, 2015, Complainant asked for his gear from the truck, the rest of what was owed to him, and no contest to his unemployment benefits. He mentioned that "between OSHA and labor board I know I can get whats owed and compensated." (CX 1, p. 34.) Complainant sent a similar text to Bryant Roberts on July 28, 2015. (CX 2, p. 9.) Complainant continued to send these sorts of requests/complaints to Brandon Roberts on July 29, 2015, as well. Brandon Roberts told Complainant on July 29, 2015, that the payroll had been delayed for his last check, but it would be mailed out the next day. Accusations and disputes arose regarding reimbursements Complainant had made to himself, at least some by permission, out of the buy money and the documentation of these. Complainant mentioned the STAA at several points and driving an unsafe truck. Brandon Roberts informed him that his last check had been sent and that he could pick up his gear at Ace during business hours. Complainant also sent indications that he would be getting back into the business either on his own or with a competitor. He complained about his non-compete agreement, and Ace appears to have been slow to provide him with a copy. (*Id.* at 35-41.)

On August 13, 2015, Complainant, through counsel, sent his complaint to OSHA. (*See* CX 12.) OSHA's findings dismissing the complaint were issued on November 20, 2015, and Complainant dispatched his objections on December 15, 2015. (*See* CX 13.) The record contains notes prepared by Respondents in reference to Complainant's termination. (*See* JX 8.) James Roberts didn't remember who exactly prepared them, but testified that it was prepared for

the OSHA investigation at his direction. (HT, pp. 34-35.) He believed that Brandon Roberts and "the girls at the shop" put it together at his direction so they could document what had happened. (*Id.* at 43.) Brandon Roberts testified that he and Ms. Carter put the notes together after the termination. (*Id.* at 66.)

The notes indicate that James Roberts designated Ms. Hudgens to notify Complainant in person, since he could not be in the office on July 23, 2015. The termination was "due to insubordination, negligence with company equipment, and inability to perform job duties…[Complainant] developed a failure to comply with company policies forcing his termination." (JX 8, p. 1.) In reference to insubordination, the notes relate that on September 30, 2014, Complainant had refused to drive his truck to Texas and then refused to return calls, instead driving to North Carolina without approval. Brandon Roberts flew to North Carolina and met with Complainant, who agreed that he had been insubordinate and indicated that he would not repeat the behavior. They also agreed to face-to-face meetings between Complainant and someone with Ace once a month, either in Texas or North Carolina. (*Id.*) Next, the notes relate that Complainant was told during the week of July 13, 2015, that he would need to come to Texas, but that he made excuses and refused. He was told to leave on July 20, 2015, to drive to Texas, making a few stops along the way. On July 22, 2015, Complainant was told that a load had been arranged for him to pick up during the next week in Kentucky, but Complainant indicated that he would not work weekends. He was told he could leave Texas on Monday, but then hung up and refused to answer his phone. The notes state that Complainant's "erratic and unfounded choices often left office personnel questioning what he was even talking about. [Ace] made the decision to terminate [Complainant] based on the constant fight it was to get him to listen to his orders without defiance and insubordination." (*Id.* at 1-2.)

Relating to damage to company property, the notes report that on July 20-22, 2015, Complainant "failed to perform his pre-trip inspection resulting in damages of $1,137.19. [His] negligence and failure to properly perform any type of pre-trip inspections caused this incident. [He] admitted that he probably overlooked the problem." (*Id.* at 2.) Under "Additional Company Policies," notes are included stating that Complainant would refuse to follow ordered routes and would "simply go where he wanted to go instead of where designated," that he would hang up on superiors and refuse to answer his phone, that he was making offers to customers for higher prices without getting approval, and "[h]is overall attitude, erratic behavior and unfounded inconsistencies became confusing and defiant towards his superiors." (*Id.*) Finally, under "Failure to perform job duties," the notes reflect that Complainant incorrectly performed simple math, that he used company money to pay for personal items, that he had poor communication with customers, and that he had "[i]nconsistent, unreliable, and defiant behavior."[14] (*Id.*) The termination notes for OSHA reflect that after being informed of his termination, Complainant replied, "[t]hat's what unemployment is for." (*Id.*)

After Complainant was terminated, he was unemployed for 2.5-3 months. He eventually found a truck driving job with Waste Management in Granite Quarry, North Carolina. He hauls recyclables for them. The pay is less than half of what he was making at Ace. (HT, p. 209.) He testified that "I feel like I went from being a man taking care of my family to starting over." (*Id.*

[14] At the hearing, Brandon Roberts testified that he didn't think that Complainant was a thief, but couldn't be certain that his miscalculations weren't made with the intent to financially harm Ace. (HT, pp. 72-73.)

at 210.) His date of hire with Waste Management was October 10, 2015. In the interim, he applied for numerous other trucking jobs of the same sort that he had been doing for Waste Management, about 2-3 applications per week. Most of these were online. (*Id.* at 347-48.) He was offered a job by Powell Tire and Axle, a competitor of Ace, but could not take it because of the non-compete agreement he signed with Ace. (*Id.* at 349-50.) He also was receiving some interest/offers around the time he started the job with Waste Management. (*Id.* at 352-53.) These jobs paid less than Ace. (*Id.* at 363-64.) Since his termination, his only work has been as a driver for Waste Management. (*Id.* at 370.) Complainant's 2015 W-2 from Ace shows earnings of $44,065.20. (CX 14, p. 1; RX B, p. 4.) His 2015 W-2 from Waste Management shows earnings of $14,124.04. (CX 15, p. 1.) His weekly gross pay for September 13-19, 2015, was $557.48. (*Id.* at 2.) For July 17-23, 2016, it was $776.95. (*Id.* at 3.)

He and his girlfriend had been planning on getting married after they got "through the hottest part of the year," but they postponed their wedding plans because Complainant could no longer afford to pay for the wedding and honeymoon. (*Id.* at 210-11.) His son had just graduated from high school and was planning on going to school to "learn how to work on race cars," but those plans changed because Complainant could no longer afford the technical school. (*Id.* at 211-12.) Instead his son got a job, which made Claimant feel "[i]nadequate." (*Id.* at 212.) He clarified that his son was in the application process for the school when they backed out. He had wanted his son to go into the military first, but his son wanted to go to the school immediately. (*Id.* at 356-57.) Complainant has continued to see a therapist who he had been seeing for issues related to stress, but he has not been prescribed any medications for depression and anxiety. He did not seek any additional treatment because of the termination. (HT, pp. 354-55.) He has had to cancel some medical appointments and had to switch car insurance companies after he let coverage lapse. (*Id.* at 213-14.) His credit has suffered, which makes him feel "[c]heated." (*Id.* at 214.) He enjoys hunting, golfing, and shooting paintball guns with his son, but he couldn't do anything when he was unemployed. Now that he is working, he and his son are able to fish, but not do more expensive activities. (*Id.* at 214-15.)

If he prevails, Complainant would like to be reinstated to his job with Ace, receive back pay, and be awarded compensatory damages for mental pain and emotional distress. He would also like punitive damages to be assessed against Ace and for Ace to be ordered to pay his attorney's fees and costs. (HT, p. 215.)

V. Credibility Determinations

The Administrative Review Board ("ARB") prefers that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). The finder of fact is entitled to determine the credibility of witnesses, to weigh evidence, to draw her own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981). In weighing testimony, an ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor while testifying, and opportunity to observe or acquire knowledge about the subject matter at issue. An ALJ may also consider the extent to which the testimony was

supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

Having heard the witnesses' testimony, I have been able to observe their behavior, bearing, manner, and appearance. The Ninth Circuit has explained that credibility "involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963); *see also Indiana Metal Prods. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971). I have based my credibility findings on a review of the entire record, according due regard to the demeanor of witnesses who testified before me, the logic of probability, and "the test of plausibility," in light the record as a whole. *Indiana Metal*, 442 F.2d at 52.

A. Stanley Schiewe

Stanley Schiewe works for Ace as a driver and inspector. He has been driving for Ace for about 30 years. He is qualified by the Texas State Department of Transportation to do inspections and has done all of the inspections at Ace since they started doing them in-house. He estimated that he had done thousands of inspections. He also helps out with the repairs. (HT, p. 256.) He has determined that trucks need to be out of service until repaired. (*Id.* at 257.) He testified briefly on the second day of the hearing about his inspection of Complainant's truck, the equipment Ace uses, and how repairs are generally handled. I found Mr. Schiewe well-informed and credible as to the limited substance of his testimony.

Complainant alleged that Mr. Schiewe was lying about conducting an inspection of the brakes in Complainant's truck on March 27, 2015. (*Id.* at 325-26.) Their testimony differed as to whether there was an inspection, whether Complainant was present, and whether Mr. Schiewe had the assistance of the mechanic during the inspection. Insofar as there is a substantive dispute on this matter, I find Mr. Schiewe's testimony more credible. Complainant admitted that he didn't have any idea about what a brake inspection involved. (*Id.* at 325.) Mr. Schiewe and Complainant agree that he is not expert in these matters and would not be competent to work on or inspect the brakes. Complainant, then, is in no real position to assert that the inspection never took place. He may have been present for some of the inspection but absent for others, without realizing that the inspection was continuing. He may well have watched the inspection of the brakes but not realized what Mr. Schiewe was doing. Thus, Complainant's testimony does not give good reason to discredit Mr. Schiewe.

B. Kirby Henderson

Kirby Henderson is a bookkeeper and office manager at Ace. At the time of the hearing, she had been in the position for a little over four years. In her job, she handles the accounts payable, the accounts receivable, the HR functions, and Department of Transportation Compliance. (HT, p. 271.) In her compliance work, she reviews the logs sent in by the driver/buyers and ensures that they are correct and completed. Sometimes she has to send logs back to drivers to be completed. (*Id.* at 271-72.) When she does so, she attaches notes pointing

out what needs to be fixed. (*Id.* at 283-84.) She is self-taught in DOT compliance. (*Id.* at 283.) As to Ace's general practices, I found her knowledgeable and credible.[15]

There is a discrepancy over the two sets of driver's logs for March 5-6, 2015. (*See* RX R, 994-97.) Respondents, at the hearing at least, attempted to discredit Complainant for filling out two sets of logs. Complainant asserted that he did so at the insistence of Ace and Ms. Henderson. (*See* HT, pp. 221-24.) Ms. Henderson testified that she would have driver's correct mistakes in the logs related to properly filling them out, but would not ask them to change defects noted on the inspection report. She stated that she did not do so in this instance. (*Id.* at 272-75.) On the record before me, there is not enough information available to understand the two different sets of logs for March 5-6, 2015. I credit Ms. Henderson's testimony about her general practices, but in this instance there is something that needs more explaining. There is little reason for her to demand a change in the inspection report, though Ace might have an interest in obscuring the defects. At the same time, Complainant doesn't seem to have a reason to remove the noted defects either.

I cannot make a determination because the providence of the driver's logs that are in evidence was not explained on the record. Only one week of logs is in evidence. Ace regularly disposes of driver's logs after six months and did not, at least for the most part, have Complainant's logs preserved. (*See* HT, p. 280.) It was not explained where the logs in evidence came from and why only one week is available. I also don't understand where Ace got the two sets of driver's logs that are now in the record. Though presented initially as a credibility problem for Complainant, ultimately the dual sets are much more damaging to Respondents in that they would suggest that Ace has some hostility to protected activity. Complainant didn't submit both sets or explain where he got the one set he did submit. Little of the background was explained. This discussion has presumed that the logs with the defects noted came first, but this is uncertain as well. Complainant may have altered them after the fact, either for litigation purposes or, more likely, as part of general corrections that added notes that should have been made initially based on the subsequent repairs at Big O's.

Resolving this case does not require a firm resolution of why there are two sets of logs in existence and since the record is too incomplete to reach any firm conclusions, I will not resolve that question here. I do not discredit Complainant on the basis of filling out contradictory logs and I do not discredit Ms. Henderson for directing changes be made to the logs. With regard to the particular dispute, I credit neither testimony on the point. To reach a firm resolution, more information is needed about where the logs in evidence came from.

[15] Complainant pursued a line of questioning challenging Ms. Henderson's disposal of the logs after the complaint was filed. (*See* HT, pp. 280-84.) She explained that she keeps logs on file for 6 months and then they are disposed of. She knew generally of the complaint, but never read it or had any idea that the logs were relevant to it. I do not find that Ms. Henderson's actions in any way impair her credibility or call Respondents' good faith into question. She is not a lawyer. There was no reason for her to deviate from standard procedure unless directed to do so. If anything, this shows her general disinterest in the whole matter—the logs are just as likely to be helpful to Respondents as Complainant. She didn't treat them differently than anything else. If Complainant thought it was important for Ace to preserve those records in particular, he should have taken steps to make that clear.

C. Melinda Carter

Melinda Carter is a dispatcher for Ace. She started in April 2015 and was Complainant's dispatcher from April through July 2015. (HT, p. 287.) At the hearing, a potential issue was raised regarding Ms. Carter's retention of text messages with Complainant. She testified that she did not preserve her texts with him, and that would potentially support her testimony, though in part this was due to getting a new phone. (HT, pp. 307-09.) Complainant does not pursue this issue in his post-hearing brief, but in any event, I find that the failure to retain the text messages does not adversely impact Ms. Carter's credibility. She had no reason to retain them. Given potential memory constraints on her phone and a reasonable expectation that she wouldn't have further dealings with Complainant, deleting the text messages would have been natural.

Indeed, though Complainant preserved his text messages with some Ace employees, he did not provide his attorney with texts between him and Ms. Carter because he didn't think to save and turn those over. (*Id.* at 313.) For the messages between Complainant and the Roberts brothers, the record contains at least partial copies from both ends of the conversation. For the exchanges between Ms. Carter and Complainant, the record is bare because neither Ms. Carter nor Complainant retained the messages. Ms. Carter had no reason to do so. Complainant certainly did. It is conspicuous that these were the exchanges he deleted—his complaint is premised, in part, on disagreement with Ms. Carter's dispatches and an alleged refusal to drive for safety-related reasons that he now says was expressed to Ms. Carter. These exchanges are all the more important because James Roberts certainly talked to Ms. Carter before he made the decision to terminate Complainant, though he appears to have not consulted at all with his sons. What exactly Complainant had told Ms. Carter, then, could be very important, since it would confirm what James Roberts would have known when he made the decision. Complainant couldn't have known all of this, but he certainly would have known to preserve texts that evidenced his complaint. In fact he did, given his retention of other texts. Thus, the absence of the text messages reflects poorly on Complainant's credibility, not Ms. Carter's.

In his post-hearing brief, Complainant argues that Ms. Carter was not credible in regards to complaints made to her about his air-conditioning, brakes, and tires. He points out that she was equivocal at the hearing about whether any complaints had been made or whether she was aware of the problems. (CPB, pp. 26-28.) I agree in part. Complainant points to testimony on both direct and cross examination that he contends was evasive. On direct examination, Ms. Carter was asked at several points if Complainant had made any complaints or reports about mechanical problems to her. She didn't immediately give a direct answer, testifying that she didn't deal with the mechanical issues, that she didn't think so, and that anything would have been turned over to the Roberts brothers. (*See* HT, p. 291.) Though her answer wasn't direct, it wasn't equivocal or evasive either—she was clear that in their conversations mechanical problems and repairs were not issues under discussion. (*See id.* at 291, 295.)

Ms. Carter was equivocal on cross examination. In the sequence of questioning at issue, Ms. Carter was asked whether she was aware of mechanical problems with Complainant's truck and responded that she didn't deal with mechanical issues and that Complainant didn't say anything to her specifically about the problems. (*See id.* at 304.) This was consistent with her testimony on direct, but it did not answer the question being posed. Eventually she stated that she didn't believe that she was aware that Complainant talked about mechanical problems with

the Roberts brothers. (*Id.*) This testimony was slightly evasive. There was a clear answer to the question—either she had some sense that there was a mechanical problem or not. Given her testimony as a whole, she was aware that something had gone wrong. Shortly thereafter she unequivocally stated that she was aware that Complainant had suffered a blowout. (*Id.* at 306.) Yet she seemed reluctant to state that point plainly when initially asked.

I do not find that this is a substantive problem with her testimony. It did not extend beyond that one series of questions. Complainant is incorrect to link it to the testimony on direct. There she was being asked about complaints made to her—on cross she was being asked about whether she was aware of problems with the condition of the truck. These are two importantly different things. Suffering mechanical problems or a breakdown are not protected activities. Making internal complaints related to mechanical problems or a breakdown are protected activities. Ms. Carter testified consistently that Complainant did not make complaints to her. She equivocated somewhat in explaining her awareness of those difficulties.

Overall, and with the exception just discussed, I found Ms. Carter's testimony credible. She tended to be expansive in her answers and explained her perspective on the events. In contrast to some of the other witnesses, she volunteered information and explanations in response to questioning. Thus, despite her initial evasiveness on the question of whether she was aware of Complainant's mechanical problems, I give her other testimony weight below.

D. Brandon Roberts

Brandon Roberts is the manager/buyer coordinator for Ace and was Complainant's immediate supervisor. (HT, p. 59.) He doesn't have and never has had a commercial driver's license and had no qualifications as either a mechanic or truck inspector. He wasn't familiar with the types of DOT inspections. (*Id.* at 75.) He was familiar with the DOT hours of service rules "a little bit," but didn't know what sorts of activities might count against those hours. (*Id.* at 84.) He did not handle the mechanical problems with the vehicle. But as Complainant's direct supervisor he communicated with Complainant the most often and was Complaint's first contact at Ace. (*See id.* at 183.)

I found Brandon Roberts somewhat credible. The testimony he gave appeared for the most part to be honest and well-founded. But at the hearing he was not very expansive and appeared to be intentionally limiting himself from saying anything more than necessary in response to a question. This could have been a stratagem or it could have been due to his nervousness and/or general manner. Regardless, it detracted from his testimony. Rarely did he offer answers that explained his responses and rarely did he speak fully in his own words. As I result, I was presented with less of an understanding of his thinking and behavior.

In addition, his memory appears to have been rather poor. For example, he could not recall whether he had talked on the phone with Complainant at all on July 22, 2015. (*See* HT, pp. 72-74.) The hearing was more than a year after the relevant events and some deterioration of memory is to be expected. But given that Complainant was terminated the next day and the termination had been the subject of litigation for the last year, it is surprising that Brandon Roberts would have no memory at all of whether he even spoke to Complainant at that critical point. Most of the other witnesses had some memory difficulties, but were able to elaborate and

provide substantive testimony. Ms. Carter, discussed above, was able to speak convincingly about her interactions with Complainant. James Roberts, discussed below, had some difficulties with details, but was able to speak expansively about events and his thought-processes.

If Brandon Roberts was uncertain about events, there was an easy way to check. For instance, his phone records are in evidence and it is very easy to determine if and when he and Complainant spoke on July 22, 2014.[16] It is rather implausible that Brandon Roberts was so disinterested in this case—a case where until the day of the hearing it was possible that he would be held personally liable—that he blotted the events out of mind and made no efforts to recall or verify basic facts. Either he was seeking to give as little evidence as necessary or has a particularly bad memory. Both are reasons to give less weight to his testimony.

E. Bryant Roberts

Bryant Roberts was 34 years old at the time of the hearing and had been working for Ace for approximately 20 years. (HT, p. 93.) He holds a commercial driver's license and occasionally drives trucks. (*Id.* at 96.) He got this license when he was 19-20 years old. (*Id.* at 117.) He was not Complainant's supervisor, but is in charge of fleet maintenance. (*Id.* at 95.) Thus, he had interactions with Complainant related to some of the mechanical problems he reported. I find Bryant Roberts somewhat credible for the same reasons I found Brandon Roberts only somewhat credible. Like his brother, Bryant Roberts' testimony appeared both honest and well-founded. But it was limited and unexpansive. He also could not remember whether he even spoke with Complainant on July 22, 2015. (*See* HT, pp. 119-20.) This is surprising, since his phone records are also in evidence and, like his brother, he was potentially personally liable in this matter until the day of the hearing.

Both Brandon and Bryant Roberts attempted to pass off responses to the other. Brandon Roberts stressed that Bryant Roberts was handling the mechanical issues and repair decisions. (*See id.* at 82-84.) Bryant Roberts, when asked about the circumstances of Complainant's last week of work, made sure to add in that "Brandon handled Shane." (*Id.* at 118.) These are fair responses, but the effect was to make it difficult to understand the events in question. Though the two brothers clearly have distinct areas of responsibility, they were also clearly talking with each other as events transpired and so could have each given more information. Their collective memory limitations and seeming reluctance to be expansive led to an incomplete picture.

F. James H. Roberts III

James Roberts is the owner and co-founder of Ace. (HT, p. 24.) He made the decision alone to terminate Complainant, relying on information only from Ms. Carter. (*Id.* at 29.) He does not have and has never held a commercial driver's license. (*Id.* at 33.) James Roberts testified twice during the hearing and was both the first and last witness. I found him to be generally credible, with two important qualifications.

First, initially James Roberts testified that he made the decision to terminated Complainant prior to Wednesday, July 22, 2015. (*See* HT, 29-33.) This testimony was not certain. He consistently maintained that it was a series of events in that last week that led to the

[16] They did. (*See* JX 5, p. 166.)

decision, but was uncertain if the events on Wednesday confirmed his prior decision or were part of the reasons for the decision. (*See id.* at 31-32, 41-42.) Complainant argues that this is not credible on the grounds that Ace was still working with, dispatching, and making plans for him on that Wednesday. (CPB, p. 41.) This point is fair, but not dispositive—James Roberts' recollection was that he might have made the decision on Tuesday but then told others on Wednesday. (HT, p. 43.) This would account for any incongruence between Ace's actions through the other managers and employees and James Roberts' decisions. More convincing on this point is the testimony about *why* James Roberts made the decision to terminate Complainant. He wasn't exactly sure and clear about the timeline, but he stressed that it was in relation to the way Complainant was interacting with Ms. Carter and his observations in the office. These began earlier, but given Ms. Carter's testimony, would have culminated on Wednesday, July 22, 2015, not earlier. (*See* HT, pp. 294-97.) I find, therefore, that James Roberts' initial testimony about the timing of his decision is not credible.

Second, in James Roberts' later testimony, more stress was given to Complainant's performance problems. (*See* HT, pp. 392-93.) Insofar as this conflicts with his earlier testimony, I do not credit that those performance problems were a preeminent reason for the decision to terminate Complainant. Rather, in the course of listening to the rest of the testimony, James Roberts' way of framing his decision appeared to shift slightly, placing more stress on the performance problems. To be clear, I do not find that James Roberts was inconsistent between his earlier and later testimony. In both instances performance problems were mentioned and in both instances the foremost rationale was Complainant's insubordinate, difficult attitude and his interactions with Ms. Carter. Instead, I find that listening to the whole testimony and the way the later questions were put and framed had some effect on James Roberts such that performance problems came to occupy a more important role. Thus, I give more weight to his original explanation of the reasons for his decision.

The important question is whether these credibility qualifications warrant a general finding that James Roberts was either deceptive or lacked memory of the events in question. I find that they do not. Beginning with the second point, the shift was subtle and a natural effect of listening to accounts from others and answering questions that pointed him to performance problems. Throughout his testimony, the core substance of James Roberts' account was consistent. The inaccurate testimony about the timing of the decision is initially more troubling. Theoretically at least, locating the decision on Tuesday rather than Wednesday could be very self-serving—it would mean that none of the alleged protected activity on Wednesday could have contributed to the decision to terminate Complainant. This would suggest a general effort at deception.

Scrutinizing the testimony and its context, however, I find that the inaccuracy was the result of inexact memory, not calculating subterfuge. To begin with, it was clearly not a litigation strategy since Respondents' counsel had just introduced their position by a theory that would place the decision on Wednesday, not Tuesday. (*See* HT, pp. 21-22.) Though James Roberts' testimony might have supported another litigation position, it wasn't the position that Respondents adopted. In context, the testimony was less self-serving than self-undermining because it immediately raised questions about Respondents' account. Moreover, James Roberts did not present his account of the timing of the decision as a certainty—he stressed that it was a chain of events that he thought culminated on Tuesday, though he wasn't sure, also indicating

that events on Wednesday could have mattered. This hesitancy and uncertainty indicate this was not a planned out deceptive stratagem. Further, the testimony about timing related to when certain events happened, not whether certain events played a role in his decision. Throughout his awareness of Complainant's interactions with Ms. Carter was important. He admitted that the refusal to drive into Kentucky was a consideration. (*See id.* at 44.) These factors place the decision on Wednesday, not Tuesday. But even if I accepted his timeline, the date of some of the alleged protected activity would have been moved up as well, so the error would not be a logical stratagem to defeat the complaint.

In sum, I find that on those two points James Roberts' testimony is entitled to less weight. I also find that as to details, his memory was inexact and thus his testimony must be treated with caution and considered alongside the other evidence. But I do not find that these concerns warrant a generalized adverse credibility determination. They were mistakes, not efforts at deception. As a general matter, James Roberts' testimony was consistent. Furthermore, in contrast to others, James Roberts helpfully elaborated on his answers and explained his views, providing me with a good sense of his thinking. He did not appear to be attempting to hide or obscure his reasons—indeed, even when pointed to performance problems he shifted back to his consistent rationale. (*Id.* at 392.) Thus, I found him to be a generally credible witness.

G. Complainant

I find Complainant somewhat credible. Though I do not conclude he was being dishonest, I find that he was stretching his account of events to assist his case. I thus give his testimony some weight, but critically evaluate it against the background of the remaining evidence. I give his statements less weight when they are not confirmed, in some way, by the documentary evidence or another witness. I reach this conclusion for a number of reasons.

First, as with all of the witnesses, Complainant's memory was imprecise.[17] For example, though the events surrounding the alleged near miss of March 6, 2015, were stated with certainty in the complaint and initially at the hearing, after further examination Complainant retracted his certainty in the details of the event. (*See* HT, p. 234.) Based on the testimony, it isn't at all clear where it happened or if it even happened at all. He attempts to resuscitate his account in his post-hearing brief, (*see* CPB, pp. 9-10), but the fact remains that he could not give a clear account of what occurred on that date in his testimony.

Likewise, Complainant's memory of other events was off the mark. For instance, while Complainant could testify generally about the course of his hire and early employment, his recollection did not mesh with the other evidence. The sequence surrounding his CDL is somewhat unclear in relation to when he was applying to and exploring the job with Ace. For instance, he testified that he completed his application and employment paperwork when he returned from the trip with Mr. Macadue. (HT, p. 45.) The paperwork was completed on November 25, 2013. (*See generally* JX 1; JX 2; JX 3.) He had a driver fitness examination on November 8, 2013. (JX 1, pp. 10-11.) But in the sequence of events, the process of procuring a

[17] At the hearing, Ace stressed several minor inconsistencies in Complainant's reports, such as whether he stopped to eat at Hardees in Lumberton, North Carolina (as stated in the logs) or in Rockingham, North Carolina (as stated by the GPS) on March 6, 2015. He explained that the two towns are adjacent and he doesn't really know the difference between the two. (*See* HT, pp. 235-37.) I find this much ado about nothing.

CDL came after the trip with Mr. Macadue. In that account, the application paperwork was a formality after Ace had essentially hired Complainant and could not have done when he was in Texas. Something is off here. This is not a deep problem—memories fade and these events were several years prior. Yet it raises some questions about Complainant's memory in general and the degree to which I should accept statements given with more certainty about events that cannot be confirmed in the record.

There are two instances where I find Complainant was deceptive. First, Respondents contend that Claimant's credibility should be discounted because of his testimony related to a prior felony conviction. (RPB, p. 11.) Complainant first testified that he had not been convicted of a felony in the last 10 years, (HT, p. 326), but then admitted after being presented with court records that he had in fact been convicted of felony breaking and entering on April 3, 2007, for which he served time. (*Id.* at 329-30.) He explained that the underlying offense was in 2005, when he was 27, and that he had been drinking at the time. He doesn't drink anymore and the only trouble with the law he has had since then was a stop sign ticket. He stated that after his conviction he found a new way of living and started living for different reasons. He went to school to get a degree in welding and has tried to be a good father for his son. (*Id.* at 367-68.)

The conviction itself is not very important to the issues in this case. But the testimony denying that it had occurred in the last ten years is troubling. It is not the sort of thing that one would expect someone to forget about, or where one would easily mis-remember when the event occurred. The criminal conviction was not an exhibit, so Complainant would not have known that Respondents were prepared to show that he had been convicted of a felony. Absent that evidence prepared for impeachment, Complainant could have gotten away with denying a felony conviction in the last 10 years and that would have been the end of it. I allow that the conviction was 9 years before the hearing, but per Complainant's testimony, it is a conviction that he spent time in jail for and that appears to have been part of an admirable shift in his life. Both suggest that this was just not the sort of thing that would just slip Complainant's mind. If it did and the testimony was all an innocent mistake, Complainant's memory is all the more questionable.

Second, at the hearing, Complainant testified that it would have taken him 6-7 more hours to get from Ruston, Louisiana, where he stopped at 6:11 p.m., to get to Ace's facility in Lindale, Texas. (HT, p. 359.) This was false. Based on the GPS records, it only took Complainant a little over 3 hours to make the drive the next morning. (RX F, p. 273.) Moreover, on July 22, 2015, Complainant knew that it was about a 3 hour drive. At 5:11 p.m., an hour before he stopped, he texted Brandon Roberts that he wouldn't be able to get in that night because it would be 9 p.m. before he arrived. (CX 1, p. 34.) Before he left on the morning of July 22, 2015, so before he covered any distance for the day, he estimated to Brandon Roberts in a text that he was only 7 hours away. (*Id.* at 28.) This is potentially important because in the testimony at the hearing the point at issue was whether or not Complainant, who had 3 hours of service left for the day, *could* have made it to Lindale. The correct answer is that he might have been able to do so, though it would be a close call. Complainant is certainly not to be faulted for stopping—it had been a long, frustrating, hot day. I do not find that Complainant was trying to avoid meeting with the Roberts; the decision to stop was legitimate. But I am bothered by the testimony that it would have taken 6-7 more hours to get to Lindale. I find it highly implausible that Complainant could be mistaken. He made the drive the next day and had made the drive before. I would not expect pinpoint accuracy, but it is unbelievable that Complainant would be

off by a factor of 2. Rather, I conclude that Complainant exaggerated the distance at the hearing in order to thwart the questioning—avoiding the conclusion that he could have made it to Lindale by greatly exaggerating the time involved.

Both of these matters are very minor in the larger scheme of the issues of this case. But I also find that Complainant exaggerated the degree and importance of his complaints related to mechanical issues and truck safety. To be clear, I do not conclude that Complainant was lying about the existence of various complaints. But I do find that his retrospective accounts involved considerable exaggeration. As a whole, Complainant presented a growing story of increased worries about the safety of his truck from March through July of 2015. The record doesn't bear that out. I am particularly convinced by the text messages in the record, which provide a contemporary peek into the dynamics between Complainant and Brandon Roberts (and to a lesser degree Bryant Roberts). There are some mechanical complaints/reports in these messages, but on the whole they are a very minor part of the communications. There is no pattern or growing crescendo of problems. Rather, there are some isolated incidents that seem to be dealt with without any difficulties or animosity. For the most part, they are talking about the business end of buying axles and tires. The tone and dynamic is quite friendly. Brandon Roberts gives some managerial guidance about buying smarter and for lower prices while Complainant expresses some concerns related to the calculation of his pay and Ace's plans to expand in his territory. But these are rather friendly exchanges. Mechanical problems—center stage in Complainant's retelling of the history—play a minor, insignificant role.

For example, at the hearing Complainant testified that when he was inspected by the North Carolina Highway Patrol on March 25, 2015, he didn't report his problems with the brakes to the officer because he was afraid of what would happen to his job with Ace if he went to officials about his safety concerns. (*See* HT, p. 369.) The truck passed inspection, albeit only a walk-around inspection. (*See, e.g.*, RX A, p. 1.) If credited, Complainant's account would place his safety concerns and surrounding complaints in an important role in his employment relationship with Ace, lending support to both his claims about engaging in protected activity and his claims that the protected activity contributed to his termination. Yet the testimony is not believable. In the text messages, Complainant simply informs Brandon Roberts that he has been pulled over for an inspection but that everything should be good. Brandon Roberts responds only, "Okay, buddy." Complainant then updates Brandon Roberts that he has passed, which is followed by some friendly joking about getting a green sticker from the trooper. (*See* CX 4, p. 5.) Of course, one would not expect an employee afraid of retaliation to express that fear, or the desire to report the unsafe condition to an officer, to the employer. But neither would it make sense to interact in this friendly, unconcerned manner about the events. The texts suggest that Complainant wanted to pass, believed he would pass, and was happy to have passed, not a driver concerned about his brakes posing a safety hazard to himself and the public but so afraid of his employer that he was unwilling to alert an officer. I credit the version suggested by the texts, not the version sketched by Complainant at the hearing.

The events of July 22, 2015, furnish another example. Complainant had a blowout. He informed Brandon Roberts via text at 9:18 a.m. (CX 1, p. 29.) Complainant ended up driving the truck, or limping, to a nearby repair ship rather than calling a tow truck or for a some sort of mobile repair service—both of which would have been more expensive and more time consuming. Complainant testified that he had a telephone conversation with Brandon Roberts

about what to do and that in that conversation he told Brandon Roberts that he believed the truck was unsafe to drive but that Brandon Roberts directed him to drive the truck anyway. (HT, pp. 318-19.) Yet 13 seconds after the original text informing Brandon Roberts of the flat, and before receiving any response, Complainant sent another text: "I think I can make it som where [sic]." (CX 1, p. 29.) I find it highly improbable that Complainant independently expressed a belief that he could make it to a shop but then immediately switched gears entirely on the phone and told Brandon Roberts that it was unsafe to do what he had just suggested he could do. It is plausible that they might have spoken on the phone about what to do and that there was some question about driving or calling for help. But in the context of the phone records and the text messages, the testimony that he maintained that the truck was unsafe but then bowed to orders from Ace.

I find that Complainant was exaggerating his protected activity as well as the central role it was playing in his employment. Thus, in reaching determinations below, I will not simply accept Complainant's representations of events when they are not confirmed by or at least generally consistent with the other evidence of record.

VI. Legal Analysis and Findings

A. Legal Framework

The STAA, 49 U.S.C § 31105, "prohibits an employer from discharging, disciplining, or discriminating against an employee-operator of a commercial motor vehicle 'regarding pay, terms, or privileges of employment' because the employee has engaged in certain protected activity." *Clark v. Hamilton Haulers, LLC*, ARB No. 13-023, ALJ No. 2011-STA-007, slip op. at 3 (ARB May 29, 2014) (quoting 49 U.S.C § 31105(a)(1)). The employee protection provisions of the STAA were enacted to encourage employees in the transportation industry to report noncompliance with applicable safety regulations governing commercial motor vehicles. *Brock v. Roadway Express, Inc*., 481 U.S. 252, 255-58 (1987). Congress sought "to combat the increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents on America's highways." *Yellow Freight Sys., Inc., v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993). In particular, "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." *Brock*, 481 U.S. at 258 (citing 128 Cong. Rec. 32698 (1982) (remarks of Sen. Percy); *id.* at 32509-10 (remarks of Sen. Danforth)).

To accomplish that purpose, the STAA provides that:

> (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…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 … (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 or health; or (ii) the employee has a

> reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a). The STAA also contains protections against retaliation for correctly reporting hours of duty, cooperating with a safety or security investigation by the Department of Transportation, Department of Homeland Security, or National Transportation Safety Board, and furnishing information to authorities regarding an incident in connection to commercial motor vehicle transportation that resulted in injury, death, or damage to property. 49 U.S.C. § 31105(a)(1)(C)-(E).

Congress amended the STAA, effective August 3, 2007, as part of the Implementing Recommendations of the 9/11 Commission Act of 2007, *see* Public Law 110-53, 121 Stat. 266, adding protection for complaints for refusals to drive based on a violation of security regulations or vehicle security conditions and also requiring that complaints initiated under the STAA be governed the burden of proof set forth by 49 U.S.C. § 42121(b), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"). 49 U.S.C. § 31105(b). AIR-21 creates a two-step framework for analyzing causation in a retaliation complaint. At the first step, the complainant bears the burden of showing, by a preponderance of the evidence, that the protected activity was a contributing factor in the respondent's decision to take the adverse action. 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1978.104(e)(2)(i)-(iv); *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-036, ALJ No. 2014-FRS-00154, slip op. at 14 (ARB Sept. 30, 2016; reissued Jan. 4, 2017) (*en banc*). So, under the STAA, "a complainant must prove by a preponderance of evidence that: (1) he engaged in protected activity, (2) he was subjected to an adverse employment action, and (3) the protected activity was a contributing factor in the adverse action."[18] *Clark*, ARB Case No. 13-023 at 3-4; *see also Arjuno v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157-58 (3d. Cir. 2013); *Formella v. United States Dep't of Labor*, 628 F.3d 381, 389 (7th Cir. 2010); *Hoffman v. NOCO Energy Corp.*, ARB Nos. 15-070, 16-009; ALJ No. 2014-STA-055; slip op. at 3 (ARB June 30, 2017); *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-071, slip op. at 5 (ARB May 18, 2017).

To show protected activity, the complainant must show that he or she engaged in one of the activities enumerated in the statute. Protected complaints under 49 U.S.C. § 31105(a)(1)(A) may be internal. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 7 (Jan. 31, 2011). A complaint is filed if it is made to a supervisor. *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161; ALJ No. 2003-STA 55, slip op. at 6 (ARB Jan. 31, 2006); *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-37, slip op. at 6 (ARB Dec. 31, 2002). To be protected, a complaint does not need to be correct and the complainant has no burden to prove that there has been an actual safety violation. *Yellow Freight Systems*, 954 F.2d at 357. A complainant must only show that the complaint related to a reasonably perceived violation of a safety regulation. *Id.*; *Urlich v. Swift Transp. Corp.*, ARB No. 11-016, ALJ No. 2010-STA-41, slip op. at 4 (ARB Mar. 27, 2012); *see also Gaines v. K-Five Constr. Corp.*, 742 F.3d 256, 267-68 (7th Cir. 2014); *Guay v. Burford's Tree Surgeon's,*

[18] Some of the case law includes an additional required showing: that the respondent had knowledge of the protected activity. *See, e.g., Williams*, ARB Case No. 09-092 at 5-6; *Riess v. Nucor Corp.*, ARB Case No. 08-137, ALJ Case No. 2008-STA-011, slip op. at 4 (ARB Nov. 30, 2010). Though this fourth element makes things explicit, it would be difficult for a complainant to show that the protected activity contributed to the adverse action if he or she could not show that the respondent had some awareness of the protected activity.

Inc., ARB No. 06-131, ALJ No. 2005-STA-045, slip op. at 6-8 (ARB June 30, 2008). This turns on whether a reasonable truck driver would perceive a violation of a safety regulation because of the subject of the complaint. *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 11 (ARB Sept. 14, 2007), *aff'd* 576 F.3d 201 (4th Cir. 2009). To qualify as protected activity under 49 U.S.C. § 31105(a)(1)(B), the driver must actually have refused to operate the vehicle as instructed. *Calhoun v. U.S. Dept. of Labor*, 576 F.3d 201, 209-10 (4th Cir. 2009); *see also TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206 (10th Cir. 2016). For the refusal to be protected by 49 U.S.C. § 31105(a)(1)(b)(ii), the apprehension must be one for which "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." 49 U.S.C. § 31105(a)(2). The employee must also have unsuccessfully sought a correction of the hazardous condition. *Id.*

Adverse actions include "discharge," "discipline," and discrimination "against an employee regarding pay, terms, or privileges of employment." 49 U.S.C. § 31105(a)(1). Whistleblower standards are meant to be interpreted expansively, as they have "consistently been recognized as remedial statutes warranting broad interpretation and application."[19] *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, slip op. at 15 (ARB Sept. 13, 2011). In *Burlington Northern & Santa Fe Ry. v. White*, the Supreme Court held that an adverse action under Title VII need only be "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." 548 U.S. 53, 68 (2006). Drawing on this rule, the ARB has held that in whistleblower claims, the starting point is any action that "would dissuade a reasonable employee from engaging in protected activity." *Menendez*, ARB Nos. 09-002 and 09-003 at 20. Employer actions must be considered in the aggregate to determine if together they constitute an actionable adverse action. *Id.* at 20-21. Put another way, a respondent employer takes adverse action if takes "'unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.'" *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015) (quoting *Williams*, ARB No. 09-018 at 7).

To complete a case for retaliation, a complainant must establish a causal link between the protected activity and the adverse action—that the protected activity was a contributing factor in the adverse action. 49 U.S.C. § 31105(b)(1); 49 U.S.C. § 42121(b)(2)(B)(i). The ARB has recently clarified the contributing factor inquiry for whistleblower complaints that use the AIR-21 burden-shifting framework in its *en banc* decision in *Palmer v. Canadian Nat'l Ry*. It explained that at this stage the inquiry

> involves answering a question about what happened: did the employee's protected activity play a role, any role in the adverse action? On that question the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is

[19] Cautioning against applying the more stringent standards of Title VII cases, the ARB has stressed the safety issues present in "hazard-laden, regulated industries." *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 12 (ARB Dec. 29, 2010); *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-018, slip op. at 3 (Arb Dec. 21, 2012); *see also Blackorby v. BNSF Ry. Co.*, 2015 U.S. Dist. LEXIS 266, *8 (W.D. Mo. Jan. 5, 2015).

> more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.

ARB No. 16-034, slip op. at 52. The ARB stressed "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.* at 53 (emphasis in original) (quoting *Lockheed Martin Corp. v. Admin. Rev. Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Araujo*, 708 F.3d at 158). There are no evidentiary limitations on this determination, but if an ALJ determines that the protected activity did, in fact, play some role, the inquiry is at an end. Consideration and evaluation of the employer's proffered reasons will only occur in the context of determining whether those were the *only* reasons for the adverse action or if some infirmity therein shows that they are not the real or complete reasons for the action. *Id.* at 52-53. All evidence is considered, but reasons for the action are not weighed. *Id.* at 55.

If the complainant makes out these showings, the burden then shifts to the respondent employer, which in order to avoid liability must demonstrate "by clear and convincing evidence, that [it] would have taken the same [adverse] action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1978.104(e)(4); *Araujo*, 708 F.3d at157; *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-020, 2008-STA-020, slip op. at 7-11 (ARB May 13, 2014). Clear and convincing evidence is evidence that shows "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015) ("*DeFrancesco II*") (citing *Williams*, ARB No. 09-092 at 5); *see also Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 10-13 (ARB Apr. 25, 2014) The *Palmer* ARB explained that this

> second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard is proof by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probably that the employer would have taken the same adverse action in the absence of the protected activity.

Palmer, ARB No. 16-034, slip op. at 52.

So under the STAA, a complainant need only show that his protected activity somehow affected the decision to take the adverse action and to rebut the respondent must show that it is highly probable or reasonably certain that the same action would have been taken absent the protected activity. Thus, the two-step AIR-21 framework for "contributing factor" whistleblower protection statutes is "much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard" familiar from employment discrimination cases—and correspondingly more difficult for an employer to defend. *Araujo*, 708 F.3d at159; *see also Addis v. Dep't of Labor*,

575 F.3d 688, 691 (7th Cir. 2009) (noting that AIR-21 language overrules traditional case law and allows an employee to shift the burden to the employer with a "lesser showing"); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) ("For employers, this is a tough standard, and not by accident"); *Clark*, ARB Case No. 13-023 at 4. Nonetheless, the complainant still has the burden of showing the elements of his case by a preponderance of the evidence—*that* he engaged in protected activity, *that* an adverse employment action was taken against him, and *that* his protected activity was a contributing factor in the adverse action. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 3 (ARB Aug. 31, 2011); *Williams*, ARB Case No. 09-092 at 6; *Fleeman v. Neb. Pork Partners*, ARB Case Nos. 09-059, 09-096; ALJ Case No. 2008-STA-015, slip op. at 3-4 (ARB May 28, 2010).

If a complainant is successful in a STAA action, the Secretary may order abatement of the violation, reinstatement (where appropriate), back pay with interest, other compensatory damages, and special damages. 49 U.S.C. § 31105(b)(3)(A). These damages "are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress." *Ferguson*, ARB No. 10-075 at 7 (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091; ALJ No. 2006-STA-032 (ARB Sept. 24, 2010)). Successful complainants are entitled to be restored to the same or a similar position that they would have occupied but for the discrimination. Where reinstatement is impractical, front pay is available. *Fleeman*, ARB Nos. 09-059, 09-096 at 6-7; *Williams*, ARB No. 09-092 at 10 (citing *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4-5 (ARB Mar. 31, 2005)). Reasonable attorney's fees and litigation costs may be assessed as well. 49 U.S.C. § 31105(b)(3)(A)-(B). Finally, a violation of the STAA may lead to punitive damages, capped at $250,000. 49 U.S.C. § 31105(b)(3)(C). Punitive damages penalize outrageous conduct by a respondent and are appropriate when there has been intentional violation of federal law or reckless or callous disregard for the complainant's rights under the STAA. *Ferguson*, ARB No. 10-075 at 8 (citing *Smith v. Wade*, 461 U.S. 30 (1983); Restatement (Second) of Torts § 908(1) (1979)); *see Youngermann v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 4-8 (Feb. 27, 2013).

B. Did Complainant Engage in Protected Activity?

Complainant contends that during the course of his employment he engaged in a variety of protected activities.[20] In his post-hearing brief, Complainant addresses these contentions in reference to four general categories: brake complaints, tire complaints, air conditioning complaints, and a refusal to drive. I discuss each, concluding that Complainant established that he engaged in protected activity in his brake-related and tire-related complaints. I also find that Complainant established protected activity related to complaints about the uprights on his trailer.

[20] At the hearing, Complainant testified that he engaged in the following protected activities: report of the March 6, 2015, near miss; interactions involving repairs at Big O's on March 6, 2015; talking about the brake/brake rotors/brake pads with both Brandon and Bryant Roberts on March 10, 2015, when he picked up the truck from Big O's; a March 20, 2015, oral complaint to Brandon Roberts about the brakes; complaints to Brandon Roberts and Mr. Schiewe about the brakes on March 27, 2015; April 27, 2015, complaints about the tires and an air leak in the air tanks; May 27, 2015, text to Brandon Roberts complaining about the brakes; air conditioning complaints in July 2015; July 20, 2015, complaints to Brandon or Bryant Roberts about the tires; reporting damage to the rim after the flat tire; and refusing to drive to Kentucky. (HT, pp. 331-33, 336-41, 366.)

1. Brake-Related Complaints

First, Complainant argues that his complaints about defective brakes are protected. These include reports of brake problems that led him to take the truck to Big O's, submission of driver logs noting brake problems on March 5-6, 2015, submitting the invoice from Big O's including a note that the truck needed new brakes, phone conversations about the problem, and the complaints of brake problems on May 27, 2015. (CPB, p. 25.) 49 U.S.C. § 31105(a)(1)(A)(i) protects internal complaints about violations of "a commercial motor vehicle safety or security regulation, standard, or order." Complainant points to potential violations at issue concerning brakes at, for instance, 49 C.F.R. § 392.7 and 49 C.F.R. § 393.40 *et. seq.* He also alleges that, generally, 49 C.F.R. § 396.7(a), which prohibits operating a vehicle in a condition where it is "likely [to] cause an accident or breakdown of the vehicle," and 49 C.F.R. § 396.13(a), which requires that the driver shall be "satisfied that the motor vehicle is in safe operating condition," relate to his complaints. (CPB, pp. 28-30.) He argues that these were reasonable complaints because of the report from Big O's, Brandon Roberts' representation that the brakes would be repaired, and his difficulties with the brakes. He argues that the subsequent inspections that identified no further problems do not defeat the reasonableness of his complaints. (*Id.* at 30-32.)

In relation to the "complaint-based" protected activity generally, Respondents argue that Complainant cannot prevail because his complaints were "centered on extra job assignments rather than on safety violations." (RPB, p. 17.) This argument is inapposite. Respondents are correct that most of the complaints in July were related to weekend work. That does not mean that Complainant made no complaints protected by the STAA. He complained *both* about the perceived need to work on the weekend and various mechanical issues with his truck. In relation to the brakes, the protected activity actually long pre-dates the complaints about weekend work.

I find that Complainant made complaints about the condition of his brakes in early March both in expressing the need to Ace about the need to take the truck for repairs and in his report back to Ace after those repairs about the potential need to replace the brakes. Separately, he complained about a brake problem on May 27, 2015. Both sets of complaints were reasonable. Complainant is not an expert mechanic and was in no position to evaluate the need for more work as recommended by Big O's. I credit that he experienced problems, even if they may have been exaggerated in the re-telling. Respondents have provided convincing evidence that any brake problems were resolved eventually, but that does not render Complainant's complaints unreasonable when they were made. Thus, I find that both sets of complaints—early March and May 27, 2015—are protected activities. I do not find, however, that any protected activity related to the brakes continued into July or that any complaints were directed at Ms. Carter. Aside from Complainant's retrospective account, no evidence makes out any continued protected activity. I also credit Ms. Carter's testimony that Complainant was not making complaints to her about the condition of the truck—given their relationship and her role at Ace, it would have been quite odd for him to be making complaints to her to begin with. No evidence documented additional brake complaints and on the record as a whole, the issue appears to have resolved. Thus, I find that Complainant engaged in brake-related protected activity, but only in March 2015 and then again at the end of May 2015.

2. Tire-Related Complaints

Second, Complainant asserts a variety of protected activity related to his tires, including complaining about tread depth on April 27, 2015, complaining again about tread depth on July 4, 2015, and the events of July 22, 2015, related to informing Ace of the blowout and the needed repairs related to tires on the trailer. (CPB, pp. 25-26.) The parties also stipulated to a complaint via text about inside drive tire tread depth on July 20, 2015. Complainant alleges that in making these complaints he was raising concerns about violations of regulations regarding tire safety found, for instance, at 49 C.F.R. § 392.7 and 49 C.F.R. § 393.75, as well as the general regulations at 49 C.F.R. § 396.7(a) and 49 C.F.R. § 396.13(a). (CPB, pp. 28-30.) Complainant contends that the reasonableness of his beliefs is confirmed by the problems with the tires, the observations upon repair, and the tire check at Loves. (*Id.* at 31-32.) Respondents do not make any additional argument contending that these complaints were not made or that they were not reasonable. I find that each of the complaints is supported by the record and was reasonable. Thus, the three groups of complaints related to the tires—the April 27, 2015, complaint, the July 4, 2015, complaints, and the various reports/complaints related to events in Complainant's last week of work—are activities protected by the STAA. I find that Ms. Carter was aware that Complainant had suffered a breakdown but that no specific complaints were directed at her: there was no reason for Complainant to make such a complaint to her, there is no documentary evidence of such a complaint, and I find Ms. Carter's testimony on the point more credible.

3. Air Conditioning-Related Complaints

Next, Complainant argues that his various complaints related to his air conditioning are protected by the STAA. He points to his July 17, 2015, and July 20, 2015, text messages to Brandon Roberts complaining about the air conditioning as well as his discussion with Ms. Carter about the air conditioning. (CPB, p. 26.) Complainant alleges that air conditioning complaints relate to two regulations. 49 C.F.R. § 392.3 forbids operation of a motor vehicle "while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin of continue to operate the commercial motor vehicle." 49 C.F.R. § 396.3(a) requires that specified parts, as well as "any additional parts and accessories which may affect safety of operation," be "in safe and proper operating condition at all times." He also contends that his air conditioning complaints relate to the general regulations at 49 C.F.R. § 396.7(a) and 49 C.F.R. § 396.13(a), though these more general references to do not any distinct mode in which the regulations would have been violated.[21] (CPB, pp. 29-30.)

I find that the complaints related to the air conditioning, at least on the facts of this case, are not protected by the STAA. None of the regulations cited—or in the relevant sections of the C.F.R.—mention air conditioning or impose any requirements that a truck even be equipped with air conditioning. 49 C.F.R. § 393, which covers "Parts and Accessories Necessary for Safe Operation" does not mention air conditioning at all. Complainant can only point to general, or residual clauses that could be stretched to cover *anything* related to operating the truck, be it a

[21] I.e., for there to be a violation of one of these regulations, the problem would have to have risen to the level that it also violated one of the other regulations specifically decided. Complainant does not discuss these two additional regulations as distinct forms of violation and makes no argument that they were violated other than adding them to the argument made related to the other two regulations. (*See* CPB, p. 30.)

seat that is too hard or too soft to an interior that just isn't the right color. There may be instances where air conditioning could fall under one of these regulations, but generally speaking air conditioning is a comfort feature of a motor vehicle, not a feature relevant to safe operation.

49 C.F.R. § 392.3 addresses instances where a driver becomes ill or fatigued, not uncomfortable. If Complainant were dehydrated or suffering heat stroke, it might come in to play. But it has no obvious application to driving a vehicle without air conditioning. I was only able to locate one case, an ALJ decision, in which air conditioning was mentioned in reference to this regulation. In that case, the ALJ credited multiple complaints connecting air conditioning to fatigue and determined that "reports of problems with the air conditioning may be considered a safety complaint pursuant" to 49 C.F.R. § 392.3, though the ALJ recommended dismissal on failure to establish the requisite causal connection.[22] *See Evans v. Gainey Trap. Servs., Inc*¸ ALJ No. 2007-STA-00004 (Apr. 10, 2007). 49 C.F.R. § 396.3(a) concerns inspecting and keeping parts and accessories that may affect safe operation in good repair. It both cross-references parts discussed in 49 C.F.R. § 393 and enumerates others. Air conditioning is not included, which is why Complainant must rely on the catch-all "any additional parts" language. I have located no cases that address whether air conditioning falls under the scope of this provision.[23]

To be protected under the STAA, the complaint must be *related to* the violation in question. For example, that was essential to the finding in *Evans* that complaints about the air condition "may" relate to 49 C.F.R. § 392.3: the ALJ credited the complainant's account that the heat made him so fatigued that it created a safety risk and that was why he was complaining. A complaint about a condition in the truck that is based at least in part on the reasonable belief that the condition renders the driver so impaired that it is likely to prevent safe operation would relate to the regulations—the *same* complaint absent that underlying rationale would not. The same point holds for 49 C.F.R. § 396.3(a): for a complaint to relate to the regulation, one of the grounds for the complaint must be a reasonable belief that the condition of the accessory may affect the safe operation of the vehicle. Here, Complainant made complaints about the air conditioning, but they were related to his comfort in operating the vehicle. At no point did those complaints make any link with safety related concerns. As opposed to things like tire-tread depth, the link is not obvious. Complainant points to regulations that forbid conditions that make it "so likely" to impair the driver that it is unsafe to continue operation and that require "additional parts and accessories" affecting safe operation to be in good operating condition. If his complaints are to relate to these regulations, they must be based on a concern that the lack of air conditioning was so likely to impair him that it was unsafe to continue operation or that the air conditioning was one of those parts affecting safe operation in his vehicle.

At the hearing, Complainant made out part of the case for some connection, testifying that not only did he report that the heat was "unbearable," but that he "was having trouble

[22] At the time of the decision, the STAA used a "motivating factor" rather than "contributing factor" analysis and ALJ dispositions of STAA complaints were recommended decisions and orders that were finalized by the ARB. The ARB finalized the recommended decision and order based on the causation issue alone. *Evans v. Gainey Transp. Servs., Inc.*, ARB No. 07-068, ALJ No. 2007-STA-004 (ARB Mar. 27, 2009).

[23] The closest is a district court case in which it was *pled* that complaints regarding air conditioning related to the safe operation of the truck because the defect was causing the windows to fog up such that the driver could not see. The decision, however, is a denial of summary judgment on unrelated grounds and thus does not address the issue. *See Manske v. UPS Cartage Servs.*, 870 F. Supp. 2d 185 (D. Me. 2012).

focusing and managing what I was doing due to what I felt was fatigue from just sweating all day. I thought I was dehydrated to be honest with you." (HT, p. 180.) This is then stretched in his closing brief into an argument that he was "so likely" to become impaired and the "additional parts" were in a condition that made operation of the truck contrary to regulation. (CPB, pp. 29-30.) But even if this last stretch were convincing, I do not credit Complainant's testimony that in complaining about the air conditioning he was relating the issue to the sorts of safety violations in the regulations. In the actual complaints, he was saying it was uncomfortable and needed to be fixed—something Ace accommodated by putting him a hotel at night and scheduling an appointment for a fix as soon as he got to Texas, a trip that was supposed to take less than two days. He never made out the missing piece relating the non-functional air-conditioning to the sorts of safety problems described in the regulations, and I do not credit his hearing testimony that attempted to do so. It fit into a pattern of retrospective accounts that played up the protected activity in the course of employment. Above, I determined that these sorts of extensions from what is in the record do not deserve credit here.

4. Trailer Upright Defect Complaints

Though undiscussed in his post-hearing brief, I find that Complainant has established protected activity in regards to one other series of complaints he made. After he picked up a trailer on June 4, 2015, Complainant sent Brandon Roberts a text message complaining about the uprights being bent and defective. This was followed by pictures and further discussion. The next day, Complaint sent more texts about the problem, linking it to some shifting in the load. (*See* HT pp. 173-76; CX 1, pp. 7-13; CX 4, p. 25; CX 7, pp. 1-5.) These complaints appear to have been reasonable—no suggestion has been made that they were not. In addition, they relate to safe operation of the vehicle because Complainant was reporting that they defective or bent uprights were causing shifting in his load.[24] Therefore, I conclude that Complainant engaged in protected activity in early-June 2015 when he reported defective uprights in his trailer.

5. Refusal to Drive

Finally, Complainant contends that he engaged in protected activity under 49 U.S.C. § 31005(a)(1)(B) when he refused to drive his tractor-trailer to Kentucky on July 22, 2015. (CPB, pp. 32-34.) That provision protects refusals to operate a vehicle because doing so would violate "a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security" (sub-section (i)) or because the driver "has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition" (subsection (ii)). Complainant argues that his belief about the condition of the vehicle was reasonable and that, in that state, it would have violated the regulations. (CPB, pp. 33-37.) Respondents disagree, arguing that Complainant did not engage in a refusal to drive that is protected by the STAA. To begin with, they aver that Complainant never actually refused to drive. (RPB, pp. 14-15.) Moreover, they contend that any such refusal would have been unreasonable given that repairs were set to be made and Complainant wasn't being dispatched to work over the weekend. In addition, any such refusal was not due to the condition of the vehicle but turned on Complainant's desire not to work over the weekend. (*Id.* at 15-16.)

[24] *See* 49 C.F.R. § 392.9; 49 C.F.R. §§ 100 *et. seq.*

Complainant argues at some length about the history of brake and tire problems, averring that they culminated in a refusal to drive his truck into Kentucky on July 22, 2015. (CPB, pp. 33-37.) The record tells a less engaging tale. Complainant had engaged in intermittent protected activity since March 2015 with regard to the tires and brakes, as determined above. But there was not a clear progression. Complainant reported problems and Ace responded. In regards to the brakes, the problems, if any, seem to have been resolved. Complainant was not making complaints in near proximity to his alleged refusal to drive and termination. Complainant points out that there are no records of major repair bills to fix the problem, but this rather misses the point—Complainant had a problem, repairs were done at Big O's, and he was told more repairs were needed. Ace said they would do the repairs if needed, but Bryant and Brandon Roberts were concerned that the mechanic was overstating any problem. This is not an unreasonable worry in the realm of automotive repairs. The record also reflects that Big O's may not have fully investigated the brakes. I have found that Complainant's complaints were reasonable—he was in no position to run a full diagnostic—but the fact that Ace investigated, did further testing, and then determined no additional repairs were needed indicates that by July 22, 2015, the brakes were no longer a reasonable ground for complaint or reason to refuse to drive. Complainant, at least in his actions, appears to have agreed—except in his re-telling of the history, he wasn't complaining about the brakes.

He was definitely more concerned about the air conditioning and the condition of the tires. But even these do not appear to have been the impetus for his alleged refusal to drive. In the text messages and based on the testimony of the other witnesses, Complainant was most upset about the need to work on weekends. Indeed, his immediate reaction to the termination was to attribute to his refusal to work on weekends. (*See* CX 1, p. 34.) During the week of July 13, 2015, Complainant was scheduled to drive to Texas, though based on the dispatches reviewed above, this appears to have been meant for a visit late in the week. He objected. It would have meant a weekend in Texas, not North Carolina. Ace accommodated, planning instead to have him drive to Texas during the next week, starting on Monday August 20, 2015. They expected him to arrive that Tuesday, which would have easily allowed time to do the face-to-face meeting, fix the air conditioning (which they had made an appointment for on Tuesday), and then return to North Carolina driving through Kentucky buying axles. This was an ambitious, but not unreasonable plan. Face to face meetings were a priority in Ace's employment of Complainant due to the events the prior fall. The Roberts would be out of town starting on Thursday. By having Complainant leave on Monday, finish filling up his truck on the way to Texas and then start filling another trailer on the way back to North Carolina, everyone would come out in a better situation. Complainant would be in North Carolina for both weekends, Ace would get its face to face meetings, both Ace and Complainant would make money on the trailers Complainant was filling on both the way there and back, and Ace wouldn't have to pay a driver to take Complainant a new trailer and return the loaded trailer to Texas.

The plan didn't work out. First, Complainant had difficulty filling his trailer, which led to not covering very many miles on Monday and Tuesday and so not making it to Texas. Second, the lack of air conditioning seems to have contributed to this slow progress since Complainant wasn't comfortable driving long distances. Third, the blowout on Wednesday meant that Complainant would not make it to Texas until either very late on Wednesday or Thursday morning. At that point, there was no way Complainant was going to be returning to North Carolina for the weekend. This was understandably distressing for Complainant. He

perceived that Ace would be sending him back to North Carolina *over* the weekend, perhaps hauling a load back. I agree that Complainant was refusing to do this. But except in the re-telling, it doesn't seem to have had anything to do with the tires. Indeed, given that Ace had or had easy access to tires (and the trailer could have simply been switched out), they wouldn't have prevented the return trip. (*See* HT, p. 257.) It was a quick fix. Neither would the air conditioning have required such a delay that he couldn't return starting on Friday or Saturday. Adding the brakes into the picture would have complicated matters, but I have found that by this point the brakes were not an issue. The underlying reason Complainant was refusing to drive over the weekend is that he didn't want to work on weekends—just like he complained about to Brandon Roberts, Ms. Carter, and in his post-termination text message to Brandon Roberts.

Complainant argues that this conclusion is not credible because it would make no sense for him to remain in Lindale, Texas over the weekend because he had no interest in being there and his financial interests, if the tractor-trailer were in good condition, were to drive to Kentucky and work over the weekend. (CPB, pp. 28-29.) I do not find this convincing. Driving to Kentucky over the weekend did not serve Complainant's financial interests because there were few if any opportunities to buy axles and tires on the weekends. (*See* HT, pp. 133-34, 297-98, 303-04.) Complainant's financial interests were best served by getting to Texas mid-week, having the air conditioning fixed, and any tires in need of replacement replaced, and then driving into Kentucky buying axles and tires and returning to North Carolina by the end of the week. That wasn't going to happen given the delays. I credit that Complainant did not want to be in Texas over the weekend and that it was important to him to get back to North Carolina. But that was no longer a viable possibility, unless Complainant simply turned around almost immediately and started back without buying on the way back, and thus ill-serving his financial interests.

In short, Complainant was angry with the situation. His job involved travel and plans that changed somewhat quickly depending on where buying calls could be arranged and who had axles to sell. An unfortunate hazard was weekend work—something that had happened before, for example at the end of March 2015. Complainant was not happy with that and Ace arranged to get him to Texas and back in one week. That didn't work out, and Complainant was upset that he would be away from home for the weekend. But these complaints and a refusal to drive on the weekend were not safety-related: Complainant was still due to arrive in Lindale on Thursday morning. That left ample time to replace the tires and fix the air conditioning in time for Complainant to work on the weekend. Yet what he was refusing to do was weekend work. At the hearing he attempted to describe the refusal as at least in part a refusal to turn around immediately and head back to North Carolina. (*See* HT, p. 206.) But I do not find this credible. The only reason to do that would be if the only priority was getting Complainant home for the weekend. Ace would make no money, the repairs wouldn't get done, Complainant would make no money, and the whole point of the trip—expensive all around—would have been thwarted. The only person involved in this case with an interest in getting Complainant home for the weekend was Complainant. None of the other witnesses linked his reluctance to drive to the proposition of simply during around and going home and none of the documentary evidence establish that this is what Complainant was reluctant to do.

Furthermore, for activity to be protected by 49 U.S.C. § 31105(a)(1)(b)(i)-(ii), the employee must have actually refused to operate a vehicle. *Calhoun*, 576 F.3d at 209. There is no credible evidence that Complainant was actually being asked to drive over the weekend or to

turn his truck around and go to North Carolina. Instead, by Wednesday Ms. Carter was focused on the next week and setting up appointments for the next week in Kentucky. Earlier the plan had been to do those appointments at the end of the week—but delays in getting to Texas prevented that. The evidence shows that Ace was willing to accommodate Complainant's dislike of working on the weekends, though by this point that would of course mean a weekend in Texas, with a return trip buying axles and tires starting the next Monday. The alternatives, in fact, make no sense. There was nothing for Complainant to haul back to North Carolina or Kentucky, so I reject the proposition that Ace was dispatching him to drive a loaded trailed to North Carolina over the weekend. The business model was to buy supplies in Kentucky, North Carolina, etc. and drive them to Texas, not the other way around. Second, it is also illogical that Ace would have been sending Complainant to buy axles and tires in Kentucky over the weekend. Suppliers were rarely open on the weekend, so this would have been a futile effort.

If anything, Ace was ordering Complainant to return to North Carolina through Kentucky during the next week. But even if Ace had dispatched Complainant to drive into Kentucky beginning in the next week, this is not something that, per his position in this litigation, Complainant refused to do. He argues that the refusal on Wednesday was protected because there would have been insufficient time for repairs. (*See* CPB, p. 36.) But that could only have been a problem if Complainant were being directed to drive immediately and then over the weekend, rather than beginning the next Monday. At the hearing, his contention was that he was told that he would be dispatched immediately upon getting to Texas with repairs being made only in North Carolina. (*See* HT, p. 203.) Complainant may have believed this, but I do not credit that this is actually what Ace was asking him to do. In addition to all of the reasons above, the record shows that Ace preferred to repairs onsite or local in Texas. (*See, e.g., id.* at 108-09, 257, 382.) To accept Complainant's account of what he was asked and refused to do, I must discredit all of the other witnesses and believe that Ace was going to empty Complainant's trailer and immediately turn him around and send him into Kentucky even though the suppliers wouldn't be open to buy on the weekend so that Complainant could get the repairs in North Carolina where it would be more expensive for Ace. I do not do so. Rather, I find that contrary to Complainant's stated understanding, Ace was planning to have him spend the weekend in Texas, with repairs being done in the next few days, and then depart on Monday to for Kentucky.

Communication was a problem, especially between Ms. Carter and Complainant. Even by his own account, he didn't fully understand what she was saying due to the heat and the noise in the truck. (*See* HT, pp. 204-05.) Complainant may have simply been confused about what was been proposed or planned. One text, however, suggests otherwise: on the afternoon of July 22, 2015, Complainant sent a message to Brandon Roberts saying "I hear yall have s master plan of my staying up over wk end then head to ky. I will go to ky after i have my wk end off. I cannot work wk ends." (CX 1, p. 33.) This is the best evidence of a refusal, but it looks like Complainant was refusing to *not drive* on the weekend and *then* drive to Kentucky followed by North Carolina. The objection was to being in Texas for the weekend. If that is right, the refusal could not be related to the condition of the truck. The only way Complainant wasn't going to be in Texas (or on the road) over the weekend would be if he simply turned around on Thursday so he could get home as soon as possible. I found that the needed repairs were quick fixes, but they were not automatic. If as suggested here, Complainant was demanding that Ace get him home for the weekend, *he* was the one requesting driving the truck without the needed repairs, not Ace. The refusal evidenced by the text, then, could not be protected activity.

If I discount the text and credit Complainant's hearing testimony and litigation position, he was refusing to drive on the weekend, or at least without the repairs being made. But *that* isn't something that Ace ever asked him to do. For an activity to be protected by 49 U.S.C. § 31105(a)(1)(B), the employee must actually refuse to operate the vehicle. Complainant *cannot* refuse a dispatch to drive the vehicle if it was never given—there's nothing to refuse to do. I find that as a matter of fact Ace did not dispatch Complainant to drive to North Carolina (via Kentucky or not) immediately or over the weekend and that Complainant's impression that this was the plan was mistaken. Any refusal to adhere to that plan, then, is not protected activity—he was not refusing to do something that Respondents were asking him to do.

6. Conclusion

In conclusion, I find that Complainant has established that he engaged in activity protected by the STA. In particular, his series of brake-related complaints, tire-related complaints, and upright-related complaints are protected by 49 U.S.C. § 31105(a)(1)(A)(i). But I find that his air conditioning-related complaints do not fall under the scope of that provision on the facts of this case. Finally, Complainant has not established that he refused to operate his vehicle and so did not engage in activity protected by 49 U.S.C. § 31105(a)(1)(b)(i)-(ii).

C. Did Complainant's Protected Activity Contribute to His Termination?

There is no dispute that Complainant suffered an adverse action—he was terminated on July 23, 2015. To complete his case for retaliation, Complainant must make a showing, "by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action." *Palmer*, ARB No. 16-036, slip op. at 14. *Palmer* stressed that contribution is a minimal amount of causation, requiring only a showing that the protected activity played some role. But it rejected prior ARB case law that created an evidentiary rule for the contribution inquiry. Hence, there are "no limits" on the evidence I may consider, and I should consider all relevant evidence. *Id.* at 14-15, 51-52. In so doing, however, I must avoid weighing reasons for the adverse action and must not require that the complainant show that the protected activity was a substantial, significant, motivating, or predominant factor. *Id.* at 53-55. A contributing factor is *any* role given to a protected activity. Consideration of other factors and the particular roles played by each of the factors belong in the next stage, where a respondent can make out its "same-action" defense. So long as the complainant establishes that the protected activity played some role in the decision by the employer to take adverse action, contribution has been shown and I move forward with the analysis. The question now is simple: "did the employee's protected activity play a role, any role in the adverse action? On that question the complainant has the burden of proof, and the standard of proof is by a preponderance." *Id.* at 52.

Contribution not meant to be a difficult or arduous showing. *E.g. Ledure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 8 (ARB June 2, 2015); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ Case No. 2010-FRS-020, slip op. at 7 (ARB May 31, 2013). It may be established by direct evidence or by circumstantial evidence. *E.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011) (citing *Sylvester v. Paraxel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 27 (ARB May 25, 2011)). Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an

employer's shifting explanations for its actions, relationships among the parties, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation of the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *See DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7 (ARB Feb. 29, 2012) ("*DeFrancesco I*"); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op at 17 (ARB Aug. 29, 2014) ("*Bobreski II*"); *Bechtel*, ARB No. 09-052 at 13. To evaluate a complainant's case for contribution, the ALJ must examine different ways in which contribution might be shown. Further, an ALJ must consider the circumstantial evidence *as a whole*. Evidence that individually might be insufficient can together make a very strong case—for instance where there is temporal proximity, evidence of animus by some decision-makers, evidence of pretext, significant inconsistencies in a respondent's evidence, shifting explanations and policies, etc. *Bobreski II*, ARB No. 13-001 at 17-22.

Complainant makes a number of arguments in favor of an inference to contribution. In addition, Respondents contend that the protected activity played no role in the decision to take the adverse action—that the permissible reasons articulated were the *only* reasons in play. Thus, below I consider each of Complainant's arguments for contribution, Respondents' argument to the contrary, and all of the evidence bearing on the question. After reviewing all of these points together, I find that Complainant has not established that his protected activity contributed in any way to the adverse action, his termination.

1. Did the OSHA Statement Concede Contribution?

Complainant argues that Ace's statement to OSHA indicates contribution in that it points to Complainant's refusal to drive to Kentucky. (CPB, pp. 38-39.) The statement provides a list of insubordinate actions that led to Complainant's termination. One of the items on that list was the interaction with Complainant on July 22, 2015, in which Ace informed him that it had appointments for him during the next week to pick up in Kentucky. The statement reports that Complainant said that he could not work weekends and then hung up on "office personnel and refused to answer his phone to further discuss the plans for the following week." (JX 8, p. 1.) It indicates that Ace then decided to terminate Complainant "based on the constant fight it was to get him to listen to his orders without defiance and insubordination." (*Id.* at 2.)

This does not concede contribution for reasons explained above. Complainant's refusal to drive to Kentucky was not protected activity because he was not refusing any actual dispatch. Ace was informing him that they planned to have him drive to Kentucky the next week. His refusal was to work/drive on the weekend. Since he was not refusing to operate the truck in a way asked by Ace, he wasn't engaging in protected activity in so doing. Moreover, Ace's account in the OSHA statement turns on Complaint's attitude and tone in dealing with office staff and the difficulties surrounding the question of whether Complainant would work on the weekend. This does not involve a reference to protected activity.

2. The Credibility of the OSHA Statement

Later, Complainant contends out that the parade of horribles presented in the OSHA statement is not credible, which can itself evidence contribution. (CPB, p. 42.) I agree with

Complainant that parts of the OSHA statement are not credible. For the most part, the statement links Complainant's termination to the insubordination/defiance/difficulty of Complainant in the Fall of 2014 and July 2015. (*See* JX 8, pp. 1-2.) These portions are consistent with the explanations given at the hearing and are credible. But the OSHA statement also gives three additional "add-on" rationales for the termination. These explanations are not credible.

First, the statement cites an alleged failure to complete the pre-trip inspection on July 20-22, 2015, resulting in damages of $1,137.19 to the truck. (JX 8, p. 2.) This amount is listed as the amount for "tires/repairs" in the accounting of Complainant's last paycheck. (*See* RX C, p. 40.) It is slightly more than the $1,122.76 of repairs at Southern Tire Mart on July 22, 2015. (*See* RX K, p. 798.) It is not clear if the figure is a mistake or if there is another expense that Ace was charging to Complainant's account. The record indicates that on July 22, 2015, the Roberts brothers came to suspect that the blow out and resulting repairs could have been prevented if Complainant had done a proper pre-trip inspection. (*See* HT, p. 111; CX 1, p. 33; CX 2, pp. 8-9; CX 5, p. 5.) Complainant testified credibly that he did the inspections as taught by Ace. (*See* HT, p. 195.) There is no further evidence of an investigation—in calculating Complainant's final paycheck Ace simply decided that it would hold Complainant responsible for everything. This is rather dubious, heavy-handed, and mean-spirited, though this case does not involve a dispute over the proper accounting of Complainant's pay. The issue here is how the reference to the supposed responsibility for damage reflects on the various accounts of what led to the adverse action. It reflects poorly on Respondents because it is not credible that this was an *actual* reason for the termination. It all post-dates the termination to begin with, and even if the Roberts brothers had suspicions on July 22, 2015, they did not share them with their father. This simply could not have been a reason for the termination.

Second, the statement indicates that Complainant was "[o]ffering and paying higher prices to [Ace] customers without company approval." (JX 8, p. 2.) The text messages between Complainant and Brandon Roberts show that the amount Complainant was paying for axles and tires was an issue that concerned Brandon Roberts to some degree. (*See, e.g.*, CX 1, pp. 16, 22, 24, 27.) But these all read as managerial reminders, not corrective actions or citations of deficient performance. Further, there is no evidence that the issue was presented to James Roberts as a consideration. James Roberts was consistent in his general awareness of some performance problems involving Complainant, but this related to missing appointments. (*See* HT, pp. 31-32, 392.) Overpayment was not a point James Roberts was aware of or referenced. Therefore its inclusion in the OSHA statement is not credible—it indicates a search, after the fact, for additional reasons rather than a simple statement of the actual reasons for the decision.

Third, the statement references both mathematical errors that caused inaccurate tracking of company money and unauthorized use of company money to pay for personal items. (JX 8, p. 2.) I link these points together because on the record as a whole, they relate to the same underlying considerations and involve problems with Complainant's accounting and record-keeping practices. (*See* HT, pp. 72-73; CX 1, p. 21; RX C, pp. 39-42.) These are not credible reasons either. Ace never seems to have determined exactly what the problem, if any, was. When it came up pre-termination, it was never broached as something that Complainant needed to correct. Ace appears to have drawn adverse conclusions eventually, but only after terminating Complainant. And no matter, James Roberts was not aware of any of these issues when he made the decision to terminate Complainant, so they could not be actual reasons for the adverse action.

Shifting explanations and policies can support a finding of contribution. *See, e.g.*, *DeFrancesco I*, ARB No. 10-114 at 6-7. This is not really a case of shifting explanations—the central explanation given in the OSHA statement is Complainant's insubordination/defiance, which is the same explanation that Ace presented at the hearing. James Roberts was personally quite consistent about his reasons, linking it to this behavior. The OSHA statement is phrased somewhat differently and goes into a different sort of detail, but this is readily explained by the fact that Brandon Roberts and Ms. Carter prepared the statement, not James Roberts. (*See* HT, pp. 34-35, 66.) Nonetheless, the statement does show that Ace was attempting to multiply reasons for the adverse action after the fact, some of which are not credible. Though alone this does not establish contribution, it is evidence that supports Complainant's position.

3. Does Ace's Response to Complaints/Repairs Evidence Animosity or Hostility?

Complainant also alleges that Ace's failure to make repairs to both the brakes and tires evidences animus to protected safety complaints. (CPB, p. 39.) Respondents argue that there is no evidence of animus in this case related to any safety concerns articulated by Complainant. They argue that they made all needed repairs promptly and engage in reasonable inspection protocols. (RPB, pp. 17-19.) To show contribution, it is not necessary to show any animus. *DeFrancesco I*, ARB No. 10-114 at 6. But evidence of some hostility or animus towards the protected activity supports an inference to contribution and is one of the ways it *could* be shown.

Here, the evidence of record supports Respondents' position on this question. Complainant's requests were not ignored. When he had brake problems, Ace paid for repairs at Big O's. When Big O's recommended full replacement, Ace didn't jump at the prospect, but it had the truck fully inspected within the month. The record of brake-related complaints disappears until May 27, 2015, when a new problem emerges but seemingly gets resolved quite quickly. I do not take a healthy skepticism at recommendations for further repairs made by a mechanic as an animus to safety. Nor do I credit that Complainant experienced an undocumented series of problems that Ace ignored. Complainant's argument on this point turns on Brandon Roberts' indication in March that repairs would be made, which was not followed by additional repairs. What this leaves out, however, is that Ace fully inspected the brakes and came to the conclusion that further repairs were not necessary. In relation to the air conditioning, Ace promptly fixed it once and once informed that it had broken again promptly arranged an appointment to have it fixed. After Complainant complained about the tires, Bryant Roberts sought more information so he could send tires to Complainant. When he had a blowout, Ace fixed the problems and authorized the additional repairs recommended. While it is true that Ace didn't replace all of the tires that were low, Complainant had not yet made them fully aware of the problem or provided information documenting it—the Loves tirepass report was not given to Respondents. It would have been a basis for tire replacements the next day, after Complainant arrived at the Ace yard. Complainant was not a mechanic and new to the industry. It was altogether sensible that Ace wanted more information before doing repairs. It is also sensible that Ace would want to do repairs either in-house or locally. In the instances where it was clear this was not workable, Ace arranged for repairs elsewhere.

Moreover, in the various messages discussing the complaints and the repairs, I detect no animus or hostility from Ace managers. The only hint of frustration comes on July 22, 2015, when Bryant Roberts is bothered about the difficulty communicating with the mechanic and

getting a quote. That isn't hostility to safety or to safety-related complaints. In general, the response is always to get more information, attempt to help Complainant solve any problems, and to arrange for a way to fix the problem in a timely manner, if not always at the speed that Complainant may have preferred. Thus, examining the history of the repairs and responses to the complaints, I find no evidence of contribution. Rather, the record points to the conclusion that Ace had no hostility to making needed repairs and so alerting managers to those needs would not have contributed to any adverse employment actions.

4. Is Ace Hostile to the Regulations?

In addition, Complainant contends that Ace showed animus to the vehicle safety regulations when Brandon Roberts instructed Complainant to adjust the brakes on his trailer even though Complainant was not competent to do so. (CPB, p. 39.) The suggested inference is that Ace would also be hostile to complaints that related to the regulations and so those complaints would have contributed to the termination decision. The reference here is to Brandon Roberts' May 27, 2015, text message to Complainant involving the automatic adjustment of his slack adjusters. (*See* CX 1, p. 5.) Though uncited by Complainant, the record also contains various text messages from Bryant Roberts to Complainant that provide remote instructions for making adjustments/repairs. (*See generally* CX 6.) Complainant cites to a regulation prohibiting him from working on the brakes specifically (49 C.F.R. § 396.25), but the same point applies generally—Complainant had no business making adjustments or repairs and so Ace's instructions to do so evidences some hostility to the regulations and/or safe operation generally.

I do not find this to be a very convincing argument for contribution. Though there may have been some technical violations of the regulations, at no point was Ace asking Complainant to complete substantial or intricate repairs. At most, he was being given helpful hints on quick fixes and basic information about the truck. For example, the instructions from Brandon Roberts pertain to engaging the automatic slack adjusters. (CX 1, p. 5.) This hardly evinces a careless attitude to repairs or safety. The messages involving Bryant Roberts are also quite basic and often concern helping Complainant understand potential issues. Ace was certainly not asking Complainant to work as his own mechanic. Thus, I conclude that the record does not show a general hostility to safety regulations by Ace managers.

5. Did Ace Have Reason to Retaliate?

It is not necessary for a complainant to establish any retaliatory motive in order to show the contributory factor element. *See Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993); *see also Coppinger-Martin v. Solis*, 627 F. 3d 745, 750 (9th Cir. 2010). Nonetheless, the existence of a potential motive or a reason to retaliate would be evidence of contribution. Complainant argues that Ace had motive to retaliate for his complaints and refusal to drive because repairs would require delay in getting to Kentucky, which would anger customers. (CPB, pp. 39-40.)

I do not find this argument convincing, for reasons discussed above. Difficulties Complainant was causing with customers due to missed appointments was a motive to take adverse action. But these were not tied to any protected activity. The claim here is that the protected activity, seeking repairs, would prevent Complainant from making appointments in

Kentucky, and thus contributed to a motive to retaliate. Ace, however, adjusted the appointments for the next week. The behavior that was problematic and angered the customers was failure to make a scheduled appointment on the day of, not changing the date of the appointment in advance.

Moreover, regardless of the repairs, Complainant wasn't on track to get into Kentucky until sometime on Friday or over the weekend, assuming that he worked over the weekend. Since sellers were for the most part not open for the weekend, Ace had no clear reason to prevent repairs to get Complainant into Kentucky as soon as possible. Doing so would not have financially benefitted Ace—there wasn't product to buy and the repairs, when done in North Carolina, would have been more expensive. Ace certainly had motive to have Complainant stay in Texas over the weekend and then drive into Kentucky buying axles and tires, but this was entirely consistent with making the repairs needed to the air conditioning and tires.

I do agree that abstractly Ace had some motive related to the protected activity, but the connection is weak. Repairs can be expensive, and Ace, like any sensible business, is motivated to keep down costs. This motivation, however, pertains more to preventing mechanical problems, not suppressing complaints about or reports of mechanical problems. Ace would not have been happy that Complainant had a blowout and it cost over a thousand dollars to get the truck running again. But the truck was going to be broken down regardless of whether Complainant reported it or not. Text messages later in the day do suggest at least that the Roberts brothers were mildly upset with Complainant over the breakdown, but these related to reminding him that he needed to do his pre-trip inspections to spot problems. (*See* CX 1, p. 33; CX 2, pp. 8-9; CX 5, p. 5.) This does not evidence some motive to retaliate against protected activity—to the contrary, it evidences that they were motivated to encourage more reports of potential mechanical problems so that they could get fixed *before* a breakdown. Ace, then, did not have a motive to suppress the protected activity at issue. Nor did it have a motive to suppress requests for additional repairs to be completed in Texas—it had a motive to encourage these sorts of requests because it was cognizant that breakdowns on the road increased costs and that it was much better financially, all things considered, to complete needed repairs in Texas.

6. Is Ace's Explanation Credible?

The parties have agreed that James Roberts was the sole decision-maker, though they disagree about what he may have known and how information from others may have impacted his decision. I will consider that disagreement below. First, however, I must consider how James Roberts explained his decision and whether those reasons are independently credible as a rationale for the termination. Respondents contend that the only factors involved in the decision to terminate Complainant were legitimate and non-retaliatory: Complainant's insubordination going back to the fall of 2014 and then again during his last week of work. (RPB, pp. 13-14.) Consideration of the strength of a respondent's evidence for its proffered reasons for an adverse action is not necessary in many cases because "the complainant need establish only that the protected activity affected *in any way* the adverse action taken, notwithstanding other factors an employer cites in defense of its action." *DeFrancesco II*, ARB Case No. 13-057 at 6 (emphasis in original). Simple weighing is inappropriate because "[u]nder the contributing factor causation standard, protected activity and non-retaliatory reasons can coexist; therefore, [a complainant] is not required to prove the [respondent's] reasons are pretext." *Coates v. Grand Trunk Western*

R.R. Co., ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3-4 (ARB July 17, 2015). But where, as here, the Respondents contend that the non-retaliatory reasons are the only reasons for the adverse action, it is appropriate to consider and evaluate those reasons at the contribution stage of the inquiry. *See Palmer,* ARB No. 16-035 at 53.

Moreover, contribution might be shown by an absence of any plausible reasons for the adverse action or any reasons at all—employers do not simply take random adverse actions, so a paucity of reasons invites an inference of contribution. *See, e.g., id.* at 53-54. In some of these inquiries, it will be necessary to consider a respondent's stated rationale for the adverse action in order to determine if some shortcoming in or surrounding it makes out a case for contribution by the protected activity. *E.g. Ledure*, ARB Case No. 13-044. It may be necessary to critically examine the employer's stated reasons and ask whether the reason would merit to action by a prudent, rational supervisor—or whether it leaves something wanting, suggesting that the protected activity played some role. *Id.* at 8-9; *see also Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 19-21 (ARB Mar. 30, 2016) (contribution established by temporal proximity, evidence of pretext, and inconsistent application of policy/personnel actions). So one of the ways contribution can be shown is by reference to the insufficiency or lack of credibility in the *employer's* explanation of the action—a problem in that explanation can license an inference that the protected activity *did* play some role. Thus, in this section I consider James Roberts' explanation. I find it plausible and sufficient to explain the adverse action. Below I consider additional arguments and evidence that might show contribution despite the plausibility of James Roberts' explanation.

At the hearing, James Roberts provided several explanations of his decision to terminate Complainant. A chain of events during July 2015 led him to the decision. These involved observations of difficulties that Brandon Roberts and Ms. Carter seemed to be having with Complainant, and the perceived defiance and insubordination involved in getting Complainant to come to Texas for the meeting and then the difficulties with Complaint during the last week regarding arranging his future schedule. In his explanation, he indicated that this was the second time that this sort of problem was occurred and that influenced his decision that he wasn't going to accept the behavior any more. He observed how frustrated Ms. Carter was with talking to Complainant and when he inquired further became aware that there were issues with Complainant missing appointments. (*See* HT, pp. 29-33, 38-44, 391-93.) He was not happy that Complainant had hung up on Ms. Carter and appeared to have been especially bothered by the reports that Complainant was "cussing on the phone," "cussing at her," or, as he put it later, had "a bad attitude, cusses at the ladies in the shop." (*Id.* at 29, 31, 392.) So he decided that he wasn't going to have some who behaved that way working for him anymore. (*Id.* at 31, 392.)

Though James Roberts wasn't certain as to when the decision was made and I found that in his explanation at the end of the hearing more emphasis was given to the performance problems, in his basic explanation for *why* he terminated Complainant he was quite consistent. The explanation was also consistent with the central line of explanation given in the OSHA statement. Moreover, it is well supported factually. Ms. Carter's testimony confirmed her difficulties with Complainant during his last few weeks of employment, her frustration, the (at least perceived) problem of missing appointments, that Complainant was hanging up on her and not listening, that Complainant was cussing on the phone, and the circumstances of James Roberts talking with her about the issues. (*See* HT, pp. 294-96.) There has been no dispute

about the September 2014 problems or the message conveyed to Complainant by Brandon Roberts in October 2014 about the insubordinate/defiant behavior being unacceptable. Complainant disputed some of the interactions with Ms. Carter, denying that they were heated, but admitted that he was upset, that, he hung up on her, that he was discouraged, and that he decided to simply finish the conversation when he got to Texas. (*See* HT, p. 204-05.)

To discount Respondents' rationale for terminating him, Complainant argues that the reliance on events in September 2014 are not credible since they occurred 10 months prior and that even if he was difficult, the fact that Respondents retained him until he engaged in protected activity evidences that the protected activity was playing a causal role. He avers that his performance issues should not be considered, since there is no evidence that they contributed to his termination. (CPB, p. 42.) I agree that there is no evidence that any performance issues related to pricing contributed to the decision. But there is evidence that problems keeping appointments played some role in the decision—James Roberts testified that he was aware of them and that they were in his mind. In relation to the events in the Fall of 2014, Complainant misunderstands the role of these events. He is correct that if James Roberts stated that he terminated Complainant in July 2015 because of something that happened in September 2014, the explanation would not be credible. But that is not what he claimed. Rather, the events in July 2015 directly before the termination were the *second* time he believed they had the same sort of problems with Complainant. Events in the Fall of 2014 were relevant because that was the first time and had resulted in a warning that the behavior would not be tolerated. So when the behavior, at least in James Roberts' mind, recurred, he decided to follow through on the earlier guidance and not tolerate it.

Complainant was on thin ice. Ace had already warned him. There may not have been any official disciplinary record, but Ace is a relatively small company that does not appear to have any particular progressive discipline policy. Ace took the September 2014 insubordination seriously—it spent the money to fly Brandon Roberts up to North Carolina immediately so that he could talk with Complainant in person and convey the message that Complainant's actions were not acceptable. James Roberts also decided to have face-to-face meetings with Complainant on the monthly basis. (*See* HT, pp. 38, 384, 388.) Complainant obviously was not happy with some of the travel involved in having these meetings, but it was not an arrangement that was lucrative to Ace—it had to invest funds to have someone travel to meet with Complainant on some occasions or to bring him to Texas to meet on others. Ace could well have terminated Complainant after the insubordination in September 2014—he had, after all, refused a dispatch, stopped returning calls, and driven Ace's truck back to his home in North Carolina without permission. James Roberts decided not to do so, to give Complainant a warning instead. Thus, contrary to Complainant's contentions, the 2014 events provide substantial support to the explanation James Roberts gave for his decision: he had already given Complainant a second chance but the unacceptable behavior was continuing.

The record also makes plain that the sort of behavior James Roberts used as his basis for termination is behavior that is generally concerning to him. Of course, it is to be expected that insubordination/defiance is a serious issue for any employer. The prior history confirms that James Roberts took it seriously. The reference to "cussing" as an issue is slightly more idiosyncratic, but I conclude that it is a genuine concern at Ace. One of the 12 enumerated rules that James Roberts gives his employees is to not use obscene language in front of customers.

(*See* JX 4, p.1.) The list as a whole is somewhat peculiar and cannot be exhaustive. It is far from the sort of conduct codes that larger employers use. From the list, it becomes evident that James Roberts has some things that particularly bother him. One of these is obscene language. Of course, Ms. Carter was a co-worker, not a customer. But the existence of the rule evidences that James Roberts' repeated references to Complainant's rude behavior and obscene language as an important factor was not something he merely invented for this case. Moreover, in the course of the hearing, these points were made extemporaneously. (*See* HT, pp. 29, 31, 392.) They were not mentioned at the prompting of counsel. In fact, when the point was made on direct examination, Respondents' counsel was asking about Complainant's performance problems and James Roberts independently returned to his problem with the way Complainant was treating and talking to Ms. Carter, after which counsel redirected him to the performance issues. I found James Roberts to be quite genuine on the point—it did very much bother him the way he thought Complainant was behaving to his co-workers and the language he was using.

Part of Complainant's argument and his challenge to the termination generally are based on his belief that James Roberts' reasons were not correct or that they were not good reasons to terminate him. For example, in reference to the interactions with Ms. Carter, Complainant disagreed both with how difficult they were and how big a deal his behavior should have been. He perceived the discussion as not heated. This is not very credible, given that he then admitted that he hung up on Ms. Carter, but it really doesn't matter either. What matters is James Roberts' perception of the situation and, derivatively, Ms. Carter's experience of the situation. Complainant seems to have thought that there was no big deal and they could just finish the discussion/argument the next day. Ms. Carter and James Roberts felt otherwise. Complainant also testified to an explanation for his behavior—that he was uncomfortably hot, couldn't hear very well, and then didn't notice his phone ringing. (*See* HT, pp. 204-05.) The intimation here is that the termination wasn't fair or that he should have been given a chance to explain.

Whether or not those are valid points is not my concern. The STAA does not require that an employer have a *sound* reason for taking an adverse action, that is, a reason that is both factually true and sufficient to warrant the adverse action. Rather, it only specifies that the employer cannot be considering a *prohibited* reason for the adverse action. Courts do not sit as a sort of "super-personnel department" evaluating the wisdom of business decisions. *See Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997); *see also Kuduk v. BNSF Ry. Co.*, 768 F. 3d 786, 792 (8th Cir. 2014) (citing *Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 898 (8th Cir. 2002)). The validity of the stated reason can become relevant when its insufficiency licenses an inference that a prohibited reason was also in play. But throughout the focus is on the actual reasons of the decision-makers, not whether those reasons would somehow ultimately justify the decision. To make the point more bluntly, Ace is James Roberts' company and he gets to make decisions about who he employs and what he considers appropriate grounds for termination. Those decisions are constrained by law, but the STAA only forbids him from considering a particular sort of reasons—protected activities—in making his decisions. Here, he gave a consistent and sufficient explanation of what his reasons were, why he believed them, and why he found them important. Thus, I conclude that Respondents' account of the decision to terminate Complainant that in no way involves protected activity is plausible.

This determination supports an inference that there was no contribution by the protected activity, but it does not compel it. It is quite possible that in addition to the plausible and

convincing reasons given by James Roberts, the protected activity was an additional reason in play. If so, Complainant would have established contribution, and the above considerations would be relevant only to Respondents' affirmative defense. Hence, I will continue with the inquiry examining other ways contribution might be shown. My finding at this stage, however, is that Complainant has not shown contribution by reference to some internal problem, implausibility, or insufficiency of the reasons given by Respondents for the adverse action.

7. Is the Protected Activity Inextricably Intertwined with the Adverse Action?

At one point, Complainant contends that he may have engaged in some "intemperate conduct" when talking with Ms. Carter, but this was inextricably intertwined with his refusal to drive. (CPB, p. 43.) Where the content of a protected report or disclosure gives an employer the reasons for the adverse action, the protected activity is inextricably intertwined with the adverse action. *E.g. Hutton*, ARB No. 11-091 at 6-7; *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (ARB Apr. 25, 2013); *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 12 (ARB Oct. 26, 2012) (citing *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012)). In such a case, the consideration of the respondent's non-discriminatory rationale occurs in the context of its affirmative defense to liability. *DeFrancesco I*, ARB No. 10-114 at 7-8; *see also Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB Nos. 14-053 and 14-056, ALJ No. 2009-FRS-015, slip op. at 10 (ARB Apr. 5, 2016) ("*Rudolph II*"). When there are intervening events that might explain the adverse action, "the only question" at this stage of the analysis "is whether the intervening events…negate a find that [the complainant's] protected activity was a contributing factor in [the respondent's] adverse action." *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 21 (ARB Mar. 29, 2013) ("*Rudolph I*"); *see also Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, 15-022; ALJ No. 2013-FRS-082; slip op. at 4 n.20 (ARB June 21, 2016) (not all connection via a chain of events establishes contribution). The ARB was particularly clear on this point in *Palmer*: to be inextricably intertwined means that it is not "possible, even on the employer's theory of the facts, to explain the basis for the adverse action without reference to the protected activity." ARB No. 16-035 at 58. If this holds, contribution is established, and the employer's permissible reasons for the adverse action are considered as part of the next step.

This is not a case involving inextricably intertwinement. On Respondents' theory of the case, James Roberts' decision to terminate complainant was the result of his insubordination and conduct towards other employees, in particular his difficulty with Ms. Carter, his swearing on the phone, and his hanging up on her. Regardless of the truth of these points, Respondents assert that James Roberts believed that they were true and decided that he wasn't going to employ someone who acted in that manner. This theory can be described without reference to any protected activity—I just did so. Furthermore, Complainant's difficulty with Ms. Carter was related to arranging dispatches and Complainant's perception that he was being asked to work on the weekend. While I determined that Ms. Carter was aware of some of Complainant's mechanical problems, I find that Complainant did not establish that he engaged in protected activity in his conversation with Ms. Carter—that is, he did not make mechanical complaints to her or ask for repairs. There is no documentary evidence of such complaints and it would not have made sense for Complainant to direct them to Ms. Carter in the first place. Even assuming that their conversation did include some sort of reports that would fit into protected activity, even

by Complainant's account that was not the substance of their conversation and their conversation did not even conclude because Complainant hung up on her. It is easy to describe Respondents rationale for terminating Complainant without making reference to any protected activity. This is thus not a case where the protected activity and adverse action are inextricably intertwined.

8. Is the Protected Activity Part of the Chain of Causation Leading to the Adverse Action?

Sometimes contribution can be shown simply by the presence of a protected activity in a chain of causation leading to the adverse action. *E.g. Hutton*, ARB No. 11-091 at 6-7. Here, however, the protected activity is ancillary to the chain of causation at issue. To begin with, the protected activity prior to July 2015 are unrelated to the events leading to the termination. The protected activity in July 2015 are causally involved, but not in a direct way. The termination was driven by perceived insubordination, defiance, and inappropriate behavior/language towards other employees. Complainant's breakdown on July 22, 2015, is part of this story/causal chain. It exacerbated the difficulties and compounded Complainant's negative attitude towards coming to Texas and the continuing plans. This led, in part, to his behavior with Ms. Carter. The breakdown also played an important causal role in some of the protected activity—it prompted his complaints/reports to Brandon and Bryant Roberts about the need for repairs.

Yet, on the record before me, these are separate, or "forked," causal chains. The breakdown both led to some of the protected activity and contributed to some of the behavior that James Roberts based his decision on. But breaking down is not protected activity. The complaints/reports that followed it were, but these were not part of the same causal chain that led to Complainant's defiant/difficult behavior. There is, then, no direct causal connection between the protected activity and the credible reasons proffered by Respondents for the adverse action. This alone does not show that there was no contribution, since it may have still influence the decision in some way, but it does support the conclusion that there was no contribution, or at least closes off one way in which contribution *might* be shown.

9. Temporal Proximity

Complainant alleges that there is temporal proximity plus knowledge of the protected activity. He rightly points out that some of his protected activity came just the day before he was terminated. (CPB, p. 40.) Temporal proximity is one form of acceptable circumstantial evidence in the contributing factor analysis. *Bobreski v. J. Givoo Consultants, Inc.,* ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011) ("*Bobreski I*"); *Bechtel*, ARB No. 09-052 at 13 & n.69. In some instances, temporal proximity alone can license an inference to contribution. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009); *Lockheed Martin*, 717 F.3d at 1136; *Dietz*, ARB No. 15-017 at 20. In evaluating the importance of temporal proximity, however, an ALJ must consider the overall circumstances and the nexus between the protected activity and the chain of events leading to the adverse action. *Compare Kuduk*, 768 F.3d at 792 *with Mosby v. Kan. City S. Ry.*, 2015 U.S. Dist. LEXIS 93869, *19-20 (E.D. Okla. July 20, 2015). A finding of no contribution may be sustained despite temporal proximity when there is countervailing evidence. *See Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-42, slip op. at 3-6 (ARB Feb. 18, 2016). While the ARB has rejected use of a *per se* knowledge/timing rule, an ALJ *may* infer from knowledge of the

protected activity and the time of the adverse action that there was contribution. Circumstantial evidence alone can suffice. *Palmer*, ARB No. 16-034, slip op. at 55-56. In this section I address temporal proximity. I turn to knowledge in the next.

Temporal proximity presents some evidence favoring a finding of contribution. Most of the protected activities are not temporally proximate to the adverse action. The brake problems were an important issue in March 2015 and then another brake problem arose at the end of May 2015. But based on the credible evidence, that was the end of it. The problem with the uprights occurred in early June. Tire complaints prior to the last week of Complainant's employment are also rather temporally distant and do not show a progression. For example, on June 4, 2015, Complainant sent a report that some of his truck tires would need to be looked at in the next couple of weeks. Bryant Roberts responded by indicating that he understood, would like pictures, and would prefer to send tires to Complainant. (*E.g.* CX 2, p. 7.) That appears to have been the end of it—though tire problems emerged again on July 22, 2015, the acute issue was with the trailer, not the truck.

The complaints/reports on July 22, 2015, however, are temporally proximate to Complainant's termination—they occurred the day before the adverse action was taken and the day that the decision to take the adverse action was finalized. Thus, as to that protected activity, the timing supports an inference that there was contribution.

10. Was James Roberts Aware of Complainant's Protected Activity?

Temporal proximity alone is not enough—unless the decision-maker was aware of the protected activity, no inference can be made that the protected activity contributed to the decision to take the adverse action.[25] Complainant acknowledged that James Roberts was the sole decision-maker. (*See* HT, pp. 8-9.) Respondents' foremost argument on causation alleges that James Roberts was unaware of any protected activity engaged in by Complainant. Respondents point to James Roberts' testimony, Complainant's admission that he never made any complaints to James Roberts, and the testimony of the other Ace witnesses that they never informed James Roberts about any complaints from Complainant. (RPB, p. 13.)

Complainant testified that he made no complaints about his truck to James Roberts. (HT, p. 225.) He only met James Roberts once, in North Carolina, and talked to him in the phone on one occasion. (*Id.* at 341-42.) James Roberts testified that in general he does not handle any of the repair issues and problems that arise with the operation of Ace's trucks. (*Id.* at 401.) His sons handle those issues and in this case neither of them told him about any issues with Complainant's truck. (*Id.* at 394.) Brandon Roberts testified that he never told his father about Complainant's mechanical complaints. (*Id.* at 383.) He stated that he found out about the termination decision when he came into the office from the shop and was informed that the decision had been made. (*Id.* at 65-66.) Bryant Roberts also testified that he did not inform his father about any complaints from Complainant or the breakdown on July 22, 2015. (*Id.* at 111,

[25] In the implementing regulations, a *prima facie* case at the investigatory stage includes an additional "knowledge" element: "The respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity." 49 C.F.R. § 1978.103(e)(2)(iii). Some cases include this fourth knowledge/awareness element. *See* n.14 *supra*. Here, I have followed more recent cases in not distinguishing this fourth element. For the reasons discussed in the text, the knowledge/awareness of the decision-maker is still an important consideration.

127.) Ms. Henderson testified that Complainant never made any complaints about the condition of his truck to her and that she never communicated any sort of complaints from Complainant to James Roberts. (*Id.* at 273.) Ms. Carter, as discussed above, was somewhat equivocal about whether she knew about the breakdown, but she more clearly stated complaints about the truck or the need for repairs was not an issue in their conversations. (*Id.* at 295.) She does not normally speak directly to James Roberts, but after observing her interacting with Complainant on the phone, he approached her and she told him about her difficulties/frustration. (*Id.* at 296.)

Based on the evidence of record, James Roberts was not aware of Complainant's protected activity when he made the decision to terminate Complainant. In response to this point, Complainant argues that Ms. Carter was equivocal about her knowledge and that James Roberts' denials of knowledge are not credible because Ace has a small business office of 7-8 workers, three were related, and James Roberts had a desk in the office where he spent time. He contends that the small nature of the business warrants a conclusion that James Roberts did know about the protected activity, concluding that "[i]t would defy logic to conclude that in an office with a handful of employees that Ms. Carter, Brandon Roberts and Bryant Roberts did not make the owner of Ace aware of Mr. Hunter's protected activities." (CPB, pp. 40-41.)

I have some sympathy with Complainant's plight on this question—he is not in a good position to produce evidence of the internal conversations at Ace that would show that James Roberts was aware of the complaints Complainant made to others. Further, I agree that in many cases the inference he is arguing for would be warranted—co-workers talk to each other and problems occurring in the workplace get discussed. It is usually reasonable to presume that the person making the decision to take an adverse action is aware of most of what is occurring in that employee's employment, either directly or via a subordinate passing along the information. In this particular case, however, I am convinced that the inference is not warranted. I reach this conclusion for a number of reasons.

To begin with, James Roberts obviously delegated a great deal to his sons. But he reserved his role in make adverse employment decisions. Ace's Rules and Regulations explicitly give him the authority to take remedial actions. (JX 4, p. 1.) Throughout the record, James Roberts appears to be a very much big-picture manager, as one would expect. His awareness here came not via a normal report but by his observations, first noticing that Brandon Roberts was spending an inordinate amount of time dealing with someone on the phone and then witnessing Ms. Carter's interactions with Complainant on the phone and inquiring about what was wrong. His involvement was *not* a normal part of the business. I find it particularly notable that Ms. Carter testified that she simply does not speak directly to James Roberts on a normal basis. (HT, p. 296.) This is credible—though the office portion of Ace's business is small, the nature of Ms. Carter's job would have her on the phone throughout the day, locating axles and tires to buy and arranging appointments in a relatively high-paced environment. There is no reason that she would be speaking with the company President regularly—she would be working with the buyer/drivers and Brandon Roberts.

Nor is it natural to conclude that Brandon or Bryant Roberts would have passed information about the complaints onto their father. The text messages paint the picture of a fast moving business in which they would be dealing with multiple issues throughout the day. The messages between Brandon Roberts and Complainant show that plans could change quickly as

adjustments were made based on the availability of axles and tires to buy. He would have been managing multiple buyer/drivers and dealing with all of the issues that arose. Furthermore, the various protected activities in this case never received a reaction from either Brandon or Bryant Roberts—they aren't ever treated like a big deal. Rather, they are run of the mill issues that arise in day-to-day business when operating machinery.

Ace is a small company, but it is certainly not miniscule. It operated up to 13-15 trucks at a time and it is not a shipping company. The business is refurbishing axles and tires. Operating the trucks is simply a part of that business. The trucking portion alone is not a mom-and-pop operation, and the record doesn't even explore the size of the company with respect to other operations—the refurbishing and reselling of the tires and axles. The only part of the business at issue has been the purchase of used tires and axles to refurbish. Though Brandon Roberts supervised all of the driver/buyers and dispatchers, Bryant Roberts actually supervised most of the company employees. (*See* HT, p. 95.) Ace may be a family-firm, but it does not qualify as a paradigmatic "small shop." James Roberts, as President, handled the big-picture Brandon and Bryant Roberts handled the details. There is little reason to think that they would be keeping their father informed of ever issue that arose or communication that was received.[26]

The history of Complainant's employment bears this point out. He was not hired by James Roberts. He did not meet James Roberts when he was in Texas. He met James Roberts once, briefly, when he picked up a check in North Carolina. Beyond that, he spoke to James Roberts only once. In the voluminous text messages that are part of the record, dealing with a variety of work-related and non-work-related issues, James Roberts is only *mentioned*, even obliquely, twice. In the first, Brandon Roberts that he will "talk to dad" about an issue related to their company insurance coverage in which everything in North Carolina was out of network. (*See* CX 4, p. 4.) The second relates to arranging the meeting in May 2015 between Complainant and James Roberts in North Carolina so that James Roberts could sign a check. (*See id.* at 20.) Beyond those peripheral concerns, James Roberts is absent from the course of Complainant's employment. James Roberts only became substantively involved in Complainant's employment on the two occasions where his behavior became a problem: on the first he dispatched Brandon Roberts to deliver the message that the behavior was not acceptable, on the second he decided he didn't want someone who behaved that way working for him.

Therefore, given the testimony of the witnesses and the evidence concerning how Ace operates and the general involvement of James Roberts in day to day issues and with Complainant in particular, I find that James Roberts was not aware of Complainant's protected activity when he made the decision to terminate Complainant. He may have been generally aware that there was some sort of delay/breakdown, but these are not protected activities. The protected activities are the complaints, but nothing establishes that he was being made aware of the complaints Complainant was making.

[26] Based on their phone records, (JX 5; JX 6) and the partial history of text messages with Complainant alone, (CX 1; CX 2; CX 3; CX 4; CX 5; CX 6; CX 7; RX C; RX D, RX I; RX Q), their work involves constant communications—it would simply not be possible to apprise their father of everything occurring.

11. Is Contribution Shown Via the "Cat's Paw" Theory?

This is not quite the end of the inquiry. A complainant may also show contribution via a "cat's paw" theory. *See Kuduk*, 768 F.3d at 790-91; *Lockheed Martin*, 717 F.3d at 1137-38. This theory applies when the impermissible consideration has no bearing on the decision-maker, suggesting no discrimination, but does bear on the actions of another supervisor who in turns acts to bring about the ultimate adverse action in some way. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 422-23 (2011). If the impermissible factor contributed to actions of one supervisor, and those actions contributed to the ultimate decision resulting in the adverse action, then the impermissible factor was a contributing factor in the adverse action. The complainant need only show that one individual among multiple decision makers influenced the final decision and acted, in part, because of the protected activity. *Rudolph I*, ARB No. 11-037 at 16-17 (citing *Bobreski I*, ARB No. 09-057 at 13-14).

Neither Brandon nor Bryant Roberts is a viable source of cat's paw liability. First, the evidence does not suggest that they were at all motivated to get their father to take an adverse action against Complainant. Here, some of the above discussed ways of showing contribution are important. Their reactions to the protected activity was normal and measured, not hostile. No direct or circumstantial evidence supports the conclusion that one or the other would have subtly influenced James Roberts for retaliatory reasons. Second, the record suggests that neither was involved with or even aware of the decision until after it was made. Initially this is somewhat surprising, but it appears to be normal at Ace—James Roberts expressly reserved the authority to take these sorts of actions, even if he delegated day to day management to his sons.

The only other potential source of cat's paw liability is Ms. Carter. She was a co-worker, not Complainant's supervisor, but presuming for the moment that legally she could be a source of cat's paw liability,[27] as a matter of fact this potential route to showing contribution is not viable. I found that Ms. Carter was equivocal and evasive as to her awareness of whether Complainant had mechanical problems, but she was much more clear and direct about her lack of awareness of any particular mechanical complaints. She was quite frustrated with Complainant, but this frustration related to difficulties arranging dispatches for him and his behavior towards her on the phone. Nor is there any reason to believe that she would be concerned about Complainant's protected activity—it had nothing to do with her job and wasn't going to have an impact on her financially no matter how things turned out. It is to be expected that she would be upset about difficulties scheduling for and working with Complainant—it was her job to do so, and if he was not cooperative or didn't follow through, her job was more difficult and her performance would suffer. She was indifferent to the protected complaints—they simply weren't her concern. Finally, Ms. Carter did not instigate any sort of disciplinary action. James

[27] *Staub* left open the question as to whether or not a co-worker could be the source of cat's paw liability. *Id.* at 422 n.4. Most courts have limited the theory to supervisors, *e.g. Abdelhadt v. New York*, 2011 WL 3422832 (E.D.N.Y. Aug. 4, 2011); *Reynolds v. Fed Ex. Corp.*, 2012 WL 1107834 (W.D. Tenn. Mar. 31, 2012), though some have held that cat's paw liability can stem from animus from co-workers. *See Johnson v. Kappers, Inc.*, 2012 WL 1906448 (N.D. Ill. May 25, 2012). The ARB has countenanced cat's paw liability in whistleblower cases, but it has not squarely addressed whether the discriminatory intent of a co-worker can sustain a showing of contribution. *See e.g. Rudolph I*, ARB Case No. 11-037 at 16-17; *Bobreski I*, ARB No. 09-057 at 13-14; *Chen v. Dana-Farber Cancer Inst.*, ARB No. 09-058, ALJ No. 2006-ERA-009, slip op. at 17-20 (ARB Mar. 1, 2011) (Royce, J., dissenting).

Roberts approached her and asked what was going on. She reported what had occurred as she understood it. That was the extent of her involvement in the decision.

The parties agreed that James Roberts was the sole decision maker and the record supports the conclusion that he acted alone, without the prompting or influence of others. Therefore, contribution is not shown through cat's paw liability.

12. Conclusion

After considering all of the evidence of record and the arguments made by the parties, the only factors supporting a finding of contribution are the partial lack of credibility in the OSHA statement and the temporal proximity of some of the protected activity with the adverse action at issue. The OSHA statement, however, was not completed by the sole decision-maker and was written as an after-the-fact justification, an effort to give all of the permissible reasons Ace could *have* referenced. On the narrower question of what reasons James Roberts, as the decision maker, did rely on, he has been consistent and given a plausible explanation. That greatly reduces the evidentiary value of the OSHA statement. In regards to temporal proximity, the argument fails because the record indicates that James Roberts was not aware of the protected activity. It, thus, could not have been a factor in his decision. In addition, I have found that the protected activity did not prompt others to influence James Roberts' decision-making process.

The remaining considerations all weigh against a finding of contribution. There is no evidence of hostility or animus to the protected activity, most of the protected activity is temporally distant, Ace had no good reason to retaliate, James Roberts' explanation is credible, and he made the decision alone, unaware of the protected activity. Therefore, I find that Complainant has not established that his protected activity contributed, in any way, to the adverse action Ace took against him.

VII. ORDER

For the reasons stated above, it is hereby ORDERED that the Complainant's August 13, 2015, complaint is DISMISSED.

Digitally signed by Jennifer Gee
DN: CN=Jennifer Gee, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

JENNIFER GEE
Administrative Law Judge

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

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

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

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

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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